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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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T. D. CRAWFORD
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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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CARROLL D. WOOD, - - - - - - - Associate Justice
JESSE C. HART, - - - - - - - - - Associate Justice
FRANK G. SMITH, - - - - - - - - Associate Justice
THOMAS H. HUMPHREYS, - - - - Associate Justice
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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

MISSOURI PACIFIC RAILROAD COMPANY *v.* CONWAY COUNTY BRIDGE DISTRICT.

Opinion delivered January 26, 1920.

1. JUDGMENT—RES JUDICATA.—The finding on appeal as to what was determined by the court below is conclusive in a subsequent suit in which *res judicata* is pleaded.
2. JUDGMENT—CONCLUSIVENESS.—Where, on appeal from a bridge district's assessment, the method of assessing the property was discussed and approved, it was not open to inquiry in a subsequent suit.
3. JUDGMENT—CONCLUSIVENESS.—Where, on appeal from a bridge district's assessment of the appellant's property the court expressly held that the assessors had not adopted an arbitrary method of assessment, the appellant can not litigate the same question in a subsequent suit.
4. BRIDGES—INCLUSION OF TELEGRAPH, ETC., LINES IN DISTRICT.—The Legislature may properly include, in an improvement district created to construct a bridge, telegraph, telephone, power and pipe lines, as provided by Acts 1917, page 318, section 7.
5. JUDGMENT—CONCLUSIVENESS.—The validity of a statute providing that the assessment of railroads, telegraph and telephone lines for the construction of a public bridge should be by the mile, and not by the acre, not being involved in an appeal from an assessment made in the manner provided, was open to adjudication in a subsequent suit to enjoin the assessment.
6. BRIDGES — ASSESSMENT OF BENEFITS — FRANCHISE OF RAILROAD.—The franchise of a railroad is an element of value to be considered in assessing its real estate within a bridge improvement district.

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

STATEMENT OF FACTS.

The Missouri Pacific Railroad Company brought this suit in equity against J. M. Gordon, as sheriff of Conway County and the Conway County Bridge District to enjoin them from taking any further steps towards enforcing local assessments upon the property of the company for the purpose of erecting a bridge across the Arkansas River within the limits of the proposed district.

The validity of the act is attacked in the bill, and it is also alleged that the assessment was unlawful and void for the various reasons which will be stated in the opinion.

The defendants in their answer asserted the validity of the statute and entered a plea of *res adjudicata.* The facts upon which the defendants rely to sustain their plea of *res adjudicata* are substantially as follows:

The Legislature of 1917 passed a special act forming all of Conway County into an improvement district for the purpose of building a highway bridge at a point to be selected by the commissioners of the district. Acts of 1917, vol. 1, p. 314. The line of railroad of the plaintiff lies north of the Arkansas River and runs parallel with the river east and west through the county. Pursuant to the terms of the act the commissioners organized the district and appointed assessors to assess benefits on the real property within the district, including the right-of-way of the railroad company. The assessors divided the district into five beneficial zones, and assessed the property in each zone at a different percentage, according to its proximity to the bridge. The assessments of benefits to the property of the railroad company was placed at $68,975.

Section 7 of the act provides that any property owner who deems himself aggrieved by the action of the board of assessors may take an appeal from the action of the assessors to the board of commissioners within thirty days.

It also provides that the commissioners shall hear all appeals and determine the same. The section further provides that the property owner may appeal from the findings of the commissioners to the circuit court within sixty days by filing his complaint in the circuit court setting up the facts and serving notice upon the chairman of the commissioners and that such complaint shall be heard and determined as any action at law.

The railroad company, deeming itself aggrieved by the assessment of benefits, first appealed from the board of assessors to the commissioners and then from the commissioners to the circuit court. In the circuit court a complaint was filed as required by the statute, and in the complaint the constitutionality of the statute was attacked on several grounds. The complaint also alleged that the action of the board of assessors amounted to a confiscation of the property of the railroad company; that its action in assessing the benefits on the property of the railroad company was arbitrary; that the amount assessed was much greater than the benefits that would be derived from the erection of the bridge, and that the assessment of benefits was unreasonably high.

The district interposed a special demurrer to the complaint in the circuit court, which was sustained in part, and testimony was taken and heard by the court on the remaining issues. The judgment of the circuit court is full and complete and shows the action of the court. It is as follows:

"Now, on this day, a regular day of the Conway County Circuit Court, comes on this cause for consideration and comes the plaintiff, Missouri Pacific Railroad Company, by T. B. Pryor and W. P. Strait, its attorneys, and comes the Conway County Bridge District, J. J. Scroggin and and other defendants, by Sellers & Sellers, their attorneys, and this cause is submitted to the court upon the complaint of the plaintiff, the demurrer of the defendants and oral testimony before the court, and the court, being well and sufficiently advised, doth find, that, acting under the provisions of the

act of the General Assembly of the State of Arkansas creating the Conway County Bridge District, the assessors of said district assessed against the plaintiff railroad company's line of railroad through Conway County, in accordance with the law creating the said district, as benefits the sum of approximately $88,000; that the plaintiff filed exceptions to such assessment before the board of assessors for the district, and said exceptions were by said board of assessors overruled, and the assessment left as first made; that thereafter within the time allowed by act the plaintiff appealed from the action of the board of assessors of said district to the board of commissioners, as provided in the act, and that upon a hearing before said board of commissioners the said assessment against the said plaintiff said property was reduced to the sum of $68,975 as the amount of benefits to the said plaintiff railroad company's said property. That subsequent to such hearing and within the time allowed by said act the plaintiff filed in this court its complaint alleging, among other things, that the said railroad company was not and could not be benefited by the construction of the bridge contemplated in said act, and that, if said plaintiff and its property was benefited at all, said benefit as fixed by the board of assessors of board of commissioners was in excess of the amount of benefits which would actually be received.

"That the defendant filed a demurrer to said petition to all parts thereof except upon the issue that the said property of the said plaintiff would not be benefited by the improvement and that the benefits as assessed were in excess of the true benefits, and upon consideration of the demurrer the court sustained the same and held that the plaintiff was only entitled to have heard the question as to whether or not the property of the plaintiff as assessed was benefited at all, and, if so, the extent of such benefits.

"The defendant thereupon filed a second demurrer to the complaint upon the grounds that no facts were alleged upon which to base the conclusion set out and that the

complaint after being amended was insufficient to constitute a cause of action.

"Upon consideration the second demurrer was overruled by the court. Upon consideration of the testimony the court finds that the said plaintiff's property, being its line of railroad through Conway County, will be benefited by the construction of the said bridge contemplated in said action and that the amount of benefits in the sum of $68,975 is not and will not be excessive.

"Wherefore, it is by the court considered, ordered and adjudged that plaintiff's complaint be and the same is hereby dismissed; that the acts of the board of assessors and board of commissioners in fixing the benefits against the property of plaintiff in the sum above mentioned be and they are hereby confirmed and the amount of benefits accruing to and which will accrue to the property of plaintiff as set out in the complaint by reason of the construction of the improvement is fixed at the sum of $68,975." Other facts will be stated in the opinion.

The decree of the chancellor recites that a demurrer was sustained to that portion of the complaint which seeks to raise the question of the justness or equality of the assessment of benefits against the property of the railroad company and that the plea of *res adjudicata* filed by the defendants is sustained.

The plaintiff has appealed.

Thos. B. Pryor and *W. P. Strait,* for appellant.

1. The complaint stated a good cause of action, and appellant was entitled to the relief prayed, and it was error to sustain the demurrer and the plea of *res judicata.* Const., art. 16, § 9; 32 Ark. 676; 36 *Id.* 281; 37 *Id.* 649; 30 *Id.* 101. Injunction against illegal taxes is the proper remedy. 46 *Id.* 471. Railroads are not assessed like other real estate for general taxation, but higher, and this results in the assessment of benefits higher in proportion than other real property and denies them the equal protection of the law as to uniformity. 62 Ark. 461; 127 *Id.* 347; 92 *Id.* 492; 86 *Id.* 1. The assessment

was arbitrary and void. 55 N. Y. 604; 48 L. R. A. 851; 86 N. Y. S. 597; 42 *Id.* 87.

2. Legislatures can not arbitarily exercise powers affecting property rights, assessments or taxation, and these matters are open to judicial investigation and their methods are open to periodical investigation and determination. 42 Ark. 87; 98 *Id.* 116; 83 *Id.* 344; 81 *Id.* 562; 83 *Id.* 54; 87 *Id.* 322; 172 U. S. 269; 181 *Id.* 324; *Ib.* 396; McGehee on Due Process of Law, 248; 85 Ark. 12; 98 *Id.* 117.

No objection was made that the facts alleged were not sufficiently pleaded nor could this be raised by demurrer, but only by motion to make more definite. 83 Ark. 54; 77 *Id.* 29; 27 *Id.* 34; 96 *Id.* 163. Every fair and reasonable intendment must be indulged to support a pleading. 101 Ark. 35; 96 *Id.* 963. If the pleading is vague, inadequate or uncertain, the remedy is by motion to make more definite. 91 Ark. 400; 87 *Id.* 136; 98 *Id.* 136.

The valuation in assessment of benefits must be uniform and not arbitrary. 48 Ark. 252; *Ib.* 383; 49 *Id.* 202; 52 *Id.* 112; 56 *Id.* 356; 63 *Id.* 584; 99 *Id.* 504. The principle contended for here is sustained in 37 Sup. Ct. Rep. U. S. 673. See also 101 U. S. 153; 60 U. S. App. 166; 44 Ill. 229; 54 N. H. 455; 58 *Id.* 38; 63 Conn. 321; 54 Kan. 781; 70 Iowa 87; 152 Mass. 372. The decree should be reversed and a perpetual injunction granted.

Calvin Sellers, for appellee.

There was no error in sustaining the demurrer and plea of *res judicata.* These questions have been eliminated by *nunc pro tunc* order of the chancery court. The act is constitutional and the demurrer was proper. 28 Ark. 378. The assessment was valid. 86 Ark. 1-15; 81 *Id.* 567. The assessment was not arbitrary or unreasonable. The constitutional requirement as to uniformity refers to general taxes and not to benefits in improvement districts. 56 Ark. 337; 87 *Id.* 12; 86 *Id.* 109. The case here raises the same questions, and the pleadings the

same as in the circuit court, and the matter is *res judicata.* The decision is correct and should be affirmed.

HART, J., (after stating the facts). It will be perceived from the statement of facts that the railroad company sought relief from the action of the assessors by appealing from the finding of the board of assessors to the board of commissioners and then to the circuit court as provided by the statute. In the circuit court a complaint was filed by the railroad company as required by the statute. The circuit court sustained a demurrer to a part of the complaint and tried the remaining issues on the pleadings and the evidence introduced. We have set out the judgment of the circuit court in full in our statement of facts, but for convenience again set out that part of it which is most material to the issues raised by the plea of *res adjudicata* in the present case. It is as follows: "Now on this day comes the plaintiff by its attorneys, T. B. Pryor and W. P. Strait; comes the defendant, Conway County Bridge District, by attorneys, Sellers & Sellers, and this cause coming on for hearing upon the demurrer to plaintiff's petition, pleading in this cause, and the court being well and sufficiently advised, it is ordered and adjudged that the demurrer to the petition, pleadings of the Missouri Pacific Railroad Company, be and the same is hereby sustained to all the provisions and matters pleaded except that feature and provision alleging that plaintiff was not benefited and that the benefits assessed are excessive and more than the actual benefits received, to which finding and ruling the plaintiff, Missouri Pacific Railroad Company, at the time excepted and saved exceptions."

The railroad company duly prosecuted an appeal from the judgment of the circuit court to this court, and the judgment of the circuit court was affirmed. The opinion is reported in 134 Ark. 292, under the style of *Mo. Pac. Rd. Co.* v. *Conway County Bridge Dist.*

Upon the present appeal there is a dispute between the parties as to what was decided in that case, and it is also strongly and earnestly insisted by counsel for the

plaintiff that in certain respects the holding of this court in that case was not in accord with the issues raised by the appeal. In short, counsel claim that the court went beyond the issues and decided matters not raised by the appeal. On this point the case at bar must be determined by the opinion and statement of facts on the appeal in the case of the circuit court reported in 134 Ark. 292. Whatever the court held on the appeal in that case was determined in the court below is conclusive in the present suit. If this were not so, litigation might be interminable, and a judgment settling the rights of the parties would be only a starting point for new litigation. In the opinion in that case, in discussing what issues were presented by the appeal, the court said: "Therefore, the only question for decision is whether or not the evidence is legally sufficient to support the finding of the circuit court as to the amount of assessment against appellant's property, and the uniformity of the assessment with those imposed upon other property in the district."

In making the assessment in that case the assessors divided the district into five beneficial zones and assessed the property in each zone at a different percentage according to its proximity to the bridge. It is now insisted that this was an arbitrary method of assessing the property of the railroad, and that there was no issue on this point made by the pleadings in the case in the circuit court. It is sufficient answer to this to say that this method of assessing the property was distinctly referred to, discussed and approved in the opinion on the appeal in that case. Hence the present suit is concluded in this respect by that opinion.

It is also insisted in the case at bar that the assessment of benefits was arbitrary and much greater than the benefits received by the railroad company. It is now insisted that this issue was not raised by the appeal in that case. We repeat that this issue was discussed and determined by the court on that appeal. The court expressly recognized that the board of assessors had no right to arbitrarily fix a method of assessment which

would not result in the ascertainment of the true benefits so as to work out uniformity in the assessment; but the court expressly held that the assessors had not done so and the question can not be again litigated. Moreover, this holding was in accord with the previous decisions of this court. In *Lee Wilson Co. v. Road Imp. Dist. No.* 1, 127 Ark. 310, the court had under consideration the provisions of the general law for the organization of road districts. In that case provision was made by the statute for an appeal to the county court to hear and determine the justness of any assessment of benefits and the court was authorized to equalize, lower or raise any assessments upon a proper showing to the court. The property owner there pursued the statutory method of appealing from the judgment of the county court making the assessment, and contended on appeal to this court that the assessors in making the assessment of benefits to accrue to the land owner acted in an arbitrary manner, which resulted in an assessment far in excess of any benefits which would be derived from the improvement and which was so discriminatory and confiscatory as to amount to taking its property without due process of law. The court held that the evidence showed that the assessments of benefits was arbitrary and not made in the manner required by the statute. It held that the court erred in sustaining the assessment and reversed the judgment of the circuit court which had sustained the judgment of the county court in making the assessments.

In the present case the assessors assessed the property of the railroad upon a mileage basis which was in the manner pointed out by the statute. This court affirmed the judgment of the circuit court sustaining the assessment in this respect because the statute had been followed in making the assessment.

As we have just seen, the holding is in accord with the rule laid down in the Lee Wilson Company case, although that case was not referred to in the opinion on the appeal in the circuit court case. It is true that the

Lee Wilson Company case was subsequently overruled in so far as it held that the validity of the statute could be attacked on appeal under the statute from the finding of the bodies authorized to make the assessment of benefits; but it was not overruled in so far as it held that upon an appeal under the statute from the assessment of benefits the court could determine whether the property was not benefited at all, whether the benefits assessed exceeded the benefits received, whether the assessment of benefits was arbitrarily made, or in fact whether the assessment of benefits amounted to a confiscation of the property of the complainant. See *K. C. Sou. Ry. Co.* v. *Road Imp. Dist. No.* 6 *of Little River County,* 139 Ark. 424.

It appears from the complaint that the total benefits assessed against all the real property in Conway County, including the railroad of the plaintiff, for the construction of the bridge is $296,806, of which amount plaintiff's twenty-two miles of railroad is assessed at $68,975, an approximately one-fourth of the entire benefits to be received by all the property within the district by reason of the construction of the bridge. It is claimed that this amount not only is far in excess of the benefits received by the railroad company from the construction of the bridge, but that it is discriminatory and arbitrary when compared with the assessments made upon the other property within the district. It is claimed that this question was not within the scope of the issues raised by the appeal in the former case. We can not agree with counsel in this contention. The judgment of the circuit court expressly recites that the sum of $68,975, the amount of benefits assessed against the property of the railroad company, was not excessive. In the opinion upon appeal in that case the court said that the assessors divided the county into five zones according to the proximity of the property to the bridge and assessed the benefits by percentages on the value of the property for the purpose of taxation. The court sustained that method of assessment. While the evidence as disclosed by the record was

not set out in detail and discussed by the court, the action of the court in sustaining the assessment in the opinion was necessarily an adjudication of the matter against the railroad company, and the question can not be reopened in the present case.

To sum up, under section 7 of the act in question, the board of assessors shall hear the complaint of all owners of property within the district, and shall increase or decrease the assessments, after having heard the complaints of the property owners, so as to adjust the burden of the assessment to the benefits which will accrue to the property. The section also provides for an appeal to the board of commissioners and from that board to the circuit court. The power to increase or to decrease the assessments and to adjust the burden of the assessments to the benefits which will accrue to the property necessarily includes the power to decide whether the assessment is erroneous, whether the assessment is so high as to be confiscatory, whether it exceeds the actual benefits, or whether it is discriminatory. In these respects the statutory remedy is exclusive, and it is only upon grounds questioning the validity of the statute that the present suit can be based.

It follows that the court was correct in sustaining the defendant's plea of *res judicata.*

Section 7 of the act provides that the assessors shall assess the value of the benefits which will accrue to telephones and telegraph lines and other power lines and also pipe lines.

The validity of the statute is assailed in the present suit on the ground that this rendered the act invalid because the Legislature had no power to include such lines within the district. There has been much diversity of opinion as to whether or not the right-of-way of such lines receive any benefits from a local improvement, but we are of the opinion that they may be included in the district for the same reason that is generally given in the case of the right-of-way of railroad companies. Of

course, the amount of benefits would be a question of fact to be determined by the board of assessors.

Section 7 of the act also provides that the assessments of railroads, etc., shall be by the mile and not by the acre. The assessors made the assessment in the manner provided by the statute. Hence the validity of the statute in providing that the assessments of railroads, telegraph and telephone lines shall be by the mile and not by the acre was not involved in the appeal from the circuit court reported in 134 Ark. 292, and that question is a proper subject for adjudication in the case at bar. The precise question has been determined adversely to plaintiff in the case of *Branson* v. *Bush*, 251 U. S. 182. In that case the railroad company sought to enjoin the sheriff and collector from collecting the taxes assessed against the railroad company under a special act passed by the Legislature of 1911 for the purpose of constructing a highway in Crawford County, Arkansas. Special Acts of Arkansas, 1911, page 642.

Section 3 of that act provides for the assessment of all railroad rights of way within the boundaries of the district. In the opinion of the Supreme Court of the United States it is stated that the Circuit Court of Appeals enjoined the collection of the taxes as against the railroad company on two grounds:

"(1) Because the including of the franchise and other intangible property of the company in the assessment results in 'a higher rate of taxation' on the property of the railway company than on the other property in the district; and

"(2) Because the evidence fails to show that the company would derive any benefit from the improvement of the road."

The court reversed the decree of the Circuit Court of Appeals, and in regard to the first ground said that the basis for assuming that the franchise of the railroad company was added as a separate personal property

value to the assessment of the real property of the company becomes upon the record as much too unsubstantial to justify invalidating the tax on that account if it be otherwise valid.

The court also reversed the decree on the second ground. On this point the witnesses for the district testified that the development of the adjacent county would increase the business of the railway company and by making a station on the plaintiff's line of railway more accessible to distant lands would divert business from Van Buren where there was a competing railroad. The court then said: "To this must be added the obvious fact that anything which develops the territory which a railroad serves must necessarily be of benefit to it, and that no agency of such development equals that of good roads."

The record here is in all essential respects similar to the record presented in that case. The reasoning of the court in that case is sound, and will be adopted in the case at bar. The franchise of a railroad is an intangible element of value but it is inseparable from the value of the physical property of the railroad. We are of the opinion that the franchise is an element of value to be considered by the board of assessors as entering into and enhancing the value of the real estate of the railroad company, and was not the application of an unlawful measure of value of such property for purposes of taxation. The value of the franchise attaches to the property regardless of ownership, and as above stated, is inseparable from the value of the physical property. Mr. Justice Clark in the case last cited, speaking for the court said: "If, however, the distinction sometimes taken between the 'essential properties of corporate existence' and the franchises of a corporation (*Memphis & L. R. Rd. Co.* v. *Commissioners,* 112 U. S. 609, 619), be considered substantial enough to be of practical value, and if it be assumed that the distinction was applied by the State commission in making the assessment here involved, this would result, not in adding personal property value to

the value of the real estate of the company in the district, but simply in determining what the value of the real property was—its right-of-way, tracks and buildings—having regard to the use which it made of it as an instrumentality for earning money in the conduct of railroad operations. This at most is no more than giving to the real property a value greater as a part of a railroad unit and a going concern than it would have if considered only as a quantity of land, buildings and tracks. * * *

"Thus, the assessment complained of was made under valid laws and in a manner approved and customary in arriving at the value of that part of railroad tracks situated in a State, county or district. So far as this record shows, the assessment, modified by the decree of the District Court not appealed from, is not a composite of real and personal property values, but is the ascertained value of the real estate—the tracks and buildings—of the company within the taxing district, enhanced, no doubt, by the special use made of it, but still its value as a part of the railroad unit, resulting from the inherent nature of the business in which it is employed, a value which will not be resolved into its constituent elements for the purpose of defeating contribution to a public improvement. No attempt was made to prove fraudulent, or capricious or arbitrary action on the part of any officials in making the assessment, the only evidence upon the subject being the opinions of four employees of the company that the improvement of the road would not benefit the railroad property, and if inequality has resulted from the application of the State law in a customary manner to a situation frequently arising in our country, it is an incidental inequality resulting from a valid classification of railroad property for taxation purposes which does not fall within the scope of the Fourteenth Amendment, which was not intended to compel the States to adopt an iron rule of equal taxation."

It follows that the decree will be affirmed.

ADKISSON v. STATE.

Opinion delivered January 26, 1920.

1. HOMICIDE—EVIDENCE OF CONSPIRACY.—In a prosecution for murder it was admissible to prove that defendant was an evader of the draft; that he had conspired with members of his family to enable him and his brother-in-law to evade the draft, and to resist with force any attempt to locate and arrest them; and that deceased was a member of a sheriff's posse and was killed while attempting to arrest defendant.
2. CRIMINAL LAW—CONTINUANCE — ABSENT WITNESS.—Defendant's right to a continuance would not be defeated because the testimony of the witness was cumulative where the other witnesses were highly interested, and some of them were charged with participation in the crime.
3. SAME—CONTINUANCE—ABSENT WITNESS.—It was not error to refuse a continuance on account of the absence of a witness, if no showing was made that his attendance could be secured later.
4. HOMICIDE—EVIDENCE.—A witness who testified that defendant was one of the party which fired upon the posse at the time when deceased was killed was properly allowed to state that he had examined him for military duty as showing ability to recognize him.
5. CRIMINAL LAW—STATEMENTS OF PROSECUTING ATTORNEY—NECESSITY OF BILL OF EXCEPTIONS.—Objections to statements of the prosecuting attorney in argument are not reviewable where there is nothing in the bill of exceptions to show what they were.
6. CRIMINAL LAW—INSTRUCTIONS—GENERAL OBJECTION.—The court instructed the jury that if deceased was a member of the posse that was endeavoring to arrest defendant or two others mentioned and appellant knew that fact and shot deceased in a spirit of resistance or defiance of the posse he could not plead self-defense. *Held* that the objection that there was no evidence that the posse was endeavoring to arrest the other two should have been raised by specific objection.
7. CRIMINAL LAW — INSTRUCTIONS — SUBJECT ALREADY COVERED.—Where the court instructed the jury to try the case on the evidence introduced, and that the burden was on the State to prove by competent evidence beyond a reasonable doubt that defendant was guilty, it was not prejudicial error to refuse to instruct that the jury are bound by the law as given in the instructions, that they are the judges of the evidence and can not consider outside influence, prejudice, passion or rumors.

8. CRIMINAL LAW—INSTRUCTION—WEIGHT OF EVIDENCE.—An instruction that if defendant became a fugitive from justice after the alleged crime this may be considered as tending to show guilt, but if he was afraid of a mob then this fact of being a fugitive is explained, and if he volunteered to officers this is a circumstance in his favor, *held* properly refused as on weight of evidence.

9. JURY—OPINION BASED ON RUMOR.—Jurors were not incompetent in a murder case because they had formed an opinion as to defendant's guilt if their opinions were based on rumor and they entertained no bias or prejudice against him.

Appeal from Cleburne Circuit Court; *J. M. Shinn,* Judge; affirmed.

Bratton & Bratton, for appellant.

1. It was error to refuse the continuance. The court abused its discretion in so doing. 60 Ark. 567; 99 *Id.* 400; 71 *Id.* 180; 100 *Id.* 311; 110 *Id.* 251.

2. It was not proper for the court to usurp the province of the jury in passing on the credibility of the witnesses. 99 Ark. 394; 110 *Id.* 256.

3. Immaterial and prejudicial evidence was admitted and instruction No. 23 was error. 93 Ark. 410; Wharton on Cr. Law, § § 622-5, 633.

4. It was error to refuse the challenges to jurors for cause and thus force defendant to exhaust his peremptory challenges. 102 Ark. 180 and cases cited.

5. The prosecuting attorney's remarks were clearly prejudicial. 30 A. & E. Enc. of Law, 1085-6, note 1; 5 Jones on Ev., § 838; 114 Ark. 243.

6. The instructions refused should have been given and No. 23 modified as requested.

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

1. There is no merit in the claim that objectionable testimony was admitted and excluded. No prejudice or error is shown.

2. Instruction No. 23 was properly given and there was no error in refusing No. 1 for defendant, nor No. 6.

3. The ruling of the court as to the qualification of the jurors was evidently correct. *Mallory* v. *State,* 141 Ark. 496.

4. The continuance was properly refused. 82 Ark. 203; 90 *Id.* 586; 91 *Id.* 497; 108 *Id.* 594; 100 *Id.* 180; 62 *Id.* 543; 125 *Id.* 269. The testimony of Rice was cumulative merely. 79 *Id.* 594; 86 *Id.* 317; 100 *Id.* 149; 120 *Id.* 562; 121 *Id.* 17; 125 *Id.* 269. There was no abuse of discretion by the court.

5. The remarks of the prosecuting attorney were not prejudicial nor erroneous.

SMITH, J. Appellant has assigned and discussed a number of errors, said to be prejudicial, occurring at the trial from which this appeal is prosecuted, and which resulted in a sentence of eighteen years in the penitentiary, upon a conviction for murder in the second degree.

The first of these assignments is that the trial occurred in an atmosphere of prejudice occasioned by the admission of testimony tending to show that appellant and members of his family who were indicted with him were disoyal, and that appellant was himself an evader of the draft. The testimony complained of was elicited, however, by witnesses who detailed the circumstances of the killing, it being shown that Porter Hazelwood, for whose murder appellant was convicted, was a member of a sheriff's posse, which was attempting at the time to arrest appellant, pursuant to direction of the military authorities, as an evader of the draft. The theory of the prosecution was that appellant and the members of his family, together with Leo Martin, his brother-in-law, had conspired together for the purpose of enabling appellant and Martin to evade the draft—that appellant and Martin had received orders to report for military duty and had failed and refused so to do, and were in hiding at the time, and that a part of the conspiracy was to resist with force, if necessary, any attempt to locate and arrest them. As tending to show this conspiracy, testimony was admitted to the effect that large quantities of provisions and ammunition were concealed near the home

of appellant's father, this being the congregating point of the members of the alleged conspiracy. This testimony was competent, therefore, not only to show the conspiracy, but as tending to explain the circumstances under which the shooting commenced which resulted in Hazelwood's death.

Another assignment is the refusal of the court to continue the cause on account of the absence of Bill Rice, who was a member of the posse which attempted to arrest appellant at the time Hazelwood was killed and who was himself then wounded. In the motion for continuance it was alleged that Rice, if present, would testify that as the posse approached the house of appellant's father, where appellant was supposed to be concealed, Hardy Adkisson, appellant's brother, for whom the posse had no process, came near the posse, but, upon discovering them, and without knowing their mission, and without indication of violence, turned and started back to the house, whereupon the sheriff in charge of the posse gave a command to shoot, or stop, Hardy Adkisson, and just as a member of the posse was about to execute this order by shooting Hardy Adkisson, Tom Adkisson, the father of Hardy, appeared on the front porch of his home and hallooed something to the officer, who apparently was about to shoot his son, and, as the officer appeared not to have heeded—if, indeed, he had heard—this cry, Tom Adkisson entered his home and hastily reappeared with a gun and opened fire on the posse, and that no one else in or about the house fired upon the posse, and that appellant was not seen around the premises at any time. Members of appellant's family who were present during the shooting, including Mrs. Leo Martin, appellant's sister, detailed the circumstances of the shooting as stated in this motion for a continuance. But they were all highly interested witnesses, and the male members of the family were charged with the commission of the murder and it can not, therefore, be said that appellant was not entitled to the continuance because the testimony was cumulative of other testimony offered at the trial. *Hall* v. *State,* 64

Ark. 121. But no showing was made that the attendance of this witness could later be secured. At appellant's request a subpoena had been issued by the clerk of the Cleburne Circuit Court, where the cause was pending for trial, directed to the sheriff of Pulaski County, but the subpoena had been returned *non est,* and no showing was made as to where the witness had gone, or as to the time when he would likely return, and it was not error, therefore, to refuse the continuance.

Objection was made to the testimony of a Doctor Turner in regard to having examined appellant for military service. But this testimony was brought out during the examination of the witness, who was a member of the posse and had testified that appellant was one of the parties on the porch, who fired upon the posse, and as the identity, as well as the presence, of appellant at the shooting was one of the questions in dispute, it was proper for the witness to state his opportunity to know appellant when he saw him.

Other assignments of error relating to the admission of testimony to the effect that appellant was a draft resister are discussed; but we think they may all be disposed of by the general statement that the testimony objected to tended to show the motive for the killing as well as the circumstances under which it occurred.

Objection is made to certain statements of the prosecuting attorney in the course of his argument before the jury; but there appears to be nothing in the bill of exceptions showing what these statements were, the only reference thereto being found in the motion for a new trial. These objections are not, therefore, properly before us for review. *Cravens* v. *State,* 95 Ark. 321.

An instruction numbered 23 was given, in which the jury was told that if Hazelwood was a member of the posse that was endeavoring to arrest and capture appellant, or Tom Adkisson, or Hardy Adkisson, and appellant knew that fact, and shot Hazelwood in a spirit of resistance or defiance of the posse, he could not plead self-defense as an excuse for the killing. Objection is

made to this instruction upon the ground that there was no testimony that the posse was endeavoring to arrest Tom Adkisson or Hardy Adkisson. And this appears to be the fact. But only a general objection was made, and we think the point now presented should have been raised in the court below by a specific objection to the instruction.

Appellant requested, and the court refused to give, an instruction reading as follows:

"The court gives you all the law, and by that law so given in these written instructions you are bound.

"But, on the weight of testimony, the court can not aid you. You and you only must judge the evidence, but you can not consider anything as evidence not submitted to you by the court. In arriving at your verdict you have no right to consider outside influence, prejudice or passion or rumors, for or against the defendant."

This is, of course, a correct declaration of the law, and might very well have been given; but at the request of the State, and of appellant, the court gave a very large number of instructions, and in these the jury was told to try the case upon the evidence introduced, and that the burden was on the State to prove, by competent testimony, beyond a reasonable doubt, that appellant was guilty, and we conclude, therefore, that no prejudicial error was committed in refusing the instruction.

The court also refused to give appellant's instruction numbered 6, as follows:

"If you find that the defendant became a fugitive from justice after this alleged crime, then you may consider this as a circumstance tending to show guilt unless explained by the defendant. If you should find that he was afraid of a mob, then this fact of being a fugitive is explained. If you should further find that the defendant volunteered to officers of the law, this becomes a circumstance in the defendant's favor."

This instruction was properly refused, as being a charge upon the weight of evidence.

Assignments 69 to 89 relate to rulings of the court on the competency of various veniremen. Isolated answers of several of these veniremen would indicate that such fixed opinions of appellant's guilt were entertained that they were incompetent to serve as jurors; but we think that fact does not appear in any instance where the entire examination is considered as a whole. We have read the testimony as it appears in the transcript, and it is apparent that the killing had attracted wide interest and attention, and that practically all the veniremen had heard about it, and had talked about it, and had formed some kind of opinion. None of the veniremen held competent had talked with the witnesses, and the opinion in each instance appears to have been based upon rumor. These veniremen did not know appellant, and entertained no bias or prejudice against him, and we think it was not shown that appellant was compelled to exhaust a challenge upon any veniremen who could not try the case, according to the law and the evidence.

No prejudicial error appearing, the judgment of the court below is affirmed.

PAVING DISTRICT NO. 5 OF FORT SMITH v. FERNANDEZ.

Opinion delivered January 26, 1920.

1. MUNICIPAL CORPORATIONS—PAVING DISTRICT—DIVERSION OF FUNDS.—Act April 1, 1919 (Acts 1919, page 767), authorizing use of surplus funds of a paving district collected for the purpose of constructing a pavement to be used for the purpose of making repairs, *held* unconstitutional as authorizing a diversion of such funds.
2. APPEAL AND ERROR—APPOINTMENT OF RECEIVER—DISCRETION.—In appointing a receiver under Kirby's Digest, section 6342, the chancery court exercises a discretion which will not be overturned by the Supreme Court on appeal, in the absence of a showing of abuse.
3. MUNICIPAL CORPORATIONS — PAVING DISTRICT — REMOVAL OF COMMISSIONERS.—Though the commissioners of a paving district assented to the passage of an unconstitutional act authorizing

an improper diversion of the district's funds, the chancery court erred in removing the commissioners from office and in appointing a receiver to take charge of the district, since the commissioners were subject to the court's orders, and no fraud or wilful misconduct on their part is alleged or proved.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; reversed.

A. A. McDonald, for appellants.

1. The court had no authority to appoint the receiver to take charge of the funds, books, papers, etc., at an enormous expense, when the commissioners and the secretary were ready and willing to perform all those duties without additional expense. Act 579 was not unconstitutional and void, and the decree is against the clear preponderance of the evidence. Am. & Eng. Enc. Law (2 Ed.) vol. 23, div. 3, p. 1002, and cases cited; 28 Ark. 48; 20 *Id.* 325; 23 A. & E. Enc. Law, par. 10, p. 1011, etc.; 129 N. Y. 288-297. The chancellor's findings are erroneous, and the court costs should not have been taxed against the fund but against appellee. 89 S. W. 316; 76 Ark. 501; 95 *Id.* 389; 130 S. W. 574.

2. As to the unconstitutionality of the act, see 103 Ark. 529; 146 S. W. 105; 103 Ark. 529; 104 Ark. 270; 56 *Id.* 148.

3. The court had jurisdiction and had the power and authority to direct the distribution of the fund. 209 S. W. 526; 136 *Id.* 597; 150 *Id.* 154. The demurrer should have been sustained, as the complaint did not state facts sufficient to state a cause of action. The allegation as to trust funds is too indefinite. 90 Ark. 29; 117 S. W. 1073. The decree should be reversed and the commissioners directed to distribute the fund according to law.

Covington & Grant, for appellee.

1. The court had authority to appoint a receiver to wind up the affairs of the district. Kirby's Digest, § 6342; 34 Cyc. 18-19, 61. It took jurisdiction and should retain it to completely adjust the rights of all parties. 92 Ark. 15.

2. The act is unconstitutional. An excessive amount was collected under an erroneous assessment. 32 Ark. 496. The money belonged to the parties who paid it. The act violates article 19, section 27, Constitution. 109 Ark. 93; 123 *Id.* 330-1; 125 *Id.* 60.

The findings and decree are right and should be affirmed.

SMITH, J. The appellee, Fernandez, is a citizen and taxpayer of Fort Smith, and owned real estate in Paving District No. 5 in that city. This was an improvement district organized for the purpose of paving certain streets in that city, and assessments were made against the lands lying therein for the purpose of raising funds with which to pay for paving the streets in the improvement district. The assessments were levied annually for several years, and when the last assessment had been collected there remained in the hands of the commissioners a surplus of about $22,000 after all cost of the improvement had been paid. Appellee had paid all the assessments levied against his property from the time the district was created, including the last assessments, whereupon he brought this suit against the mayor and commissioners of the city of Fort Smith, who, under the act under which Fort Smith adopted the commission form of government, were successors to the commissioners of the improvement district, for the purpose of having the surplus distributed among the property owners who had paid taxes.

A demurrer to the complaint was overruled, whereupon an answer was filed by the mayor and city commissioners, in which they alleged they were the legal successors of the commissioners of the original improvement district, and admitted that the improvement contemplated upon the original organization of the district had been completed, but alleged the fact to be that all the affairs of the district could not be wound up until all outstanding assessments had been collected, as it could not be known prior to that time the sum to be divided

among the taxpayers. That no provision had been made on the organization of the district for the maintenance of the pavements and that many of the streets were in bad repair and some of them almost impassable. That the city had no funds with which to repair the streets, and that necessary repair work could be done only by forming a new improvement district for that purpose or by using the surplus funds of the original district, and that an act had been passed by the General Assembly (approved April 1, 1919) authorizing the use of this surplus for the purpose of making these repairs.

The answer tendered to the court an offer of a full statement of the district's finances, together with a statement of the delinquent taxes unpaid. The answer avowed the purpose to use the surplus as directed in the special act of the General Assembly, unless the court should hold that, for any reason, the act did not confer that authority, in which event they prayed directions from the court in regard to the distribution of this surplus.

The court sustained a demurrer to that portion of the answer which recited the authority claimed under the special act of the General Assembly, holding it unconstitutional and void, and appointed a receiver to take charge of the funds of the district. The court held that, "Neither the said commissioners nor the said district have authority as such, nor can they derive authority from any order of the chancery court, to hold, handle or dispose of said funds unless the chancery court should deem it proper to constitute the *personnel* of said commissioners its own receiver under the qualification and affidavit and bond as required by law, and the court declines to appoint them receivers, because their attitude in this action is one of hostility in law to equitably return said money to its owners, but more particularly because they are defendants in the action, and further because the court wanted J. R. Chandler, the county treasurer of Sebastian County, as such receiver, relying upon and trusting his honesty, qualifications and integrity."

The court apparently based its finding "of hostility in law to equitably return said money to its owners" upon the finding, also recited in the decree, that defendants had not applied to the chancery court for directions in regard to the disbursement of the funds in their hands, but had consented to and approved the introduction of the special act above referred to, as the decree also contained the finding that "the said commissioners and their predecessors had managed the affairs of said paving district in a business-like manner, free from fraud, and had sometimes theretofore consulted together to know what was the best to do with said money, and, being so advised, had contemplated filing a bill in equity for instructions, but that they abandoned that resolution, and consented to and approved the introduction of the special act of the Legislature of 1919, which was accordingly done."

The receiver qualified and attempted to take charge of the fund, but defendants refused to turn it over, whereupon a citation for contempt issued, in response to which the defendants replied that they held the funds subject to the order of the court, and would pay them over as directed, and specifically disclaimed any intention to refuse to execute any order which the court might make, but recited that they desired to be heard in opposition to the court's order in regard to the appointment of a receiver, as they were advised that that action was unauthorized by law. Upon the court's direction they then turned the money over to the receiver.

Pursuant to the directions of the court, the receiver caused an audit to be made of the affairs of the district, employing expert accountants for that purpose, which audit was embraced in the report of the receiver. The court approved this report and ordered that "the whole sum of money now in the hands of said receiver and any that shall hereafter be collected by him be paid and distributed to the several land owners in such a just and equitable proportion to each as the court may hereafter find and declare," and this appeal has been duly prosecuted from that order.

The majority of the court are of the opinion that the special act of the General Assembly is unconstitutional, as authorizing a diversion of funds collected for one purpose to be appropriated to another use, as an improvement district organized to construct streets has no authority to use funds collected for that purpose to thereafter appropriate any portion thereof for purposes of repair, and the special act did not confer that authority because it was not based upon the consent of the taxpayers of the city, as required by the Constitution. In other words, to create an improvement district for the purpose of building or repairing streets in a city, the consent of the taxpayers must first be obtained in the manner provided by law and the authority conferred by the original petition under which the district was formed could not be subsequently enlarged by legislative enactment to which the taxpayers had not consented.

But we are all agreed that the court erred in displacing appellants, and in appointing a receiver to take charge of the affairs of the district. It may be conceded that the testimony supports the finding made by the court below that appellants had abandoned their resolution to ask advice of the chancery court, and did in fact assent to the introduction and passage of the special act, and, but for the interposition of the chancery court, would have disbursed the fund as authorized by said act. But they were, nevertheless, under the law, the commissioners of the district, and, as such, were the officers designated by law to manage its affairs. The court was in error in assuming that the commissioners could be made subject to its orders, only by being appointed receivers of the court. On the contrary, they were subject to its orders as commissioners, and if they were about to make unauthorized or unlawful use of the district's funds—as the court found—that action could have been prevented by appropriate orders of the court, and should have been prevented in that manner. In other words, the commissioners, as such, were as much amenable to the appropriate orders of the court as its receiver would have

been; and we think there was neither authority, nor necessity, for the removal of the commissioners and the appointment of a receiver.

What we have just said is not in derogation of the right of the court to make appropriate orders, *in limine,* to prevent waste. Upon the contrary, the court has that right; but that right should have been exercised here by appropriate orders directed to the commissioners themselves, without displacing them.

It is provided by statute that whenever it shall not be forbidden by law and shall be deemed fair and proper in any case in equity, the court, judge or chancellor shall appoint some prudent person as receiver, who shall take an oath faithfully, impartially, diligently and truly to execute the trust reposed in him. Section 6342, Kirby's Digest. And the court making this appointment must necessarily exercise a discretion, which will not be overturned by this court on appeal unless there appears to have been an abuse of that discretion; and this is especially true with reference to a decision by us of a controversy over the naming of a receiver, and learned counsel for appellee insist that the question of who should have been appointed receiver is the real question in the case, as they insist that the services of a receiver had become indispensable under the pleadings and testimony in the case.

We think, however, that the question is not who should have been appointed receiver, but, rather, did the court err in removing the commissioners?

In 23 A. & E. Enc. of Law (2 Ed.), 1011, the law is announced as follows: "It may be stated as an undoubted general rule in this connection that a court of equity is reluctant to disturb the possession or control of a lawfully constituted trustee, and to supersede such authority by the appointment of a receiver. A trustee will not be displaced and a receiver appointed on slight or insignificant grounds. Thus it has been said that a court would not, at the instance of one of several parties interested in an estate, displace a competent trustee, or take

the possession from him, unless he wilfully or ignorantly permitted the property to be placed in a state of insecurity which due care or conduct would have prevented. And it would require a particularly strong case, it has been held, to warrant the appointment of a receiver of an internal improvement fund, created by the Legislature and vested in the governor and other State officers as trustees."

On the following page the text continues: "Notwithstanding the reluctance of a court to supersede a trustee by the appointment of a receiver, if it appears that the trustee has been guilty of positive misconduct or waste, or an improper disposition of the trust estate, or that he has an undue bias towards one of two conflicting parties, or that the estate is liable to be wasted or destroyed, a proper case is made out for the appointment of a receiver."

To the same effect see section 1510, Pomeroy's Equity Jurisprudence, vol. 4 (4 Ed.); section 696, High on Receivers (4 Ed.). If this be the test as to ordinary trustees, how much stronger must be the showing required to remove from office persons who have a legal title to the office whose functions they are undertaking to perform; and, if it be conceded that the chancery court has the right, upon a proper showing, to remove such officers (which we do not decide), it must at least be said that such a case has not been made here.

No fraud or wilful misconduct is alleged or shown, nor does it appear that the commissioners were incapacitated or unwilling to execute the orders of the court, and we conclude, therefore, that the control and management of the affairs of the district should not, therefore, have been taken out of their hands, and for the error in doing so the decree of the court below is reversed and the cause remanded with directions to restore the fund to appellants.

HUMPHREYS, J., not participating.

NUTT *v.* SECURITY LIFE INSURANCE COMPANY.

Opinion delivered January 26, 1920.

INSURANCE—EXEMPTION WHILE ENGAGED IN MILITARY SERVICE.—A life insurance policy, making insurer liable only for reserve of policy upon death of insured while engaged in military service in time of war, without a permit, did not exempt insurer from liability upon death of insured from influenza in a base hospital in an army camp in the United States, while a private in the United States army; the exemption referring to death proximately caused by war activities.

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

T. D. Wynne, for appellant.

The only issue involved is the construction of the war clause in the policy sued on. The court based its findings and judgment on the Miller case in 212 S. W. 310, but that case does not control, as the provision of the war clause there is entirely different from this. All limitations in an insurance policy are construed most strongly against the insurer. 17 L. R. A. (N. S.) 1011. All doubts should be resolved in favor of the insured and against the insurer. 25 Cyc. 739; 30 Pa. Sup. Ct. 456; 172 N. W. 152. Only war risks were contemplated, and not death from ordinary diseases. 48 N. Y. 34; 5 Ct. Ct. 182-181; 172 N. W. 152; 207 S. W. 74. There is no such provision here as in 212 S. W. 310. There was no forfeiture when the assured entered the United States service, and the court erred in holding that the defendant was exempt from liability under the provisions of the war clause.

T. E. Helm, for appellee.

There was no dispute as to the facts, and the Miller case, 212 S. W. 310, is conclusive of this case as to the law. 71 Ark. 295; 52 *Id.* 201; 112 *Id.* 171-178. See also dissenting opinion in 207 S. W. 74. The judgment should be affirmed, as there is no error.

HUMPHREYS, J. Appellant, administrator of the estate of Beulah B. Forehand, instituted suit against

appellee in the Dallas Circuit Court to recover $2,000, the face value of insurance policy No. 34304, issued to Jesse M. Forehand on the first day of March, 1917, by appellee, in which Beulah B. Forehand was named as the beneficiary. The policy was made the basis of the suit. In addition to setting out the policy, it was alleged in the complaint that, during the life of the policy, Jesse M. Forehand died; that due proof of the death of the insured was made to the appellee, and that appellee had refused, contrary to its obligation, to pay appellant, the representative of the assured, the amount due under the terms of the policy.

Appellee filed answer, claiming exemption from liability under the following clause in the policy: "This policy shall be incontestable after one year after its date except for non-payment of premiums and except for naval or military service in time of war without permit, which are risks not assumed by this company; provided that in case of the death of the insured while engaged in such service without a permit, the amount payable hereunder shall be the reserve of the policy at date of death."

The cause was submitted to the court, sitting as a jury, upon the pleadings, the application for the policy, the policy, proof of death, and the following agreed statement of facts:

"1. That upon written application of Jesse M. Forehand there was issued by the defendant company, March 1, 1917, its policy No. 37304, insuring the life of the said Jesse M. Forehand in the amount of $2,000, subject to the terms and conditions of said policy, and that said policy provided for an annual premium of $68.26 dollars, which was paid by the said Forehand, and that sufficient proofs of death was filed, except as to securing permit to enter military service and as to amount due under the policy, which is $51.44."

"2. That in said policy of insurance issued by the defendant on the life of the said Jesse M. Forehand, among others, is the following provision:

"'This policy shall be incontestable after one year from its date, except for non-payment of premiums and except for naval or military service in time of war without a permit, which are risks not assumed by the company; provided that, in case of the death of the insured while engaged in such service without a permit, the amount payable hereunder shall be the reserve on the policy at date of death. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy unless it is contained in the application therefor.'"

"3. That after said policy was issued and while the same was in effect, with all of its terms and conditions, the said Jesse M. Forehand entered, and until and at the time of his death was engaged in, the military service of the United States Government of America as a private in the army of the said United States of America. That, at and during the time the said Forehand entered and remained in said service as aforesaid, a state of war existed between the said United States of America and the Imperial German Government."

"4. That at no time before he entered, or while he was engaged in, the said military service of the said United States of America, during said state of war, did the said Jesse M. Forehand apply for, nor was there issued to him by the defendant, a permit to engage in said service in said time of war in accordance with the provisions of said policy referred to in the paragraph hereinbefore numbered two."

"5. That the said Jesse M. Forehand died of influenza October 12, 1918, in the Base Hospital at Camp Pike, Arkansas, while engaged in said military service of the United States of America as private in the army of said United States of America, without a permit as aforesaid, and while said state of war existed between said United States of America and the Imperial German Government."

The court found appellee liable for $51.44, the reserve value, but not liable for the face value of the policy, and, in accordance with the findings, rendered judgment against appellee for $51.44, with costs, and dismissed appellant's complaint for the face value of the policy. From the judgment an appeal has been duly prosecuted to this court.

It is insisted that the court erred in construing the war exemption provision in the policy as meaning the death of the insured during the time he was in the army, instead of construing it to mean the death of the insured resulting from war activities. The war exemption provision, when read in entirety, relates to death proximately caused by war. In order to give the proviso contained in the provision a reasonable meaning, it is necessary to restrict the risks not assumed by appellee insurance company while the insured was in military service without a permit, to death incidental to military duty. The word "engaged" in the proviso furnishes the key to a proper construction of the provision. It was so held by this court in the interpretation of a provision in an insurance policy quite similar to the provision now before us for construction, in the renct case of *Benham* v. *American Central Life Ins. Co.,* 140 Ark. 612. In that case the court said: "The word 'engaged' denotes action. It means to take part in;" and, in the same case, also said: " 'Death while engaged in military service in time of war,' means death while doing, performing, or taking part in some military service in time of war. That is to say, in order to exempt the company from liability, the death must have been caused while the insured was doing something connected with the military service, in contradistinction to death while in the service due to causes entirely, or wholly, unconnected with such service." While we do not regard the clause now before us for construction as containing any ambibuity, yet an additional reason in support of the conclusion reached upon the interpretation of the clause may be found in the fact that no

reduction was provided in the policy of the premium during the period of enlistment. Had it been the intention of appellee insurance company to relieve itself from death resulting from natural or ordinary causes during the period of enlistment, it would certainly have provided for a corresponding reduction in the premium. It is hardly supposable that the same premium of $68.26 per annum would have been exacted to give the insured protection to the extent of the reserve value of the policy when the reserve value was less than the annual premium. The fact that no reduction was made in the premium is indicative of the intent on the part of the company to exempt itself from the payment of the face of the policy under the war exemption provision from death caused by enhanced danger or hazard to life incident to war, and not from death incident to causes for which it imposed and exacted a fixed annual premium. We think that the construction of the war exemption provision contained in the policy in the instant case is ruled by the case of *Benham* v. *American Central Life Ins. Co., supra,* and not by the case of *Miller* v. *Illinois Bankers' Life Assn.,* 138 Ark. 442. The provision under review in the latter case did not contain the proviso in the provision under review in the instant case. To rule this case by the Miller case would, in our judgment, extend the doctrine announced therein.

We do not think the instant case is differentiated from the Benham case, as suggested by appellee, on account of the following provision in the agreed statement of facts: "That after said policy was issued and while the same was in effect, with all of its terms and conditions, the said Jesse M. Forehand entered, and until and at the time of his death was engaged in, the military service of the Government of the United States of America." It appears in the agreement of facts that the insured died of influenza on October 12, 1918, in the Base Hospital at Camp Pike. This disease was a disease common to soldiers and civilians alike, and was not confined to any particular locality; so it is apparent that it was

not intended by the clause in question to concede that death resulted to the insured from any active service in the war. The liability of appellee in this case is dependent upon a construction of the war exemption clause in the policy and not upon an agreement of facts by the parties. The provision is plain and unambiguous. It only exempts the company from liability on the face of the policy from death proximately caused by war activities.

For the error indicated the judgment is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

McCULLOCH, C. J., (dissenting). This case should, I think, be controlled by *Miller* v. *Illinois Bankers Life Association,* 138 Ark. 442. There is no sound distinction between the two cases. The language of the policy related to the status of the insured and not to the cause of death, and meant that if he died during the period of his military or naval service in time of war, there should be no liability except for the reserve.

Mr. Justice SMITH is of the same opinion.

ADKISSON v. STATE.

Opinion delivered January 26, 1920.

1. CRIMINAL LAW—NECESSITY OF BILL OF EXCEPTIONS.—A motion for continuance and the overruling thereof, and the objection and exception to such ruling, must be brought into the record by bill of exceptions, and otherwise can not be considered by the Supreme Court.
2. CRIMINAL LAW—NECESSITY OF BILL OF EXCEPTIONS.—Alleged error in refusing a change of venue will not be considered on appeal where the motion, refusal and objections and exceptions to the ruling are not brought into the record by bill of exceptions.
3. CRIMINAL LAW—NECESSITY OF BILL OF EXCEPTIONS.—In order that remarks of the prosecuting attorney in his opening statement or in the argument may be reviewed, they, with objections and exceptions thereto, should be brought into the record by bill of exceptions.

4. HOMICIDE—GUILTY PARTICIPATION.—One who is present at a killing, aiding and abetting those who killed deceased, is guilty, though he did not fire the fatal shot and had not previously conspired to kill the deceased.

5. HOMICIDE—INSTRUCTIONS.—Where the evidence justified the submission of the question of guilt on all the grades of homicide, a requested instruction that the defendant be acquitted unless the facts warranted a conviction of murder in the first degree was erroneous.

6. HOMICIDE — DEFENSE OF FAMILY — INSTRUCTION.—An instruction that "if you believe the posse was the aggressor and fired on the home containing the defendant, his wife and family, then in law he was justified in returning the fire, and you should acquit him" was properly refused, as he could kill only in necessary defense of himself and family.

7. CRIMINAL LAW—INSTRUCTION AS TO ADMISSIBILITY OF DYING DECLARATIONS.—An instruction which advised the jury as to the admissibliity of dying declarations was properly refused, being a matter properly addressed to the court.

8. HOMICIDE—INSTRUCTION—MISTAKEN BELIEF OF DANGER.—In an instruction on self-defense it was not error to charge that "if there was no danger, and his (defendant's) belief of the existence thereof be imputable to negligence, he is not excused, however honest his belief may be."

Appeal from Cleburne Circuit Court; *J. M. Shinn*, Judge; affirmed.

Bratton & Bratton, for appellant.

1. The continuance should have been granted. Defendant had used all diligence to get Rice's testimony and failed without his fault. His testimony was important to the defense, and material.

2. It was error to overrule the motion for change of venue. Kirby's Digest, § § 2317-18; 68 Ark. 466.

3. The verdict is not supported by the evidence but is against the clear preponderance. *Adkisson* v. *State*, *ante*, p. 15.

4. The prosecuting attorney's remarks were prejudicial and the court erred in its instructions to the jury. See cases cited in brief. *Adkisson* v. *State*, *ante*, p. 15.

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

1. There was no prejudicial error in the prosecuting attorney's remarks or argument.

2. There is no reversible error in the instructions. 38 Ark. 498; 81 *Id.* 417; 58 *Id.* 47; 99 *Id.* 208; 104 *Id.* 162.

HUMPHREYS, J. Appellant was indicted by the Cleburne Circuit Court jointly with Bliss Adkisson and Hardy Adkisson for the crime of murder in the first degree for killing Porter Hazelwood on the 10th day of July, 1918. It appears from the transcript that at the following spring or March term of the court a motion for change of venue was filed, in manner and form required by law, which was granted, and the cause transferred to the Boone Circuit Court for trial; that, on the same day, by an agreement between the State and appellant, the order granting the change of venue to the Boone Circuit Court was set aside, the motion for change of venue withdrawn and the cause continued and set for the second day of the September, 1919, term of the Cleburne Circuit Court. It also appears from the transcript that, on the day to which the cause had been continued, appellant with Bliss and Hardy Adkisson filed a motion for continuance on account of the absence of Bill Rice, a former deputy sheriff, who was a member of the sheriff's posse at the time Porter Hazelwood was killed; that the motion for continuance was overruled, to which ruling appellant at the time objected and excepted; that thereafter on the joint motion of appellant, Hardy and Bliss Adkisson, the cause was severed; that, prior to the trial, to-wit, on the 25th day of September, 1919, appellant, in manner and form required by law, filed a motion for change of venue, which was overruled by the court over the objection and exception of appellant. The motion for continuance and change of venue, the overruling of each by the court and the objections and exceptions of appellant to the rulings of the court in respect to the

motions were not brought into the record by the bill of exceptions filed and certified.

The cause then proceeded to a trial, which resulted in a verdict and judgment against appellant for voluntary manslaughter and the imposition of a punishment in the State penitentiary for two and one-half years. From the verdict and judgment an appeal has been duly prosecuted to this court.

The evidence in the instant case is not materially different from that adduced in the kindred case of *Bliss Adkisson* v. *State, ante,* p. 15, which was submitted to this court for decision upon the same date as this. For a general history and statement of the facts in the instant case, reference is made to that case.

It is insisted that the court erred in overruling the motion for a continuance on account of the absence of the witness Bill Rice. It has been repeatedly held by this court that a motion for continuance and the overruling thereof and the objection and exception to such ruling must be brought into the record by bill of exceptions, else it is no part of the record which can be considered by this court. *Phillips* v. *Reardon & Son,* 7 Ark. 256; *Ward* v. *Worthington,* 33 Ark. 830; *Evans & Shinn* v. *Rudy,* 34 Ark. 383; *Quertermous* v. *State,* 114 Ark. 452; *Empire Carbon Works* v. *Barker,* 132 Ark. 1.

It is insisted that the judgment should be reversed because the court refused to grant appellant a change of venue. For the same reason announced above, this court can not consider that question. *Stearns* v. *St. L. & San Francisco Railway Co.,* 94 Mo. 317; *Estes* v. *Chesney,* 54 Ark. 463.

The matters complained of in assignments numbers 7, 8, 9, 10, 11, 12, 13 and 14 seem to have been based upon statements made by the prosecuting attorney either in the opening statement or arguments of the case, which statements, with the objections and exceptions thereo, do not appear in the bill of exceptions. These assignments of error should have been brought into the record by the

bill of exceptions, and, because of that failure, can not be considered and decided by the court in a review of the cause.

It is contended in assignment of error No. 33 that Leo Martin was forced by the prosecuting attorney to admit that he stood indicted for the crime of assault with intent to kill and murder, and in assignment No. 34, he was permitted to make such inquiry of Leo Martin. Appellant has not abstracted any evidence upon which to base these assignments of error, and we have been unable to find in the bill of exceptions where such permission was granted to the prosecuting attorney by the court.

It is insisted that the court erred in refusing to give appellant's requests Nos. 1, 2, 4 and 5. We have read these instructions and each casts the burden upon the State to show beyond a reasonable doubt that appellant either fired the shot that killed Porter Hazelwood or that, prior to the killing, he had entered into a conspiracy with others and was engaged with them in carrying out the conspiracy to fight men lawfully trying to arrest his son, Bliss Adkisson. This was error. Appellant was present at the time of the killing, so the only burden cast upon the State was to prove that appellant either fired the shot that killed Porter Hazelwood unlawfully, wilfully, feloniously, with malice aforethought and after premeditation and deliberation to kill him, or that he aided or abetted others in killing him with such intent, premeditation and deliberation. It was proper to refuse to give instructions carrying this erroneous declaration of law.

Appellant insists that the court committed reversible error in refusing to give his request No. 3, which is as follows: "If you find from all the evidence, beyond all reasonable doubt that the defendant was engaged in a conspiracy with two or more other parties to resist a lawful arrest of his son Bliss, and that he fought with them to resist said lawful arrest, and that Porter Hazelwood was thereby killed, without fault on the part of his

posse, then, in that event, defendant cannot plead self-defense and is guilty of murder in the first degree, and you would not be warranted in finding him guilty of a lesser grade of homicide. But, before you believe him guilty of such conspiracy, you must believe from the evidence introduced in open court, and not by rumor or passion, that the defendant himself had agreed with other conspirators to fight any lawful posse or men trying to make a lawful arrest."

This instruction excludes from the jury the question of whether appellant was guilty, under the facts, of a lesser grade of homicide than murder in the first degree. In other words, it said that, unless the facts warranted a conviction of murder in the first degree, it would be the duty of the jury to acquit. We think the evidence justified the court in submitting the question to the jury as to the guilt or innocence of appellant on all the grades of homicide. For that reason, the request was erroneous and should have been denied.

Appellant insists that the court committed reversible error in refusing to give his request No. 9, which is as follows: "If you believe the posse was the aggressor and fired on the home containing the defendant, his wife, and family, then, in law, he was justified in returning the fire, and you must acquit him."

This request was tantamount to instructing an acquittal if the appellant fired the shot that killed Porter Hazelwood, even if, at the time, appellant or some member of his family were not in imminent danger. He could only kill another in necessary self-defense of himself and family.

Appellant insists that the court erred in refusing to give his request No. 11, which appellant contends only laid down rules of guidance for the jury in the consideration of the dying declaration. The instruction, however, does more than this. It laid down the rules governing the admissibility of a dying declaration, which were questions for the court and not for the jury. For that reason, the request was properly denied.

It is insisted that the court committed reversible error in giving instruction No. 27a, which is as follows: "If you find the deceased, Porter Hazelwood, was a member of the sheriff's posse that was endeavoring to arrest and capture Bliss Adkisson or Tom Adkisson or Hardy Adkisson, and that defendant knew that deceased was there in that capacity, or by the exercise of reasonable care could have known it, and if you further find that defendant, or Bliss Adkisson or Hardy Adkisson, were acting in conjunction with the defendant, shot the deceased in a spirit of resistance or defiance of said sheriff's posse, then you are instructed that defendant could not plead self-defense or the defense of person or property as an excuse for the killing, and that said plea would not avail him."

This instruction was under consideration in *Adkisson* v. *State, ante,* p. 15, and the court disposed of appellant's objection thereto by saying the error complained of could have been reached by a specific objection only. No specific objection was interposed by appellant to the instruction when given by the trial court.

Lastly, it is insisted that the court erred in giving instruction No. 31a, which is as follows: "In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was necessary, and must also appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given. To be justified, however, in acting on the facts as they appear to him, the defendant must honestly believe without fault or carelessness on his part, that the danger is so urgent and pressing that it is necessary to kill his assailant in order to save his life, or to prevent his receiving great bodily injury. He must act with due circumspection. If there was no danger, and his belief of the exist-

ence thereof be imputable to negligence, he is not excused, however honest his belief may be."

The supposed vice contained in this instruction consists in the impossibility of one being honest in his belief if he were negligent in reaching the opinion. We see no reason why a man could not honestly believe a thing, though he reached the conclusion through his own negligence. One cannot justify against a charge of criminal homicide, however, on the ground that he was under the honest belief that he was in imminent danger, if he reached that belief through fault or carelessness. The only belief upon which he can justify would be a belief not founded on his own fault or carelessness. The instruction complained of clearly carried this idea and was not erroneous.

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

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY v. BLACK.

Opinion delivered February 2, 1920.

1. RAILROADS—FIRES—PRESUMPTION OF NEGLIGENCE.—The rule that where inflammable property near a railroad track is discovered to be on fire soon after the passing of an engine emitting sparks the jury may infer that the fire originated in sparks from the engine, in the absence of other evidence to explain its origin, applies though the cause of action arose in another State where a different rule prevails.
2. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Where there was neither allegation nor proof that defendant railroad company was holding the cotton alleged to have been burned on its platform as warehouseman, it can not be contended on appeal that under the Oklahoma law no recovery could be had without proving negligence because the cotton was held by defendant as warehouseman; that issue not having been raised below.

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

W. F. Evans and *Warner, Hardin & Warner,* for appellant.

1. The evidence is insufficient to sustain the finding that defendant set out the fire. The cause of action arose in the State of Oklahoma and the laws of that State govern as to liability, if any. 113 Ark. 265; 64 *Id.* 291. Review the evidence and contend that the greatest probation force of the proof is to show a mere possibility that the cotton was set on fire by defendant's train. This is clearly insufficient. 16 S. E. 958; 112 N. W. 1121; 153 Pac. 872; 174 *Id.* 510; 28 Mo. App. 622; 20 Pac. 664; 42 N. E. 818.

2. Defendant occupied the relation of warehouseman and only liable for negligence, and, even if sparks from defendant's engine set the fire, plaintiff was not entitled to recover, as defendant was not sought to be held as a common carrier but under section 114, Revised Laws of Oklahoma, it was the custom of shippers at Cameron, Oklahoma, to place cotton on the platform which they intended for shipment. No bill of lading was issued and none asked for and there was no delivery to the railroad at the time of the fire and defendant was liable only as a warehouseman, if at all. 108 Pac. 380; 134 *Id.* 856; 153 *Id.* 857; 87 Ark. 26; 140 S. W. 480. The railway company was bound only to ordinary care to prevent fire. 10 Corp. Jur., p. 226; 1 Hutch. on Car., § 112; 16 Ill. App. 284; 16 S. E. 323. It is liable only for loss resulting from its own negligence. 108 Pac. 380; 5 Am. & E. Enc. L. (2 Ed.), 212; 4 R. C. L. 747; 122 S. W. 184; 59 S. E. 949; 42 Ark. 200; 33 Cyc., p. 1328. The rule is well settled by the law of Oklahoma which governs this case. 13 A. & E. R. R. Cas. (N. S.), 253; 58 Ark. 156; 187 S. W. 635; 67 *Id.* 295.

T. P. Winchester, for appellee.

1. The case was not tried on the theory that the defendant was a warehouseman, and no such issue was made by the pleadings or tendered. 46 Ark. 96; 69 *Id.*

23; 71 *Id.* 242; 4 Hutch. on Car. (3 Ed.), § 118; Elliott on R. R., § 1410, vol. 4; 101 Ark. 75.

2. The evidence is ample to sustain the verdict, and was sufficient to justify a verdict that the fire was set by sparks from the train. 92 Ark. 569; 82 *Id.* 3; 79 *Id.* 12; 89 *Id.* 418; 140 S. W. 480; 90 Ark. 182, and cases cited; 85 Ark. 127, 257.

McCULLOCH, C. J. Appellee instituted this action against appellant in the circuit court of Sebastian County to recover the value of thirty-three bales of cotton destroyed by fire alleged to have been communicated by sparks from one of appellant's locomotives while the cotton was situated on a platform near the railroad at the station of Cameron, State of Oklahoma. There was recovery in the trial below for the full value of the cotton as alleged and proved.

Appellee based his right to recover on a statute of Oklahoma which reads as follows:

"Any railroad company operating any line in this State shall be liable for all damages sustained by fire originating from operating its road." Revised Laws of Oklahoma, 1910, § 114.

It is alleged in the complaint that "defendant owns and operates a line of railway through the States of Arkansas and Oklahoma, and at Cameron, Oklahoma, on its said railway line it erected a platform upon which it received and stored baled cotton intended for shipment over its said railway line;" that on October 11, 1917, "plaintiff had upon said platform fifty-five bales of cotton placed there for shipment over said defendant's railway; and that on the date named "one of defendant's freight trains going south passed the platform upon which said cotton was located and when said train passed said platform the locomotive engine drawing said train emitted great showers of sparks and live coals, some of which fell upon plaintiff's cotton and ignited it," and that thirty-three bales of said cotton of the aggregate value of $4,807.77 were destroyed by the fire thus communicated.

The answer contained specific denials of each allegation of the complaint and also contained an allegation that the cotton was not destroyed through any negligence of the defendant. It was specifically denied in the answer that said cotton was placed on the platform "for the purpose of being shipped over defendant's line of railroad."

Appellee testified that he had fifty-seven bales of cotton at a gin and hauled fifty-five bales of it to the railroad platform and placed it thereon for the purpose of shipping it over appellant's road; that the bales had his own tags on it, and that he intended to haul the other two bales and ship it all at one time. The cotton was destroyed by fire that night while on the platform. The other testimony adduced by appellee tended to show that a passing engine drawing a freight train emitted showers of live sparks, large and small, which were borne by the wind toward the cotton platform and that a short time thereafter the cotton was found to be on fire. The testimony adduced in the case did not tend to show any origin of the fire other than by communication from the engine. Appellant's testimony tended to show that the engine did not and could not emit sparks of sufficient size to reach the cotton platform. The watchman, who was introduced as a witness by appellant, testified that he patrolled the cotton platform between the times the train passed and the fire became flagrant, and that he did not discover any fire in the cotton. There was conflict in the testimony as to the precise time the train passed and as to the time the cotton was discovered to be afire.

Appellee's right of action, if any exists, arose in the State of Oklahoma, and the laws of that State control.

It is contended, in the first place, that the evidence is not sufficient to sustain the finding that the fire was communicated from the engine.

In the case of *Railway Company* v. *Dodd,* 59 Ark. 317, the rule was announced that where inflammable property situated near a railroad track was discovered

to be on fire soon after the passing of an engine emitting sparks, these were "facts from which the jury might have inferred that the fire originated in sparks from the engine of the train which had just passed, there being no evidence to explain its origin on any other theory." That rule has been adhered to in all later cases. *St. L., I. M. & S. Ry. Co.* v. *Coombs,* 76 Ark. 132; *Monte Ne Ry. Co.* v. *Phillips,* 80 Ark. 292; *St. L., I. M. & S. Ry. Co.* v. *Clements,* 82 Ark. 3; *St. L. S. W. Ry. Co.* v. *Trotter,* 89 Ark. 273; *St. L. & S. F. Rd. Co.* v. *Shore,* 89 Ark. 418; *Central Arkansas & Eastern Ry. Co.* v. *Goelzer,* 92 Ark. 569; *Missouri & North Arkansas Rd. Co.* v. *Phillips,* 97 Ark. 54; *Bush* v. *Taylor,* 130 Ark. 522.

The Oklahoma Supreme Court has adopted a different rule in weighing the sufficiency of evidence, but we are not bound by the rule of that court, even though the cause of action arose in that State. The cause of action does not rest on the rules of evidence in the State where it arose, nor on a statute of that State on the subject which enters into the cause of action, and the law of the forum governs. *St. L. & S. F. Rd. Co.* v. *Coy,* 113 Ark. 265; *St. L., I. M. & S. Ry. Co.* v. *Steel,* 129 Ark. 520.

The next and last contention of appellant is that, according to the construction placed by the Supreme Court of Oklahoma on the statute in question to the effect that the statute is not applicable where a contractual relation as bailee and bailor subsists between the owner of the destroyed property and the railroad company (*Walker* v. *Eikelberry,* 7 Okla. 599, 54 Pac. 553), there is no liability in the present case, for the reason that the proof shows that appellant held the cotton as warehouseman, and that negligence was not proved and that the court refused to submit the question of negligence to the jury.

The question appears to be raised here for the first time, for the case was not tried below on the theory of any contractual relationship between the parties. The issue was not raised below, either in the pleadings, the proof or the instructions.

Appellee based his right of recovery on the statute, and alleged the purpose for which the cotton was placed on the platform to show that he had rightfully placed it there. The answer presented an issue on that subject by the denial that the cotton was placed there for shipment. The complaint contained no allegation as to negligence on the part of appellant with respect to the loss of the cotton. Appellee adduced, in support of his plea, proof that he placed the cotton on the platform for the purpose of shipping it. He did not prove that he gave notice to the agent of the company, nor that the cotton was formally received by the company's agent, but the circumstances proved were such as to warrant the finding that the cotton was on the platform with the consent of appellant and that question was submitted to the jury in the charge of the court. The purpose of appellee was manifestly, as before stated, to show that his property was rightfully on the platform. *St. Louis, I. M. & So. Ry. Co.* v. *Cooper & Ross,* 120 Ark. 595. Appellant made no effort at all to prove that it had received the cotton and held it as warehouseman. Nor was there any request to have that issue submitted to the jury. The refused instructions requested by appellant were confined to the question of negligence and contained nothing concerning the relationship of the parties with respect to the possession of the cotton.

Instruction No. 5, requested by appellant, is a fair sample of the refused instructions. It reads as follows:

"Before the plaintiff can recover in this case he must establish by a preponderance of the evidence that the fire which destroyed his cotton was set out, or caused, by sparks emitted from the engine of a southbound freight train passing Cameron on the evening of October 11, 1917, at about 8 o'clock and also that said fire was set out, or caused, by the negligence of the defendant, and if he fails in either of these your verdict should be for the defendant in this cause."

The court gave, at appellant's request, the following instruction:

"You are instructed that it is alleged by plaintiff that thirty-three bales of cotton belonging to him, which was situated upon the defendant's cotton platform at Cameron, Oklahoma, was destroyed by fire set out by one of defendant's southbound freight trains on the night of October 11, 1917, about 8 o'clock. Now the court instructs you that the burden is upon the plaintiff to show these facts by a preponderance of the testimony, and if he fails to do so you should return your verdict for the defendant."

The submission of the question of negligence would not necessarily have carried with it a submission of the relationship of the parties. On the contrary, the giving of appellant's requested instruction would have constituted an assumption that the cotton was held by appellant as warehouseman. The inference to be drawn from the testimony as to the relationship of the parties with respect to the cotton was not undisputed, and it would not have been proper for the court to give instructions assuming that appellant had possession of the cotton and held it as warehouseman. The jury could have found from the testimony that appellee put the cotton on the platform at appellant's implied invitation, and merely for his own convenience, and that it was not held by appellant as warehouseman. The question should not, if the issue was raised, have been taken away from the jury by a peremptory instruction, or one assuming that the relationship of warehouseman subsisted.

If this question had been appropriately raised so as to direct the court and adverse party to its presence in the case, the testimony on the point might have been fully developed by additional testimony. It would not be fair to appellee to allow it to be raised here on appeal for the first time. The reports abound in decisions of this court holding that such practice is not permitted. *Radcliffe* v. *Scruggs,* 46 Ark. 96; *Martin* v. *McDiarmid,* 55 Ark. 213; *Greenwich Ins. Co.* v. *State,* 74 Ark. 72; *James* v. *Mallory,* 76 Ark. 509.

Upon the record presented we do not think that there was any prejudicial error committed which appellant is in position to take advantage of now. The judgment is, therefore, affirmed.

SMITH, J., dissents.

BRANNEN v. POOLE.

Opinion delivered February 2, 1920.

1. BROKERS—RIGHT TO COMMISSIONS.—Where a real estate broker was given no exclusive agency to sell lands, and no authority for any definite time, in order to earn his commission, he must, before a revocation of his authority or a sale of the land, have procured a purchaser ready, willing and able to purchase on the terms specified in the contract.
2. BROKERS—RIGHT TO COMMISSIONS.—A broker is not entitled to commission for procuring a purchaser for land on the theory that he dealt with another broker as a purchaser, where such deal fell through, and a sale was finally made to another through the efforts of the other broker who received a commission for procuring a purchaser.
3. BROKERS—RIGHT TO COMMISSIONS.—Where a real estate broker, employed to sell defendant's land, turned over a second broker to defendant with the statement that such second broker was his associate, and that any arrangement made with him would be satisfactory, and the defendant subsequently paid the second broker a commission for procuring a purchaser, the first broker was not entitled to recover a commission from defendant.

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

J. A. Watkins, for appellant.

Poole was not exempt from service of a summons in this case and the court properly directed a verdict for appellee. 45 L. R. A. 613; 126 Ark. 398; 53 Id. 51; 76 *Id.* 376. The sale was brought about and procured by the efforts and labors of appellant and under the law he was entitled to recover the commission. Cases *supra.* See also 23 L. R. A. 632.

Mehaffy, Donham & Mehaffy, for appellee.

1. Appellee was not exempt from service of a summons and 126 Ark. 389 is not in point. 2 R. C. L. 482.

2. Brannen did absolutely nothing to bring about or procure the sale, and the evidence is clear that he did not earn the commission. 4 R. C. L. 305; 116 Ark. 273; 112 *Id.* 227; 122 Ark. 258; 91 *Id.* 212; 55 *Id.* 574; 121 *Id.* 536.

McCULLOCH, C. J., Appellant instituted this action against appellee to recover broker's commission on a sale of real estate under an alleged contract whereby appellee employed appellant to procure a purchaser for the land. There was a trial of the issues before a jury, but the court directed a verdict in favor of appellee.

The only question presented, therefore, is whether or not there was sufficient evidence to warrant a submission of the issue to the jury.

Appellee was the owner of an undivided one-fifth interest in a large tract of timber land in Calhoun County, Arkansas, aggregating about 10,000 acres, and he was endeavoring on behalf of himself and his associates to sell the land. He had authority also to sell for a man named Bell another tract in the same vicinity containing about 6,000 acres. Appellant was engaged in business in the city of Little Rock, as a real estate broker, and applied to appellee for authority to sell this land. Appellee authorized appellant to sell the land at a net price of $16 per acre. Appellant introduced to appellee a man named Buzard, through whom there was an effort made to sell the land to the Belzoni Hardwood Lumber Company of Belzoni, Mississippi, who was represented by its agent, Mr. Brattan. Buzard was a real estate broker in Memphis, connected with a firm doing business in that city. The effort to make the sale just mentioned was not successful, but subsequently appellee sold the Bell land himself to another concern, and the 10,000 acres in which appellee was personally interested was later sold to the Calion Land & Lumber Company of St. Louis, the

sale being made through Buzard and Brattan at the price of $15.50 per acre, and appellee paid Buzard a commission of 25 cents per acre for making the sale.

Appellant testified that he dealt with Buzard as a prospective purchaser of the land and introduced him to appellee as such. On the other hand, appellee testified that appellant introduced Buzard as his (appellant's) associate in the effort to make the sale, and told him that whatever Buzard did would be satisfactory.

We are of the opinion that the court was correct in giving the peremptory instruction to the jury, for under neither of the two theories presented by the conflicting evidence was appellant entitled to a commission. Under the contract between the parties there was no exclusive agency for the sale of the land, nor was appellant's authority given for any definite period of time. Under the terms of the contract, in order to earn a commission, appellant must, before the revocation of the authority or a sale of the land, have procured a purchaser ready, willing and able to purchase on the terms specified in the contract.

This is not a case like *Simpson* v. *Blewitt,* 110 Ark. 87, where the commission could be earned either by procuring a purchaser or by procuring some one to find a purchaser, but under the terms of this contract it was necessary for appellant, either himself or some one acting for him, to produce the purchaser in order to earn the commission. It is undisputed that there was no sale made to Buzard, and that the first sale in contemplation to the Belzoni Hardwood Lumber Company was never consummated. Appellant is not entitled, therefore, to recover upon his own theory that he dealt with Buzard as a purchaser, for the simple reason that there was no sale made to Buzard. The sale finally made was through the efforts of Buzard as a broker, and appellee paid the commission to Buzard for making the sale. There having been no sale made to Buzard, nor to any one else through the procurement of appellant, he is not entitled to a commission, nor is there the slightest evidence of any collu-

sion between appellee and Buzard or any evasion in the form of the contract for the purpose of defeating appellant's right to claim a commission. The attempted sale to the Belzoni Hardwood Lumber Company on the terms first stipulated between appellant and appellee failed, as before stated, and the sale thereafter was made several months later to the Calion Land & Lumber Company upon new terms and after an express agreement was entered into between appellee and Buzard as to the amount of commissions to be paid.

If, as contended by appellant, he introduced Buzard to appellee as a prospective purchaser, and no sale was made to Buzard, appellant would not be entitled to a commission on a sale subsequently made by Buzard under contract entered into in good faith by appellee with him as a broker. Appellee did not bind himself in his contract with appellant not to sell the land himself, or not to attempt to sell it through some other broker, and appellee was entirely within his rights in engaging with Buzard, or any other broker, to make a sale without incurring liability to appellant for a commission.

Now, turning to the theory of appellee, under the testimony adduced by him, it was equally plain that appellant is not entitled to recover in the action. Appellee testified that appellant had turned Buzard over to him with the statement that Buzard was appellant's associate, and that any arrangement made with him would be satisfactory. The terms of the sale to the Calion Land & Lumber Company and the agreement with reference to the commission on the sale were made with Buzard, and appellee paid the commission according to his agreement with Buzard. Under those circumstances, appellant is not entitled to recover the commission.

Judgment affirmed.

EASLEY v. PATTERSON.

Opinion delivered February 2, 1920.

1. HIGHWAYS—VALIDITY OF SPECIAL ACTS.—It is not essential to the validity of special acts creating road improvement districts that they contain express declarations that the roads to be improved have already been established as public roads; if they are not public roads, it devolves upon those assailing the validity of the acts to make it so appear.
2. HIGHWAYS—DESCRIPTION OF ROAD TO BE IMPROVED.—Where a special act provides for the improvement of a public road between two towns and continuing through and to certain other towns named, an allegation that there are several public roads between the two first mentioned towns is insufficient to render uncertain the description of the road, since there is nothing to show that there is not a particular road forming a continuous route from the first to the last named town.
3. HIGHWAYS—DESCRIPTION OF ROAD.—The words in Road Acts 1919, No. 415, creating a road improvement district, "thence in a general southerly direction on the most practical route to an intersection with the road from Rogers to Garfield," do not contemplate the improvement of a road that is not public.
4. HIGHWAYS—SINGLE IMPROVEMENT.—Though the territory embraced by three road improvement districts created by Road Acts 1919, Nos. 149 (amended by 240), 238 and 415, is large, and the roads to be improved are extensive, the courts can not say that the roads can not be treated as a single improvement, and that the legislative finding to that effect is arbitrary.
5. HIGHWAYS — INVASION OF COUNTY COURT'S JURISDICTION.—The above acts held not to invade, but to recognize clearly, the jurisdiction of the county court over public roads.
6. HIGHWAYS — PROVISION FOR ADDITIONAL ROADS.—A provision in each of the above-mentioned acts directing the boards of commissioners, on petition of 51 per cent. of the property owners in number, acreage or valuation in any district or part of the county not included in the acts asking that such territory be embraced in the districts for the purpose of building roads not included in the acts, to include said territory in the districts, *held* void as not providing for assessment of benefits.
7. HIGHWAYS—PROVISION FOR REPAIR.—The provision in the above acts authorizing the boards of commissioners "to build, construct, maintain and repair said road or roads within said district" *held* not invalid as authorizing them to maintain and repair the roads without orders of the county court.

8. HIGHWAYS—APPROVAL OF PLANS BY COUNTY COURT.—The above-mentioned acts do not invade the county court's jurisdiction, though they fail to provide that the plans for improvement made by the boards of commissioners of the districts must be submitted to and approved by the county court.

9. HIGHWAYS—ASSESSMENT OF BENEFITS.—The above acts were not unenforceable because the commissioners in making assessments were required to enter the lands on the tax books in convenient subdivisions as surveyed by the United States Government, though town lots could not be so described; the above requirement being merely directory.

10. HIGHWAYS—POWER TO VACATE ROADS.—The above acts do not empower the boards of commissioners to vacate public roads.

11. CONSTITUTIONAL LAW—LEGISLATIVE DETERMINATION OF BENEFITS. —The legislative determination as to benefits is conclusive unless manifestly arbitrary and without foundation.

12. HIGHWAYS—PERPETUITY IN COMMISSIONERSHIPS.—The above acts are not void because the commissioners are kept in power with authority to name their successors.

13. STATUTES—LOCAL ACTS—NOTICE.—It will be conclusively presumed that the Legislature found that the notice required by the Constitution (article 5, section 26) to be given of the introduction of local or special bills was given.

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

E. P. Watson, for appellants.

1. The power to create special road districts for improvement is given only for the purpose of improving public county roads already laid out or recognized by the county court. The improvement necessarily becomes a part of the original road. 92 Ark. 93; 89 *Id.* 513; 118 *Id.* 294; 133 *Id.* 64; 118 *Id.* 119; Page & Jones, Tax by Assessment, § 859. The roads also must be definitely designated and described. Section 2 of the act is void, being too vague and uncertain. 118 Ark. 119; Page & Jones on Tax by Assessment, § 859. A "roving commission" can not be given to determine what roads are to be improved. 118 Ark. 294; *Ib.* 119; 32 *Id.* 131.

2. The Legislature can not create a public corporation in violation of article 12, section 2 of our Constitution. 78 Ark. 580.

3. The commissioners named in section 1 of the act are public officers. 69 Ark. 460; 84 *Id.* 540; 24 Mich. 59; *Ib.* 62-3; 17 Am. Ann. Cas. 449.

4. The Legislature can not appoint a public officer for the full term of his office. 24 Mich. 68; 13 *Id.* 136.

5. Being public officers, they must be elected by a *viva voce* vote of both houses. Art. 5, § 14, and art. 3, sec. 12, Constitution.

6. The act is void because it creates a perpetuity of office by giving the commissioners power to elect their successors in violation of section 19, Bill of Rights to our Constitution.

7. The act does not state that the roads are situate in the district, and section 2 of the act declares that the district is organized to improve roads in Benton County, thus interfering with the jurisdiction and power of the county court. 25 A. & E. 1179; 153 Ill. 348; 65 Pa. St. 182; 38 N. J. L. 410.

8. The act is in many other ways and for many other reasons void. It gives the commissioners legislative powers. The act is impracticable and uncertain; it does not provide for an appeal; it gives the exclusive right to a board of assessors to make assessments for benefits and to hear objections; it takes away from minors and insane the right to protection or hearing by guardian or attorney *ad litem;* it fixes a permanent lien for taxes without notice; the benefits are not equal and uniform and all costs are assessed property in the district, including lands of the State; the act is arbitrary and unjust. 32 Ark. 131; *Milwee v. Tribble,* 139 Ark. 574; 25 A. & E. Enc. (2 Ed.), 1224 and note; 134 Ark. 411; 132 *Id.* 141; 21 *Id.* 378; 102 *Id.* 553; 120 *Id.* 277.

Duty & Duty, J. W. Nance, Tom Williams, Jeff Rice, McGill & McGill and *Lee Seamster,* for appellees.

None of the attacks on the act are tenable; many of them have been settled by this court. 99 Ark. 100; 76 *Id.* 197; 102 *Id.* 277; 112 *Id.* 277; 114 *Id.* 156; 119 *Id.* 314; 120 *Id.* 278; 102 *Id.* 553; 213 S. W. 762; 121 Ark. 325;

130 *Id.* 507, 503; 215 S.W. 255; 92 Ark. 93; 98 *Id.* 113; 78 *Id.* 580; 55 *Id.* 148; 103 *Id.* 452; 59 *Id.* 513; 109 *Id.* 90; 215 S. W. 255; 214 *Id.* 50; 119 Ark. 188; 107 *Id.* 285; 112 *Id.* 557; 92 *Id.* 93; 109 *Id.* 556, and others.

McCULLOCH, C. J. The General Assembly of 1919 (regular session) passed three special statutes creating three separate improvement districts in Benton County for the purpose of improving certain specified roads. The districts were designated in the statute, respectively, as "Road Improvement District No. 2 of Benton County," "Road Improvement District No. 3 of Benton County," and "Road Improvement District No. 4 of Benton County." See Act No. 149, approved March 1, 1919, creating District No. 2, and Act No. 238, approved March 11, 1919, creating District No. 3, and Act No. 415, approved March 27, 1919, creating District No. 4. A later statute was passed during the same session (Act No. 240) amending the statute creating District No. 2, by authorizing an extension of the road to be improved and the addition of other territory.

Owners of real property in each of the districts instituted separate actions attacking the validity of each of the statutes, and they have appealed from an adverse decree of the chancery court upholding the statutes. The three cases involve substantially the same questions, and have been consolidated here for the purpose of being heard.

Learned counsel for appellants present in their argument thirty-five separate and distinct grounds for the attack upon these statutes, the greater portion of which grounds have been settled adversely to their contention by former decisions of this court. The questions are so plainly settled by those decisions that it is unnecessary to refer to them for the purpose of application. We will, therefore, confine the discussion to the questions involved which are fairly open to debate under our own decisions.

The statutes follow, in a great measure, the usual form adopted by the lawmakers in the enactment of special statutes creating road improvement districts by de-

scribing the boundaries of the district and the roads to be improved, and by conferring authority on the commissioners to prepare plans for the improvement, to let contracts therefor, and to assess benefits and levy assessments thereon, and to borrow money and issue bonds.

The road or roads to be improved in District No. 2 are described in Act No. 149 as beginning at a point in a certain section where the road intersects the Eureka Springs-Seligman road "and running in a southwesterly direction through Garfield, Bestwater, Avoca, Rogers, Lowell, and to the south county line" in a certain section; also a road beginning at Rogers connecting with the above described road "and running west through Bentonville, Centerton to Decatur;" and also another road beginning on the Missouri line in a certain section "and running south through Sulphur Springs, Gravette, Decatur, Gentry, Siloam Springs and to the Oklahoma State line."

The amendatory statute referred to above provides for an extension of this road "from Siloam Springs in a southeasterly direction to the Washington County line, and intersecting said Washington County line," and "thence east with said Washington County line and with the south line of Benton County to the southeast corner" of a certain section. It will be seen from this description and by comparison with a map of Benton County, of which we take notice so far as the location of towns is concerned and the sections of land, there is a provision for a road running practically north and south, near the east boundary of the county from a point near the Missouri line southerly through the city of Rogers to the Washington County line; and also a road substantially paralleling the western boundary of the county from a point on the Missouri line south to the Washington County line, and also a road from the city of Rogers connecting with the eastern road just mentioned, and running northwesterly through the city of Bentonville and certain other municipalities, and connecting with the western road at Decatur.

The statute creating District No. 3 provides for a road beginning on the Missouri line in a certain section near the town of Carvena, Missouri, thence in a southeasterly direction through Bella Vista to Bentonville; thence in a southerly direction through Cave Springs to the Washington County line to a point in a certain section; also a road beginning at the intersection of the road from Rogers to Bentonville in District No. 2, near Droke schoolhouse in a certain section; thence in a westerly direction to Morning Star schoolhouse; thence south and west to Vaughan, thence south and west through Mason Valley, to an intersection with the line between two specified sections of land; and thence along or near the section line and through the town of Highfill, thence in a general westerly direction through Springtown, thence in a general southwesterly direction to an intersection with the road from Siloam Springs to Gentry in District No. 2; also a road beginning at or near Morning Star schoolhouse and running west one-quarter mile, thence north to an intersection with the Bentonville and Center road in District No. 2.

The statute creating District No. 2 authorizes the improvement of a road beginning at Elkhorn tavern and running westerly to the town of Pea Ridge, "thence in a general southerly direction on the most practical route to an intersection with the road from Rogers to Garfield" in District No. 2 at or near the town of Rogers; also a road beginning at the southeast corner of the public square in Bentonville, thence in a northeasterly direction to an intersection with the above described road from Pea Ridge to Rogers, at or near the bridge across Sugar Creek.

In each of the statutes the roads are mentioned as public roads. Learned counsel for appellants argue with great earnestness that the statutes do not declare the roads to be public roads, and this is one of the grounds for attack. We do not think that it was essential to the validity of the statutes that there should be an express declaration therein that the roads have already been es-

tablished as public roads. On the contrary, we hold that, if they are not public roads, it devolves on those assailing the validity of the statute to make it so appear. But, as a matter of fact, the sections of these statutes describing the roads each start out with an express statement that they are public roads, and we think that the attack on this ground is, from any viewpoint, unfounded.

It is alleged in the complaint (and this must be treated on demurrer as true) that there are several public roads from Rogers to Bentonville, and it is contended that this renders uncertain the description of the road "beginning at Rogers, connecting with the above described north and south road, and running west through Bentonville, Centerton to Decatur."

Conceding that there is more than one public road between Rogers and Bentonville, there is nothing to show that there is not a particular one forming the continuous route from Rogers to Decatur so as to answer the description in the statute.

Again, it is argued that the words "thence in a general southerly direction on the most practical route to an intersection with road from Rogers to Garfield," found in the statute giving description of the road from Elkhorn Tavern to Rogers, shows that it is not a public road. Such is not the necessary effect of those words. There may be more than one public road between Pea Ridge and Rogers, and the commissioners are there authorized to select the most practical one.

It is next contended that the roads, particularly in No. 2, in which two of the roads to be improved parallel the eastern and western boundaries, and one runs practically across the county for the purpose of connecting those two roads, are too diverse to constitute one improvement. The boundaries of the district extend three miles on each side of these roads. While the territory is large and the roads to be improved are extensive, we can not say on the face of the statute that these roads can not be treated as a single improvement, and that the finding of the Legislature to that effect is arbitrary.

They fall within the rule announced in the case of *Johns* v. *Road Improvement Districts of Bradley County, post,* p. 73, decided this day.

The point is made also that the statutes constitute invasions of the jurisdiction of the county court for the reason that there is no provision for the county court to lay out the roads to be improved. The answer to this has already been stated in saying that the roads appear to have already been established as public roads, and it is unnecessary to invoke the jurisdiction of the county court. Each of the statutes provide, however, that the commissioners of each district "may with the consent of the county court of Benton County change the route of any of the roads herein provided for, or eliminate any of them, and may build such laterals as they may deem expedient, the same to be constructed upon highways laid out by the county court." This is a clear recognition in the statute of the jurisdiction of the county court over the subject of public roads, and contitutes an authority to invoke the aid of that jurisdiction for the purposes mentioned. Each of the statutes contains a section, which reads as follows:

"Said board of commissioners are further required to, upon the petition of 51 per cent. of either a majority in number, acreage, or valuation of property owners in any defined district or part of Benton County not now included in this act, asking that additional territory be embraced in this district for the purpose of building or improving any road or roads not now included in this district, it shall be the duty of said board of commissioners to include said territory in said improvement district, and to assume jurisdiction over it, and to proceed to build, maintain and to construct a public road or roads as herein provided in this act."

It is difficult to discover the meaning of the lawmakers from the language used in this provision. It does not provide merely for the change of boundaries for the purpose of including laterals or changes in the route of the road, for that is provided for in another sec-

tion. Giving the language the force which its use necessarily implies, it seems to confer authority for the creation of entirely new districts, but it is ineffectual for that purpose for the reason that there is no provision made in the statute for the assessment of benefits and the levy and collection of taxes for that purpose. The section is entirely inoperative, and is, therefore, void, but that does not affect the validity of the remainder of the statute, which provides that if for any reason any section or part of this act shall be held unconstitutional or invalid, that fact shall not affect the validity of any other part of the statute, "but the remaining portions shall be enforced without regard to that so invalidated." There is no allegation that the commissioners were about to proceed under the section just quoted, and appellants are not entitled to any relief on that score.

In the principal section in each of the statutes, defining the power of the board of commissioners, it is declared that they "are hereby vested with the power and authority, and it is hereby made their duty, to build, construct, maintain and repair said road or roads within said districts as hereby provided." The contention is that this is an attempt to confer authority, not only to construct the original improvement, but that it contains the continuing authority "to maintain and repair" said road or roads, and that to vest such power in the board of commissioners without orders of the county court would constitute an invasion of the jurisdiction of that court over public roads. We do not think that this language, standing alone and without any other provision in the statute to carry it into effect, constitutes sufficient authority for the commissioners to exercise a continuing power in the maintenance and future repair of the roads. The first section declares that the lands described "are hereby made an improvement district for the purpose of constructing and improving highways in Benton County." This appears to be in conflict with the subsequent section, which uses the term "maintain and repair said road or roads." An examination of the entire stat-

ute shows clearly that it was the intention of the lawmakers to provide only for the original improvement and for an assessment of benefits to raise funds to pay therefor. The statute, in other words, treats the project as a single one, and there is no provision for separate contracts for maintenance or repair or for reassessments of benefits for the new work to be done from time to time in the maintenance and repair of the road. The framers of the statute must have used a term in connection with the word "improve" so as to give the language its broadest effect in authorizing the improvement of the public roads described so that there might be found no restriction upon the power of the commissioners to improve the roads, but, in the absence of further provision sufficient to carry out the continuing power to maintain and repair the roads after they have been improved, we must assume that there was no intention on the part of the lawmakers to confer continuing power for that purpose. The words "build, construct, maintain and repair," as used with reference to established public roads, were intended as synonymous terms to express broadly the power to be conferred. The commissioners are authorized in subsequent sections to form only one set of plans for the improvement and to assess benefits accruing only from the original improvement, which shows that the lawmakers did not intend to authorize assessments for future maintenance and repairs. The fact that the commissioners are continued in power after the completion of the improvement does not imply the power to make new contracts for maintenance and repair and to assess benefits arising from the same, for the manifest purpose of continuing the authority of the commissioners was merely to provide for collecting assessments and paying the cost of improvement and the bonds sold for that purpose.

We are, therefore, not called on to decide what would be the effect of a statute which attempts to confer continuing power on the board of commissioners to maintain and repair public roads. Whether or not that would

be an invasion of the jurisdiction of the county court, we need not now consider.

This statute does not, however, contain any provision that the plan for the improvement must be submitted to and approved by the county court, and it is contended that this constitutes an invasion of the county court's jurisdiction. We have never had that question before us for decision, and now for the first time the question is squarely presented whether or not an improvement district created by statute can be authorized to make improvements on public highways without obtaining the approval of the county court. Our conclusion is that the authority to improve a public highway does not invade the jurisdiction of the county court. The road is a public highway, but the improvement is for the betterment of the contiguous lands. The improvement of the road does not in any sense constitute an interference with the general control of the county court over public highways. The authority of the board of commissioners is to bring about a betterment of the highway and not a detriment. The authority of each body, that is to say the board of commissioners and the county court, may be exercised without hindrance to the other. This is illustrated by the decision of this court in the case of *Pulaski Gas Light Co.* v. *Remmel*, 97 Ark. 318, where we held that there was no conflict between the authority of a board of improvement to pave a street and the general authority of the city council over the streets of a municipality. Whenever the powers conflict, that of the board of commissioners must yield to the jurisdiction of the county court, but, as before stated, there arises no necessary conflict from the authority of the commissioners to improve the road. It is suggested that the county court after the completion of the improvement might exercise its jurisdiction over the road and destroy it. This may be true, but it is not to be presumed that a county court would abuse its power; and if it should attempt to do so, remedies are available to prevent it. The county court, in the exercise of its power, is subject

to legislative restrictions, and remedies may be and are afforded for appeals from judgments of the county courts abusing their power.

It is next contended that a provision in the statute for assessment of benefits is contradictory and unenforceable in that the commissioners are required, in making assessments, to enter the lands upon the tax books "in convenient subdivisions as surveyed by the United States Government," and that there is no provision for assessing town lots, which can not be described by subdivisions under the Government surveys. This provision is merely directory, and it does not mean that an assessment of a given tract of land under another description would not be valid. The provision merely designates the most appropriate method of description, but it is only applicable so far as it can be used to describe lands in the district. Other methods of description may be used when the directed method is not applicable.

The contention is made that the statute should be declared void because it gives the board power to vacate public roads, but this is not true, because, as we have already seen, the statute provides that any change in the route must be with the approval of the county court.

There is also a contention that the statute, in confining the limits of the district to lines three miles distant from the roads to be improved, is arbitrary, and that it excludes other lands which may be benefited by the improvement. It is pointed out that lands in the county east of the three-mile limit of the territory along the road paralleling the east boundary of the county will be necessarily benefited because of the opportunity to use the road, and that the same condition exists with reference to lands west of the limits of the boundary of that part of the district which parallels the west line of the county.

We have frequently had similar questions before us, and we have uniformly held that the legislative determination as to benefits is conclusive unless it is manifestly arbitrary and without foundation. The latest case on

this subject is *Bush* v. *Road Improvement District of Lee County,* ms. op. And another illustrative case is that of *Hill* v. *Echols*, 140 Ark. 474.

It is contended that the statute creates a perpetuity by keeping the commissioners in office with power to name their own successors. No perpetuity is created by these statutes, for the districts are brought into being for specified purposes and last only until those purposes are accomplished. The commissioners are kept in authority only for that purpose, and there is no inhibition in the Constitution against the method of reappointing commissioners so as to continue the existence of the board until the purposes of the district have been accomplished. The Constitution does not restrict the power of the Legislature with respect to the method of appointing commissioners of local improvement districts, or in providing for the appointment of their successors. *Reitzammer* v. *Desha Road Imp. Dist. No.* 2, 139 Ark. 168.

We find nothing else in the case which has not been settled by repeated decisions of this court.

It is alleged in the complaint that notices of introduction of the bills for these statutes were not given as required by the Constitution, article 5, section 23, and counsel renew this oft-repeated attack on the validity of the statutes. In the case of *Davis* v. *Gaines,* 48 Ark. 370, this court held that a presumption will be conclusively indulged that the Legislature found that the notice was given. The doctrine of that case remains to that extent unimpaired, and has been recognized in all subsequent decisions, including the recent case of *Booe* v. *Road Improvement District,* 141 Ark. 140, where we held that the provision of the Constitution requiring notice is mandatory, and that a presumption in favor of the legislative finding that the notice was given will not be indulged where the circumstances were such that it could not have been given.

The decree of the chancellor is, therefore, affirmed.

HART, J. (dissenting). Judge WOOD and the writer are content to declare the law as we find it written,

and therefore dissent from that part of the opinion which holds that the statute does not authorize or empower the commissioners to maintain and repair the roads.

The section which confers the power and duty upon the commissioners to make the improvement is the same in each district. In District No. 3 it is section 6 and reads as follows: "The said board of commissioners shall have, and they are hereby vested with the power and authority, and it is hereby made their duty to build, construct, maintain, and repair said road or roads within said district as herein provided, and to carry out the improvements herein contemplated, and in so doing shall expend all necessary sums of money authorized to be levied and collected under the authority of this act, provided, that said commissioners shall not expend more than four thousand dollars ($4,000) per mile in building and constructing the highway or highways herein designated or those that may be designated by said commission under the provisions of this act. Said four thousand dollars to be exclusive of State and Federal aid, and exclusive of all funds derived from the assessment of benefits of railroads and tramways, and said sum to be also exclusive of the amount of interest that shall be required to be paid on bonds of said improvement district."

The framers of the act must be understood to have used words in their natural sense and to have intended what they said. When the language of a statute is plain and conveys a clear and definite meaning, courts should give to the statute the exact meaning conveyed by the language, adding nothing thereto and taking nothing therefrom. When tested by the language used, it is evident that the power to maintain the roads is as plainly and clearly conferred as is the power to construct them in the first instance.

The section provides that the board is hereby vested with the poyer and authority, and it is hereby made its duty, to build, construct, maintain, and repair said road or roads as herein provided. The language is too plain

to need construction. The power to repair and maintain is as plainly conferred as the power to construct. This is shown by the latter part of the section which limits the cost of construction to $4,000 per mile. If the act is too indefinite to confer the power to make assessments for the repair and maintenance of the roads, it is likewise too indefinite to confer the power to levy assessments to construct the roads. If it is too indefinite to be capable of enforcement in the matter of repairs and maintenance, it is subject to the same vice with regard to construction. The language in the one case is as plain as in the other. The words "as herein provided" as clearly and definitely refer to the maintenance of the roads as they do to the construction thereof. To hold otherwise would be to hold that the General Assembly meant to say that which it did not say, and that it did not say that which in the clearest and plainest language it has said.

But it is said that there is a certain section which provides for the continuation of the commissioners in office, and that it bears out the construction of the majority.

In district 3 this section is No. 1. It first provides that the lands hereafter described are hereby made an improvement district for the purpose of improving certain highways in Benton County, Arkansas. Commissioners are then provided for whose terms of office are fixed at six years. It is then provided that the commissioners, not less than thirty days before the expiration of their term of office, shall elect five commissioners to succeed themselves, whose term of office shall be six years, and who shall hold office until their successors are elected and qualified which shall be done in the same manner. Continuing the sections reads "after which the commissioners of said district shall be maintained in succession in the same way as a board of improvement for the preservation and maintenance of the highway or highways herein contemplated." It will be noted that the language used is not for the preservation and maintenance of the

districts in order to provide for collecting assessments and paying the cost of the improvement. That purpose is provided for in subsequent sections. The language used is that the board shall be maintained in succession in the same way and as a board for the preservation and maintenance of the highways. As we read the law, the maintenance of the board for the preservation and maintenance of the highways does not and can not (except as made so by the decision of the majority) mean continuing the board "merely to provide for collecting assessments and paying the cost of the improvements and the bonds sold for that purpose."

For the sake of convenience it may not be inappropriate to discuss that portion of the opinion which approves the manner of selecting commissioners in succession. As we have just seen, the section provides that the original commissioners shall hold office for a term of six years, and they in turn shall elect their successors for a like term.

In *Board of Improvement of Sewer District No.* 2 v. *Moreland,* 94 Ark. 380, the court held that the commissioners of the improvement district within a city are public officers. The statutes creating the districts in the case at bar speak of the terms of office of the commissioners. In the first place, we think it is contrary to our American institutions that officers should perpetuate themselves in office, or even that they should be given the power to elect their successors in office. The power given to the board to continue itself in succession is also opposed at least to the spirit of section 19 of our Bill of Rights, which provides that perpetuities and monopolies are contrary to the genius of a republic.

Having reached the conclusion that the statute gives to the commissioners the power to maintain and repair the roads, it becomes necessary to consider whether the authority conferred is violative of article 7, section 28, of the Constitution, which confers upon the county courts exclusive original jurisdiction in all matters relating to roads, bridges, etc. Inasmuch as this question has not

been discussed in the majority opinion, and is therefore a matter subject to judicial determination hereafter, it will be only necessary to briefly state our views on this point. This court has expressly held that under the section of the Constitution just referred to, the Legislature has no power to vest any other tribunal than the county court with jurisdiction over the expenditures of the road funds raised under the general revenue clause of the Constitution. *El Dorado* v. *Union County*, 122 Ark. 184.

This court has repeatedly recognized the wisdom of giving exclusive original jurisdiction to the county courts, not only in laying out, vacating and altering public roads, but also in preserving, repairing and maintaining them. The reason is that the roads are devoted to public use. A public road is a county road which the entire public travels and in which it is interested. Of course, the jurisdiction over roads might have been conferred upon some other tribunal, had the framers of the Constitution seen fit to do so, but, under our Constitution, counties are the units of government, and it was deemed best to vest in them the exclusive original jurisdiction over roads and bridges. It was manifestly intended that one tribunal should have the exclusive original jurisdiction, not only of establishing, vacating and altering highways, but also of preserving, repairing and maintaining the same for the purpose of acquiring uniformity in the system and to the end that the public interests might best be subserved. Otherwise the conflicting interests of the various towns and localities in the county might prevent such a location and maintenance of the roads as would be best for the public good. To illustrate: Benton County is a large county, and there are other public roads in the county that are not to be improved under the acts under consideration in this case. At present the county court has the exclusive jurisdiction to preserve and maintain these roads. If the commissioners should be given charge of the preservation, maintenance and repair of the roads enumerated in the acts in question and the

other public roads are under the jurisdiction of the county court for the same purpose, it is evident that there is and can be no uniformity in preserving, maintaining and repairing the roads of Benton County as a whole. The conflicting interests of the various towns and localities and the divergent views of the various officers given charge of the matter will inevitably result in injury to the public interests.

It is suggested in the majority opinion that if the county court abuses its discretion in any particular, the courts could curb it. Does this mean that the county court is to be a mere figurehead and obey the mandates of the commissioners and approve their suggestions? If so, where is its freedom of judgment or real jurisdiction over roads? To exercise jurisdiction over a subject means to give thought and direction to the subject within well defined limits; but it does not mean that the tribunal exercising the jurisdiction must approve the acts of another body or else be deprived of any voice or judgment in the matter at all.

Again, other road districts might be created until every public road in the county is included in some district. Suppose the commissioners who construct the roads are given jurisdiction to preserve, maintain and repair them; there are usually from three to five commissioners in each district, and they are given the power to appoint agents and servants to aid them in their work. If this should be done, then indeed we shall have, not only an unwieldy and expensive system of maintaining, preserving and repairing our public roads, but one where the conflicting interest of the various districts and localities may work to the injury of the public. We think the framers of the Constitution had in mind the probability, or at least the possibility, of these evils or injurious consequences to the public good, when they placed the exclusive original jurisdiction over roads and bridges under the same tribunal in the various counties. The people vested the exclusive jurisdiction over roads in the same tribunal in each county to the end that there

might be uniformity in the system of constructing and maintaining roads, and to the further end that the tribunal vested with control over them should be elected by the whole people and accountable to them.

We are constrained to concur in that part of the opinion of the majority which holds that the act should not be held invalid because no notice of the intention to apply therefor was given in accordance with the provisions of article 5, section 25, of the Constitution, but for an altogether different reason. We think that the provisions of section 25, article 5, of the Constitution were intended to be mandatory, and should have been so construed in the case of *Davis* v. *Gaines*, 48 Ark. 370, instead of having been held to be directory merely. We would be in favor of overruling altogether the holding in that case to the effect that the question of whether notice was given as required by the Constitution was not open to judicial review, were it not that such decision would operate retrospectively and would disturb vested rights. It is true that some of the reasoning in the recent case of *Booe* v. *Road Imp. Dist. No. 4 of Prairie County,* 141 Ark. 140, is opposed to this view, but the reasoning was not necessary to the decision made and was used to show that the court would not be in favor of making a decision which would disturb vested rights. The opinion proceeded on the theory that the decisions of a court operate retroactively, and rights which should be regarded as certain and fixed should not be disturbed. Property is purchased and investments are made upon the faith of the stability of the decisions of a court, and more harm than good would result from rendering decisions which would impair the obligation of contracts or disturb vested rights, even though the decisions overruled were manifestly wrong and unjust. All that was necessary to decide in the Booe case was that the passage of an act is conclusive of the fact that due notice of the intention to apply for the passage of a special bill was given unless the records of which the courts may take judicial notice show otherwise. As pointed out in that opinion,

courts can not act upon admissions or proof made by the parties in determining the constitutionality of statutes. If this were so, laws could be made or abrogated by agreement or by proof made during the trial at the option of litigants. Where courts have record evidence to guide them as to the question of notice, all uncertainty with regard to the giving of the notice will be eliminated.

The section of the Constitution with regard to giving notice provides that the Legislature may prescribe the manner of giving it. It further provides that the evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed. One of the meanings in law given to the verb exhibit, by Webster, is to file for record. Hence we think the framers of the Constitution intended that evidence of the notice should be filed for record in the Legislature. The court then could judicially take notice of that record and conclusively ascertain whether or not the mandate of the Constitution had been complied with. If any evidence of such notice having been published appeared on file as a part of the records of the Legislature, the court for the reasons above given would not inquire into the sufficiency of the notice, but would indulge the conclusive presumption that the Legislature had determined that it had been given in the manner required by the Constitution. On the other hand if there was nothing filed of record in the Legislature, this would be conclusive proof that the evidence of the notice having been published had not been exhibited to the Legislature and that the mandatory provision of the Constitution had not been complied with.

If any of the reasoning in the Booe case should be opposed to this view, it could be eliminated without overturning the soundness of that decision and would not disturb vested rights. The case of *Davis* v. *Gaines, supra,* however was decided at the November term, 1886, of this court, and since that time many special acts have been passed and rights have grown up under them. To set aside the line of decisions on this question

following that case at this date might result in more harm than good in the administration of justice and would necessarily disturb vested rights In expressing the view that a decision now overruling a former decision construing a provision of our Constitution would have a retroative effect, we are not unmindful of the long established doctrine of the Supreme Court of the the United States to the effect that the question arising in a statute in a Federal court where vested rights have acrued is to be determined by the law as judicially declared by the highest court of the State when the rights accrue and that the rights and obligations accruing under such state of the law would not be affected by a different course of judicial decisions subsequently rendered any more than by subsequent legislation. *Loeb* v. *Columbia Township Trustees,* 179 U. S. 472. The court however in that case recognized that the decision of the State court overruling a former decision acts retroactively, and pointed out that this was the effect of the holding in *Central Land Co.* v. *Laidley,* 159 U. S. 103. In the latter case it was held that under the statute giving the Supreme Court of the United States authority to review the judgment of the highest court of the State, the Supreme Court of the United States was without jurisdiction if the action of the State court was impeached simply on the ground that it had not determined the rights of the plaintiff in error in accordance with its decisions in force when those rights accrued, but had followed its decisions of a contrary character rendered after his rights had accrued.

In *Tolliver* v. *Barnett,* 47 Ark. 359, the court held that the decision of a court overruling a previous decision of a court operates retrospectively. Chief Justice COCKRILL said: "A decision of the court when overruled stands as though it had never been, and the court in the reversing judgment declares what the rule of law was in fact when the erroneous decision was made."

Again in *Apel* v. *Kelsey*, 52 Ark. 342, the court in discussing the question, speaking through Judge SAN-

DELS, said that former interpreations of the law have become rules of property, and can not be overturned without uprooting the title to one-fourth of the property of the State.

What we have said in the dissenting opinion in *Johns* v. *Road Imp. Dist.* applies with equal force to this case and need not be repeated here.

JOHNS v. ROAD IMPROVEMENT DISTRICTS OF BRADLEY COUNTY.

Opinion delivered February 2, 1920.

1. HIGHWAYS—OMISSION OF LANDS FROM DISTRICT.—The omission from a road district of a tract of land situated in the heart of the affected territory and abutting on one of the public roads would make a case of unwarranted discrimination.
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS. —The findings of the chancellor on an issue of fact will not be disturbed unless the preponderance of the testimony is against them.
3. STATUTES—EVIDENCE AS TO INTERLINEATIONS.—The chancellor's findings of fact that certain interlineations on the face of the engrossed bill (1 Road Laws 1919, page 898) creating a road district, and on the enrolled bill, were not made thereon after the enrolled bill was signed by the Governor and filed with the Secretary of State *held* supported by the evidence.
4. STATUTES—INTERLINEATIONS AND ERASURES.—Interlineations and erasures in bills and in journal entries concerning them shall be avoided, especially in regard to the enrolled bills.
5. HIGHWAYS — IMPROVEMENT DISTRICT — AREA INCLUDED.—1 Road Laws 1919, page 898, is not void because it creates two highway districts covering 86 per cent. of all the lands in the county and all the public roads except about 17 miles; the test not being the extent of the area included in the district but the singleness of the authorized improvement and the relationship to it of the included territory as to benefits to accrue from the improvement.
6. HIGHWAYS—INVASION OF PROVINCE OF COUNTY COURT.—The above act does not authorize the commissioners to lay out and improve roads not established as public highways, thus invading the province of the county court, because the roads to be improved are not described as public roads where it appears that they were public roads.

7. HIGHWAYS—JURISDICTION OF COUNTY COURT.—1 Road Laws 1919, page 898, creating highway improvement districts, is not void as conferring on the commissioners a continuing power over the roads affected, since their power is limited to a single improvement to be presently made.

8. HIGHWAYS—ROAD TAXES—INVASION OF JURISDICTION OF COUNTY COURT.—1 Road Laws 1919, page 898, section 29, authorizing the county court to turn over to the road districts therein created certain proportions of the road tax and of the general revenue fund, *held* to be directory and not to invade the jurisdiction of the county court.

9. HIGHWAYS — MODE OF ASSESSING BENEFITS.—The provisions of 1 Road Laws 1919, page 898, for the assessment of benefits, are sufficiently definite to form a basis for the assessments.

Appeal from Bradley Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

J. C. Clary and *B. S. Herring,* for appellants.

1. Act 237, the Bradley County Road Act (1919), is unconstitutional and void and is governed by the decisions in 89 Ark. 513; 118 *Id.* 294, and not by the principles in 213 S. W. 762.

2. It arbitrarily leaves out lands in the central portion of the county and of the twin districts and lands are arbitrarily assessed, although distant from the road and not benefited. 48 Ark. 370; 130 *Id.* 70; 196 S. W. 931. The act is discriminatory, as it omits certain tracts of lands in the heart of the district and includes others more remote. The evidence shows that an effort has been made to change the new road law by alteration with pen and ink since the Legislature adjourned. The act as passed did not contain the omitted lands when passed. The act is void as a whole. 25 Ark. 246; 34 *Id.* 224; 49 *Id* 110. A void act can not be amended. 31 Ark. 701.

3. The act is void for failure to provide a method of assessments. 133 Ark. 64; 201 S. W. 808; 89 Ark. 513.

J. R. Wilson, for appellees.

1. The act is not void because it usurps the jurisdiction of the county court; this is practically conceded

by appellant. See cases cited in their brief. 89 Ark. 1, the Glover case and *Salle* v. *Dalton* case.

2. The act does not create new county officers. 120 Ark. 277.

3. Nor is the act inoperative and ineffectual because it provides a blanket authority to assess benefits in the two districts.

4. There have been no alterations in the act since its proper passage and enrollment. The maps and plats show that the description of the lands would not affect the validity of the act, if left entirely out of the bill. 122 Ark. 491; 126 *Id.* 172; 130 *Id.* 70; 214 S. W. 56.

5. The findings of the chancellor are amply sustained by the evidence and are conclusive on *de novo* hearing. 126 Ark. 224; 9 *Id.* 350; 192 S. W. 906; 81 Ark. 68; 91 *Id.* 540; 24 *Id.* 431; 185 S. W. 255.

6. An act duly signed by the Governor and deposited with the Secretary of State raises the presumption that every requirement of law was complied with, unless the contrary is affirmatively shown. 40 Ark. 200; 131 *Id.* 291; *Perry* v. *State*, 139 Ark. 227; 214 S.W. 4. The invalidity of a statute must be proved beyond a reasonable doubt. 33 R. I. 541; 182 Atl. 487.

Interlineations are not of themselves suspicious when they are mere completions of imperfect descriptions of lands. 1 Enc. of Ev. 118; 61 Ala. 23. Alterations merely to correct an error will be presumed to be properly made. 82 Tex. 352; 18 S. W. 702; 30 Ark. 285; 50 *Id.* 358. See also 21 Ala. 393; 34 Ark. 588; 98 *Id.* 269; 109 *Id.* 4.

McCULLOCH, C. J. Appellants instituted this action below attacking the validity of an act of the General Assembly of 1919 (regular session), creating two improvement districts embracing contiguous territory for the purpose of improving certain roads in that county. Acts 1919, vol. 1, p. 898. The two districts are separately designated, and they are declared to be separate organizations with different commissioners. In other

words, the two organizations are entirely separate in every respect, except that they were created by the same statute, which is in that respect similar to the statute which we upheld in the recent case of *Van Dyke* v. *Mack*, 139 Ark. 524.

The dividing line between the two districts is an irregular one, though it follows section and half-section lines, and District No. 1 embraces all of the northern portion of the county except thirty-three sections in the northwest corner of the county, and District No. 2 embraces all of the southern portion of the county, except certain areas in the extreme southern and southeastern part of the county equaling nearly two townships in extent. The boundary line between the two districts does not run straight across the county, but, as before stated, is an irregular line, following, however, section and half-section lines. The territory in District No. 1 runs far down the western side of the county well below the middle line, and the territory in District No. 2 runs up through the center of the county far above the middle line. The city of Warren, which is the county seat, is situated in the northeast portion of the county, and the roads converge, so to speak, from that point. The division line between the two districts is at that point along the southern boundary of the city of Warren. District No. 1 includes several roads to be improved, all converging, as before stated, from the city of Warren. One of those roads begins on the northern boundary of the county in a certain designated section and runs southerly to the city of Warren, and through the city to a certain point along a certain designated street. Another one of the roads begins on the northern boundary of the county, six or eight miles west of the beginning of the other roads, and runs southeasterly to the city of Warren, and thence through the city on designated streets so as to intersect with the other road. The other road to be improved begins on the eastern boundary line of the county, and runs northeasterly to the city of Warren, thence through that city along a certain designated street and thence

westward to the town of Banks, and thence southwesterly to a certain point connecting with a public road coming across from Calhoun County. All of these roads are connected together in the city of Warren.

In District No. 2 the principal road to be improved is one beginning in the southern portion of the city of Warren and running thence southerly and southwesterly through the town of Hermitage and thence southwesterly along a designated route to Moro Bay on the southwest boundary line of the county. The only other road to be improved in that district is one forming a loop, which begins at the intersection of what is termed the Hermitage and Ingalls public road with the road last above described at the town of Hermitage, and running southerly to the town of Ingalls on the Chicago, Rock Island & Pacific Railway, thence in a southerly direction to the town of Vick, on said railroad, and thence northeasterly to Johnsville, and thence northeasterly to the intersection at a certain point with the aforementioned road from Warren to Moro Bay.

Appellants are owners of real property in the two districts, and joined, without objection, in a single action against the commissioners of both districts for the purpose of attacking the validity of the statute as a whole. The chancellor upheld the statute, and an appeal has been prosecuted.

The first contention in support of the assault on the statute is that it is discriminatory in its effect in that a certain tract of land situated in the heart of the affected territory, and abutting on one of the public roads, is omitted entirely from each of the districts, whilst other lands more remote are included. The tract alleged to have been omitted intervenes between one of the roads to be improved and other lands which are included, and, if the charge is true that these lands are omitted, it makes clear a case of unwarranted discrimination. *Heinemann* v. *Sweatt,* 130 Ark. 70.

This contention of appellants, however, is based upon the charge that the tract of land in question was omitted from the statute, but that there has been an

unauthorized interlineation on the typewritten legislative bill as engrossed, and on the enrolled bill signed by the Governor and now on file with the Secretary of State, showing the inclusion of the tract alleged to have been omitted. In other words, it is conceded that the tract of land in question was included in one of the districts if the face of the enrolled bill be accepted as correct with the interlineation thereon, but appellants contend, and attempt in this case to prove, that the interlineations were unauthorized and were made after the enrolled bill was signed by the Governor and filed in the office of the Secretary of State. Much testimony was adduced bearing on the issue as to when the interlineations were made on the original typewritten bill and the enrolled bill as signed. The testimony adduced by appellants tends to establish the fact that the interlineations describing the tract of land in question were not on the original bill as engrossed after it passed the Senate, and that the interlineations on the enrolled bill were not there when the bill was signed by the Governor and filed in the office of the Secretary of State. On the other hand, the testimony adduced by appellees tends to show that the interlineations on the original bill were made after the bill had been prepared but before its introduction into the Senate, and that the interlineations on the enrolled bill were made with the consent of the enrolling committee of the Senate before it was signed by either of the presiding officers of the two houses of the Legislature or by the Governor. Appellants introduced clerks and assistants in the office of the Secretary of State who testified that they copied the enrolled bill and carefully compared the copy the next morning after the bill was filed in the office of the Secretary of State, and that these interlineations were not there at that time. The Secretary of State furnished to the State printer a duly authenticated copy of the enrolled statute and the copy thus furnished did not show these interlineations. Another copy was furnished to one of the newspapers at Warren, and it did not show the interlineations. A lady who was a stenographer

doing work for members of the Legislature during the session of 1919 testified that she copied the bill after it had passed the Senate and was pending in the House, and that the bill at this time did not have any interlineations on it. The testimony of all these witnesses tended to show that the interlineations were not on the enrolled bill at the time it was approved and filed in the office of the Secretary of State, and the witnesses gave very definite statements on that subject, but conceded the possibility of overlooking the interlineations in making copies.

It seems to be conceded that the interlineations on the original typewritten bill are in the handwriting of Mr. Hugh R. Carter, an engineer, who at that time was connected with the State Highway Department, and who is now the engineer for the districts involved in this litigation. The interlineations on the enrolled bill are in the handwriting of Mr. Aubert Martin, who was then a clerk or draftsman in the State Highway Department. The testimony adduced by appellees tends to show that after the preparation of the bill, but before its introduction, it was carefully checked over by two attorneys who were interested in promoting it and Mr. Carter, the engineer, in the presence of the senator who introduced it, and that when these omissions were discovered they were supplied by the interlineations of Mr. Carter, and that the bill was then introduced and was passed in that form without amendment. The testimony further shows that after the bill had been duly passed by both houses and had been enrolled, the above mentioned parties who were interested in the bill were allowed by the chairman of the enrolling committee to take the enrolled bill into a committee room for the purpose of comparison to ascertain whether or not there were any errors therein and that they discovered that the interlineations on the original bill had been omitted from the enrolled bill and these interlineations were supplied by Mr. Martin on the enrolled bill. This was, according to the testimony, with the knowledge and consent of the enrolling committee, and was done before the bill was signed by either of the

presiding officers of the Legislature or by the Governor. The Governor was introduced as a witness and testified that his recollection was that when the enrolled bill was presented to him for approval the interlineations appeared there at that time in the handwriting of Mr. Martin, with which he was familiar and recognized.

There is a sharp conflict in the testimony as to when these interlineations were made. It would serve no useful purpose to further analyze the testimony of the various witnesses for the purpose of determining its force and effect. Suffice it to say that the chancellor made a finding in favor of appellees on this issue, and we are unable to discover that there is a preponderance of the testimony against the finding of the chancellor. It is a well-established practice here not to disturb the findings of a chancellor on an issue of fact unless there is a preponderance of the testimony against those findings.

We deem it not amiss to say, without attempting to criticize the members of the Legislature or the assistants or employees of that branch of the Government, that the situation presented in this proof with respect to interlineations on the enrolled bill is a deplorable one by reason of the fact that it leaves open to question the last solemn record made of the enactment of a statute. Interlineations and erasures in bills, and journal entries concerning them, should be avoided as far as possible, even in the preliminary stages of the enactment of a statute, but when it comes to the enrolled bill there ought not to be any doubt as to the condition of the bill at the time it was approved and filed in the archives of the State for permanent preservation. That is the last and best evidence of the enactment of a statute, and its pages should be clear and unequivocal. No amount of urgency or haste should be permitted to call for sacrifice in accuracy, and when errors are discovered in comparison of an enrolled bill, the bill should be rewritten before presentation to the Governor. This case presents such an unseemly controversy and such a conflict in the testimony as to when the interlineations in the bill were made as

to serve as a warning that the situation should not again arise. Each house of the General Assembly should have sufficient assistance for the enrollment of bills as to perform that work with accuracy and dispatch, and the work should be confined to those so employed and working under the supervision of the committee.

We pass then from this phase of the case, since we uphold the finding of the chancellor that the interlineations describing the tract of land in question were made in the bill before its approval.

It is next contended that the statute is void because it creates two districts which embrace the greater portion of the whole territory of the county. Counsel for appellant state in their brief that the territory embraced in the two districts covers eighty-six per centum of all the lands in the county and all the public roads, except about seventeen miles. It is contended that the case falls within the decisions of this court in *Road Improvement Dist. No.* 1 v. *Glover,* 89 Ark. 513, and *Swepston* v. *Avery,* 118 Ark. 294. The substance and effect of the Glover case was to hold that the inclusion of the whole of a county for the purpose of improving all the roads was void for the reason that the entire road system of the county was too diverse to be made the subject of a single local improvement, and that it constituted an invasion of the jurisdiction of the county court. In *Swepston* v. *Avery, supra,* substantially all of a county was included in a road district for the purpose of improving any or all of the roads selected by the commissioners, and the statute provided that the improvement should be paid for by assessments levied in the same proportion on all of the land in the county. We have never decided that the mere inclusion of the whole of a county in a district is void. On the contrary, we have held that the whole of a county may be included if the improvement is a single one and affects all the lands of the county. *Board of Directors of Jefferson County Bridge Dist.* v. *Collier,* 104 Ark. 425.

The test is not the extent of the area included in the district, but the singleness of the authorized improve-

ment and the relationship to it of the included territory as to benefits to accrue from the improvement. This is not a case like the Glover case, *supra,* where all the roads in a county were to be improved, nor like the case of *Swepston* v. *Avery, supra,* where any or all of the roads might be improved and the cost of improving any given road taxed against all of the property in the district in like proportion. In each of the districts created by the statute now before us a large area—nearly half of the county—is included, and more than one road is to be improved, but the relations of the roads to each other are such that we can not say that the legislative determination that all of the roads to be improved in one of the districts constitutes a single improvement in that district so as to be grouped together as one improvement is arbitrary and erroneous. Nor is the area so extensive that we can say that the fixing of the boundaries of the district is arbitrary and erroneous. The case is, in this respect, ruled by the decisions of this court in *Conway* v. *Miller County Highway & Bridge District,* 125 Ark. 325; *Bennett* v. *Johnson,* 130 Ark. 507; *Sallee* v. *Dalton,* 138 Ark. 549.

It is not true, as contended, that the statute in question invades the province of the county court in authorizing the commissioners to lay out and improve roads not already established as public highways. In describing the various roads in the two districts, the statute does not in each instance refer to the roads as public highways, but it is fairly inferable that they were found by the framers of the statute to be public highways, and there is no showing made in this case that they were not public roads; on the contrary, the proof adduced in the case shows that they are public roads. It is not essential to the validity of the statute that they should be described therein as public roads. In order to render the statute void, it would be necessary for those who assail its validity to show that the roads to be improved are not public highways, and that no authority is conferred to submit to the county court the question of laying them out as

public highways. The statute provides for changes in the route, and for widening and straightening the roads, but that this must be done under the approval and authority of the county court. It is provided in the statute that all the plans for the improvement must be submitted to and approved by the county court before the commissioners can proceed with the construction of the improvements. We find nothing at all in the statute which tends towards an invasion of the constitutional jurisdiction of the county court.

Attention is called to the language of the two sections of the statute in regard to the appointment and qualification of commissioners, providing that "thereafter the commissioners of said district shall be maintained in succession in the same way as a board of improvement for the preservation and maintenance of the highway hereby contemplated." It is argued that a continuing power over roads is thus conferred, which invades the jurisdiction of the county court.

This subject is discussed in the case of *Easley* v. *Patterson, ante,* p. 52, handed down this date, and fully disposes of the question. In addition to what is said in that case, it may be added that the language of section 26 of the statute shows unmistakably that its framers did not intend to confer a continuing power to make improvements, but limited the power to a single improvement to be presently made.

Section 29 of the statute contains the following provision: "The county court of Bradley County is hereby authorized to turn over to each of said districts such proportions of the road tax collected in any of the townships in which any of the lands of either of the districts shall lie as may be just and equitable, and the county court of said county is further authorized to contribute such funds in money or script to the expense of the several improvements from the general revenue of said county as it may deem appropriate, provided, that, if said county court shall make any contribution out of the gen-

eral revenue of said county, it shall be apportioned equitably to each of the several districts hereby created."

This is a recognition of the general public interest in the improvement of the roads mentioned. It confers authority for contributions out of the general road funds and is merely directory to the county court—not mandatory. The county court exercises its discretion in determining whether or not the contributions shall be made and the provision is not compulsory. It does not invade the juridiction of the county court. *McClelland* v. *Pittman,* 139 Ark. 341. It relates to the original improvement and not to maintenance or repairs, which already falls within the authority of the court.

It is next contended that the provision in the statute for the assessments of benefits is not sufficiently definite to form a basis for the assessments, and that the whole statute fails on this account. This contention is untenable, for the statute provides that the commissioners of each district shall "make an assessment of the benefits to be received by each tract or parcel of land, railroads and tramroads, and all other real property within the district of which they are the commissioners, and shall inscribe the same in one or more books, as may be necessary, together with the assessment of benefits against each tract;" that the assessment books shall be filed in the office of the county clerk and notice given of the time and place of a hearing to be afforded to property owners to present complaints concerning the assessments. It is also provided that as soon as the assessments have been completed the county court shall enter an order levying assessments on the benefits, and the statute also prescribes the time and method of collecting assessments and enforcing payment of delinquent assessments. There is nothing found wanting in the statute to afford a complete and adequate scheme for the assessment and collection of benefits.

This completes the discussion of the several grounds of attack on the statute, none of which we find to be well founded. The decree of the chancery court is, therefore, affirmed.

HART, J., (dissenting). It appears from the record that practically the whole of Bradley County is included in the road district provided for in the act under consideration. Eighty-six per cent. of all the lands are included in the improvement district. There are about 160 miles of public roads embraced in the bill, and this includes all of the public roads in the county, except about 17 miles.

In the majority opinion it is said that this court has never decided that the mere inclusion of the whole of a county in a road improvement district renders it void, and the case of *Board of Directors* v. *Collier,* 104 Ark. 425, is cited to show that the court has held to the contrary. The court in that case held that a bridge across a navigable stream may be of such special benefit to the lands in the entire county that it may be made the subject of an improvement district and said: "We are not now called on to say whether a single road can benefit the whole of a county so as to justify the imposition of special assessments for its construction." The court had already decided that question. In *Parkview Land Co.* v. *Road Improvement District No.* 1, 92 Ark. 93, the court held that an act of 1907 authorizing the formation of improvement districts in Jefferson County is unconstitutional in so far as it authorizes the formation of the entire county into one district and the building and construction of new roads, but that such provisions might be stricken out and the remainder of the act left in force. *Road Imp. Dist. No.* 1 v. *Glover,* 89 Ark. 513, was cited in support of the holding. In discussing the question in that case the court said:

"According to this theory, the district should not extend beyond the limits of the benefits of the improvements made in pursuance of the object of its organization, and should not be extended by many and independent improvements as to include territory in no wise affected by all the improvements. It is obvious the State can not be organized into a district to construct or maintain improvements to be paid for with money derived from local

assessments. So counties can not be organized into districts for the building, repairing and maintaining roads without usurping the exclusive jurisdiction of roads vested in county court by the Constitution. Its roads and need for roads are too numerous, diverse and independent and some too remote from each other, to be embraced in one district and sustained by local assessments. In such a case the board of directors of the road district would become a partial substitute for the county court vested with its jurisdiction over roads. We do not mean to apply what we have said to improvement districts including cities and towns. That subject is not presented for consideration in this case, but has been considered in another case. *Crane* v. *Siloam Springs,* 67 Ark. 30."

In the subsequent case of *Swepston* v. *Avery,* 118 Ark. 294, the court quoted the above language with approval. Continuing the court said:

"That was said in a case where there was an attempt to form the whole county into a road district, but it is no less applicable in a case like this where more than 95 per cent. of the lands of the county are embraced in the district. The 'roads and need of roads' are no less 'numerous, diverse and independent and some too remote from each other' where 5 per cent. or less of the county is omitted from the district than where the whole county is embraced. The doctrine of that decision is that on account of the diversity of the road interests of the whole county, or such a substantial portion of it as renders the conditions of the same as if it were the whole county, the project to improve all of the roads does not constitute a single improvement and can not be made the subject-matter of an improvement district for the purpose of levying local assessments to pay for the improvement. It is clearly an evasion of the necessary effect of that decision to attempt to organize substantially the whole of a county into a road improvement district, and it can not be done. It does not follow from this that the improvement must be confined to a single road, or

to a road of any particular length. We are holding to the contrary in the case of *Cox* v. *Road Improvement District,* 118 Ark. 119. But where such a considerable part of the county is embraced in it as to render the various roads affected by it diverse and independent and remote, then the several improvements can not be ground into one district and treated as single."

Road improvement districts are sustainable only upon the theory that the local assessments are imposed upon the property of persons who are specially and peculiarly benefited by the improvement. The term "local improvement" denotes an improvement made in a particular locality in which the property adjoining or near it is specially benefited.

We think all the cases above cited are authorities sustaining our dissent in this case, and they, in effect, hold that where the size and magnitude of the district as described in the act creating it shows that the localities embraced in the district have diverse and independent interests they can not be embraced in one district. We have already held in the Glover case and the Parkview Land Company case that the whole of a county could not be embraced in one road improvement district. The effect of the opinion in the Swepston case was to hold that a substantial part of the county could not be embraced in one district in order to evade the effect of our previous decisions. Such is the case here. Practically all of the county is embraced in the district created by the bill and nearly all of the public roads in the county are included therein. It is evident that the purpose of the framers of the act was to evade our previous decisions holding that an entire county could not be included in one road improvement district. It is true the present bill purports to create two districts, but that is also a mere subterfuge. Article 5, section 1, of our Constitution provides that no law shal be passed except by bill. If the two improvement districts created should be considered as separate and independent improvements, they could not be included in one bill. It was never intended

by the framers of the Constitution that more than one independent and separate subject should be treated in one bill. Hence, if the act in question intends to create separate and independent districts, it is void for that reason. If the districts are to be considered separate and independent, they embrace in the same bill subjects which are not germane to each other, as bearing on the question. See *Hickey* v. *State,* 114 Ark. 526. If they are to be treated as one district, then it is void for the reasons above given.

What has been said in our dissenting opinion in the case of *Easley* v. *Patterson, ante,* p. 52, also applies here. The acts are not precisely the same, but they are substantially so. At least they are sufficiently alike, in our judgment, to make the reasoning in that case apply here.

Judge WOOD concurs in the views the writer has expressed.

WALLIN v. STATE.

Opinion delivered February 2, 1920.

1. CONTINUANCE—ABSENT WITNESS.—The refusal of a continuance for the absence of a witness, who would merely have testified to a statement by the prosecuting witness in conflict with his testimony as to the time when the property was stolen, was not error where there was no question as to the theft being within the period of limitation.
2. LARCENY—EVIDENCE OF VALUE.—On a trial for larceny of several rolls of barbed wire, evidence of the value thereof *held* sufficient to sustain a conviction of grand larceny.
3. CRIMINAL LAW—HARMLESS ERROR.—Permitting a witness on a trial for larceny to state that a third person asked him about the theft, and whether he knew anything about it, and that he told him he did, and told him what he knew, was not prejudicial.

Appeal from Cross Circuit Court, Second Division; *R. E. L. Johnson,* Judge; affirmed.

J. C. Brookfield, for appellant.

1. It was error to refuse the continuance. 99 Ark. 394-9; 38 *Id.* 174.

2. Hearsay testimony was admitted. 16 Ark. 628; 10 *Id.* 638.

3. There was no proof that the wire was worth over $10.

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

1. The continuance was properly refused. The motion does not come within the provisions of our statute. Kirby's Dig., § 6173. No abuse of discretion by the court is shown. 40 Ark. 114; 79 *Id.* 594; 100 *Id.* 132; 103 *Id.* 354; 109 *Id.* 450; 110 *Id.* 402; 79 *Id.* 594.

2. The value of the wire was proven to have been over $10.

3. The objections to the so-called hearsay evidence are not well taken.

WOOD, J. Appellant was convicted of the crime of grand larceny in the stealing of three or four rolls of barbed wire. He complains that the court erred in overruling his motion for continuance, in which he set up that one Dan Slocum had been duly subpoenaed as a witness and was not present for the reason that he was in the service of the United States, and that the last information appellant had of him was that he was on the seas returning home. He set up that Slocum, if present, would testify that he heard the prosecuting witness say that the wire alleged to have been stolen was stolen on the 4th of July, 1918, whereas the witness Slocum would testify that he saw the wire at the place where the prosecuting witness Smith said it was stolen from, and he, Slocum, knew that the wire was moved from that place more than five days before July 4, 1918.

The indictment against appellant was returned on February 6, 1919, charging in apt words that the appellant stole the wire fencing to the value of $30 about June 10, 1918.

At the trial witness Roark testified that he and appellant moved the wire alleged to have been stolen some time in the summer of 1918, but he did not remember the

date. Appellant claimed to own the wire and requested witness to assist him in moving it and told witness that he would give him $1.50 for his services.

Prosecuting witness Smith testified that he missed the wire on the morning of the 11th of July, 1918. Didn't know how long it had been gone, as he left for his vacation on the 4th.

The court did not err in overruling the motion for continuance. It appears that the only purpose of the testimony of the absent witness was to contradict the testimony of the prosecuting witness Smith by showing that Smith had told Slocum that the wire was stolen on the morning of July 4, whereas, at the trial Smith testified that he missed the wire on the morning of July 11.

The indictment covered a period of three years before the date of its return by the grand jury. The precise day, therefore, within that period on which the wire was stolen is wholly immaterial. So, even if the prosecuting witness Smith did tell the absent witness that the wire was stolen on the 4th of July and this tended to contradict his testimony at the trial to the effect that he missed the wire on the 11th of July, this contradiction was immaterial because the material matter about which prosecuting witness Smith testified was that he missed the wire and that it was stolen within a period of three years prior to the indictment. The testimony of the prosecuting witness shows that he missed the wire on the morning of the 11th of July, but did not know how long before that it had been gone. The testimony of the witness Roark fixed the summer of 1918 as the time when the wire was taken.

The appellant also contends that there was no testimony to prove that the wire alleged to have been stolen was over the value of $10.

One of the witnesses testified that he knew what the market price of wire was in July, 1918. That he had been farming about forty years, and during that time had bought considerable wire, and had seen it bought and sold. That in July, 1918, he paid $5.50 per roll.

The testimony tended to prove that three or four rolls of the wire were taken. There was, therefore, testimony to sustain the verdict.

Appellant urges that the court erred in permitting witness Roark to make the following statement: "And then about three or four days later the road foreman was asking me about it, and he asked me if I knew anything about it, and I told him that I did and told him what I knew about it."

There was no prejudicial error in the ruling of the court in permitting the witness to make this statement. The statement does not contain anything prejudicial to the rights of the appellant. It at most was but a declaration of the witness that he had a conversation with the road foreman about it, but it does not show that the foreman said anything to the witness or that the witness said anything to the foreman that was in any manner prejudicial to the rights of the appellant.

Judgment affirmed.

SANDERSON v. WILLIAMS.

Opinion delivered February 2, 1920.

1. STATUTES—IMPLIED REPEALS.—Where there is no express repeal by the last enactment of prior statutes, it is to be presumed that no repeal was intended, and such effect will not be given unless the statutes are in irreconcilable conflict.
2. STATUTES—IMPLIED REPEALS.—Where there is a plain repugnancy between two acts upon the same subject, the latter act repeals the prior, or, if the two acts are not in express terms repugnant, and the later covers the whole subject of the first and embraces new provisions, showing that it was intended as a substitute for the first, the last enactment will stand as the law upon the subject, and the first will be set aside.
3. TAXATION—CLERK'S FEE FOR TAX DEED.—The fee of $1 allowed the county clerk under the revenue law for making a deed to the purchaser of lands forfeited and sold for delinquent taxes is required to be paid by the purchaser, and not by the county; Kirby's Digest, sections 3494, 3495, being to this extent repealed by *Id.*, section 7111.

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

M. E. Sanderson, for appellant.

Taking our statutes together (Kirby's Digest, sections 3494-5, 7111, Acts 1903, page 51), the county should pay the fee. The general revenue act does not repeal the acts of February 25 and December 13, 1875. The Legislature is presumed to have known of the prior statutes and to have enacted with reference thereto. 76 Ark. 446. Repeals by implication are not favored, and a later act will not repeal a former one unless repugnant or inconsistent. 123 Ark. 184; 101 *Id.* 443; 41 *Id.* 149; 45 *Id.* 90.

Where there is a special act made to apply in particular cases, it only applies and not the general act. 68 Ark. 130; 131 *Id.* 230. These acts were passed to accomplish different purposes and their provisions are not irreconcilable or inconsistent. Both may stand and be operative. 131 Ark. 230. The court erred in declaring the law for appellee.

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

The only purpose of the act of 1903 was to make the purchaser of land at tax sale responsible for the fee for executing the deed and sections 3494-5 of Kirby's Digest are inconsistent with it and repealed.

WOOD, J. The question for decision in this case is, whether or not the fee of $1 allowed the county clerk under the revenue law for making a deed to the purchaser of lands forfeited and sold for delinquent taxes is required to be paid by the purchaser at such sale.

The determination of the question involves the construction of sections 3494, 3495 and 7111 of Kirby's Digest, which are as follows:

"Section 3494. For services under the revenue laws, the county clerk shall receive for making a deed to the purchaser for lands sold at delinquent tax sales * * * $1."

"Section 3495. The fees provided for in section 3494 shall be paid by the county under the order and direction of the county court, except for making out the original tax books, one-half of which shall be paid by the county. * * * ."

"Section 7111. The clerk of the county court of any county in which any lands or lots are situated which have been or may hereafter be sold for taxes, under the provisions of any law of this State, is authorized and required to execute the proper deed therefor to the person entitled to receive the same whether said lot or land shall, at the time of the execution of said deed, continue to be within said county or not, in the same manner as though the said land or lot still remained within the limits thereof, any law to the contrary notwithstanding, for which he shall be entitled to charge and receive a fee of one dollar, to be paid by the person to whom the deed is made."

The history of this legislation is as follows:

An act entitled "An act to establish fees" was approved February 25, 1875. This was a general act having reference to all State and county officers who were allowed fees. Section 13 of that act provides that, "The county clerk shall receive fees for services under the revenue law * * * for making a deed to the purchaser for lands sold at delinquent tax sale $1." This section was digested by Judge Mansfield, under the chapter on Fees, as section 3240. It will be observed that the act as originally passed did not provide as to how the fee of $1 should be paid. The act was amended March 28, 1887. Acts of 1887, p. 139, and again on February 8, 1889. The original act as thus amended was digested as sections 3310 and 3311 by Sandels & Hill, and as sections 3494 and 3495 by Kirby, *supra.* The amendment of March 28, 1887, to the original act, as shown by section 3495, *supra,* provided among other things that the fee of the clerk, as prescribed in the original act, should be paid by the county.

The general revenue act of 1871, section 133, p. 107, and the general revenue act of 1873, p. 294, section 134, and the general revenue act of 1883, section 151, p. 199, all contain precisely similar provisions to that of section 7111 of Kirby's Digest, *supra,* except as to the amount of the fee that the clerk was allowed to charge. The last of these provisions enacted February 17, 1883, was digested as section 6631 of Sandels & Hill's Digest. On February 21, 1903, the Legislature amended section 6631 of Sandels & Hill's Digest so as to make it read as section 7111 of Kirby's Digest, *supra.* The last amendment, it will be observed, consisted only in adding the words, "to be paid by the person to whom the deed is made."

Mr. Sutherland in his work on Statutory Construction, volume 2, section 448, among other things, says: "It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy and was intended to be consistent and harmonious in its several parts and provisions. For the purpose of learning the intention, all statutes relating to the same subject are to be compared and, so far as still in force, brought into harmony, if possible, by interpretation, though they may not refer to each other, even after some of them have expired or been repealed."

It is a well recognized rule in the construction of statutes that where there is no express repeal by the last enactment of prior statutes it is to be presumed that no repeal was intended. The Legislature must be presumed to have knowledge of prior statutes, especially those relating to the same subject. Hence it will be assumed in the construction of any statute that if the Legislature had intended by such statute to abrogate a prior law on the same subject it will do so in express terms.

Therefore, courts are slow to interpret the last enactment upon any given subject-matter as repealing by implication any prior law upon the same subject, and will not do so unless they find that the statutes are in irreconcilable conflict. *Martels* v. *Wyss,* 123 Ark. 184-7, and cases there cited.

But on the other hand where there is a plain repugnancy between two acts upon the same subject, the later act repeals the former, or if the two acts are not in express terms repugnant and the later act covers the whole object of the first and embraces new provisions, showing that it was intended as a substitute for the first, the last enactment will stand as the law upon the subject, and the first will be set aside.

In *St. Louis & San Francisco Rd. Co.* v. *Bowman,* 76 Ark. 32-4, we said: "But where the later of two statutes covers the whole subject-matter of the former and it is evident that the Legislature intended it as a substitute, the prior act will be held to have been repealed thereby, although there may be no express words to that effect, and there be in the old act provisions not in the new. See *Bell* v. *State,* 120 Ark. 530; *Campbell* v. *Samples,* 92 Ark. 79, and other cases cited in 4th Crawford's Digest, p. 4672, section 49.

Keeping in mind these familiar canons of interpretation, we are convinced, upon a consideration and comparison of all the acts upon the subject, that it was the intention of the lawmakers that the clerk should receive the fee, which he was entitled to charge for making deeds to the purchasers at delinquent tax sales, from the purchaser at such sale and not from the county. While the fee allowed under section 3494 of Kirby's Digest is under a general statute to establish fees for all the officers named therein, nevertheless, the particular fee in controversy was for services under the revenue laws. The act of February 21, 1903, section 7111 of Kirby's Digest, provides compensation for precisely the same service also under the revenue law. These statutes are *in pari materia.* It was manifestly the intention of the Legislature to allow the clerk only one fee for making the deed specified. This fee, as we construe the plain terms of the last enactment, is to be paid by the person to whom the deed is made, no matter whether the lot or land purchased at the time of the execution of the deed is situated in the county where the land was forfeited and where the sale

took place, or whether since that time it had been placed within the boundaries of some other county. The only purpose of the Legislature, by the last enactment on the subject, was to make the purchaser instead of the county pay the clerk's fee for executing the deed.

The judgment of the circuit court so holding was correct, and it is therefore affirmed.

JACKSON v. STATE.

Opinion delivered February 2, 1920.

1. CARNAL ABUSE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of carnally knowing a female under the age of 16 years, in violation of Kirby's Digest, section 2008.
2. CRIMINAL LAW—EXPERT WITNESS.—In a prosecution for carnally knowing a female under the age of consent, it was not error to refuse to permit an ignorant negro woman, who attended at the birth of the child of the prosecuting witness, and who had had 16 years' experience as midwife, to testify as an expert as to the development of a prematurely born child where she had never been present when a child had been prematurely born.
3. CARNAL ABUSE—EVIDENCE.—In such prosecution where defendant claimed that the child could not have been conceived on the alleged date, the woman who attended the prosecuting witness at its birth was properly allowed to state in detail the appearance of the child at that time.
4. CARNAL ABUSE—INSTRUCTION.—In such prosecution an instruction to the effect that it was immaterial whether defendant had intercourse one time or five times was not erroneous, though the prosecuting witness testified that there was but one act of intercourse.
5. CRIMINAL LAW—SPECIFIC OBJECTION.—Where defendant made no specific objection to the above instruction, he can not complain on appeal that it was likely to mislead the jury.

Appeal from Prairie Circuit Court, Southern District; *George W. Clark, Judge;* affirmed.

J. G. & Cooper Thweatt, for appellant.

1. The court erred in excluding the evidence of Elsie Thompson that the child was born fully developed.

She qualified as an expert. 5 Enc. of Ev., pp. 535, 658; 45 Vt. 29; 56 N. H. 227; 22 Am. Rep. 441; 100 Ark. 232; 117 *Id.* 8.

2. The court erred in instructing the jury as to reasonable doubt. 39 Ark. 275-280; 111 *Id.* 457, 465-6.

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

1. There was no error in admitting or excluding evidence. 64 Ark. 523; 94 *Id.* 75; 36 Kan. 700; 139 U. S. 559; 130 *Id.* 520; 175 Mo. 161; 108 N. Y. 56; 162 Mass. 556.

2. There is no error in the court's instructions. The date laid in an indictment is immaterial, if prior to the indictment and within the statute of limitation. 18 Ark. 363; 26 *Id.* 260; 32 *Id.* 205; 36 *Id.* 222; 37 *Id.* 273; 54 *Id.* 269. The exceptions are saved only *en masse. Long* v. *State,* 140 Ark. 413.

HART, J. Camp Jackson was convicted, under section 2008 of Kirby's Digest, of carnally knowing a female person under the age of 16 years, and from the judgment of conviction has duly prosecuted an appeal to this court.

The prosecuting witness was Aurelia Young, a negro girl, who testified that she lived in Prairie County, Arkansas, with her mother and father; that on the fourth Sunday night in August, 1918, which was the 23rd day of the month, the defendant went home with her from church and on the way home had sexual intercourse with her; that she was not 16 years old at that time; that the defendant had gone with her a good many times before that night, but that he never had intercourse with her before that night or afterwards; that she became pregnant, and then told her mother about the defendant having had intercourse with her.

The mother of the prosecuting witness testified that she was not 16 years of age at the time of the alleged intercourse; that she gave birth to a child on April 18, 1919, and that the child died on the 6th day of May, 1919.

The defendant admitted that he kept company with the prosecuting witness, but denied that he had ever had intercourse with her at any time. His testimony was corroborated to some extent. The evidence adduced for the State, if believed by the jury, was sufficient to convict the defendant.

It was the theory of the defendant that the child was conceived before the 23rd day of August, 1918, and as tending to establish that fact he introduced as a witness Dr. Adams, a white physician, who testified that he had been practicing medicine for eighteen years. The court permitted him to testify as an expert witness. His testimony as abstracted by counsel for the defendant is as follows: "The average time for the birth of a child after conception is 280 days, which is nine calendar months; when a child is born at the regular time, its muscles would be developed, its head would be well developed, its finger nails would be developed, and, if a normal child, its lungs would be well developed; a child born six weeks earlier than the normal time would be an undeveloped child, and not fully matured; its arms wouldn't be well developed; its nails or fingers would not be developed, and it wouldn't cry nor likely live long; five weeks under time would cause an undeveloped child; it is my opinion that a child born six weeks before time might live three or four days; it might live longer and maybe not near so long."

The defendant also attempted to introduce as an expert witness Elsie Thompson, a negro woman who was present on April 28, 1919, when Aurelia Young gave birth to the child. She said that it had been her business to deliver children for sixteen years, and that she had had training along that line under physicians. She stated, however, that she had never waited on women who had prematurely given birth to children and that she had never seen children of that kind. The court refused to allow her to testify as an expert, and the court's action is assigned as error, calling for a reversal of the judgment.

In *Green* v. *State,* 64 Ark. 523, the court said that the competency of a witness to testify as an expert depends upon either his actual experience with respect to the subject of investigation, or his previous study and scientific research concerning the same, and sometimes on both combined. The court further stated that no rule can be laid down by which it can be accurately determined how much skill, knowledge, or experience a witness must possess to qualify and entitle him to testify as an expert. The court held that that question rests within the fair discretion of the trial court whose duty it is to decide whether the experience or study of the witness has been such as to make his opinion of any value, and that its decision of the question will not be reviewed by this court, unless it clearly appears to be wrong. According to this test, it cannot be said that the trial court erred in refusing to allow Elsie Thompson to testify as an expert with regard to the development of a prematurely born child. It is true she had had 16 years' experience in assisting physicians in delivering children, but she was an ignorant negro woman and said that she had never been present when a child had been prematurely born. Hence her qualifications as an expert were doubtful, and the court did not abuse its discretion in not allowing her to so testify. She was present at the time the child was born and was properly allowed to state in detail the appearance of the child at that time. She went back and dressed the child when it was four days old and was permitted to state its appearance at that time.

The testimony of this witness and that of Dr. Adams tended to contradict the testimony of the prosecuting witness that the defendant carnally knew her on the 23rd of August, 1918. The jury might have believed them and still believed that the prosecuting witness told the truth about the crime being committed, but was mistaken about the date thereof.

It is also insisted that the court erred in instructing the jury as follows: "The material issue the State must prove beyond a reasonable doubt is, did he, Camp Jack-

son, in the Southern District of Prairie County, within three years prior to the return of the indictment, have sexual intercourse, or commit adultery with this girl, whether one time or five times, the offense would be consummated just one single time or act, and that is all the statute requires."

We do not think the court committed prejudicial error in giving the instruction. The prosecuting witness did not claim that there had been more than one act of intercourse between her and the defendant. This was all the testimony adduced by the State upon that issue. The court in using the expression, "whether one time or five times," was simply defining the offense and telling the jury that a single act constituted the offense under the statute. If the defendant thought that the jury was likely to be misled by the instruction, a specific objection should have been made to it, and, not having done so, it is now too late to complain.

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

STRANGE v. PLANTERS' GIN COMPANY.

Opinion delivered February 2, 1920.

1. BAILMENT—GIN RECEIPT.—A gin company's receipt for cotton ginned by it, merely stating the owner's name and the number and weight of the bale, did not of itself constitute a contract between the parties.
2. BAILMENT—GRATUITOUS BAILEE.—Where a gin company permitted its customers to leave cotton ginned by it in its gin yard, so that they would not have to haul it back home or find a storage place until they sold it, and issued receipts therefor in order that they might identify their cotton, it was a gratuitous bailee and not liable for loss unless guilty of gross negligence.
3. APPEAL AND ERROR—REQUEST FOR PEREMPTORY INSTRUCTION—EFFECT.—Where both parties asked a peremptory instruction, and no other instruction, the court's finding of facts was conclusive as the verdict of a jury.

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

STATEMENT OF FACTS.

Peter Davis brought separate suits in the circuit court against the Planters' Gin Company and the Garland Gin Company to recover the value of five bales of cotton claimed to have been lost in the gin yards of the defendants.

The facts in the two cases being the same, the suits were consolidated and tried together. The plaintiff had five bales of cotton ginned by the defendants and received from the defendants a receipt for each bale so ginned. It is claimed that these receipts constituted a contract of bailment for hire, and they are the basis of the two suits.

The defendants denied that the tickets constituted a contract of bailment for hire, but alleged that they were issued solely for the benefit of the customers for the purpose of identifying their cotton. Peter Davis died, and the suits were revived in the name of a special administrator of his estate.

A. McLane, a tenant on the farm of Peter Davis, carried a bale of seed cotton to the Planters' Gin Company and had it ginned. The gin company issued to him the following receipt:

"Planters' Gin Company. 10-5-17. For A. McLane. Gin No. 229. Weight 580. York, Weigher."

McLane turned the receipt over to Peter Davis. Four other bales of cotton were carried from the farm of Peter Davis to the gin of the defendants, and, after they had been ginned, similar receipts were issued, which were also turned over to Peter Davis. After the cotton was ginned it was left in the gin yards of the defendants. When Peter Davis wished to sell the cotton, he went to the gin yards of the defendants to get it and found the cotton had been lost. The defendants refused to make good the loss. Hence this lawsuit.

On the part of the defendants it was shown that these receipts were given to the customers for the purpose of identifying their cotton which had been ginned by the defendants. After the cotton was ginned it was

rolled out on the cotton yard of the defendants, and the customers could go there and get the cotton at any time without any demand or notice to the defendants. The cotton was weighed and tagged by the defendants, and these receipts were given to the customers solely for the purpose of identifying the cotton. The cotton after it was ginned was left in the yards of defendants until the customers came and hauled it away. There was a fence around the gin yards to keep out the stock, and the gates to the yards were kept closed for the same purpose.

Both parties asked for peremptory instructions, and the court instructed the jury to return a verdict for the defendants.

M. E. Sanderson, for appellant.

It was sufficient under the facts for appellant to show a delivery of the cotton and a failure to return it to entitle him to recover. The relation of bailor and bailee was established, and when appellees issued the tickets they accepted the sole custody of the cotton and it became their duty to exercise due care and diligence to protect and keep it. 134 Ark. 76. The court erred in directing a verdict for appellees.

Will Steel, for appellees.

1. The tickets did not constitute contracts of bailment but were mere identification tickets. 134 Ark. 76 is not in point. 107 Ark. 76.

2. There is no bill of exceptions in this case. 109 Ark. 124.

HART, J. (after stating the facts). Counsel for the plaintiffs claim that the defendants were bailees for hire and that the court erred in instructing a verdict for the defendants. They rely on the case of *Phoenix Cotton Oil Co.* v. *Pettus & Buford,* 134 Ark. 76, in which the court held that a bailee for hire in exclusive possession of the property must explain its loss before it devolves upon the bailor to show that it was lost through the bailee's negligence. We cannot agree with counsel in this conten-

tion, and think that the receipts are essentially different in the two cases. In that case the bale of cotton contained the number and the gin weight for identification as in the present case, but it also contained the following: "On return of this ticket properly endorsed we will deliver one bale of cotton ginned for P. & B. & S. Hunt." This receipt was signed by the manager of the gin company. It will be observed that the holder of the receipt or ticket was required to present it to the gin company before he could obtain possession of the bale of cotton. Because the customer could not acquire possession of the cotton without presenting the receipt, the court held that the receipt was contractual in its nature and established the relationship of bailor and bailee for hire between the parties.

In the case at bar there is nothing in the receipt itself to show that it constituted a contract between the parties. The evidence for the defendants shows that it was given to the customer for his benefit solely in order that he might identify his cotton and take it away from the gin without any demand or notice to the defendants. It is true that the customers were permitted to leave the cotton on the gin yards of the defendants, but this was done for their sole benefit so that they would not have to haul the cotton back home, or find a storage place for it until they were ready to sell it. Under this state of the record the defendants were gratuitous bailees. The liability of a bailee without reward for lost goods intrusted to him depends upon whether he was guilty of gross negligence. *Gulledge* v. *Howard*, 23 Ark. 61; *Wear* v. *Gleason*, 52 Ark. 364, and *Baker* v. *Bailey*, 103 Ark. 12.

The evidence shows that the cotton was left on the gin yards of the defendants solely for the accommodation of the plaintiff, and the jury would have been warranted, under the evidence as disclosed by the record, in finding that the defendants were not guilty of gross negligence in regard to keeping the cotton. Both parties asked for peremptory instructions and did not ask for any other instructions. Where both parties ask the court

for a peremptory verdict and request no other instruction, the finding of the court is final and has the same effect as the verdict of a jury. *Hill* v. *Kavanaugh,* 118 Ark. 134; *Ozark D. M. Corp.* v. *Townes & Garanflo,* 117 Ark. 552; *Nutt* v. *Fry,* 119 Ark. 450, and *St. L. S. W. Ry. Co.* v. *Mulkey,* 110 Ark. 71.

It follows that the judgment must be affirmed.

IRWIN v. DUGGER.

Opinion delivered February 2, 1920.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS. —Findings of fact made by a chancellor will not be reversed on appeal, unless they are against the preponderance of the evidence.
2. FRAUDULENT CONVEYANCES — TRANSACTIONS BETWEEN HUSBAND AND WIFE.—Transactions between a husband and wife affecting the rights of creditors, especially where the husband is insolvent, are to be scrutinized with care in passing upon the question of good faith, and the burden is upon the wife to show her good faith.
3. HUSBAND AND WIFE—HUSBAND USING WIFE'S PROPERTY.—Where a wife allows her husband to use her property for a long time as his own, she will not be allowed to claim it as against his creditors.
4. FRAUDULENT CONVEYANCES—FAILURE TO RECORD DEEDS.—The mere facts that a debtor did not record a deed to him of land, and that his wife and son did not record deeds from him, are not of themselves sufficient evidence of fraudulent purpose as to constitute fraud in law, but are circumstances tending to impeach the want of good faith of the parties.

Appeal from Cleburne Chancery Court; *Lyman F. Reeder,* Chancellor; affirmed.

STATEMENT OF FACTS.

M. M. Irwin, doing business as Heber Hardware & Furniture Company, brought this suit in equity against J. E. Dugger, Sarah C. Dugger, and M. G. Dugger, to set aside certain deeds which it is alleged J. E. Dugger executed to his co-defendants in fraud of the rights of his creditors. The facts, so far as are necessary to test the

the correctness of the decision of the chancellor, are substantially as follows:

On the 15th day of March, 1917, the North Arkansas Townsite Company executed to J. E. Dugger a deed to lot 1, in block 14, in the town of Miller, Arkansas. The consideration in the deed was $100 and this was the true consideration. Twenty-five dollars were paid in cash, and the balance was to be paid in deferred payments. This deed was not filed for record until the 14th day of December, 1918. At the time J. E. Dugger purchased the lot it was understood that he would sell the west 50 feet of it to his son, M. G. Dugger, for $50. His son paid him $25 in cash, which was used by J. E. Dugger in making his cash payment on the lot. On May 26, 1917, J. E. Dugger executed a deed to M. G. Dugger for the west 50 feet of said lot 1 and delivered the deed to M. G. Dugger on that day. This deed was not filed for record until the 20th day of February, 1918. On May 31, 1917, J. E. Dugger executed a deed to his wife, Sarah C. Dugger, to the east 100 feet of said lot 1 for the consideration of $175, and the further consideration of the lumber and money she had furnished to erect a storehouse on the lot, and the payment of the balance of the purchase money to the North Arkansas Townsite Company. This deed was not filed for record until the 20th day of February, 1918. Both J. E. Dugger and Sarah C. Dugger were witnesses in the case and testified as to the transaction complained of without objection being made to their testimony.

According to the testimony of J. E. Dugger, his wife paid him $175 for the east 100 feet of lot 1, in block 14, Miller, Arkansas. She had furnished the money and lumber which had been used in erecting a storehouse on said lot. She also furnished the money with which to pay the balance of the purchase money; M. G. Dugger, his son, having furnished the money with which to make the initial payment, which was $25. After the storehouse was erected on the lot, J. E. Dugger and his son, J. R. Dugger, engaged in business in it from about April 1,

1917, to October 1, 1917. At the time J. E. Dugger made the conveyances to Sarah C. Dugger and M. G. Dugger, he was indebted to M. M. Irwin in some amount, and later became indebted to him in the sum of $253.87. On August 25, 1917, M. M. Irwin filed a suit against J. E. Dugger and obtained judgment against him for $253.87 and the accrued interest on September 21, 1917. J. E. Dugger was insolvent. He further claimed that the suit brought against him by the plaintiff caused his insolvency, and if it had not been brought that he could have paid his own debts and the debts of his firm in the ordinary course of business.

On cross-examination J. E. Dugger stated that he did not purposely withhold his deed from the townsite company from the record, but simply did not record it, as frequently happened with other deeds; that he was not in conspiracy with his wife to withhold any of the deeds from record, and that he delivered to her the deed to the east 100 feet of said lot on the day it was executed; that he received $175 for the lot besides the original purchase price.

Sarah C. Dugger in every respect corroborated the testimony of her husband, and it was shown that she had a farm of her own from which the lumber was taken to erect the storehouse on the lot in question.

D. B. Bailey, county and circuit clerk of Cleburne County, was the son-in-law of the Duggers. He testified that he had in his keeping some money belonging to his mother-in-law and gave to her $175 the last of April, or the first of May for the purpose of purchasing the lot in question.

M. G. Dugger testified that he built a blacksmith's shop on the west end of the lot which he had purchased from his father. He said that he paid $50 for the lot. All of these parties denied that they had withheld their deeds from record for the purpose of assisting J. E. Dugger in defrauding his creditors.

The chancellor found the issues in favor of the defendants, and it was decreed that the complaint should be dismissed for want of equity. The plaintiff has appealed.

Mortimer Frauenthal, for appellant.

1. The conveyance from Dugger to his wife was fraudulent. 49 Ark. 20; 68 *Id.* 162; 74 *Id.* 161-186; 101 *Id.* 573; 106 *Id.* 230; 108 *Id.* 164; 129 *Id.* 396; 132 *Id.* 268; 133 *Id.* 224; *Ib.* 250; 105 Miss. 720; 67 Ark. 105; 48 *Id.* 410; 50 *Id.* 42; 62 *Id.* 26; 86 *Id.* 225; 66 *Id.* 98; Kirby's Dig., § 3658.

2. The conveyance to Mrs. Dugger is presumed to have been voluntary. 132 Ark. 126, and fraudulent as to creditors. 134 Ark. 241.

3. The circumstances were such as to charge Mrs. Dugger with notice of the fraud. 58 Ark. 446; 32 *Id.* 251; 23 *Id.* 258. A purchaser after such record would not be an innocent purchaser. 113 Ark. 100; 75 *Id.* 223.

A discharge in bankruptcy does not protect Dugger as to the property in question. 3 R. C. L., § 90; 39 Sup. Ct. Rep. 472; 254 Fed. 150. The proceeding in bankruptcy was *in rem.* 123 N. E. 370; Brandenburg on Bankruptcy, § 11; 183 Fed. 913; 210 S. W. 976. See also 117 Ark. 20; 3 R. C. L., § 145; 98 Me. 401; 145 U. S. 29; 139 N. Y. S. 853, App. Div. 36; 72 N. H. 22; 54 Atl. 705; 196 Fed. 970; 254 *Id.* 356; 97 S. E. 830.

The property should be ordered sold to pay plaintiff's debt. 103 Ark. 105; 61 *Id.* 189; 55 *Id.* 116; 90 *Id.* 236.

George W. Reed and *Lawrence Neill Reed,* for appellees.

Appellant by proving his claim in bankruptcy and sharing with other creditors had no claim to base this suit. A discharge in bankruptcy can not be collaterally attacked on the ground of failure to include some of the bankrupt's assets in his schedule. 73 Ark. 483; Collier on Bankruptcy, p. 174; Black on Bankruptcy, p. 88; Loveland on Bank., p. 785. It is presumed that Dugger was notified of J. E. Dugger's petition for discharge, and it was too late to attack collaterally the act of the court. 74 Ark. 516. The discharge bars all debts. 122 N. E. 310; 232 Mass. 122; 50 S. E. 654; 104 S. W. 379; 96 Atl.

73; 139 N. W. 883. The burden is on the plaintiff to show that the discharge is not operative as to him. 238 U. S. 21; 224 Fed. 242; 81 N. E. 1060; 245 U. S. 626. A debt evidenced by judgment is provable in bankruptcy. Bankr. Act (1898), sec. 63a; 6 Am. Bankr. Rep. 46; 117 Ark. 17; 122 Fed. 232.

If a judgment is rendered upon an unsecured claim within the four months period, it becomes null and void upon a debtor being adjudged a bankrupt. Collier, Bankruptcy, p. 786-7; 188 U. S. 486; 9 Am. Bank. Rep. 476; 12 *Id.* 330; 11 *Id.* 54; 10 *Id.* 83; 121 Fed. 910. Here there was no fraud; the deed from a husband to wife for a valuable consideration is valid. 111 U. S. 772.

HART, J., (after stating the facts). It is the settled rule of this court that the findings of fact made by a chancellor will not be reversed on appeal unless they are against the preponderance of the evidence.

It is true that transactions between a husband and wife affecting the rights of creditors, especially where the husband is insolvent, are to be scrutinized with care in passing upon the question of good faith, and the burden is upon the wife to show her good faith. *Bunch* v. *Crowe,* 134 Ark. 242.

This court has also frequently decided that a wife who allows her husband to use her property for a long time as his own land will not be allowed to claim it as against his creditors. *Cowling* v. *Hill,* 69 Ark. 350, and *Goodrich* v. *Bagnell Timber Co.,* 105 Ark. 90.

In the case at bar it was satisfactorily established that the east part of the lot in question was paid for by Mrs. Dugger with her own means and for her own benefit. The same is true with regard to the purchase of the west part of the lot by the son. The record does not show that these deeds were executed for the purpose of giving J. E. Dugger a fictitious credit, or that they were withheld from record for that purpose or for the purpose of enhancing his assets and thus to enable him to contract debts which he could not pay. On the contrary,

all the parties deny that the deeds were withheld from record and concealed in order to avoid impairing J. E. Dugger's credit. There is nothing to show that the plaintiff or the other creditors of J. E. Dugger were induced to give credit to him on the faith that he owned the storehouse or lot in question. The mere fact that the deeds were not recorded is not of itself sufficient evidence of such fraudulent purposes as to constitute fraud in law. Such act is of course a circumstance tending to impeach the want of good faith of the parties. In testing the good faith of the transaction it is necessary to consider the particular situation of the parties and the intent as indicated by all of the facts and circumstances in the case as well as the direct testimony of the witnesses. These conveyances were executed by J. E. Dugger to his wife and son the latter part of May, 1917, and the plaintiff brought suit against him on August 25, 1917. Dugger testified that he owed a part of this sum at the time he made the conveyances.

The evidence does not disclose that the plaintiff or any other creditor of J. E. Dugger, furnished him credit on the faith that he owned the lot in question and the house situated thereon, and the shortness of time that elapsed between the conveyances to his son and wife and the institution of a suit by the plaintiff on his indebtedness negatives the idea that the conveyances were in fraud of his creditors.

It follows that the decree will be affirmed.

BOLINGER v. BOARD OF DIRECTORS OF RED RIVER LEVEE DISTRICT No. 1.

Opinion delivered February 2, 1920.

LEVEES—CONVEYANCE OF STATE LANDS.—Acts 1905, page 252, section 32, conveying to the Red River Levee District No. 1 all lands of the State lying within the district, except school lands, under certain "restrictions and limitations" *held* an absolute conveyance and not a conveyance upon conditions subsequent.

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

Allen H. Hamiter and *T. D. Crawford,* for appellant.

The lands were donated to the levee district upon certain restrictions and limitations, conditions subsequent, which were not performed, and the lands reverted to the grantor. 113 Ark. 32; 91 *Id.* 407. The burden of proof was on appellee. Kirby's Digest, § 3107. There is a statutory presumption in favor of the Land Commissioner's deed. 96 Ark. 447. The burden was on plaintiff to show that it has complied with all the conditions imposed by law and it failed. No bond was executed to the Governor as required by law. 112 Ark. 291; 76 *Id.* 447; 77 *Id.* 244; 95 *Id.* 438. Appellee never complied with the conditions and the title failed and the chancellor erred in confirming the title.

Henry Moore, Jr., for appellee.

The district fully complied with all the conditions and requirements of the act, and the decree is in all things correct. 208 S. W. 402; 21 Wall. 45; 106 U. S. 365; 91 Ark. 409; 113 *Id.* 93, 407; 134 *Id.* 471.

SMITH, J. The Board of Directors of Red River Levee District No. 1 brought this suit against appellant, and alleged the organization of the levee district by Act No. 97 of the Acts of 1905, and that by section 32 of this act all the lands of the State lying within the district, except school lands, had been conveyed to it; that it accepted the title to said lands and has complied with all the requirements of the act and is the owner of all lands that belonged to the State at the time the act was passed, and that the lands here sued for were included among them. That the State acquired its title under the Swamp Land Grant, and thereafter conveyed the lands in suit to C. S. Itner on January 16, 1873, but later the lands forfeited to the State for the non-payment of the taxes due thereon for the years 1896 and 1897, and that on April 4, 1918, appellant procured a deed to said lands from the

State Land Commissioner, the same being conveyed as lands which had forfeited for the non-payment of the taxes due thereon.

The answer admitted that the land was included in the legislative grant to the levee district, but alleged that the grant was not absolute, but was conditional, and that the conditions there imposed constituted conditions subsequent for the non-performance of which the lands had reverted to the State, and had again become subject to sale by the State, and that the deed to him from the State Land Commissioner had effectively conveyed the title.

The decision of this question proves decisive of the case and renders it unnecessary for us to review the testimony upon which the court below found the fact to be that the restrictions and limitations contained in the act had been complied with.

The grant of the land, together with the restrictions and limitations there imposed, are found in section 32 of the act and reads as follows: "Section 32. That, for the purpose of assisting the citizens of the State to build and maintain a levee herein provided for, and in consideration of the general good of the State, all of the lands of this State lying within said levee district, except the sixteenth section school lands not subject to taxation, and all the right or interest the State has or may have within the next six years, by reason of forfeiture for taxes, to any lands within said levee district, except said sixteenth section school lands not subject to taxation, is hereby conveyed to said levee district under the following restrictions and limitations. Said levee district, represented by its board of directors, shall make a descriptive map of said lands, showing the location and character of the same. That said lands shall be graded into first, second and third grades, with reference to their relative elevation and timber, and a description of the land and timber given. The said levee district may sell said lands for the minimum price of five dollars ($5), three dollars ($3), and two dollars ($2) per acre as to grade, or may issue the bonds of said levee district secured by a mort-

gage on said lands or any part thereof, and payable as the board of directors may determine. The treasurer of the levee board of said district, upon receipt of payment of any part or parcel of said lands, shall certify the same to the president of said board, who shall execute a deed in the name of said corporation to the purchaser of said lands, the money arising from such sales or issuance of bonds to be applied solely to the construction and maintenance of the levee of said levee district. That said lands shall be exempt from State and county taxes for ten years, if not sooner sold by said district, and at the expiration of the term of said ten years from passage of this act, all of said lands not previously sold by said district shall be assessed in the name of said district for said State and county taxes. That the levee district shall have the same power to confirm the tax sales to lands in said district in a court of equity as is now conferred upon individuals who purchase lands at tax sales, and the proceedings shall be the same as is provided by law for individuals, providing that the president of said levee board shall make bond to the Governor, payable to the State of Arkansas, in the sum of five thousand dollars ($5,000), conditioned upon the faithful and honest appropriation of the proceeds of the aforesaid lands to the building and maintaining the levee of said district. The president of said levee board shall on the second Tuesday of May in each year make a report to the Governor of this State, showing the lands confirmed to said levee district by the courts of chancery, as provided for in this act, and all other lands hereby conveyed, showing the disposition, if any, made of those lands during the preceding year, the funds realized and where and how expended."

We think the restrictions and limitations contained in the act are not conditions subsequent, the nonperformance of which would operate to defeat the deed. The act is a grant *in praesenti,* and the title to the land there referred to passed to the levee district, when the act was approved and became a law, and we think it contains no recital evidencing an intent that the land should revert

upon the non-performance of these conditions. If the restrictions and limitations there referred to are conditions subsequent, then each of them is a condition subsequent, and a failure to perform any one of them would be as fatal as a failure to perform all of them. These conditions are too numerous, and some of them so comparatively unimportant, that we can not give this construction to the grant in the absence of any language indicating an intent that the land should revert upon the nonperformance of all, or any, of these restrictions and limitations. If the act were construed otherwise, a single failure to report annually to the Governor would determine the grant, as would a single failure to pay taxes.

The beneficiaries of this act are not the officers of the board who are charged with the performance of the duties there enumerated, but the act was passed "for the purpose of assisting the citizens of the State to build and maintain a levee." The act authorized the issuance of bonds to construct this levee, and the testimony shows that bonds in the sum of $215,000 have been issued and the proceeds of these bonds, together with the revenues collected from local taxation, have been expended in the construction of the levee to the proportionate benefit, no doubt, of the lands in suit as well as all the other lands lying in the district. It was contemplated that these lands would furnish, *pro tanto,* the security upon which the bonded indebtedness of the district would be based, and that the proceeds of the sale of these lands would be applied to the discharge of the burden arising from the construction and maintenance of the levee and, as a matter of grace, and to promote the State's development, these lands were donated. The Legislature prescribed the manner of the disposition of the lands, and no doubt, by an appropriate action, any party in interest might enforce the discharge of the duties there enjoined. But that question is not before us, and it suffices to say that, in our opinion, an absolute title was granted to the levee district, and the limitations and restrictions set out above are not conditions subsequent.

Decree affirmed.

STAR CLOTHING MANUFACTURING COMPANY v. JONES.

Opinion delivered February 2, 1920.

MASTER AND SERVANT—COMMISSIONS OF TRAVELING SALESMAN.—Where an employer agreed to pay its salesman 6 per cent. commission on all orders booked, accepted and shipped, and 3 per cent. on mail orders, the employer had no right arbitrarily to refuse to fill his orders, and could do so only for sufficient reason, such as the rejection of an order by its credit department, and it was an arbitrary refusal to decline to fill an order because of an advance in price over that at which the salesman had been authorized to and did sell.

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

W. P. Murrah, for appellant.

1. Appellant was not due appellee any commissions on orders until the goods were shipped; the verdict is contrary to the law and evidence, and the giving of plaintiff's instructions and the refusal of defendant's were erroneous.

It was error to give instruction No. 1 for plaintiff, for it goes far beyond the contract plaintiff was working under and makes him entitled to commissions on goods not shipped, under certain conditions. 90 Ark. 88; 105 *Id.* 215; 95 *Id.* 421.

2. It was error to refuse instruction No. 2 for defendant, as it was not denied that defendant had the right to accept or reject orders sent in by traveling salesmen.

Instruction No. 4 refused was covered by the one given by the court's own motion. A long citation of authorities is unnecessary to show that a contract had been entered into and that the verdict and judgment were contrary to the terms of the contract and the judgment should be reversed. Appellee had acted under this same contract for six or seven years and taking orders under it and had accepted the terms without complaint. If no contract or agreement had been entered into he was bound by the custom and appellee had no cause of action until the goods were shipped and accepted by the customers, and no commissions were due.

McRae & Tompkins, for appellee.

The company accepted the orders taken by Jones, and in almost every instance the goods were shipped, and a binding contract was thus made. The judgment is based on the amount of accepted orders as shown by the testimony of the sales manager. At the trial appellant *did not raise the question that the orders taken by Jones had not been accepted.* It based its defense solely upon the fact that the goods had not been shipped. The proof conclusively shows bad faith on the part of appellant in making excuses, as all goods bought after the advance in price were promptly delivered.

By its verdict under instruction No. 1 the jury found that Jones was working for appellant under a 6 per cent. commission contract on goods accepted and shipped; that appellant accepted the orders and had the goods to fill these orders and arbitrarily refused because of a large advance in price. 26 N. E. 314 is not this case. See also 135 Fed. 910. Here the agent produced a purchaser, ready, willing and able to purchase, and appellee earned his commission. 132 Ark. 378; 87 *Id.* 506; 44 L. R. A. 593 and note; 89 *Id.* 289; 112 *Id.* 566; 97 *Id.* 23. There were no errors in the instructions given for plaintiff nor refused for defendant. Cases *supra,* and see also 15 Pa. Sup. 250; 94 N. W. 910; 183 S. W. 1182; 49 N. W. 586. The case was fairly tried upon proper evidence and instructions and should be affirmed.

SMITH, J. This is a suit by an agent to collect commissions for effecting sales of merchandise. The plaintiff recovered judgment, and the defendant has appealed.

The testimony shows that plaintiff took numerous orders for goods in the territory in which he traveled, which were forwarded to and accepted by defendant, and portions of most of these orders were filled, but that the price of the goods sold advanced rapidly and considerably after the orders therefor had been taken and accepted and defendant ceased filling the orders. It was shown that later orders placed at the advance prices were promptly filled.

The suit was defended upon awo grounds; the first being that the goods in question were required to fill Government orders for military purposes; but that defense was submitted under an instruction which told the jury to find for the defendant, if the failure to fill orders was due to that fact, so that that defense has passed out of the case.

The second defense, and the one which presents the controlling question, is that defendant became liable for the agent's commissions only when it had accepted orders and had shipped out the goods filling the orders.

The contract out of which this controversy arises was an oral one, yet there is no substantial difference in the statement of its terms by the parties thereto. The agent was to receive 6 per cent. commission on all orders booked, accepted and shipped which were received from him, and 3 per cent. when mail orders were received from his territory.

Declaring the law applicable to a contract of that character, the court gave the following instruction: "No. 1. You are told that if you find from a preponderance of the evidence that the plaintiff worked as salesman for the defendant, under an agreement that he should receive six per cent. commission on all goods sold by him, when the orders were accepted by the defendant, and shipped by them, and that the defendant accepted the orders, then they had no right to arbitrarily refuse to ship the goods and if you believe that they refused to ship the goods for the reason that the price advanced, and in order to sell the goods at a higher price, and that they did have the goods to fill such accepted orders and did not fill the orders taken by plaintiff and accepted by them, because they could and did sell them for a higher price, your verdict should be for the plaintiff for 6 per cent. commission on such accepted orders not filled for the reason stated."

This instruction was given over defendant's objection, and instructions asked by defendant were refused which declared the law to be that defendant had the right to reject any orders, or parts thereof, up to the time the

goods were to have been sent and that defendant was liable only for the commissions on goods which were shipped.

The testimony is undisputed that the orders were accepted, and, on conflicting testimony, the jury had found against defendant's explanation of its failure to fill them. Certain orders transmitted by plaintiff were turned down by defendant's credit department, and no commission is claimed on these orders.

We think a fair construction of this contract is that defendant had no right to arbitrarily refuse to fill plaintiff's orders, and that it was arbitrary to do so because of an advance in the price over that at which he had been authorized to sell and had sold. The provision of the contract that the commission should be earned, upon the shipment of the goods, determined when the commission had been earned, and it must necessarily be assumed, in the absence of proof to the contrary, that the parties contemplated shipments would be made, in the usual and ordinary course of business, unless some valid and sufficient reason appeared for not doing so, such as the rejection of the order by defendant's credit department.

The testimony is that plaintiff devoted his whole time to his agency, and incurred considerable personal expense in traveling over the territory in which he took the orders, for all of which he expected compensation out of his commissions. So that, in the absence of a stipulation that defendant might accept or reject such orders as it pleased, for any reason satisfactory to itself, we must approve the construction placed upon the contract in the instruction set out above to the effect that defendant had no right to arbitrarily refuse to ship the goods, and that it was arbitrary to do so because of the advance in price.

In the case of *Taylor* v. *Enoch Morgan's Sons' Co.*, 26 N. E. 314, the Court of Appeals of New York, in an opinion by Haight, J., had occasion to construe a contract in which the agent's commission was to be paid "upon all orders accepted from *bona fide* purchasers." The contention was there made that the principal became

liable to the agent for the commission only upon such orders as it accepted, and that it would not be liable for commissions on orders which, for reasons satisfactory to itself, it had declined to fill. In disposing of that contention it was there said: "We incline to the view that it was the duty of the defendant to accept all orders presented by the plaintiff from *bona fide* purchasers which were made in accordance with the provisions of the contract, and that they did not have the right, without cause, to arbitrarily refuse to accept such orders. Such a construction of the contract would require the plaintiff to travel over the territory mentioned at his own expense six times a year, with a right on the part of the defendant to reject every order presented by him, and to thus deprive him of any commissions." To the same effect, see also, *Wolff* v. *Sacks,* 168 S. W. 641; *Abel* v. *Nelson,* 104 N. Y. Supp. 362; *Stone* v. *Argersinger,* 53 N. Y. Supp. 63, 65; *Jacquin* v. *Boutard,* 35 N. Y. Supp. 496, 500; *Madden* v. *Equitable Life Assur. Soc. of the U. S.,* 32 N. Y. Supp. 752, 756; *In re Ladue Tate Mfg. Co.,* 135 Fed. 910, 911; *Castleman* v. *Lewis,* 183 S. W. 1182.

Judgment affirmed.

HARRISON v. FOURCHE RIVER VALLEY & INDIAN TERRITORY RAILWAY COMPANY.

Opinion delivered February 2, 1920.

1. TAXATION—RELIEF AGAINST ASSESSMENT BY TAX COMMISSION.—Courts of equity will not grant relief from an excessive assessment of taxes due to a mistake of judgment of a taxing board or commission, unless induced by fraud, mistake, discrimination, non-uniformity or adoption of a fundamentally erroneous method of assessment.
2. TAXATION—EXCESSIVE ASSESSMENT OF RAILROAD.—The mere fact that the Tax Commission has assessed the valuation of a railroad at an excessive figure will not entitle the company to relief in equity where it does not appear that the commission adopted an erroneous method of making the assessment.

Appeal from Perry Chancery Court; *Jordan Sellers,* Chancellor; reversed.

Geo. W. Emerson, prosecuting attorney, and *G. B. Colvin,* deputy prosecuting attorney, for appellant.

There are two questions involved:

1. Did the court have jurisdiction?

2. Is the evidence sufficient to sustain the findings and decree? On the first neither fraud nor mistake were alleged and the court had no jurisdiction. 63 Ark. 576; 40 S. W. 710.

No appeal from the decision of the commission was provided for in Act 257, Acts 1909, page 764. 90 Ark. 413; 119 S. W. 251. See also 94 Ark. 217; 126 S. W. 713.

The findings of assessors and boards are conclusive, except where otherwise provided. The assessment against the railroad is not arbitrary, discriminatory or unfair and did not constitute fraud, and the act of the assessing board or commission is final. 106 Ark. 248; 153 S. W. 614. The decree reducing the assessment should be reversed and the injunction dismissed. *Supra.*

Rose, Hemingway, Cantrell & Loughborough, for appellee.

The testimony shows that all the facts were duly presented to the Tax Commission and it clearly appears that the assessment can not be sustained upon any known basis of valuation. On a stock and bond basis the valuation was grossly excessive, and on a net earnings basis the assessment was excessive, and it is impossible to sustain it on a basis of present sale value. Upon the facts the assessment was arbitrary and without any reasonable basis, and excessive, and therefore a fraud on the railroad. Kirby's Digest, § § 6906-6974; 62 Ark. 461; 124 *Id.* 569. The court properly granted relief. 2 Cooley on Tax., pp. 1406-7; 63 Ark. 576; 62 *Id.* 461; 124 *Id.* 569; 212 S. W. 317. Chancery courts enjoin such assessments. 75 Ill. 591; 175 *Id.* 383; 7 Okla. 198-206; 24 Mich. 170; 7 Wash. 101; 17 *Id.* 567; 88 Fed. 350; 101 U. S. 153. See also 10 Wis. 264; 74 Mich. 350-355; 106 Wis. 200, 204;

26 Idaho 445; 144 Pac. 1; 235 Fed. 333; 71 So. 926; 81 *Id.* 503; 121 N. E. 629; 114 Fed. 557; 214 *Id.* 180; 222 *Id.* 562. The assessment was *arbitrary* and unsustained by any evidence. The commission ignored the fact that the road had no present earnings and could not operate more than six years longer at all, which were fundamental facts.. Appellee was clearly entitled to relief.

SMITH, J. This suit was brought by appellee railway company to enjoin the collection of the taxes assessed against its railroad for the year 1918, upon the ground that the valuation had been arrived at by the Tax Commission by adopting an illegal, unauthorized and unjust basis of assessment, and, in an amendment to the complaint, it was alleged that the assessment was arbitrary and discriminatory, and constituted a fraud in law, and further that unless relief was afforded by a reduction of said assessment it would be unable to pay the taxes upon a proper assessment without incurring penalties.

Appellee is a corporation under the laws of this State, with its principal office at Bigelow, in Perry County, and it owns and operates a line of railway from Bigelow, on the Rock Island Railroad, in a southwesterly direction to Thornburgh, a distance of 18-3/4 miles, all of which is in Perry County except .238 of a mile, which is in Pulaski County.

In June, 1918, when property of this character was being assessed by the Arkansas Tax Commission, appellee furnished the commission a schedule of its property, showing, in detail, the several items listed and the aggregate value of the whole railroad, which statement had been duly verified. According to this schedule the valuation of the whole property did not exceed $90,000, but an assessment of $152,450 was made against that part of the property in Perry County, and one of $350 for that part in Pulaski County. It was shown that the outstanding capital of the company is $238,000, and that it has a bonded indebtedness of $100,000. That the railroad began operation in 1907, and for five years re-

ceived a division of the freight collected on shipments oringinating on its line, and delivered to the Rock Island Railroad, but after 1912 it was no longer allowed to share the freight charges with the Rock Island Railroad because of a Federal decision in what was known as the Tap Line Cases. Prior to 1912 appellee paid its stockholders an average dividend of 7.6 per cent., and thereafter until 1915 it paid an average dividend of 2.9 per cent., but since 1915 no dividend has been earned or paid, and in 1917 an operating loss of $7,900 was sustained, and that loss was increased to $37,000 in 1918. It was further shown that 95 per cent. of the operating income was derived from freight paid by the Fourche River Lumber Company on logs and lumber, and that 75 per cent. of the passenger fares collected was paid by the employees of the lumber company, and that it would be impossible to operate the road but for the income derived from the lumber company, which owned enough timber reached by the railroad to keep the mill of the lumber company in operation for from six to ten years, after which time there would probably be no freight or passenger traffic which would justify the operation of the railroad, and that its value would be only its scrapping value, and that the present value of the property if scrapped would not exceed $118,650, and that the entire original cost of the railroad was $355,000.

An assessment of $7,000 per mile was made against the main line of this railroad, and it is insisted that no such value could be arrived at from a basis of income, market value, original cost, or in any other way, and that the assessment was made arbitrarily and capriciously and amounted to a fraud in law. The chancery court granted the reduction prayed for, and this appeal has been duly prosecuted.

This order and decree was based upon a finding made by the court "that the assessment of the main track of the plaintiff in Perry County was made in disregard of undisputed facts and of conditions known to the Tax Commission, that it was arbitrary and could not be

reached on any permissible basis of valuation, that a tax levied upon it would wrongfully deprive the plaintiff of its property without warrant of law, and would operate as a fraud upon it, by reason of which this court has jurisdiction to grant relief upon the payment of a tax levied upon a proper assessment."

In an opinion in the very recent case of *Martineau* v. *Clear Creek Oil & Gas Co.*, 141 Ark. 596, we had occasion to again review, as the court had several times done before, the authorities defining the conditions under which courts of equity would review the action of assessing boards and grant relief, and we there said that the authorities were agreed that a mere mistake in judgment in fixing the value of property to be taxed, by a taxing board or commission, from whose action no appeal was provided, could not be relieved against in a court of equity; yet we there also also said that courts of equity will restrain the collection of illegal taxes assessed against property by such boards induced by fraud, mistake, discrimination, nonuniformity, or the adoption of a fundamentally erroneous method making the assessment.

Under the test stated we think the court below did not give proper effect to the testimony of Monroe Smith, a member of the tax commission, who was called as a witness and examined and cross-examined at considerable length. This witness testified with apparent candor, and refuted the charge that appellee's railroad had been assessed at a greater amount per mile than any other railroad in the State depending largely on some sawmill for its tonnage, by showing that at least two other railroads were assessed a thousand dollars more per mile, and we think the testimony of the witness makes it clear that there was no conscious purpose on the part of the tax commission to discriminate against appellee. It is true the witness did not make clear the manner in which the commission arrived at the valuation which it had fixed, except that, when asked if the commission took into account the fact that the road had paid no dividends since 1915, and about other matters which should prop-

erly have been considered in arriving at the market value of the property to be assessed, the witness stated that "We took everything into consideration, as we do in all assessments, and arrived at what we believed to be a fair value for the road, taking into consideration everything we could find out or know." In explaining that no controlling effect was given to the lack of earning capacity, witness stated that he supposed its earnings were governed by the allowance which the lumber company made the railroad company for services rendered. It was shown that the lumber company, not only owned all the stock and bonds of the railroad company, but owned practically all the tonnage carried by it. We do not know whether the assumption of the witness was correct or not, as the point was not developed in the testimony, but it is apparent that, however inaccurate the result arrived at may be, the commission did not adopt an erroneous method of making the assessment, as they had taken into account "everything we could find out or know."

This witness testified that the commission had before it the detailed report which the railroad company had made of its property, and its value, as it was required by law to make for the use of the commission in making the assessment, and that the sidetrack was assessed at $2,000 per mile, and that the portions of the road used only for logging purposes were assessed as sidetrack, and that the representatives of the appellee railroad appeared before the commission when the assessment was made and urged then and there the matters here presented, all of which matters were then considered in fixing the valuation which was then made.

We think, under the testimony recited, the finding of fact set out above, which was made by the court below, is contrary to the preponderance of the evidence, and that nothing more is shown than an excessive assessment, resulting from an erroneous judgment, and this error of the tax commission is one against which we can afford no relief.

The tax commission valued the property at $304,000, and assessed it at 50 per cent. of that value, that being the per cent. of value assessed against all other property. So that it appears that the assessed value was about $50,000 less than the construction cost. It is true there was testimony showing a large per cent. of depreciation in value; but there was also some testimony as to enhancement of values and increased cost of reproduction, and while it may be true that the road will be scrapped in the course of six to ten years through lack of tonnage, it is not yet ready to be scrapped, and we cannot say, therefore, that because of the limited expectancy of life of the railroad its present market value cannot exceed its value as scrapped material.

We do not think the case made is one calling for equitable relief, as any error made is one of judgment only, and the decree is, therefore, reversed with directions to collect the tax upon the valuation fixed by the tax commission.

GREEN v. MULKEY.

Opinion delivered February 9, 1920.

1. EVIDENCE—CONSIDERATION NOT EXPRESSED IN DEED.—The grantor in a deed can not defeat his conveyance by proving a failure to perform a consideration not expressed in the deed itself.
2. PARTNERSHIP—REMEDY FOR NONPAYMENT OF CONSIDERATION OF DEED.—Where plaintiff conveyed land to a partnership composed of himself and defendant, the recited consideration, if unpaid, is a partnership liability, and plaintiff's remedy is in an adjustment of the partnership accounts, either by agreement or by an appropriate action.

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

A. F. Auer and *J. S. Butt,* for appellant.

The burden was on the plaintiff and he has sustained it by proving that the consideration, $3,000, as expressed in the deed, was in fact not the real consideration, but

the real consideration was that Mulkey would furnish the money to operate the business and did not do so. No part of the expressed consideration was ever paid or intended to be paid and the case should be reversed.

W. C. Rodgers, for appellees.

1. The decree contains the only reference to any evidence in the case and there is no bill of exceptions, and the case should be affirmed. 83 Ark. 424-6; 100 *Id.* 1-3; 42 *Id.* 29-35; 46 *Id.* 67-9; 44 *Id.* 74-6; 54 *Id.* 159-162; 59 *Id.* 251-8; 74 *Id.* 551-3.

2. The abstract does not set out all the evidence nor purport to do so, and the presumption is that the decree was sustained by the evidence. 112 Ark. 118; 89 *Id.* 349. The testimony of Auer is nothing more than an effort to contradict a written instrument by parol testimony, which can not be done. Chancery cases are tried *de novo,* and only competent evidence is considered. 78 Ark. 111-116; 76 *Id.* 153-6; 92 *Id.* 315, 320; 99 *Id.* 218, 225; 127 *Id.* 186-202; 132 *Id.* 402, 411; 213 S. W. 758-9.

3. Courts do not inquire into the adequacy of the consideration. 33 Ark. 97-101; 99 *Id.* 238; 127 *Id.* 28-36; 21 *Id.* 735; 106 *Id.* 1-4. Mere inadequacy of consideration is no ground for cancellation of a contract. 23 *Id.* 735-7.

McCULLOCH, C. J. Appellant instituted this action in the chancery court of Howard County to cancel a deed executed by him conveying certain lots in Nashville on which is situated a plant operated for the purpose of removing hulls from peanuts. The parties entered into a partnership agreement for the construction and operation of a plant under the firm name of Nashville Peanut Hulling Company, and the deed was executed to the copartnership under that name. A cash consideration of $3,000 duly paid was recited in the deed. Appellant alleges that appellee orally agreed as the real consideration for the execution of the deed (the price of $3,000 being recited merely for the purpose of specifying a paid consideration) to advance and furnish to the copartnership the sum of $10,000 to use in constructing and operating the

plant; that appellee failed to furnish any part of said sum, and the cancellation of the deed is sought on that ground.

Appellee denied that he agreed to furnish that sum or any other sum for the purpose named, and alleges that he purchased from appellant an undivided half interest in a patent applied for by appellant on a hulling machine, that he paid the stipulated price of $1,000, and that the copartnership agreement was entered into with certain mutual undertakings for the operation of the plant.

It appears from the testimony that the parties entered into a copartnership agreement in writing dated September 27, 1917, whereby appellee purchased from appellant the half interest in a peanut hulling machine, appellant having applied for a patent thereon, and they were to construct and operate a hulling plant in Nashville. The price to be paid by appellee for the interest in the patent was the sum of $1,000, and it is conceded that he paid it. The plant was built and put into operation on the lots involved in the present controversy.

On September 24, 1918, after the plant had been in operation for a considerable time, the parties entered into a new copartnership agreement in writing. Nothing was mentioned in that agreement about a conveyance of the lots in controversy. The plant is therein described as being located on these lots. Contemporaneously with the execution of the new contract appellant executed to the copartnership the deed in question reciting, as before stated, the consideration of $3,000 paid. Appellant testified that appellee orally agreed, as consideration for the conveyance, to furnish $10,000 to the copartnership to use in operating the plant, and that he failed to furnish any part of that sum. Another witness corroborated appellant. Appellee denied that he made such an agreement. The written contract is silent on that subject.

The parties operated the plant until November 4, 1918, when they leased the plant to Mulkey & Son, a firm composed of appellee and another, both appellant and appellee signing the lease contract. Under the lease con-

tract Mulkey & Son were to pay royalties to appellant and appellee on all peanuts hulled at the plant and to employ appellant as manager or superintendent at the wage of $5 per day. Appellant alleged in the complaint that Mulkey & Son had not performed the lease contract in accordance with its terms; but this is denied; and the testimony is conflicting.

Appellant's sole ground urged for canceling the deed is that appellee has failed to perform an oral agreement constituting the real consideration instead of that recited in the deed.

Waiving the question whether or not appellant has proved his alleged ground for cancellation by a preponderance of the testimony, the law is well settled against his contention. He is not permitted to show, for the purpose of defeating the conveyance, failure to perform a consideration not expressed in the writing itself. *Jernigan* v. *Davis,* 71 Ark. 494; *Sims* v. *Best,* 140 Ark. 384.

The conveyance was to the copartnership. The property became partnership assets and the recited consideration, if not paid, became a partnership liability. The remedy of appellant, if the consideration has not been paid or shall not hereafter be paid, is in the adjustment of the copartnership accounts, either by mutual agreement of the parties or by a decree of court in an appropriate action instituted for that purpose. The proof is not sufficient in this case to show a failure to perform the contract between the parties to this litigation or the lease contract between them and the lessees.

Affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BLOCK.

Opinion delivered February 9, 1920.

1. APPEAL AND ERROR—NONJOINDER OF PARTIES—PREJUDICE.—Where it developed in plaintiff's testimony that a partner, not a party, was interested in the subject-matter of the action, there was no prejudice in not dismissing the action on defendant's motion;

such partner being present as a witness for plaintiff and having estopped himself to dispute plaintiff's right to maintain the action.

2. CARRIERS — DELAY IN SHIPMENT — QUESTION FOR JURY.—Where there is a conflict in the evidence as to whether there was delay in the transportation of live stock, the case is one for the jury.

3. CARRIERS—NEGLIGENCE—BURDEN OF PROOF.—Where the evidence justified the inference of unreasonable delay in transportation, the burden is on the carrier to remove the presumption of negligence in transportation causing damage to a livestock shipment.

4. CARRIERS—DEATH OF ANIMAL—QUESTION FOR JURY.—Evidence as to whether cholera caused the death of a hog in transit *held* to raise question for jury.

5. TRIAL—INACCURATE INSTRUCTION.—Where an instruction as modified was inaccurate, but the jury must have understood what the court meant, particular attention should have been called to it by a specific objection.

Appeal from Cross Circuit Court; *R. H. Dudley,* Judge; affirmed.

Troy Pace and *Daggett & Daggett,* for appellant.

1. The court erred in overruling the motion to dismiss for misjoinder of parties plaintiff. The hogs were owned by Block and Mitchell jointly as partners.

2. The court erred in refusing to grant defendants' motion for a peremptory instruction, as there was no competent evidence of delay in shipment and consequent shrinkage of value of the hogs or of negligence in handling and delay. 96 Ark. 384; 97 *Id.* 82.

3. Mitchell was in charge of the shipment and stayed with it as far as Little Rock. The presumption of negligence does not arise where a caretaker accompanies the shipment, and the burden was on plaintiff to prove actual negligence. 50 Ark. 397; 167 N. W. 546; 10 C. J. 381; Michie on Carriers, § 2085.

4. The court erred in modifying instruction No. 2 for defendant.

5. The verdict is contrary to the evidence as to the dead and crippled hogs. 59 Atl. 1117; Michie on Carriers, § 2083.

Giles Dearing, for appellee.

1. The instructions were fair and covered the law fully, and the verdict is fully sustained by the evidence.

2. There was no error in overruling the motion to dismiss for misjoinder of parties. The suit was brought in the name of R. L. Block, the real party in interest, and Mitchell was not a necessary party.

3. The motion for a peremptory injunction was properly overruled. The items of damage were proved by Block and corroborated by the claim as filed by the Live Stock Commission Company. The delay was unreasonable and a decline in price was proved.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover damages alleged to have been sustained to a carload of hogs shipped over appellant's railroad from Strong, Arkansas, to East St. Louis, Illinois. It is alleged in the complaint that by reason of delay in the transportation of the car there was a shrinkage in weight of the hogs to the extent of 1,212 pounds, depreciating the market value $150; that there was a decline in market price suffered by reason of the delay in the sum of $161; and that one hog, of the value of $7.97, was killed, and two other hogs crippled, thereby diminishing the value to the extent of the sum of $18.49. There was a verdict in the trial below in favor of appellee for the sum of $176.86, and an appeal has been prosecuted from the judgment.

Appellee alleged in his complaint that he was the owner of the hogs and consigned the same over appellant's railroad; and this was denied in the answer; in fact, the answer contains a specific denial of each and every allegation in the complaint. Appellee testified to the shipment of the hogs, but it was drawn out from him in his testimony that he had a partner in the deal, a Mr. Mitchell, who accompanied the carload of hogs on a part of the journey. Upon the development of this feature of the case appellant moved to dismiss because Mitchell was not joined as a party plaintiff, and the failure of the court

to grant the motion is assigned here as the first ground for reversal.

Mitchell was present at the trial of the case, and was introduced as a witness by appellee; in fact, the right to recover was established by Mitchell's testimony. His presence at the trial constituted an approval of the prosecution of the action in the name of his partner alone, and he is estopped to dispute appellee's right to maintain the action. This estoppel would prevent appellant from being subjected to another suit for the same right of action, and there is no prejudice in the court's refusal to dismiss the action or to require Mitchell to be made a party. Appellant did not move the court to make Mitchell a party, which doubtless would have been done if asked.

The next contention is that the evidence is not sufficient to sustain the verdict, and that the court should have given a peremptory instruction in appellant's favor.

Appellant introduced testimony tending to show that there was no unreasonable delay in the transportation of the carload of hogs. According to the testimony of appellant there was, indeed, no unreasonable delay; but there was a conflict in the testimony. Mitchell accompanied the transportation from Strong to Little Rock, and his testimony showed that that part of the journey was accomplished with reasonable dispatch; and appellee defends the judgment on the ground that there was delay in the remaining portion of the journey. The testimony adduced by appellant tended to show that the carload of hogs left Strong about 8 o'clock on the morning of January 2, 1918; that it arrived at Gurdon, the junction point with the main line to Little Rock, at 8:30 p. m. the same date, and did not reach Little Rock until 6 o'clock on the morning of January 3. The testimony further shows that there was no fast train out of Little Rock to haul the car until 5:35 that afternoon, and that there was no delay after the car left Little Rock. Mitchell accompanied the car to Little Rock, and he testified that the car left Strong at 6 o'clock on the morning of January 2, and arrived

at Little Rock the following night at 10 o'clock. This made a sharp conflict in the testimony and, if true, it showed an additional delay of about twenty hours in the transportation of the car from Little Rock to East St. Louis. Mitchell did not continue the journey further than Little Rock, and the shipment was not accompanied by the appellee or his agent on that part of the journey. The testimony was sufficient to warrant the jury in drawing the inference of unreasonable delay in this portion of the transportation and the burden of proof was, therefore, on appellant to remove the presumption of negligence in the delay which caused the damage.

Appellant introduced a professional veterinarian, who made a *post mortem* of the hog which was found dead in the car, and he pronounced the cause of death to be cholera. It is insisted that this testimony is undisputed, and that the court should not have allowed the issue as to the damage to that particular animal to go to the jury. There was also a conflict on this point, for the testimony adduced by appellee tended to show that the hogs were in healthy condition when loaded and had not contracted cholera.

Error is assigned in the ruling of the court in modifying an instruction requested by appellant which reads as follows:

"2. You are instructed that before you can find a verdict for the plaintiff, for shrinkage and decline in the market, you must find from a preponderance of the evidence that the shipment was carelessly and negligently delayed by the defendant company, and that by the exercise of reasonable diligence said shipment could have been delivered at point of destination in time to have been sold on the market of January 4. If, therefore, you find from the evidence that said shipment was moved with reasonable diligence, according to the schedule of the defendant company in effect at that time. and that the actual running time of the trains of the defendant company that moved such shipment, plus the time consumed in feeding and resting the hogs, was such that it would

have been impossible to have delivered the shipment in time for the market of January 4, then your verdict shall be for the defendant company in so far as the claim for decline in market price and loss of weight is concerned, provided you further find from the testimony that, after the shipment was unloaded for feed and rest, it was moved towards the destination in the first available train used for such freight."

The court modified the instruction by striking out the words, "plus the time consumed in feeding and resting the hogs," and inserting the words, "if it was so unloaded."

The modification would have been better framed if the court had inserted the added words without striking out the other words, as the manifest purpose of the court was to submit to the jury the question whether or not the hogs had been unloaded and to direct the jury to exclude the resting time from the time chargeable against the railroad for making the transportation. However, the jury must have understood from this modification just what the court meant by it, and if the method of submitting it was not accurate particular attention ought to have been called to it in a specific objection. We are of the opinion that there was no prejudicial error in giving the instruction in the modified form. The judgment is therefore affirmed.

SOVEREIGN CAMP WOODMEN OF THE WORLD v. NEWSOM.

Opinion delivered February 9, 1920.

1. INSURANCE—CONSTITUTION OF BENEFIT SOCIETY.—The constitution and by-laws of a mutual benefit fraternal society form the basis and constitute a part of the contract of insurance.
2. INSURANCE—FAILURE TO PAY DUES.—If a member of a mutual benefit society failed to pay his dues as provided in the constitution and by-laws of the society, he thereby became automatically suspended from the order, and his policy was rendered null and void unless it waived the forfeiture or is estopped to rely on it.

3. INSURANCE—BENEFIT SOCIETY—LOCAL AGENT.—In a mutual benevolent society composed of a sovereign camp and subordinate camps, a clerk of a local camp, charged with the duty of collecting and forwarding monthly assessments or dues, and subject to suspension or removal for failure to discharge his duties, is an agent of the society.
4. INSURANCE—ESTOPPEL TO DENY PAYMENT.—Where a member of a local lodge of a mutual benefit society had arranged with the clerk of the local lodge to pay his dues through drafts on the member's bank, which arrangement had been carried out for many years, the society, after the clerk failed to draw for a month's assessment through a mistaken belief that it had been paid, was estopped to claim a forfeiture for nonpayment of the assessment.
5. INSURANCE—BENEFIT CERTIFICATES.—The insurance certificates issued by benefit societies to their members, so far as the insurance features are concerned, are to be regarded the same as any other ordinary policy or contract of insurance issued by companies engaged in that business.
6. INSURANCE—WAIVER OF CONSTITUTION AND BY-LAWS.—Acts 1917, No. 462, section 20, providing that the constitution and by-laws of a mutual benefit society may provide that no subordinate body nor any of its subordinate officers or members shall have power to waive any provisions of the law and constitution, is applicable to foreign as well as domestic societies.
7. APPEAL AND ERROR—QUESTION RAISED ON APPEAL.—A statute which governs fraternal societies must be given full force and effect in the final decision of causes to whch it is applicable, though it was not called to the attention of the trial court or the appellate court until rehearing.
8. INSURANCE—"WAIVER" AND "ESTOPPEL" DISTINGUISHED.—The terms "waiver" and "estoppel," though often used interchangeably with reference to insurance contracts, are distinguishable; waiver being an intentional abandonment or relinquishment of a known right, and estoppel being the effect of a party's conduct whereby he is precluded from asserting rights which might otherwise have been asserted.

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

T. E. Helm, for appellant; *Gardner K. Oliphint,* on the brief.

1. The constitution and laws of the order formed part of the contract and must have been complied with before there was any liability. 1 Bacon on Ben. Soc., §

81; 80 Ark. 419; 104 *Id.* 538; 81 *Id.* 514; 136 *Id.* 355. When the assured became a member he assented to all its by-laws and is conclusively presumed to have made himself familiar with them. 104 Ark. 538-544; 1 Bacon on Ben. Soc., § 1199; 19 R. C. L., § 17, pp. 1198-9. He must take notice of the laws of the order. *Ib. supra;* 209 S. W. 379-380. A custom of the clerk of the local order could not bind defendant. The insured was bound by the by-laws. 71 Ark. 295; 208 S. W. 587; 52 Ark. 201-206. The provision in the laws as to "waivers" is sufficient to warrant a reversal and dismissal of their cause. The insured failed to pay the March assessment and his policy lapsed. The officers of subordinate lodges have no authority to waive the payment of premiums. 104 Ark. 544; 172 S. W. 687-8; 85 S. E. 827; 125 Ark. 449; 92 Pac. 971; 25 L. R. A. (N. S.) 78; 104 Ark. 538.

2. There was no waiver of the *ipso facto* forfeiture by reason of the failure of the local clerk to draw for the premium, as he was insured's agent and not that of the sovereign camp. 22 Mo. App. 127; 137 Mass. 368; 24 Fed. 450; 31 *Id.* 62; 75 S. W. 531; 214 S. W. 583; 85 S. E. 827; 80 Pac. 375; 80 *Id.* 1110; 106 *Id.* 328-330; 89 N. W. 773. See also 89 N. W. 773; 119 *Id.* 694; 135 S. W. 201; 168 *Id.* 1026; 117 Fed. 369. Neither waiver nor estoppel can exist without knowledge of all concerned with the transaction. May on Ins., § 505; 18 Wall. 255.

Harry E. Cook, for appellee.

None of the rules or by-laws require any particular manner of making the payment of premiums or dues. For eleven years the payments had been made through the Bank of Portland by draft of the local clerk and appellant is bound by the acts of the local clerk. Forfeitures are not favored. 67 Ark. 506-511-12; 113 Ark. 174-181; 103 *Id.* 171; 130 *Id.* 12; 132 *Id.* 546; 62 *Id.* 43; 65 *Id.* 54; 89 *Id.* 111; 92 *Id.* 378; 94 *Id.* 227; 99 *Id.* 476.

The local clerk had exclusive and complete control and authority over the collection and remittance of dues and assessments and his acts are binding on appellant.

Supra; 94 Ark. 578; 133 N. C. 179; 9 Howard 390; 46 Atl. 1005; 59 Neb. 451; 81 N. W. 312; 165 N. Y. 608. See also our own decisions, 51 Ark. 440; 49 *Id.* 320; 100 *Id.* 212; 99 *Id.* 204; 67 *Id.* 506; 111 *Id.* 435; 104 *Id.* 538; 129 *Id.* 450; 3 Sup. Ct. Reporter, p. 1. The law is with the appellee and the evidence sustains the judgment.

WOOD, J. This action was instituted in Chicot Circuit Court by the appellee against the appellant to recover on a certificate of insurance issued by the appellant to the husband of the appellee, in which certificate the appellee was the beneficiary.

The appellant is a mutual benefit secret fraternal association. The appellee alleged in substance that the appellant was authorized to do a life insurance business among its members in the State of Arkansas; that in July, 1908, her husband, Asa J. Newsom, became a member of the appellant, and that it issued to him a certificate insuring his life in the sum of $1,000 to be paid to the appellee in case of his death; that on the 4th day of April, 1918, Newsom died, and that at the time of his death all dues and assessments due the appellee had been paid; that appellant had been duly notified of Newsom's death and refused upon demand to pay the appellee the amount of the sum due her under the certificate.

The appellant answered admitting the issuance of the certificate and that the appellee was the beneficiary named therein and admitting the death of Newsom. But the appellant denied that Newsom had complied with the constitution and by-laws of the appellant in that he failed to pay the dues of the Sovereign Camp for the month of March, 1918, and that on account of such failure under the by-laws Newsom became suspended and remained so at the time of his death, whereby his contract of insurance was rendered void.

The material facts upon which the issue thus joined was heard are undisputed, and they are as follows: On the 29th of June, 1908, Asa J. Newsom made written application for membership and participation in the benefi-

ciary fund of the appellant. He was received as a member and on July 10, 1908, the appellant issued to him a certificate in the sum of $1,000 in which the appellee was named as the beneficiary.

The certificate among other things, recited that it was issued and accepted subject to all the laws, rules and regulations of the fraternity then in force or that might thereafter be enacted; that the certificate should be null and void if the insured did not comply with all such laws, rules, and regulations of the Sovereign Camp of the Woodmen of the World, and with the by-laws of the camp of which he was a member.

There were these further recitals: "This certificate is issued in consideration of the representations, agreements and warranties made by the person named herein in his application to become a member and in consideration of the payment made when introduced in prescribed form, also his agreement to pay all assessment and dues that may be levied during the time he shall remain a member of the order.

"If the admission fees, dues and Sovereign Camp fund assessments levied against the person named in this certificate are not paid to the clerk of his camp as required by the constitution and laws of the order, this certificate shall be null and void and continue so until payment is made in accordance therewith."

The application contained among other things the following recitals: "I hereby consent and agree that this application, consisting of two pages, to each of which I have attached my signature, and all the provisions of the constitution and laws of the order, now in force or that may hereafter be adopted, shall constitute the basis for and form a part of any beneficiary certificate that may be issued to me by the Sovereign Camp of the Woodmen of the World, whether printed or referred to therein or not.

"I agree that, if I fail to comply with the laws, rules and usages of the order now in force or hereafter adopted, my beneficiary certificate shall become void and

all rights of any person or persons thereunder shall be forfeited."

"I agree to pay all assessments and dues for which I may become liable while a member of the order, as required by its constitution and laws."

The pertinent provisions of the constitution and laws of appellant are as follows:

"Section 3. The object of the society is to combine white male persons of sound bodily health, etc., into a secret, fraternal beneficiary and benevolent society; to create a fund from which, on the death of members who have complied with all the requirements, the beneficiaries of said members may be paid according to the agreements; that a monument shall be erected at the grave of such member who dies in good standing and according to the contract and agreement with the society."

"Section 56. In order to pay death losses, disability benefits, monument obligations, emergency fund and Sovereign Camp general fund dues, every applicant admitted to membership to the Sovereign Camp, Woodmen of the World, on or after September 1, 1901, and to whom a beneficiary certificate is issued, shall annually pay to the Sovereign Clerk, in advance, an assessment based on their ages at nearest birthday at a date of entry (except as otherwise provided in sections 42 and 43 of the constitution and laws) as specified in the following table of rates."

Then follows the table of rates showing that for the age of 40 the annual assessment on $1,000 is $15.84. Then follows the provision that members should they so elect may pay the same in 12 monthly installments to the clerk of their camp on or before the first day of each month based on a table of payments. Then follows the table showing that at the age of 40 on a certificate of $1,000 the monthly payment is $1.32.

"In the event the insured has not paid his annual assessment in advance, but has paid installments of his assessment and dues up to and including the month of his death, the Sovereign Camp shall deduct from the

amount of his certificate the balance due for the installments to cover the entire annual assessment."

"Section 60. The following conditions shall be made a part of every beneficiary certificate, and shall be binding on both member and this society:

"*First.* This certificate is issued in consideration of the representations, warranties and agreements made by the person named herein in his application to become a member, and in consideration of the payment made when introduced in prescribed form; also his agreements to pay all assessments and dues that may be levied during the time he shall remain a member of this society.

"*Second.* If the admission fees, dues and Sovereign Camp fund assessments levied against the person named in this certificate are not paid to the clerk of his camp as required by the constitution and laws of this society, this certificate shall be null and void and continue so until payment is made in accordance herewith.

"*Waivers.* Section 69 (a). No officer, employee or agent of the Sovereign Camp or of any camp has the power, right or authority to waive any of the conditions upon which beneficiary certificates are issued or to change, vary or waive any of the provisions of this constitution or these laws, nor shall any custom on the part of any camp or any number of camps—with or without the knowledge of the Sovereign officer—have the effect of so changing, modifying, waiving, or foregoing such laws or requirements. Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the constitution and laws then in force or hereafter enacted.

"(b) The constitution and laws of the Sovereign Camp of the Woodmen of the World now in force, or which may hereafter be enacted, by-laws of the camp now in force or which may be hereafter enacted, the application and certificate shall constitute a part of the beneficiary contract between this society and the member.

"Section 110. Every member of this society shall pay to the clerk of his camp one annual assessment or one

monthly installment of assessment as required in section 56. * * *

"(b) If he fails to make any such payments on or before the first day of the month following, he shall stand suspended, and during such suspension his beneficiary certificate shall be void."

"Section 113. On or before the fifth day of every month the clerk of each camp shall cause a warrant to be drawn on the banker of his camp, signed by himself and the consul commander, for all the Sovereign Camp dues in the hand of the banker then due the Sovereign Camp, and forward said funds and all other funds due the Sovereign Camp to the Sovereign Clerk. Such amounts shall be remitted in money order, or bank draft with exchange, payable to the order of the Sovereign banker. Accompanying such remittances, the clerk shall also forward such detailed statement of the standing of the members in the camp as shall be required for the information of the Sovereign Clerk, upon blanks furnished for that purpose."

"Section 94. He shall deliver or forward to the last known postoffice address of the person paying the same, a receipt for all moneys paid due the camp, pay the same to the banker, taking his receipt therefor, attest all warrants drawn on the banker; also beneficiary certificates and other official documents, and attach the camp seal.

"(e) He shall remit all funds due and belonging to the Sovereign Camp to the Sovereign Clerk as by law provided. In case of failure of the clerk of the camp to comply herewith, the Sovereign Commander shall have the right to declare his office vacant and require the election and installation of his successor."

"Section 119 (b). Should any clerk knowingly violate this section, he shall on proof thereof be suspended from his office by the Sovereign Commander and expelled from this society by his camp."

The clerk of the Lakeside Camp of the appellant, the camp of which Newsom was a member, testified that Newsom resided at Portland; that he paid his assessments

up to March 1, 1918, by draft which witness drew on the Portland Bank with his receipt attached. Newsom had an agreement with witness by which a draft was to be drawn each month on the Portland Bank with witness' receipt attached, and this had been done since witness went into the office of clerk of the local camp, a period of about a year and a half and up to but not including the installment for March, 1918; that on March 1st witness drew a draft on the Bank of Portland with receipt attached for $1.35, which was to cover the following amounts: Sovereign Camp fund $1, camp monthly dues 25 cents, specials ten cents. All assessments had been paid by Newsom prior to that time in that manner. Newsom died the 4th of April. Witness notified the head camp of the fact and asked them to send the necessary papers to be filed to constitute proof of the death and also a statement for the unpaid premium to be deducted from the policy. Witness received in response a statement from the Sovereign Camp showing a balance due by Newsom at the time of his death on account of the difference between old and new rate since September 1, 1915, and unpaid installments to complete annual assessment in the sum of $4.40. With this statement was an order for the deduction of the above amount to be signed by the beneficiary. In the statement was a recital that the appellant "does not admit a liability in said certificate until proofs of death have been duly executed and approved." The receipt for the February assessment was made on the 24th of March and shows that Newsom was paid up to and including February dues. The March report was made on the 24th day of April. That report shows that Newsom was dead. Under the regulations of appellant the report should have been made on or before the 5th of each month. In witness' report for March it shows that the draft was not drawn the first of April for the March report. In making up the statement witness took the statement from the head camp of the amount of the deduction to be made from the certificate which was to be signed by Mrs. Newsom, the beneficiary,

as the amount due the head camp and he did not, therefore, draw for the March assessment. Witness did not draw the draft for the monthly assessment the first of each month but drew when he went to the bank to collect for the different ones at the bank. Newsom relied on witness to draw the draft to pay his monthly dues and attach the receipt of witness thereto and witness had always done that. It had been the custom of witness to go to the bank and draw drafts for the installments due by other members. Witness notified appellant of the death of Newsom by post card previous to the time he sent in his regular report. The reason witness didn't draw a draft for the March dues was because he was under the impression from the deduction statement Mrs. Newsom had sent the money and paid the March dues, by reason of the deduction.

Witness further testified that it had been his custom to send in his monthly report after the time prescribed by the by-laws, and that the Sovereign Camp or Parent Lodge had made no complaints and urged no objection to his reports because of the fact that they were not made within the time prescribed by the by-laws. He testified that other members of the Lakeside Camp besides Newsom paid their installments in the same manner.

It was shown that Newsom kept a deposit with the Portland Bank and instructed its cashier to pay the monthly draft with receipt attached of the clerk of the Lakeside Camp, and that the cashier had uniformly and without intermission paid these drafts when presented. That this agreement had extended over a period of two years; that during that time and until the death of Newsom he had on deposit with the Portland Bank a sum sufficient to pay the monthly installment or draft. That other members of the camp paid their monthly dues in the same manner.

The appellee requested the court to instruct the jury to return a verdict in her favor for the sum of $1,000 with 6 per cent. interest from July 4, 1918, which instruction the court granted. The court refused the prayer of

the appellant for instruction to return a verdict in its favor. From the judgment in favor of appellee is this appeal.

The application for membership in appellant order and the certificate issued thereon both expressly refer to the laws, rules, and regulations of appellant and make the certificate null and void if the holder thereof fails to comply with such laws, rules, and regulations.

It is well settled by our own cases, as well as the authorities generally, that the constitution and laws of a mutual benefit fraternal society, such as that of appellant, form the basis of and constitute a part of the contract of insurance. This contract measures the obligations of the members and the liability of the association or governing body. *Block* v. *Valley Mutual Ins. Assoc.,* 52 Ark. 201; *W. O. W.* v. *Jackson,* 80 Ark. 419; *Supreme Lodge K. & L. of H.* v. *Jackson,* 81 Ark. 512; *W. O. W.* v. *Hall,* 104 Ark. 538; *Supreme Royal Circle* v. *Morrison,* 105 Ark. 140-43; *Grand Lodge A. O. U. W.* v. *Davidson,* 127 Ark. 133; see also *W. O. W.* v. *Anderson,* 133 Ark. 411; *United Assurance Assn.* v. *Frederick,* 130 Ark. 12-15; *Baker* v. *Mosaic Templars of America,* 135 Ark. 65; *Sovereign Camp W. O. W.* v. *Compton,* 140 Ark. 313. In 1st Bacon on Benefit Societies, section 80, it is said: "The constitution, rules, and by-laws of a voluntary association is a contract between the members."

Therefore, if Newsom failed to pay the dues for the month of March to the clerk of the Lakeside Camp, the local camp of appellant, as provided in its constitution and laws, he thereby automatically became suspended from the order and his policy or certificate was rendered null and void. See *Patterson* v. *Equitable Life Assn.,* 112 Ark. 171-9 and cases cited. Hence the appellant is not liable thereon unless it waived, or is estopped by its conduct from relying on, the forfeiture.

The first question then is, were the dues paid for the month of March so far as the insured Newsom was concerned, or, to state the question in another form, was

the appellant estopped by its conduct to deny that Newsum's dues were paid?

Under the laws of the association it was the duty of the clerk of the local camp to collect the monthly assessments or dues and to forward these and all other funds to the clerk of the Sovereign Camp on or before the fifth day of every month. This he could do by money order or bank draft with exchange payable to the order of the Sovereign Banker. It was the duty of the clerk of the local camp to forward with his remittances, upon blanks furnished him for that purpose by the Sovereign Camp, a detailed statement of the standing of the members for the information of the Sovereign Clerk. Upon the failure of the local clerk to thus remit the funds, the Sovereign Commander had the right to declare the office vacant and to require the election of his successor. If the clerk knowingly failed to discharge his duty in this respect, the Sovereign Commander also had the power to suspend him from office. *Trotter* v. *Grand Lodge of Iowa of Honor,* 132 Iowa 513; Amer. & Eng. Ann. Cas., vol. 11, p. 533, is a case quite similar in its facts to the case under consideration. The opinion contains a thorough discussion of issues like the ones here involved. The opinion and the case note are an elaborate review of the authorities. The reasoning of the opinion and the conclusions there reached meet with our unqualified approval. In the course of the opinion in that case we find the following: "The authorities are substantially unanimous that in schemes of co-operative life insurance in which the authority to issue benefit certificates, prescribe terms of membership and levy assessments, is vested in a grand or supreme lodge or council or other central governing body, which central body exercises jurisdiction over local lodges or societies through which the membership is recruited and by the officers of which assessments are collected and remitted, the local organization and its officers to whom the duty of making such collection is committed are to be considered the agents of the governing body. That this agency is subject to the operation of the ordinary rules

applicable to agencies of the same general character in the business of ordinary life insurance is also well settled."

In *Supreme Lodge K. of H.* v. *Davis,* 26 Colo. 252, it is held: "In a mutual benevolent order composed of a supreme lodge and subordinate lodges, an officer of a subordinate lodge charged with the duty of notifying the members of assessments made by the supreme lodge for the purpose of paying insurance certificates of deceased members, and of collecting and forwarding to the supreme lodge such assessments, is an agent of the supreme lodge, notwithstanding a rule or by-law of the order recites that such officer in collecting or forwarding assessments shall be the agent of the members of the subordinate lodge, and the supreme lodge is charged with all knowledge possessed by the agent in making the collection."

This is a sound doctrine and according to it the clerk of the local camp of appellant, under the laws of its order, was, in the manner of making collection of assessments and remittances and reports to the Sovereign Clerk, the agent of appellant.

For about ten years Newsom was a member of Lakeside Camp of appellant. He resided at Portland and arranged with the clerk of the local camp to pay his dues in the following manner: The clerk was to make a monthly draft on the Bank of Portland, with receipt attached, for the amount of Newsom's dues. Newsom kept on deposit with said bank a sum sufficient to pay these drafts and instructed its cashier to honor the drafts made by the clerk of Lakeside Camp for these dues, which the cashier invariably did. It was the custom of the clerk under this arrangement to collect the monthly dues of Newsom and other members in this manner, but the clerk failed to collect the dues for March for the reason, as he states, that before he made his monthly collection and report for that month Newsom died, and he was under the impression that Mrs. Newsom, after the death of Newsom, had sent the money and had received credit for the

dues by the Sovereign Camp in the deduction statement which they rendered him for her to sign.

There is no law of appellant making the clerk of the local camp the agent of the members in the matter of complying with the regulations of appellant relating to the collection of the assessments for the benefit fund.

It will be observed, too, that the clerk of the local camp in making his monthly remittances had something more to do than merely state the amount collected from the members. He had also to report the standing of the members for the information of the Sovereign Clerk.

Since the clerk of the local camp must be regarded as the agent of the Sovereign Camp in the matter of collecting assessments and reporting the standing of the members to the Sovereign Clerk, the knowledge of the agent acquired in the discharge of his duties was the knowledge of appellant. Appellant, therefore, must be held to have known that when the time came for the payment of Newsom's dues for the month of March he had on deposit in the Bank of Portland funds with which to pay such dues and that such assessment would have been promptly paid at the time same was due but for the neglect and fault of appellant's own clerk and agent in collecting the same according to the method and custom which the agent had adopted in collecting or receiving the payment of dues and making his reports.

It appears from the undisputed facts of this record that money was on deposit in the Bank of Portland for the purpose of paying the assessments of Newsom at the time when they became due under the laws of appellant. The laws of the order nowhere prescribe the method which the clerk should pursue in collecting the assessments. That was left entirely with him, and he adopted the method of collecting same, as we have shown, by draft, with his receipt attached, on the bank where the money was deposited to pay the same. He also adopted (for his own convenience, not Newsom's) the custom of making his remittances and report after the fifth of each month. It occurs to us that the case is precisely the same

in legal effect as if Newsom had tendered to the agent of the appellant, duly authorized to collect monthly assessments, the amount of such assessment at the time the same was due and that the agent failed or refused, for some reason, no matter what, to receive the same and report to his principal, as was his duty to do on the fifth of each month.

In *Royal Circle of Friends of the World* v. *Paine,* 103 Ark. 171, we held that, "Where a member of a mutual benefit association tenders his dues or assessment to the proper officer of the association and the tender is refused there can be no forfeiture of his rights for non-payment of his dues or assessments."

As we view the facts, it must be held as a matter of law that so far as Newsom was concerned he had paid his March dues, which is but another way of saying that the appellant is estopped by the conduct of its duly authorized agent acting within the scope of his authority from asserting that such assessment was not paid.

Counsel for appellant quote in their brief from *Woodmen of the World* v. *Hall,* 104 Ark. 538-44, as follows: "But it is well settled by the weight of authority that the officers and subordinate lodges of a mutual benefit association have no authority to waive the provisions of its by-laws and constitution relating to the substance of the contract between the applicant and the association." This language has since also been quoted with approval in *Clinton* v. *Modern Woodmen of America,* 125 Ark. 115-19, and in *Pate* v. *Modern Woodmen of America,* 129 Ark. 159-62.

Counsel for appellant contend that under the doctrine of these cases the subordinate lodges and the officers thereof have no authority to waive the forfeiture of an insurance policy held by a member of a benefit association where such forfeiture is caused by a failure of the member to pay his monthly assessments as provided by the by-laws and constitution of the association; that the association is not estopped by the conduct of the subor-

dinate lodges and the officers thereof from setting up the forfeiture in defense of an action on the policy.

In *Woodmen of the World* v. *Hall,* and *Modern Woodmen of America* v. *Clinton, supra,* the element of estoppel by a settled course of conduct on the part of the local clerk to collect and remit assessments after they were due did not enter into the consideration and determination of those cases. They are easily distinguished from the present case on the facts, and the language above quoted was not necessary to the conclusion there reached. However, in *Pate* v. *Modern Woodmen of America,* the decision was bottomed squarely upon the language above quoted from *Woodmen of the World* v. *Hall.*

It has never been the policy of this court to intentionally overrule its former decisions by indirection. Therefore it is certain that this court did not intend by the language above quoted to overrule the doctrine announced before, and many times since, the decision in *Woodmen of the World* v. *Hall, supra,* was rendered, to the effect that, in the absence of some statute making a distinction between them, the insurance certificate issued by benefit societies to their members, so far as the insurance features are concerned, must be regarded the same as any other ordinary policy or contract of insurance issued by companies engaged in that business. Such companies, whether they be fraternal and benevolent benefit societies or "old line" insurance companies, can only transact the business of insurance through agents. The duties, obligations, and liabilities growing out of these contracts must be governed by the general laws of principal and agent as relating to such contracts. See *Block* v. *V. M. Ins. Assoc.,* 52 Ark. 201; *Johnson* v. *Hall,* 55 Ark. 210-12; *Carruth* v. *Clawson,* 97 Ark. 50; *Peebles* v. *Columbian Woodmen,* 111 Ark. 435; *Grand Lodge A. O. U. W.* v. *Davidson,* 127 Ark. 133.

In *Peebles* v. *Columbian Woodmen, supra,* we said: "For the reason that an insurance corporation can only act through its officers and agents, the company and its

officers and agents are in law one and the same as to all transactions within the scope of the authority of its officers and agents. Therefore, it has been generally held in this State that the knowledge acquired by the agent when in the discharge of his duties as to matters within the scope of his agency will be imputed to the principal."

In *Grand Lodge A. O. U. W.* v. *Davidson, supra,* we said: "There is no difference between this contract and any other contract. Individuals and business corporations can waive favorable provisions in their contracts, and there is no reason why fraternal organizations should not be permitted to waive forfeiture in their contracts."

But the language above quoted from *Woodmen of the World* v. *Hall* is susceptible of the construction that in no case, and under no circumstances, can the officers and subordinate lodges of a mutual benefit association waive a forfeiture of a certificate or policy that has accrued under the by-laws and constitution of the association. Such, indeed, as we have seen, was the construction given it in *Pate* v. *Modern Woodmen of America, supra.* When thus construed, the language is too broad and brings our decisions into conflict. It commits this court to what we now conceive to be an unsound doctrine, and therefore we hereby expressly disapprove it, and the cases in which the above language is quoted and relied on are to that extent overruled. The language should be qualified by saying that the officers and subordinate lodges of a mutual benefit association have no authority to waive the provisions of its by-laws and constitution which relate to the substance of the contract between the insured member and the association unless, in those matters pertaining to the contract, they are the authorized agents of the association and, in what they do, are acting within the scope of their authority.

Two reasons are usually given for holding that subordinate lodges and officers of a fraternal benefit society cannot waive a forfeiture, or by their conduct estop the association from claiming a forfeiture in defense to an

action based on a policy of the association where such forfeiture was caused by a failure of the insured to pay the monthly dues or assessments in accordance with the constitution and laws of the association. These reasons are as follows: First, because the members of the association are conclusively presumed to have knowledge of the constitution and laws of the association which enter into the contract. Second, because a strict compliance by the members with the laws of the association with reference to the prompt payment of dues is essential to the life of the association. These reasons do not appeal to us as sufficient to differentiate insurance contracts of fraternal societies from the ordinary contracts of insurance issued by stock (old line) companies, or to subject the former to different rules from the latter concerning the doctrine of agency and of waiver and estoppel.

In the first place all ordinary policies of insurance issued by "old line" companies usually contain provisions expressly prohibiting certain agents from waiving a forfeiture and providing that those companies shall not be estopped by the conduct of their agents from setting up a forfeiture caused by failure of the insured to pay the premiums or to comply with other conditions precedent to a binding contract of insurance. Where these provisions are embraced in ordinary policies of insurance, the insured must take notice of them. They are a part of the contract, and the insured is conclusively presumed to have knowledge of them the same as the holders of certificates in a mutual benefit society are conclusively presumed to have knowledge of its by-laws. So the contention that the forfeiture should be declared in the one case and not in the other, for the reason stated, is unsound. There is in reality no distinction between them.

In the second place, as a matter of policy, looking to the preservation and perpetuity of the association, if there is to be any difference between "old line" and benefit companies in the strictness required in the payment of premiums and assessments in order to keep alive the contract of insurance, the latter companies should be less

strict. It seems to us that it would be far wiser for fraternal and benevolent societies, in cases where the principles of right, justice and good conscience demand it, to exercise more leniency in the enforcement of the assessment payments than would be required or expected, under the same circumstances, of strictly financial companies in the enforcement of premium payments. Such a course would certainly be more in harmony with the object and purpose of the society as expressly declared in section 3 of its constitution and laws. Such purpose should not be overlooked or ignored by the supreme officers in the interpretation and enforcement of the laws of the society.

Forfeitures are not favored. If circumstances exist, such as here revealed, which would render it unconscionable or a legal fraud upon the rights of the insured for an old line company to declare a forfeiture, *a fortiori* would it be a fraud and unconscionable for a fraternal society under the same circumstnaces to declare a forfeiture.

If fraternal organizations cannot be kept alive without perpetrating hardships upon their members which the law does not tolerate in the case of a policy holder in an ordinary insurance company, then fraternal organizations, in so far as their insurance business is concerned, should die. They should not be permitted under the guise of fraternity and benevolence to inveigle unwary members into insurance contracts which are not governed by the same rules of law as any other ordinary contract of insurance.

The question then recurs as to whether or not the clerk of the local camp under the facts of this case was the agent of the Sovereign Camp in the duty of making collections and remittances and making the report of the standing of the members. If he was not the agent of the Sovereign body in these matters, whose agent was he? The Sovereign Camp had the power to suspend or remove him for the derelictions of which he was here shown to be guilty. The individual member had no such power.

Where the interest of the Sovereign body and the individual member conflict, certainly the local clerk could not be considered the agent of both.

We have already determined the question in the affirmative, and we believe there is no other correct solution of it. Being the agent of the Sovereign Camp, and, as we have seen, acting within the scope of his authority and in the line of his duty, the law applicable to agents, and of waiver and estoppel as in other ordinary cases of insurance must apply in this case.

Counsel for appellant contend that the case is ruled on the question of waiver and estoppel not only by *Woodmen of the World* v. *Hall, supra,* and other cases of our own court cited by them, but they earnestly invite our attention to the case of *Modern Woodmen of America* v. *Tevis,* 117 Fed. 368. That case in its essential facts is precisely similar to the facts in the case at bar except that in the Tevis case there was a provision in the by-laws making the clerk of the local camp the agent of that camp and not of the head camp.

The Tevis case first came before the Circuit Court of Appeals of the 8th Circuit when that court was composed of Judges Caldwell, Thayer, and Sanborn. That court then decided, Mr. Justice Sanborn delivering the opinion of the court, that the clerk of the local camp was the agent of the governing body to collect and remit assessments and to report the collections, delinquencies, etc., and that the society was estopped by the conduct of its agent from enforcing a forfeiture for default in prompt payment of dues. The exact question we now have under consideration was decided by that court as we are now deciding it. See *M. W. O. A.* v. *Tevis et al.,* 111 Fed. 113-19, 49 C. C. A. 256.

A rehearing was asked and while same was pending the Supreme Court of the United States in *Northern Assurance Company* v. *Grand View Bldg. Assoc.,* 183 U. S. 308, 46 L. Ed. 313, decided, among other things, that the written contracts of insurance, if unambiguous, must speak for themselves and cannot be altered or contra-

dicted by parol evidence unless in the case of fraud or mutual mistake of facts; that "it is competent and reasonable for the insurance companies to make it a matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered."

After the decision of the United States Supreme Court, the Circuit Court of Appeals of the 8th Circuit, composed of the same judges who made the former decision in the Tevis case, *supra,* granted a rehearing and decided that the decision of the United States Supreme Court in *Northern Assurance Co.* v. *Grand V. Bldg. Assn.,* was an authoritative determination of the question at issue in the Tevis case and that they were bound by that decision. Therefore, the Circuit Court of Appeals, through Judge Sanborn, held in effect that benefit societies may limit the authority of their agents, and that when they do so the latter cannot bind their principal by contract, estoppel or waiver, to those who know the limitations upon their power and that the insured and their beneficiaries under contracts with benefit societies are charged with knowledge of the limitations upon the power of the agents which are found in the policies or certificates and in the by-laws or applications which are a part of their contracts, and are bound by those limitations.

But this court, except where Federal questions are involved, is not bound by the decisions of the Supreme Court of the United States. Therefore, after the decision of that court in *Northern Assurance Company* v. *Grand View Bldg Assn., supra,* this court, in *People's Fire Ins. Assn.* v. *Goyne,* 79 Ark. 315, after an elaborate review of our own decisions in the light of the above decision of the Supreme Court of the United States and other authorities, deliberately repudiated the doctrine of the Supreme Court of the United States as announced in *Northern Assurance Co.* v. *Grand View Bldg. Assn.,* and held that the doctrine on the subject which had been pre-

viously announced by this court in *Insurance Company* v. *Brodie,* 52 Ark. 11, was sound.

In the Brodie case we held that an insurance company "may, at any time it sees fit, give authority to any agent to make agreements or to waive forfeitures;" that "it is not bound to act upon the declaration in its policy that they had not such authority;" that "the waiver is provable by either written or oral evidence, notwithstanding a declaration in the policy to the contrary."

In the case of *Fire Ins. Co.* v. *Goyme, supra,* we held that an insurance company may be estopped by the conduct of its agent acting in the apparent or real scope of his authority, notwithstanding clauses in the application or policy providing that it shall not be bound by any such conduct of its agent. That "when an agent does anything within the real or apparent scope of his authority, it is as much the act of the principal as if done by the principal himself."

The doctrine as to waiver and estoppel as announced by the Circuit Court of Appeals in the first opinion in *Modern Woodmen of America* v. *Tevis,* 111 Fed., *supra,* is correct and in conformity with our own decisions on the subject, whereas the doctrine announced in the same case, 117 Fed., *supra,* is not the law on that subject, and is contrary to numerous decisions of this court. An examination of the last case will discover that the court correctly held under the facts that the clerk of the local camp was the agent of the sovereign body and not of the local camp, and in this respect did not change its former holding.

The doctrine of the Brodie and Goyne cases, *supra,* has been reiterated in numerous cases since they were rendered and has never been overruled or impaired, except by the language used in *W. O. W.* v. *Hall, supra,* and that language, as we have already stated, as to waiver and estoppel under facts similar to those here presented, we expressly disapprove and overrule.

Having reached the conclusion that the clerk of the local camp was the agent of appellant and acting within the scope of his authority in making collections, remit-

tances, and reports to the sovereign clerk, it is manifest that appellant is estopped by the conduct of the local clerk from claiming a forfeiture of Newsom's policy or certificate under the undisputed facts above set forth. The law applicable to such a state of facts is accurately stated in case note to *Trotter* v. *Grand Lodge,* 132 Ark. 541: "Where a mutual benefit association has in repeated instances received from a member the payment of overdue assessments so as to establish a custom or course of dealing between the parties and lead the member to believe that a strict observance of a requirement as to the time of payment is not required, it is held that the certificate of insurance is not forfeited by failure to pay an assessment at the time when the by-laws of the society or a stipulation in the certificate requires it to be paid and that a provision for forfeiture for non-payment at such time is waived within the customary period of extension of the time of payment." Numerous cases are cited to support the text. Other strong cases to the same effect are *Edmiston* v. *The Homesteaders,* 93 Kan. 485, Ann. Cases 1916 D 588; *Head Camp* v. *Bohanna,* 59 Col. 545, 151 Pac. App. 1. The above doctrine in substance has been also repeatedly announced by this court. See *German Ins. Co.* v. *Gibson,* 53 Ark. 499; *Pac. Mutual Life Ins. Co.* v. *Walker,* 67 Ark. 147-53; *Peebles* v. *Columbian Woodmen,* 111 Ark. 431, *supra; Grand Lodge A. O. U. W.* v. *Davidson,* 127 Ark. 133-38; *Interstate B. M. A. Assn.* v. *Greene,* 132 Ark. 546-49, and cases cited.

The judgment, therefore, is correct and it is affirmed.

McCULLOCH, C. J., and SMITH, J., dissent.

WOOD, J. (on rehearing). Our attention for the first time is called to section 20 of act 462 of the Acts of 1917, which reads as follows:

"The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the law and constitution of the society, and the same shall be binding on the

society and each and every member thereof and on all beneficiaries of members."

Act 462 is an act "pertaining to the regulation and incorporation of fraternal beneficiary associations, societies, or orders and other matters pertaining thereto." The act is exceedingly comprehensive, and embraces within its terms both domestic and foreign fraternal beneficiary associations, societies, or orders, where its provisions, either by express reference or because of the character of such provisions, are alike applicable to both.

In *Acree* v. *Whitley,* 136 Ark. 149, we held that a foreign fraternal benefit society coming within the definition of a fraternal society as set forth in the first section of the act was not subject to garnishment under section 21 of the act. We, therefore, held in the above case that section 21 of the act was applicable to foreign societies. In that case the society against which the writ of garnishment was directed was an Indiana organization. If section 21 is applicable to foreign societies, then section 20 is also applicable to such societies.

Section 20 is couched in general terms which are applicable to foreign as well to domestic societies, and we therefore hold that such section is applicable to the appellant in this case. This would have been our holding in the original opinion if our attention had been drawn to the statute. The appellant, however, did not in the court below, nor in the elaborate brief filed by its counsel in this court, direct our attention to this provision of the statute, and we overlooked it. It is a part, however, of the statute law governing fraternal societies and must be given full force and effect in the final decision of causes to which it is applicable. Therefore, what we said in the original opinion concerning the authority of a subordinate body and its subordinate officers to waive any of the provisions of the laws and constitution of the society is retracted, and we now hold, in view of this statute, that it was not within the power of the local clerk of appellant to waive the payment of the March dues on or before the first day of April as required by the law

and constitution of appellant. This provision of appellant's laws and constitution under the provisions of section 20 of act 462, *supra,* was binding on the society and its members and the beneficiaries of members. The certificate in suit is an Arkansas contract, and is governed by the above statute.

This conclusion, however, does not change the result of our former holding, nor what we declared in the original opinion concerning the authority of the clerk of the subordinate lodge acting within the scope of his authority to bind appellant by his conduct, and to estop it from asserting a forfeiture of the policy. The well established rules of law applicable to principal and agent would estop appellant from denying, under the circumstances, that the dues for the month of March had been paid. It will be observed that the language of section 20 is a limitation upon the authority of the subordinate body and the subordinate officers or members to *waive* any of the provisions of the law and constitution of the society. The language can not be extended to cover cases of estoppel where the society by a settled course of conduct on the part of its agent acting within the scope of his authority, has misled the member to his prejudice. Where such is the case, the society is liable not on the ground of waiver but on the ground of estoppel.

"A waiver is an intentional abandonment or relinquishment of a known right." Words and Phrases, p. 1222; 29 Am. & Eng. Enc. of Law, p. 1091; also see 40 Cyc., p. 255 "C" and cases there cited; Law of Waiver, Bowers, sec. 1, p. 19. "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." 2 Pomeroy's Eq. Jur., sec. 804; Words and

Phrases, p. 336. These terms, "waiver" and "estoppel," though often used interchangeably with reference to insurance contracts, are really distinguishable and that distinction must be observed in construing the language of section 20.

An illuminating case showing the distinction between waiver and estoppel is that of *Sovereign Camp Woodmen of the World* v. *Putnam,* 206 S. W. 970-2. In that case the Court of Civil Appeals of Texas had under consideration a section of the laws and constitution of this same order, similar to the section under review here. Special Judge Chilton, in an able opinion, voicing the unanimous decision of the court, among other things, says:

(3) "The terms, 'waiver' and 'estoppel,' are often used indifferently in the same sense as if they were interchangeable terms; but there is a distinction which it is often important to keep in mind. Waiver presupposes a full knowledge of a right existing and an intentional surrender or relinquishment of that right. It contemplates something done designedly or knowingly, which modifies or changes existing rights, or varies or changes the terms and provisions of a contract; but not so with estoppel.

"Waiver is the voluntary surrender of a right; estoppel is the inhibition to assert it from the mischief that has followed. Waiver involves both knowledge and intention; an estoppel may arise where there is no intention to mislead. * * * Waiver involves the acts and conduct of only one of the parties; estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice, or into an altered position; an estoppel always involves this element. * * * Estoppel arises where, by the fault of one party, another has been induced, ignorantly or innocently, to change his position for the worse in such manner that it would operate as a virtual fraud upon him to allow the party by whom he has been misled to assert the right in controversy." 40 Cyc., pp. 256, 257.

(4) "The principle of estoppel in equity stands upon the very foundation of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other, and gives that effect and meaning to their actions which common sense and justice dictate. A fraternal insurance association, such as appellant, is as much subject to the operation of its principles as any other association of persons or as an individual." See also *Libbey* v. *Haley,* 91 Me. 331, 39 Atl. 104.

In 2nd May on Insurance, section 361, it is said that, "Forfeitures are so odious in law that they will be enforced only where there is the clearest evidence that such was the intention of the parties. If the practice of the company and its course of dealings with the insured and others known to the insured have been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such a forfeiture, as against one in whom their conduct has induced such belief."

This doctrine of equitable estoppel is as applicable to fraternal societies as to old line companies.

Now here there was something more than a single act of the local clerk in not collecting the dues of Newsom on or before the first of each month. The clerk through a period of years had adopted the method set forth in the original opinion which was clearly calculated to induce the belief upon the part of Newsom that his dues had been paid according to the method adopted by the local clerk for collecting the dues and reporting the same, and that the society had accepted such payments and would, therefore, not insist upon a forfeiture because of the failure of the clerk to comply, in this respect, with its laws and constitution. This conduct of appellant's agent under the authorities above cited clearly estops appellant from denying that the March dues were paid as required.

The above case of *Sovereign Camp Woodmen of the World* v. *Putnam* is also excellent authority for the doc-

trine announced in the original opinion that the local camp clerk, in the matter of collecting the assessments and dues, the reporting of same, and the standing of members, was the agent of the sovereign camp. To the same effect, see *Knights of Maccabees of the World* v. *Johnson,* 185 Pac. Rep. 82; *Modern Woodmen of America* v. *Asa Colman,* 64 Neb. 162, 89 N. W. 641; *Grand Lodge of United Brothers of Friendship and Sisters of the Mysterious Ten* v. *Carroll,* 174 Pac. (Okla.) 767.

The motion for rehearing is therefore overruled.

HINES v. RICE.

Opinion delivered February 9, 1920.

1. CARRIERS—ASSAULT ON PASSENGER—LAW OF PLACE OF ASSAULT.—Where a drunken fellow passenger assaulted plaintiff in Missouri, the laws of that State must govern in determining whether there is any liability against the carrier.
2. CARRIERS—INJURY TO PASSENGER—LIABILITY.—A carrier is liable to a passenger for injuries inflicted by any cause if it could have been prevented by the exercise of the highest degree of care usually exercised by very cautious persons engaged in similar business.
3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The Supreme Court must give the testimony its strongest probative force in favor of the verdict, which will not be set aside when supported by substantial evidence.
4. CARRIERS—ASSAULT ON PASSENGER—CONTRIBUTORY NEGLIGENCE.—A woman passenger was not guilty of contributory negligence when she took a seat beside a man who was drunk and asleep, there being no other seat vacant and the conductor having made no effort to secure her another seat.
5. CARRIERS—PERSONAL INJURIES OF PASSENGER—INSTRUCTION.—In an action for injuries to a passenger assaulted by a drunken fellow passenger, an instruction on the measure of damages that if the jury found for the plaintiff they should assess damages at such sum as would fairly and reasonably compensate her for any injuries sustained by reason of the other passenger's insults and assaults, though too general, was not open to a general objection.

6. CARRIERS—PERSONAL INJURIES—EXCESSIVE DAMAGES.—Where a female passenger was insulted and assaulted by a drunken fellow passenger who alleged she had his ticket and who laid hands on her, a verdict of $1,000 was not excessive where she received a fright and suffered a nervous collapse and other physical injuries.

Appeal from Benton Circuit Court; *W. A. Dickson,* Judge; affirmed.

W. F. Evans and *Warner, Hardin & Warner,* for appellant.

1. The evidence is not sufficient to sustain the verdict. The defendant was not guilty of negligence. The uncontradicted testimony shows that the sudden and unanticipated assault could not have been foreseen by the most vigilant observation, and the unexpected conflict was repelled by the conductor promptly and successfully. No. liabilty was proved against defendant, and plaintiff failed absolutely to show the violation of any duty to her as a passenger. The measure of care and duty of the carrier is governed by the laws of Missouri, as the injury occurred in that State. 113 Ark. 265-278.

2. A sudden and unexpected attack or assault by one passenger upon another does not render the carrier liable unless it is shown that its employees knew, or could have known, in time to prevent the assault from the wrongdoer's acts and conduct, that he was contemplating injury to his fellow passengers. 204 S. W. 508; 36 *Id.* 485; 14 Am. Rep. 190; 66 Atl. 1006; 26 Am. Rep. 68; 66 N. Y. 643; 10 C. J. 905; 3 Thompson on Neg., p. 550, § 3087, p. 545; *Ib.,* § 3093; 75 Hun. 548; 90 S. E. 221; 29 N. W. 18; 87 Mo. 74; 198 Mo. 664; 96 S. W. 1017; 7 L. R. A. (N. S.) 231; 8 Ann. Cas. 584; 84 Ark. 193; 118 *Id.* 396; 70 *Id.* 136; 4 R. C. L. 1186; 111 Ark. 288; 131 *Id.* 341; 75 *Id.* 242.

2. The court erred in instructing the jury as requested by plaintiff. 70 Ark. *Ry. Co.* v. *Wilson;* 10 C. J. 905; 17 *Id.* 1061, § 368; 105 Ark. 210.

3. The court erred in refusing the defendant's instructions. 204 S. W. 508; 96 Ark. 206, 212; 131 *Id.* 356;

75 *Id.* 242; 32 L. R. A. (N. S.) 1209; 118 Ark. 396; 135 *Id.* 480-493.

4. The court erred in admitting testimony over defendant's objection as to the porter's acts and remarks. 84 Ark. 42; 118 *Id.* 153; 93 N. E. 698; 70 Ark. 143. Also as to whether the conductor or other employee made any efforts to put the drunken man off the train and as to the effect of the drunken man's conduct on her health. 63 Ark. 402; 13 Okla. 563; 134 Pac. 388; 39 N. W. 884; 74 N. Y. S. 1113; 47 N. J. L. 23; 130 Ark. 546; 126 S. W. 1013.

5. The damages are excessive. 69 Ark. 402; 204 S. W. 565; 118 *Id.* 31; 120 *Id.* 54; 124 *Id.* 229.

Duty & Duty, for appellee.

1. The passenger was intoxicated, and the railway porter knew it and was guilty of negligence in allowing him to remain in the same car, and it was the carrier's duty to warn of danger and protect passengers. 6 Cyc. 600; 80 Ark. 158.

2. The judgment is right on this whole case, and should be affirmed, even if there were slight errors. 80 Ark. 158; 19 *Id.* 677; 87 Am. Dec. 714; 204 S. W. 511; 3 Thompson on Neg., p 545; 23 Fed. 637; 6 Cyc. 550, 551; 22 L. R. A. 250; 69 Miss. 421; 45 Ark. 368; 22 L. R. A. 250.

3. There was no error in the instructions and the verdict is sustained by the evidence. 10 C. J. 728; 116 Ark. 179; 128 Mo. 617; 25 S. W. 341; 33 Cyc. 825; 91 S. W. 989; 38 *Id.* 533; 135 Ark. 493.

4. Fright and fear are elements of damage, and appellant's testimony was competent. 25 S. W. 341. See also 89 Ark. 9; 10 C. J. 727; 96 S. W. 307; 39 Ark. 492; 93 S. W. 1120.

5. The testimony was competent, and there was no error in instructions. 94 U. S. 469; 83 Ark. 488; 118 *Id.* 569; 83 *Id.* 587; 130 *Id.* 83; 118 *Id.* 569; 95 Ark. 311; 203 S. W. 271.

The refused instructions were not the law of this case, and they were correctly refused. 115 Mo. App. 582; 38 S. W. 533; 40 Ark. 298; 135 Ark. 493; *Ib.* 480; 120 Ark. 60.

WOOD, J. Appellee, Ethel Anderson Rice, lived at Bentonville, Arkansas. She was teaching school at Anadarko, Oklahoma. She purchased her ticket from the St. Louis & San Francisco Railway Company, hereafter for convenience called appellant, to Oklahoma City, and left her home about 4 p. m. October 29, 1918, going via Rogers to Monette, Missouri, where she arrived about 8 p. m. At Monette she boarded appellant's Oklahoma City train about 11:30 p. m. She went into the chair car and through the car looking for a seat. The seats were all taken except one at the front end of the car. She returned and occupied it because there were no other vacant seats. In the chair car beside her was a large fat man who had his sleeves rolled up and vest on and was in a very unkempt condition. His face was turned toward the window, and he was sprawled out over his seat and appeared to be asleep. As she entered the chair car she asked the man standing at the end of the car for a seat in the Pullman. He stated they could not get one for her, and no one attempted to find her a seat in the chair car. A few minutes after taking the seat, the porter came through the car and made an announcement, that, on account of a wreck, passengers for Neosho should get off the train as they had to detour by way of Joplin. He asked the passengers to show their tickets, and he asked the man sitting beside her for his ticket several times, then reached over and shook him, tried to rouse him up, but got no reply from him. The porter then asked her if she had that man's ticket.

About twenty minutes after the porter went through the train and the train had started, the conductor came in the front end of the car and began taking up tickets. He took appellee's ticket and asked the man beside her for his ticket. He muttered and mumbled, but did not

answer the conductor. The conductor then shook him repeatedly and asked him for the ticket. The man answered that he had no ticket. The conductor stood there and quarreled with him about the ticket. He repeatedly asked him for his ticket. Finally, the man said, "That young lady has my ticket," referring to the appellee. The conductor said, "No, she has not your ticket; hunt the ticket up." At that time the appellee was scared and was leaning out toward the aisle trying to get out. The baggage had been piled up at the front end of the car, and the conductor was standing in the narrow place, so appellee could not get out. He stood there and wrangled a long time before the man grabbed appellee. While they were quarreling, he reached out and took hold of appellee. When he grabbed appellee, he was standing up as much as he could get from the chair he was in, but was not entirely out of his seat. He was up somewhat and over toward appellee. His hand came over the back of the seat above appellee's waist. She thought possibly from his talk that the man thought appellee had taken his ticket. The conductor then pushed him over into the window, back in the seat and let appellee out.

Appellee was badly frightened; came near fainting. Someone opened the door, and she went out into the vestibule and sat on the porter's step, where she stayed five or ten minutes when some man back in the car came and offered her his seat and took her inside. The conductor did not then or at any time offer to procure her a seat. She took the seat offered her by the gentleman about half way back on the opposite side. She saw the drunk man take a bottle out of his pocket and drink out of it. Finally he dropped the bottle on the floor of the car and broke it. He had another bottle that he went and got and drank out of that bottle. No one made any effort to put him off or take him into another car. The man stayed on the car several hours until he reached the place where he got off.

The appellee instituted this action against the appellant for damages for personal injuries. The above are

substantially the facts upon which she predicated her cause of action.

The appellant denied all the material allegations of the complaint and set up the affirmative defense of contributory negligence on the part of the appellee.

The court, over the objections of the appellant, granted certain prayers of the appellee for instructions and refused certain prayers of appellant.

The jury returned a verdict in favor of the appellee for the sum of $1,000. From a judgment in appellee's favor is this appeal.

Later we will set out and comment upon such other facts as may be necessary.

The appellant first contends that the evidence is not sufficient to sustain the verdict.

The appellee, among other allegations of negligence, alleged in her complaint that, "the trainmen in charge of said train had carelessly, negligently, wantonly and wilfully permitted an insanely drunken man to enter said train and to remain therein and occupy the opposite seat from the plaintiff and among the other passengers." She further alleged that, "the said conductor and parties as aforesaid carelessly and negligently let the drunken man remain in or near the seat occupied by the plaintiff, and permitted him to harass, annoy, and frighten the plaintiff." The complaint alleged that "the drunken man proceeded to arise from his seat and take hold of the plaintiff, and proceeded to and did shake and crush her arm, which greatly pained the plaintiff and terrified her, all of which was well known and observed by said conductor and porter in charge of said train, but that they wantonly, cruelly and negligently permitted said drunken man to assault the plaintiff, when by ordinary care and diligence the same could have been prevented." The appellee further alleged that "said trainmen were guilty of negligence in permitting a man whose conduct was so manifest to enter and remain in said train or passenger car, and when his condition and conduct were well known

to the conductor and other employees of the defendant in charge of said train."

The acts of which appellee complains occurred in Missouri. Therefore the laws of that State applicable in such cases must govern in determining whether or not there is any liability against appellant. *St. L. & S. F. Ry. Co.* v. *Coy,* 113 Ark. 265, and cases there cited.

In *Lige* v. *Chicago, B. & Q. R. R. Co.,* 204 S. W. 508 (Mo.), the facts were substantially as follows:

A passenger who was in an intoxicated condition when he boarded the train, and who was observed by the conductor to be in such condition after he entered the train on account of his manner of acting and talking, suddenly and without cause picked up an iron wrench near a stove in the smoking car and struck a fellow passenger on the head. The assault was committed without any warning whatever or without any previous verbal altercation. The man who committed the assault was "joshing and talking," but aside from this he was guilty of no improper conduct whatever, while in the train, until he committed the assault.

The Supreme Court held that the injured party had no cause of action against the railway company. In the course of the opinion, the court announced that "the carrier is liable to a passenger for injuries inflicted by any cause if it could have been prevented by the exercise of highest degree of care usually exercised by very cautious persons engaged in similar business."

The court quoted, with approval, from Judge Thompson's work on Negligence, volume 3, p. 544, section 3089, as follows: "If the conduct of a railway passenger is such as to excite reasonable apprehensions that his presence will result in injury or annoyance to their passengers, it is the right and duty of the conductor to expel him without waiting for any overt act of violence."

The court quoted the following from 10 Corpus Juris, p. 905: "It is the duty of the carrier's employees to protect passengers from the acts or conduct of an intoxicated fellow passenger, and, where there is reason to ap-

prehend injury or annoyance from him to other passengers, they should eject him from the train or other vehicle, or require him to remain seated and behave himself; and where, by reason of the employees' negligent failure to afford such protection, a passenger is injured by an intoxicated fellow passenger, the carrier is liable. But it is not liable where there has been no reasonable opportunity to discover such passenger's condition and intent; and failure to eject a passenger merely because he is drunk, if otherwise well behaved, will not alone subject a carrier to liability for an injury caused by his acts or conduct."

The law concerning the duty of common carriers of passengers (by railroad) to their passengers is essentially the same in this State as in Missouri. In *Mayfield* v. *St. L., I. M. & S. Ry. Co.*, 97 Ark. 28, this court said: "A railroad as a common carrier of passengers is bound to use extraordinary care, not only to carry its passengers safely, but also to protect them during the carriage from assault or injury from its agents in charge of the train and from others. By its contract the railroad company assumed the obligation to protect the passenger against any negligence or wilful misconduct of others on the train. The conductor has control, not only of the movements of the train, but over persons on it, and has authority to compel the observance of the rules of the company by all persons on the train. He has therefore the power under ordinary circumstances to protect them from violence or wrongful injury from others, and the law makes the company liable for an injury to a passenger resulting from a negligent failure to exercise such power." And in *St. L. S. W. Ry. Co.* v. *Bradley*, 99 Ark. 316, we held that where an injury to a passenger was caused by a drunken fellow passenger and the facts tended to show that the conductor knew that the fellow passenger was drunk and giving annoyance, the railway company was liable because of the failure of its conductor to take proper steps to protect the injured passenger. *M., D. & G. Rd. Co.* v. *Trussell*, 122 Ark. 516, is to the

same effect. See, also, *St. L., I. M. & S. Ry. Co.* v. *Wilson,* 70 Ark. 136. In *St. L. & S. F. Rd. Co.* v. *Wyatt,* 84 Ark. 194, we held that, "a railroad company is not responsible for failure to protect from assault one who was waiting at its station intending to become a passenger on its train, if the assault was committed so suddenly that the railroad company could not reasonably have anticipated and prevented it." The same rule is applicable to a passenger while on the train. Thus the law applicable to cases of this character is well settled by the decisions of the Supreme Court of Missouri, as well as by the decisions of our own court to the same effect.

It could serve no useful purpose to set out and discuss in detail the separate prayers for instructions which were granted or refused or modified and given by the trial court. There was no misapprehension of the law by the trial judge. His charge as a whole correctly declared the law applicable to the facts of this record, and the instructions to the jury were in conformity with the law upon the issues here involved, as announced by the court of last resort of Missouri.

The most difficult question for decision is whether the testimony is legally sufficient to sustain the verdict. According to a well settled rule we must give the testimony its strongest probative force in favor of appellee. Observing that rule, we have reached the conclusion that the issue of negligence was one of fact for the jury to determine under the evidence. The verdict in favor of appellee on the issue, having substantial evidence to sustain it, will not be set aside by this court.

The case on the facts is distinguished from the case of *Lige* v. *Chicago, B. & Q. R. R. Co., supra,* in some essential particulars. Although the party who committed the assault on Lige was intoxicated and the conductor was apprised of that fact, yet, until the very moment of the assault, the drunk man had not disturbed anyone and had not given any offense to or manifested any ill will towards Lige or anyone else. He suddenly and without warning assaulted Lige. Here, according to the testi-

mony of the appellee, the conductor "repeatedly asked" the man beside her "for his ticket," and the man replied: "I have no ticket, that young lady has my ticket." The conductor, she says, "stood there and quarreled with him about the ticket." "He stood and wrangled there a long time before the man grabbed me." Her testimony further tends to show that, during the time of the wrangle and quarrel between the conductor and the drunk man, she was virtually imprisoned in her seat between them. The conductor was a large man and filled the aisle. The space in the front end of the car was filled with baggage so that there was no way for her to get out until the conductor stepped aside and let her out. This he did not do until she had requested him, and not until she had been assaulted by the drunk man.

The important and controlling point of distinction between this and the Lige case is that in the Lige case the assault was sudden and without warning, whereas here the jury was justified in finding otherwise. True, the conductor testified in this case that he talked with the man only about a minute, perhaps not more than four or five seconds, and that the assault upon the young lady was immediate. But the jury accepted the testimony of the appellee upon this point. The jury were warranted in finding from her testimony that the conductor, although aware of the man's drunken or "crazy" condition, and advised by his replies that he thought she had his ticket, nevertheless stood there and "quarreled" and "wrangled with him a long time" until he finally arose partly out of his seat and "grabbed" her.

Now, it seems to us, under these circumstances, it was peculiarly a question for the jury to say whether or not a man of ordinary prudence, exercising the highest degree of care consistent with the business in which he was engaged, would have permitted the appellee to remain in the awkward and embarrassing situation in which she found herself until it was too late to prevent the assault. The porter had been informed by the appellee that she did not have the man's ticket. The testimony of the

conductor tended to prove that he knew that appellee was not the traveling companion of the drunken man. She was not of his class. He was a "tough looking customer," and his conduct proved him to be such. He had accused appellee of getting his ticket, showing that in his drunken or "crazy" condition he believed that appellee had perpetrated a wrong upon him. Would a man of ordinary prudence, a conductor of a passenger train, in the exercise of ordinary care for the comfort and safety of the passengers, after blocking with his own person, the only avenue of escape, have stood in the presence of this young woman and "quarreled and wrangled a long time" with a drunken or crazy man who had accused her of taking his ticket; or would a thoughtful conductor, under such circumstances, have first endeavored to rescue the young woman from her disagreeable, not to say, dangerous, situation by clearing the way, and inviting her into another car, or to another location in the same car out of range of personal insult or assault, while he, the conductor, "had it out" with the drunken or crazy passenger?

These were questions of fact for the jury and the trial court to answer.

The facts developed here made it an issue for the jury to determine whether the conductor knew, or by the exercise of ordinary care could have known, from the conduct of the drunken passenger that an insult to, or assault upon, appellee was reasonably to be anticipated, and which in the exercise of ordinary care he could have prevented. *Woas* v. *St. Louis Trust Co.,* 198 Mo. 664; *Spohn* v. *Missouri Pacific Ry. Co.,* 87 Mo. 74.

We have examined all the other questions urged by the learned counsel for appellant in their excellent brief, and find no reversible error in the rulings of the court. There was no contributory negligence, and the court did not err in refusing to submit that issue to the jury. There was no prejudicial error in the ruling of the court upon the admission of testimony.

The instruction upon the measure of damages told the jury that if they found for the plaintiff they should assess her damages at such sums as would fairly and reasonably compensate her for any injury she may have sustained by reason of the insults and assaults, if any, she received from the drunken fellow passenger.

The appellant objected to the instruction because the elements of damage were not specified. But the appellant did not present a prayer for instruction defining the specific elements of damage for which recovery could be had by appellee if the jury should find in her favor. The instruction in the form given was not one to be approved as a precedent, still it did not contain any positive misstatement of the law. It was couched in too general terms but was not on that account fatally defective. The appellant should have requested the court to grant a prayer explaining the specific element of damage which it conceived had been overlooked, before it can complain here. *Fordyce* v. *Jackson,* 56 Ark. 594-602.

We have reached the conclusion that the issue of negligence and of appellant's liability was for the jury, and that this issue was fully and fairly presented. The jury having determined that issue in favor of the appellee, we cannot say as matter of law that the amount of the verdict was excessive. Here was an actual assault upon the person of appellee, and, as a consequence, appellee says she "was scared nearly to death," causing "physical changes in her system," which she described, and from which she had endured a "great deal of trouble and pain." She had been in good health before the injury, but since, and to the time of the trial, she was suffering from the effects of the assault. She says: "When this (her menses) comes on, I have to lie down, and am not able to stand on my feet for fifteen minutes. Have lost ten pounds, nervous condition seriously affected. This result is the effect of the assault by the drunken man." The degree of humiliation which a "refined and sensitive" young woman would experience when the violent hands of a drunken ruffian are laid upon her in the pres-

ence of other passengers depends, of course, largely upon the particular manner of the assault and insult. The jury had the circumstances, and manner of the assault before them as related and demonstrated by the appellee and appellant's conductor.

The appellee testified that the conductor said to her that "he was sorry it happened. He said he should have been killed." If indeed the conduct of the drunken man was so flagrant as thus indicated, the jury were fully warranted in finding that the assault upon appellee was well calculated to and did produce directly and proximately the fright, nervous shock, and distressful condition of health which she described.

The cases of *Kansas City, P. & G. Ry. Co.* v. *Bragg,* 69 Ark. 402, *C., R. I. & P. Ry Co.* v. *Allison,* 120 Ark. 54, and *Butler County Rd. Co.* v. *Exum,* 124 Ark. 229, are differentiated from the present case by the facts of those cases. In neither of them was there a personal injury to or assault upon the plaintiff. Here there was a personal assault upon the plaintiff, and the fright, nervous collapse and other physical injuries of which she complained were the direct and proximate result of such assault; at least the jury was warranted in so finding.

There is no reversible error. Let the judgment be affirmed.

HEER ENGINE COMPANY *v.* PAPAN.

Opinion delivered February 9, 1920.

1. SALES—WARRANTY—NOTICE OF BREACH.—Where a contract of sale of a tractor required notice by telegram of its failure to fulfill the warranty within six days from its first use, and also provided for a demonstration which continued for six days, notice given within a day after the demonstration was in time.
2. SALES—BREACH OF WARRANTY—EVIDENCE.—Evidence that a purchaser of defendant's tractor could do more work with eight mules than he could with the tractor, that a ten-horse power tractor purchased from third parties developed a greater horse

power, and that on wet ground defendant's tractor would spin around and sink into the ground and stall the machine, supported a finding by the chancellor that it did not develop sixteen horse power as warranted.

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

John L. Ingram, for appellant.

The contract shows appellee purchased the tractor and that he never paid for it as he agreed. It was delivered to him as per contract. A satisfactory demonstration was not agreed to in the contract of sale. The contract contains no warranties or representations other than those that it was sold as a 24-brake horsepower, 16 tractive horsepower, and was warranted to develop the horsepower at which it was rated. There is no proof that the engine failed to develop its rated horsepower. The burden was on appellee, and he has failed. The decree is not sustained by the evidence, and should be reversed. Notice was not given within the time designated by the appellee.

Lee & Moore, for appellee.

The tractor was not up to specifications and warranty, and the company was duly notified that appellee would not accept. A demonstration was made, and appellant duly notified that the tractor was not acceptable and did not come up to warranties and representations. 106 Ark. 411. The demonstration was not satisfactory, and the tractor was not as represented and guaranteed; and the chancellor properly held that appellee was not liable. 79 Ark. 506; 100 *Id.* 17; 203 S. W. 695.

HART, J. Heer Engine Company brought this suit in equity against John A. Papan to recover the purchase price of a tractor which it claims was sold under a written contract dated February 27, 1914, and also asked for a foreclosure of the vendor's lien on the tractor. The defense was that the tractor did not develop the horse power warranted in the contract of sale in the demonstration of it, and that it was never accepted.

The chancellor found in favor of the defendant, and a decree was entered accordingly.

John A. Papan owned a farm of 640 acres in Prairie County, Arkansas, and used twelve mules in cultivating it. It was level land and he usually plowed about 340 acres every season and raised principally rice, oats and corn. He entered into correspondence with the Heer Engine Company for the purchase of a tractor to be used in plowing his land, and all the above stated facts were contained in the correspondence with the plaintiff.

C. Heer, the president of the plaintiff company, met John A. Papan at Stuttgart, Arkansas, and on behalf of his company entered into a written contract with him for the sale of a 16-horsepower tractor for the price of $1,700. The description of the tractor in the contract is as follows:

"One of your 24-brake H. P. 16-tractor H. P. four-wheel drive tractors, with the fixtures and equipment usually furnished with your tractors."

The contract contained a warranty clause as follows:

"It is warranted that it will be well made and of good material and workmanship. That it is capable of developing the horse power at which it is rated. If any part (excepting batteries, magnetos, and spark plugs, which are not warranted) prove defective within one year from shipment of said tractor through inferior material, or workmanship, same shall be furnished free by the Heer Engine Company on board cars at Portsmouth, Ohio. Defective parts will be returned prepaid to the Heer Engine Company, Portsmouth, Ohio, for inspection, and, if found defective, charges made for such replaced parts to be remitted. If within six days from its first use, it should fail to fill the warranty, purchaser shall notify the Heer Engine Company at their office at Portsmouth, Ohio, by registered letter and telegram, stating specifically wherein it fails to do so, and if this defect cannot be remedied by instructions by mail, company shall within a reasonable time send a person to operate the tractor and correct the defects, if any, purchasers to

render such friendly assistance as may be required. If the tractor cannot be made to develop the guaranteed power, purchaser shall thereupon return the tractor to the place where he received it, notify the company by telegram and registered letter at said home office that he has done so, and company shall then have the option to replace it with another, on the conditions herein set forth, or replace defective part or parts or to take back the tractor and return the purchaser's cash and notes received. This to constitute full settlement between the parties, and no further claim shall be made for any cause or reason for failure of machinery to fulfill warranty."

The contract also provided that the plaintiff should furnish a competent operator without charge to make a demonstration of the tractor. Pursuant to this contract the plaintiff shipped the tractor to Stuttgart, Arkansas. There John Morgan, an expert engine operator and the demonstration agent of the plaintiff, took charge of the tractor and carried it to the farm of John A. Papan and with the assistance of Papan and his son made a demontration of the machine for six days. According to his testimony the operation of the machine was successful, and it in all respects came up to the warranty made in the contract.

According to the testimony of Papan and his son, the tractor would not operate in wet ground at all, and did not develop the horsepower as warranted in the contract. They testified that they could do more work in a day with eight mules and said that in wet ground the wheels of the tractor would just spin around and dig a hole in the ground. They afterwards purchased a 10-horsepower tractor and said that it would pull bigger loads than the tractor of the plaintiff could pull.

It was also shown by the defendant that the demonstration of the tractor lasted six days; that on the afternoon of the sixth day the defendant notified the demonstration agent of the plaintiff that he would not accept the tractor because it did not develop the horsepower provided for in the contract; that on the next day the de-

fendant notified the plaintiff both by telegram and by registered letter that he did not accept the tractor because it did not develop the horsepower provided for in the contract.

As above stated, the chancellor found in favor of the defendant, and it cannot be said that his finding in that regard is against the preponderance of the evidence.

The contract provides that if within six days from its first use the tractor should fail to fulfill the warranty, the purchaser should notify the plaintiff by registered letter and by telegram stating specifically wherein it failed. When the tractor arrived at Stuttgart, Arkansas, the demonstration agent of the palintiff took it to the defendant's farm and worked with the defendant for six days in testing the tractor. The defendant, on the afternoon of the sixth day, notified the demonstrator that it did not develop the horsepower provided for in the contract, and for that reason he would not accept it. He notified the plaintiff, both by letter and telegram on the next day. This was a sufficient compliance with the provision in regard to notice. Under the circumstances as disclosed by the record, the period of demonstration would be considered as the first use of the machine contemplated by the contract, and, the notification having been made the next morning after the demonstration had been finished, it was necessarily within the six days.

It is next contended that the court erred in holding that the tractor did not develop the horse power at which it was rated. We cannot agree with counsel in this contention. The contract of sale was for a 16-horsepower tractor, and it was warranted to be capable of developing the horsepower at which it was rated.

The defendant testified that he could do a great deal more work in a day with eight mules than he could with the tractor. It is true as contended by counsel for the plaintiff that the word "horsepower" is a unit of measurement for energy in steam or gasoline engines, and that it cannot be measured by what a horse could pull in the same length of time; yet the fact that eight mules could

pull more in a day than a tractor rated as a 16-horsepower tractor was a circumstance to be considered by the court in determining whether the tractor could develop the horsepower at which it was rated.

Again the defendant and his son both testified that they afterwards purchased a 10-horsepower tractor, and that it developed a greater horsepower than the 16-horsepower tractor in question. They also stated that on wet ground the wheels of the tractor would spin around and sink in the ground and stall the machine.

These circumstances were sufficient to warrant the chancellor in finding that the tractor was not capable of developing the horsepower at which it was rated.

It follows that the decree will be affirmed.

RUGEN v. VAUGHAN.

Opinion delivered February 9, 1920.

1. FRAUDS, STATUTE OF—PART PERFORMANCE.—Continuance in possession of land by a lessee after an oral purchase is insufficient to take the contract out of the statute.
2. SPECIFIC PERFORMANCE—PART PERFORMANCE.—Payment of a small part of the purchase money of land and making permanent improvements, as by clearing the land and finishing a house, in value equal to a fourth of the purchase price, is sufficient ground for specific performance of an oral contract for purchase of land.

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

STATEMENT OF FACTS.

On the 17th day of March, 1919, Wes Vaughan brought this suit in equity against A. F. Rugen and John Turner for the specific performance of an oral contract for the sale of 40 acres of land.

According to the testimony of Wes Vaughan, the contract of sale was made in October, 1917. The contract was an oral one, and under it Vaughan agreed to pay Rugen $500 for the land, $20 of which was to be paid in cash; $200 to be paid on the 1st day of January, 1918,

and the balance was to be on deferred payments. Vaughan had lived on the place for about three years as a tenant of Rugen before he made the contract to purchase the land. He continued to reside on the land after he purchased it and cleared and put in cultivation about seven acres of ground. It was worth about $15 per acre to do this. Vaughan also finished building a house which Rugen had started while Vaughan was his tenant. Vaughan also cut down some trees and split a lot of rails. All these improvements were made by Vaughan because he had purchased the land. Vaughan also testified that Rugen agreed to furnish him an abstract showing that he had a clear title to the land. Vaughan made arrangement with J. B. Sturdivant to lend him the money with which to pay off the land. Vaughan's son and another witness corroborated his testimony as to the contract for the purchase of the land.

J. B. Sturdivant was a witness for the plaintiff and testified that he agreed to lend Vaughan the money with which to pay off the land provided Rugen furnished an abstract showing a clear title to the land. In the chain of title there was a deed to A. F. Rugen from his brother whose wife did not release her dower in the land. It was also shown that there was a mortgage lien of $1,500 on the land. Rugen never did bring the abstract down to date by showing the release of dower as above stated and the release of the mortgage lien on the land. On the 6th of May, 1919, Vaughan brought into court and offered to the defendant, Rugen, the amount of purchase money due on the land and interest to the date of the tender. Rugen refused to accept the same.

According to the testimony of the defendant, A. F. Rugen, he made an oral contract with Vaughan to sell him the land in question on the terms stated above. Rugen said that Wes was to pay $20 cash and $200 the 1st of the year 1918. He was then to have a bond for title. He denied that he agreed to furnish an abstract showing a clear title to the land, but stated that he did have a clear title to the land. He also said that he sent a deed

to his brother and had his wife to relinquish her dower in the land and then executed and tendered to Sturdivant a warranty deed to the land. It was the understanding that the deed was to be made to Sturdivant, and that he would hold the title to the land until Vaughan paid him the purchase money. In August, 1918, Rugen sold the land to John Turner. Rugen, Turner, and another witness all testified that Vaughan did not clear more than two or three acres after he purchased the land from Rugen.

Another witness for the defendant testified that Vaughan cleared six or seven acres after he purchased the land from Rugen. The record shows that the abstract of title was not completed so as to show relinquishment of dower by the wife of Rugen's brother. It was also shown that John Turner knew of the rights of the plaintiff in said land at the time he purchased it from Rugen.

The court found the issues in favor of the plaintiff and a decree was entered accordingly. The defendants have appealed.

W. C. Rodgers, for appellants.

1. The burden was on appellee to establish that he was entitled to a decree, and he has failed. This was a parol contract for the sale of land and void under our statute of frauds unless the possession taken was sufficient to take it out of the statute. Possession previously taken is not sufficient, but it must be taken *in pursuance of the contract.* 44 Ark. 334-339; 206 S. W. 896-8; 1 Ark. 391; 103 Iowa 512, 612; 1 Sugden on Vendors, p. 228; 20 Cyc. 316.

2. No tender of the purchase money was ever made. 85 Ark. 246-250; 92 *Id.* 460; 106 *Id.* 310-315.

3. Practically all the evidence offered by the plaintiff was irrelevant and incompetent. This court will disregard all such testimony. 76 Ark. 153-6; 78 *Id.* 111-116; 92 S. W. 1162; 92 Ark. 315, 320; 99 *Id.* 218-225; 127 Ark. 186-202; 132 *Id.* 402-411; 213 S. W. 758-9. Whatever im-

provements were made were made before any of the purchase money was paid and before the deed was corrected and the abstract brought down to date. Equity does not tolerate *mala fides.*

W. P. Feazel, for appellee.

Part payment of the purchase money and the substantial improvements made by appellee take this case out of the statute of frauds, and the chancellor properly granted relief. 76 Ark. 363; 79 *Id.* 100; 44 *Id.* 335; 102 *Id.* 378; 18 L. R. A. (N. S.) 337 and note. The tender was sufficient, as it contained all interest due up to the date and all the principal due, and the decree is just.

HART, J. (after stating the facts). The decree of the chancellor was correct. That one who is already in possession of land as tenant and continues such possession after the making of a parol contract for the purchase thereof from his landlord does not thereby take the contract out of the statute of frauds. This court has held that possession to have the effect to take the case out of the statute must be exclusive, evincing the birth of a new estate, and distinguished from the continuation of an old one; and must not be referable to an antecedent right. *McNeil* v. *Jones,* 21 Ark. 277; *Haines* v. *McGlone et al.,* 44 Ark. 79; *Moore* v. *Gordon,* 44 Ark. 334, and *Ashcraft* v. *Tucker,* 136 Ark. 447, and cases cited. These authorities also support the rule that an independent ground for specific performance for a parol contract for the purchase of land is that the purchaser has made permanent and valuable improvements under claim of ownership of the land. According to this test Vaughan was entitled to a decree of specific performance. According to his own testimony and that of one of the witnesses for the defendants, he cleared seven acres of land which was worth $15 per acre. He also, as he expressed it, finished building a house which had been started by Rugen during the period of his tenancy.

Another witness testified that the work Vaughan did on the house was to cover it.

Rugen testified himself that Vaughan did some work on the house. He, also, paid $20 of the purchase money at the time the contract was made. The contract price of the land was $500. The value of the improvements and the part of the purchase money paid amounted to at least $125. These improvements were permanent in their nature, and it can not be said that they were of so little value as to be considered as compensated for by the temporary enjoyment of the land. The evidence shows that Turner lived in the neighborhood and knew of Vaughan's claim to the land at the time he purchased it from Rugen.

The chancellor found the issues in favor of the plaintiff. Under the circumstances we think that the part payment of the purchase money and the improvements made by the purchaser were of a permanent nature and of such a substantial character, when compared with the value of the land, that it would be inadequate to refuse the plaintiff the relief prayed for in his complaint.

It follows that the decree must be affirmed.

FENDLEY v. SHULTS.

Opinion delivered February 9, 1920.

1. LIMITATION OF ACTIONS—PART PAYMENT BY JOINT DEBTOR.—Part payment of a debt by a joint and several debtor before the bar of the statute of limitations attaches binds the other joint debtors.
2. SAME—PART PAYMENT BY ADMINISTRATOR OF JOINT DEBTOR.—Where one jointly indebted on a note died, and his administrator made a partial payment before the statute had run, such payment tolled the statute as to all who had signed the note, including sureties.

Appeal from Searcy Circuit Court; *J. M. Shinn*, Judge; affirmed.

STATEMENT OF FACTS.

F. D. Shults sued W. W. Fendley in the circuit court to recover on a promissory note. The note was exhibited with the complaint and is as follows:

"$500. October 3, 1910.

"January 1, 1911, after date we promise to pay to the order of F. D. Shults five hundred and no one-hundredths dollars at 10 per cent. interest per annum from date until paid. Value received.

"(Signed)

"Jno. R. Aday,
"J. W. Aday,
"W. W. Fendley,
"Albert Garrison."

"Endorsed on back as follows:

"June 2, 1914, paid $100."

The defendant, Fendley, in his answer states the facts to be that he signed the note sued on as surety for John R. Aday; that John R. Aday died intestate on July 12, 1912; that said note was duly probated against his estate, and that a judgment of allowance was duly rendered in favor of the plaintiff against said estate by the probate court; that the defendant was not a party to this proceeding; that the payment of $100 was made on the judgment of said probate court by the estate of John R. Aday and not upon the note as stated in plaintiff's complaint; that plaintiff had no right to credit said payment on said note and could not thereby stop the statute of limitations from running against the defendant; that said note was due January 1, 1911, and that the cause of action against the defendant was barred by the statute of limitations on January 1, 1916, before the institution of this suit.

The court sustained a demurrer to the answer and the defendant declined to plead further. The case was then submitted to the court upon the complaint, the answer and the original note. The court found that the defendant was indebted to the plaintiff in the sum of $841.66, principal and interest, and judgment was rendered accordingly. The defendant has appealed.

Garland Keeling, for appellant.

The suit was barred by the statute of limitations. The payment by an administrator of a sum on an un-

probated debt does not arrest the statute and form a new point of beginning. 65 Ark. 1 and cases cited; 10 Ark. 642; 7 Gray 275. The court erred in sustaining the demurrer to the third paragraph of defendant's answer.

S. W. Woods, for appellee.

The note was not barred. The payment was made within five years from the maturity of the note and formed a new point for the statute to commence to run. 19 Ark. 692; 5 *Id.* 551; 17 R. C. L., par. 945, sec. 308; 64 Mo. 408; 29 Mo. App. 474; 200 Mass. 599. See also 17 R. C. L., p. 942, § 305; 25 Cyc. 1383, § C; L. R. A. 1915 B, p. 1048 C. The case in 65 Ark. 1 is not in point, as the claim there had not been probated.

HART, J. (after stating the facts). In maintaining his plea of the statute of limitations the defendant relies upon the case of *Cox* v. *Phelps,* 65 Ark. 1. In that case it was held that payment by an administrator on an unprobated debt of his decedent which was secured by mortgage will not arrest the running of the statute of limitations with reference thereto if there was no order of the probate court authorizing such payment, although that court subsequently allowed the administrator credit for the payment in his settlement with the estate. That case is not an authority in the case at bar. In that case there was no authority in the administrator to make the payment. The court said that, before an administrator can pay any claim against his decedent's estate, it must be exhibited and allowed by the probate court in the manner provided by the statute. There was no order of the probate court authorizing the administrator to make the payment, and the operation of the statute of limitations could not be suspended by a payment the administrator was not authorized to make and which he could not have legally made because the debt had not been proved or allowed against the estate as provided by the statute.

In the case at bar the facts are essentially different. The claim has been duly presented, examined and allowed in the manner provided by the statute. Of course, it was

necessary to prove payment, but there could be no stronger proof of payment than the admission in the answer that the $100 had been paid by the administrator of the estate of John R. Aday, deceased. This brings us to the question of whether such payment suspended the running of the statute of limitations against the defendant who signed the note as surety for John R. Aday. The parties who sign a note are jointly and severally liable. This court has held that the part payment of a debt by one joint and several debtor before the bar of the statute of limitations attaches will bind the other joint debtors. The reason is that payment by one is payment for all. *Trustees R. E. Bank* v. *Hartfield et al.,* 5 Ark. 551; *Hicks* v. *Lusk & Co.,* 19 Ark. 692, and *Burr* v. *Williams,* 20 Ark. 177.

In the subsequent case of *McAbee* v. *Wiley,* 92 Ark. 245, the court held that payments endorsed on a note which were admitted by the debtor to be correct, or were impliedly assented to by him, are sufficient to stop the running of the statute of limitations. The court further held that part payment made by an agent of the debtor suspends the running of the statute of limitations as effectually as if made by the debtor himself. In other words, the rule is settled in this State that a part payment of principal or interest made by one who could be compelled by law to pay the note suspends the statute of limitations, and a payment so made fixes a new point from which the statute begins to run.

In a case note to L. R. A. 1915 B, at page 1048, it is said that part payment by a personal representative having general authority to pay debts has been held sufficient to waive or toll the statute of limitations where such a representative has authority to so relieve from the statutory bar, and in support of the rule the following cases are cited: *Semmes* v. *Magruder,* 10 Md. 242; *Foster* v. *Starkey,* 12 Cush. (Mass.) 325; *Fisher* v. *Metcalf,* 7 Allen (Mass.) 209, and *McLaren* v. *McMartin,* 36 N. Y. 88. We think this holding is in accord with the reasoning of our decisions bearing on the question. In the case at bar

the note was a subsisting one at the death of John R. Aday. His administrator was bound to pay it after it had been legally exhibited and allowed. The administrator was the legal representative of his decedent, and payment by him after the claim had been allowed against his decedent's estate was a payment for all who had signed the note. The payment having been made before the statute of limitations had run, the payment by the administrator tolled the statute as to all the parties who had signed the note.

It follows that the judgment must be affirmed.

GORDON v. CLARIDY.

Opinion delivered February 9, 1920.

1. TRUST—PART PAYMENT OF PURCHASE MONEY.—Payment of part of the purchase money of a tract of land will not be sufficient to establish a resulting trust unless it was paid to purchase some definite interest or determinate aliquot part of the property.
2. LIENS—PAYMENT OF PART OF PURCHASE MONEY.—Evidence that a wife furnished part of the purchase money of land, though insufficient to establish a resulting trust in favor of her or her heirs, *held* sufficient to support a finding awarding a lien on the land for the amount of money so furnished.

Appeal from Clay Chancery Court, Eastern District; *Archer Wheatley,* Chancellor; affirmed.

W. E. Spence, for appellant.

The evidence makes a case of resulting trust. 101 Ark. 451; 40 *Id.* 68. The evidence clearly shows that it was the intention of the parties that Myrtle May Claridy was to have a part of the land when it was paid for, as she had furnished part of the money in paying therefor. 101 Ark. 451; 79 *Id.* 69; 81 *Id.* 478; 96 *Id.* 281; 89 *Id.* 452.

T. W. Davis and *S. C. Costen,* for appellees.

The evidence fails to meet the requirements of a resulting trust by parol. In the main it is neighborhood gossip. All the circumstances refute the idea of such a trust. The tract involved was purchased before the Myr-

tle May Claridy land was sold. It was paid for with promissory notes executed by T. C. Claridy alone, and the principal part of the consideration was paid after Myrtle May Claridy's death. She furnished, if anything, not to exceed one-third of the purchase money and certainly can not claim that Claridy agreed to convey to her 80 acres, or more than one-half of the land, and that the best improved, to the exclusion of his other children. A resulting trust could not arise, and 40 Ark. 68 does not apply, as the proof does not meet the requirements of that case. 101 Ark. 451 is clearly against appellant's contention. The chancellor based his finding on 102 Ark. 309, which does not govern this. This case is similar to 89 Ark. 180.

The witness Luther Claridy best expresses the true intention of the parties to this transaction. Equity and good conscience demand that this widow and her children share equally with the others, and the decree should be reversed on the cross-appeal.

SMITH, J. Appellant brought this suit for the purpose of having a resulting trust declared in her favor. In her complaint she alleged that she was the only child of her mother, Mrs. Myrtle May Claridy, who, on August 17, 1897, owned a forty-acre tract of land in the Eastern District of Clay County. Her father, T. C. Claridy, at the same time also owned a forty-acre tract of land, and it was agreed by her father and mother that they would each sell their forty-acre tract and buy the south half northwest quarter, section 3, and southwest quarter northeast quarter, section 3, township 18 north, range 8 east, Clay County, Arkansas, and that her mother should have the west eighty, which is the south half, northwest quarter, and that her father should have the other forty, and that pursuant to this understanding Mrs. Claridy sold her land and delivered the proceeds of the sale to Mr. Claridy, who bought the land above described and used Mrs. Claridy's money in so doing, pursuant to the agreement to that effect. The answer denied these alle-

gations. Claridy sold his own forty-acre tract and used the proceeds of that sale in meeting the payments on the larger tract.

The court below denied the relief prayed, but found the fact to be that Mrs. Claridy had advanced the sum of $400 which was used in the purchase of the land sought to be charged with the trust, and awarded appellant a lien on all the land for that sum, with interest thereon, and both parties have appealed.

In support of the allegations of the complaint, it was shown that Mrs. Claridy executed a deed to her land on November 10, 1897, for the consideration of $550, and that she died soon thereafter, at which time appellant was a baby. That Mr. Claridy obtained only a bond for title for the land, when he made the contract for its purchase, and that he did not complete his payments until January 17, 1902, at which time he received his deed and took title to all the land in his own name. Thereafter Mr. Claridy married again, and had other children, and resided on the land until his death, which occurred December 24, 1917.

The matter of the sale of the two forty-acre tracts of land and the purchase of the one hundred and twenty acre tract appears to have been known to the neighbors generally, and to have furnished subject-matter for numerous conversations among them, and much of the testimony is objected to on the ground that it was mere gossip. There was a witness, however, who was in a position to know the facts. This witness was Luther Claridy, a brother of T. C. Claridy, and, therefore, an uncle of all the children of T. C. Claridy, involved in this litigation. This witness appears to be disinterested, and his testimony was evidently accepted as true by the court below, as the finding of fact made by the court conformed thereto. This witness stated that as a young man he lived with his brother during the lifetime of Mrs. Myrtle May Claridy, who had been dead about eighteen years, and that his brother died December 24, 1917, and that appellant, Verdie Claridy Gordon, was the only child

born to his brother and Mrs. Myrtle May Claridy. That Mrs. Claridy owned forty acres of land when she married, which was sold about the time the larger tract was purchased, and that his brother told him about the money he received for the land belonging to his wife, and that his brother told him "he was putting $400 down on that land," and that he helped his brother clear a part of the 120-acre tract soon after its purchase, and that his brother built a barn thereon which cost about $150. That he had never heard his brother say anything about conveying any land to Mrs. Claridy, but had heard her speak of it, and that "she talked like she was to get eighty." That his brother told him that he was going to put his wife's money into the land, and Mrs. Claridy told him afterwards this had been done.

In opposition to granting appellant any relief, it is insisted by cross-appellants that the 120-acre tract was purchased before Mrs. Claridy's forty-acre tract was sold, and that most of the purchase money was represented by the promissory notes of Claridy, the larger portion of which were paid after the death of his wife, and that, even though the entire proceeds of the sale of Mrs. Claridy's forty had gone into the purchase of the larger tract, that sum was only about one-third of the purchase price of the larger tract. In answer to this it may be said that while the larger tract was purchased before Mrs. Claridy's land was sold those transactions were practically contemporaneous, and it is certain that one was sold to raise money with which to purchase the other, and that $400 of this money was used for that purpose; and while it is possible that even more of the purchase money derived from the sale of Mrs. Claridy's land was thus applied, that fact does not sufficiently appear to warrant us in disturbing the chancellor's finding of fact on that subject.

The case of *Long* v. *Scott,* decided by the Court of Appeals of the District of Columbia, 24 App. D. C. 1, announced the principle which controls here, and which was applied by the court below. It was there said:

"* * * We are of opinion that neither the bill of complaint, nor the testimony taken in support of it, shows sufficient ground for the declaration of a resulting trust in this case in favor of the complainant for the portion of the purchase money of the property in controversy shown to have been paid by her. For the establishment of such a resulting trust, it must be clearly shown that the whole purchase money was paid by the person seeking to have such interest declared, or that the purchase was of some definite interest or determinate aliquot part of the property. In the absence of any satisfactory proof of the amount of the purchase money in this case, and therefore of proof as to the proportion of the sum of $400 advanced by the complainant to the whole purchase money, it is impossible to establish a resulting trust in any part or share of the property in favor of the complainant.

"But, while the bill of complaint and the testimony are insufficient to establish a resulting trust, we are likewise of the opinion that there is sufficient allegation and ample proof of facts in this case to show an equitable lien on this property in favor of this complainant to the amount of $400. * * * Here an express agreement is shown, although not in writing, whereby, in consideration of the contribution by the complainant of the sum of $400 to the purchase money of a certain piece of property, she was promised by the purchaser that she should have practically a life estate in the premises, in common with the purchaser; and, upon that inducement and with that agreement between herself and her son, the purchaser, she paid her share of the money and entered into the possession of the property, and retained that possession until she was evicted under what she would seem to regard as false representations." See, also, section 1178, Jones on Liens (3 Ed.).

In the case of *Remshard* v. *Renshaw,* 102 Ark. 309, a wife allowed her husband to use her money in improving his property and in discharging a mortgage lien thereon on the faith of the husband's false representation that

the property would come back to her at his death because of there being no other heirs. The court below refused to vest title in the widow, but decreed a lien in her favor to the extent of her advances, and in approving that decree this court there said: "The result is the same as if she has entrusted the money to him as her agent, and he had wrongfully used it in improving his own property and in discharging liens thereon. In that case he would be held to be a trustee for her, and a lien in her favor for the money wrongfully used would be declared on the property into which the money could be traced. *Atkinson* v. *Ward,* 47 Ark. 533. She is entitled to subrogation to the extent of the amount of her money used in discharging the mortgage lien. *Spurlock* v. *Spurlock,* 80 Ark. 37."

So here we conclude that, while the testimony does not warrant us in decreeing the existence of a resulting trust in favor of Mrs. Claridy's heir-at-law, we do think it supports the action of the court below in awarding her a lien on the land for the sum of money shown to have been used in purchasing the land, and the decree of the court below is, therefore, affirmed both on the appeal and on the cross-appeal.

SOLMSON v. DEESE.

Opinion delivered February 9, 1920.

1. BROKERS—LIABILITY TO PRINCIPAL.—Where a broker undertook to sell the principal's land for $50,000, under a contract which authorized a sale for $50,000, with a commission of $1,000 if a sale was made at that price, together with any excess over $49,000 net to the principal, and subsequently took a deed from his principal for $49,000, but paid the principal, $45,000, explaining that the purchaser would pay that amount only, when in fact he had sold the land for more than $50,000, he will be responsible to his principal for the difference between $49,000 and $45,000.
2. BROKERS—RATIFICATION OF TRANSACTION.—Where the owner of land sold to the State through an agent accepted a payment from the agent as in full settlement of all issues between them, with-

out knowing the terms of the sale, he will not be held to have ratified a transaction whereby the agent retained a much larger commission than the owner had agreed to give him.

3. BROKERS—MISREPRESENTATION AS TO ACREAGE—LIABILITY.—Where an owner of land employed an agent to sell for a net price, the broker to receive the excess over that price, and made no representations as to acreage, but the agent sold under a false representation as to the number of acres, it was proper to deduct the proportionate amount of the shortage from the agent's commission.

4. BROKERS—LIABILITY FOR SHORTAGE.—A broker who without authority makes false representations as to the number of acres in the land sold by him will be bound thereby, whether he made the representations innocently or not.

5. VENDOR AND PURCHASER — DEDUCTION FOR SHORTAGE.—Where a deed represented the land sold as being "304.26 acres, more or less," and a survey proved that there was a shortage of 66 acres, such shortage was so large a proportionate part of the whole as to constitute a gross mistake, entitling the buyer to deduction therefor.

6. VENDOR AND PURCHASER—ACREAGE IN SANDBAR.—Where a sandbar was not considered in making a sale, except as a thing conveyed in adldition to the property for which value was paid, acreage in the sandbar need not be taken into account in determining the deduction to which the purchaser is entitled on account of a shortage in acreage.

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

Cohn, Clayton & Cohn and *Moore, Smith, Moore & Trieber,* for appellant.

1. The relation between Solmson and Deese had changed from that of principal and agent to that of vendor and vendee at the time the purchase contract was entered into on March 23, 1919. The testimony of the members of the Board of Control reveals the true facts as to the purchase of the farm as they occurred and they had undertaken the performance of the obligation placed upon them by the Legislature. The contract actually entered into is the best evidence of what the parties agreed to. There is no other testimony than that of Deese himself that Solmson claimed to be buying for

another party. All the circumstances of the trade and all that followed are strongly opposed to the contention of Deese. If Solmson was selling to another party for the account of Deese and did not disclose to whom the sale was being made until after Deese executed the deed to him and then disclosed it by a statement that he was "unloading" the property on this party, that is, the State, this would naturally immediately arouse the suspicion of Deese as to the price at which he was selling to the State, because the word "unload" would convey to the mind of even an ignorant person that it was done in an unconscionable way, for an excessive consideration. The greater weight of the evidence supports the contention that Solmson from the beginning negotiated with Deese for the purchase of the place and in taking the agency contract considered it as the equivalent of an option to purchase. The payment of the additional sum was consistent with his position as a purchaser, and inconsistent with Deese's contention that he continued as Deese's agent. All the facts and circumstances show that when Solmson entered into the second contract with Deese on March 23 he had had no prior negotiations with the Board of Control or any one for them, and that there was nothing for him to diclose to Deese except that he personally desired to purchase the place and would pay the price offered. No other finding can be made except by wholly disregarding the evidence of the members of the Board of Control, whose statements have the stamp of truth and frankness.

2. The evidence shows ratification by all parties of the sale of the place to Solmson. Notice of the facts and circumstances would put a man of ordinary intelligence and prudence on inquiry, and this is equivalent to knowledge of all the facts that reasonably diligent inquiry would disclose. 58 Ark. 91; 104 N. W. 820; 2 Pom. Eq. Jur., sec. 959. See also 31 N. W. 52; 40 Fed. 777.

3. There was a shortage in acreage, but a mistake of Deese as to his acreage was not the fault of Solmson.

If Deese elects to take the benefit of the relation of agency, he must assume the burdens incident to it. If the State can not recover, then it would be unconscionable to permit Solmson to recover from Deese. The board bought the place *en masse* without regard to the acreage, and the board is presumed to have had knowledge. If the actual shortage is too large to be embraced under the "more or less" clause, the abatement should be made for not exceeding 52 acres instead of 66 acres. 18 S. E. 355; 12 *Id.* 389; 54 Ind. 374; 29 Md. 305; 41 N. E. 599; 213 S. W. 201.

Assuming that Solmson told the Board of Control that he would make good the shortage, the promise, if made, related to a past and completed transaction, and there was no new consideration therefor, and no liability. 26 Ark. 160; 2 *Id.* 160; 66 *Id.* 26; 68 *Id.* 276; 70 *Id.* 232; 112 *Id.* 227; 37 L. R. A. (N. S.) 930; 73 S. E. 56; 70 W. Va. 38; 9 Cyc. 356; 30 S. E. 364; 51 *Id.* 603; 102 Am. St. 779; 76 S. W. 821. The decree should be reversed with directions to dismiss the complaint, the cross-bill of Solmson and the intervention of the Board of Control; or, in the alternative, that Solmson be given judgment against Deese and the judgment in favor of the Board of Control be credited on the $15,000 note executed by Solmson to Deese to the extent of the judgment recovered by Solmson against Deese and the balance of the judgment in favor of the State be credited on the note of the board to Solmson first maturing.

John F. Clifford, for appellee Deese.

1. It is conceded that the first contract was one of agency, and that the court was correct in its conclusion that the status of principal and agent, once fixed, could not be changed by Solmson into that of vendor and purchaser without full and complete disclosure to Deese of all the facts which Solmson knew at the time. The burden of proving this full, complete and honest disclosure was upon Solmson, and there is no testimony that he disclosed anything to Deese. The testimony of Deese is

clear and convincing that he did not know who the purchaser was and did not know the price Solmson received for the land until some days thereafter. In transactions between principals and agent *uberrima fides* is required, and if not the transaction is voidable and will be set aside at the option of the principal. 73 Ark. 575; Pom. Eq. Jur. (4 Ed.), par. 951.

2. Where the evidence is conflicting in chancery cases, the finding of the chancellor will not be reversed unless clearly against the preponderance of the testimony. 101 Ark. 503; 85 *Id.* 105; 101 *Id.* 522.

3. The contract executed on Sunday was void and of no effect either as a contract or evidence of change of status of the parties. An agent can not, without the clear consent of his principal, suddenly change the relationship and buy for himself at a reduced figure. The decree of the chancellor is sustained by the evidence as to Solmson's acts and statements, and that he did not make a full statement of what he knew, and the finding of the chancellor is conclusive.

4. Discrepancies in testimony are natural and usual, but the great preponderance of the testimony is in favor of Deese's contention and against Solmson. The doctrine of ratification does not affect the issues here between Deese and Solmson, but there was in fact no ratification of Solmson's acts, and the chancellor in effct so found. The chancellor properly held that the $250 payment was not in accord and satisfaction of Deese's claim. As to the shortage in acreage Deese stated clearly and definitely that he did not know the acreage—had never had it measured or surveyed. The relationship of principal and agent existed from the date of the signing of the contract upon March 19 until April 2, when the place was delivered to the Board of Control. The paper signed on Sunday was a nullity because of fraudulent representations and because also it was altered. There was no accord and satisfaction and the decree should be affirmed.

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

The board knew no one in this transaction except Solmson, and if he acted as agent for Deese but held himself out as the true owner and did not disclose his principal, he becomes personally liable for any misrepresentations and false warranties he may have made. So far as these interveners are concerned it is unnecessary to discuss the liability of Deese, as we did not deal with him in any way and were not apprised of the fact that they were dealing with his agent. All our late cases on this subject are bottomed upon 19 Ark. 103. See 25 Ark. 541; 30 *Id.* 535; 61 *Id.* 120; 71 *Id.* 97. The deficiency here is 21.7 per cent. For decisions of other courts on the questions involved, see 11 S. E. 218; 79 S. W. 185; 51 S. E. 827; 122 S. W. 220; 5 N. E. 375; 4 Ind. 512; 152 Mass. 60; 170 Mo. 121; 4 N. J. Eq. 212; 25 N. Y. 224; 29 A. & Eng. Enc. Law 629.

After appellant was advised of the shortage he agreed to hold the State harmless and that he would be liable for any shortage in acreage. There was a new consideration for his agreement. The decree below is right and should be affirmed.

SMITH, J. J. R. Deese brought this suit, and for his cause of action alleged that he had employed H. B. Solmson as his agent to sell his farm, and that the contract of agency authorized a sale for $50,000, with a commission of a thousand dollars, if a sale was made at that price, together with any excess over $49,000 net to Deese, but that his said agent had made a sale at $62,500 and had only accounted to him for $45,000, and judgment was prayed for $16,500.

Solmson filed an answer denying the allegations of the complaint, and alleged the facts to be that, acting solely for himself, he took a contract from Deese for a period of thirty days for the sale of the farm together with certain personal property for the net sum of $49,000, Solmson to receive all in excess of that sum as compen-

sation. That, while said contract was in the form of an agency contract, Solmson in fact intended to obtain an option for the purchase of said property, and in pursuance of this purpose he, in a few days after obtaining said contract, entered into negotiations with Deese to purchase said property for himself, and on March 29, 1919, Deese and his wife conveyed said property to him for the consideration of $46,950.

It very clearly appears that Solmson is a man of much more experience in the transaction of important business than is Deese; in fact, Solmson is a man of large and successful experience, yet the original contract entered into between the parties is very clearly an agency contract, a form being used in its preparation which was in common use by real estate agents in Little Rock in taking contracts to sell land. Solmson admits that he knows, and knew, the difference between an agency contract and a contract with an option to buy, and that he knew the contract he had taken was an agency, and not an option, contract; but he says it was his purpose to take an option contract, and that this purpose was effectuated by the second contract, which he made with Deese. The first contract was executed March 19, 1919, and the second one on March 24, 1919.

This second contract is in form a contract of sale and recites a consideration of $49,000, of which sum $5,000 is cash in hand paid, and Solmson says this second contract expresses the agreement he had with Deese. This is denied by Deese. In fact, according to Deese's testimony, and that of his son, who was present when the contract was signed by Deese and wife, the contract which they did sign was written on a single page, while the writing produced appears on three different pages, the insistence being that the writing is now a contract of sale when it was not so at the time of its execution. We do not review the testimony on this disputed point and decide that dispute, as we find it unnecessary to do so. On March 29 Deese and his wife executed and delivered to Solmson a deed to the land, and a separate bill of sale for

the personal property, for the consideration recited in the contract of sale. Deese testified that when the deed and bill of sale had been delivered Solmson confided to him that he had "unloaded" this property on the State Board of Control, but did not tell him the terms of the sale, and he was not advised as to its terms until a few days before the institution of this suit, and that as soon as he was advised he immediately consulted his attorney and brought this suit, it being filed April 25, 1919.

The General Assembly, at its 1919 session, passed an act, which was approved February 13, 1919, directing the Board of Control of the State Charitable Institutions to purchase and operate a farm within fifteen miles of the city of Little Rock, and pursuant thereto the members of the board undertook to locate a farm containing something like 500 acres, and that fact appears to have been generally known to the real estate men of the city, although the testimony does not show when Deese was first advised of the board's purpose. The board was unable to find a place of that size and decided to buy a smaller place, and, being advised that Solmson had lately become the owner of the land in controversy, they sent for him and opened the negotiations which terminated in its purchase. The board members testified that they dealt with Solmson as the owner, and knew no other party in the transaction, and that on April 2 he executed a deed to them for the land, which, after describing the lands, contained the further statement, "all of the foregoing lands being in township 1 north, range 11 west, and containing three hundred four and twenty-six hundredths (304.26) acres, more or less, also all accretions thereto, whatever they may be or become."

In addition to this recital, the board members testified that Solmson represented to them that the place contained 304.26 acres of tillable land and a sandbar of fifteen to twenty acres, and this Solmson admits doing. After obtaining the deed the board caused a survey of the land to be made, which disclosed the fact to be that there were only 254.12 acres of tillable land and fourteen

acres in the sandbar, which is practically valueless. The correctness of this survey is not disputed. Thereupon the Board of Control intervened in this litigation and asked a proportionate abatement of the purchase money.

It is insisted on behalf of Solmson that, even though his original contract with Deese created an agency, his second contract changed the relationship to that of vendor and vendee, and the correctness of this contention presents the real question in the case. Upon this issue we summarize our understanding of the facts as follows: Solmson had an agency contract, which gave him as his commission the excess over $49,000, but at the time of making the second contract he represented to Deese that his "party" would only pay $45,000, yet the cash payment recited, together with the deferred payments, aggregated $49,000. A cash payment of $5,000 was recited, of which only a thousand dollars was in fact paid. The $4,000 additional cash consideration was paid by Solmson delivering to Deese his check on the American National Bank for $4,000, payable to Deese, which Deese endorsed and returned to Solmson, who later passed the check through the bank, having the same marked paid by it. Solmson did not tell Deese he expected to sell the property to the State. Upon the contrary, he asserts the fact to be that he did not open negotiations with the board until after he had completed his purchase. A witness named Thomason gave testimony, however, to the effect that he had a conversation with Spencer, the partner of Solmson, in which Spencer stated that Solmson had a purchaser for a farm such as the Board of Control desired to buy, the substance of that testimony being that Solmson had the customer if he could get the farm. This conversation is said to have occurred at a time when, if the facts there stated were true, there was a gross breach of good faith to Deese on Solmson's part. Spencer denied having this conversation, and the chancellor made no finding of fact on that issue, stating in the opinion, which he delivered in deciding the case, that he considered it unnecessary to do so.

Deese testified that the second contract was executed on a Sunday morning and dated a day later; that Solmson stated $45,000 was the best price he could get out of his party, but that the purchaser would need a manager, and that he would endeavor to secure that position for him, and that, without being told that Solmson was assuming the attitude of purchaser, and without reading the contract, he and his wife signed it under the assumption that it was a writing authoizing Solmson to make a sale at the price which Solmson had then and there said was the best one obtainable.

As has been said, the testimony is irreconcilably in conflict on this question of fact; but Solmson admits that he never told Deese about the details of his trade with the Board of Control, and did not do so even when the deed was executed and delivered, as he stated that he thought it was none of Deese's business.

In reviewing this testimony and in pronouncing judgment thereon the court below found the facts as follows:

"If Solmson entered into a contract of agency, then there is nothing in the record which will show that that contract was changed until the sale of the land. If he entered into a contract of purchase, that contract continued until the final sale of the land to him by Deese. There is no doubt but that at the time the contract was finally consummated Deese understood that he was making a sale of the land to Solmson, or, rather, in Solmson's name. * * * But I have reached the conclusion that at the time they entered into the contract it was a contract of agency."

In holding that it was unnecessary to pass upon the question of veracity between Thomason and Spencer the court made this declaration of law upon the finding of fact above stated:

"If it is true that when they (Solmson and Deese) commenced their negotiations they created a contract of agency, and not one of sale, then Solmson by no act of his which was not fully explained to Deese could have changed that contract. When he found a purchaser for

the land it was his duty to make correct representation to Deese, as to the price he was to receive for it. If he did not do that, and sold it for more than he represented, then he is responsible to Deese for the sum at which he did sell it."

We think the finding of fact is not clearly against the preponderance of the evidence, and the law as declared conforms to Professor Pomeroy's statement of the agent's duty to his principal (Pomeroy's Equity Jurisprudence (4 Ed.), § 959), and both are, therefore, approved. See also *Thweatt* v. *Freeman*, 73 Ark. 575.

It is further insisted in Solmson's behalf that Deese, for the full consideration of the sum of $250, ratified the sale to Solmson. The court below, however, made an express finding against that contention; and we think the court was warranted in doing so. At the time this check was given a dispute had arisen between Solmson and Deese over the current accounts of the tenants on the place due to Deese and which he estimated at $500. At the time this payment was made Solmson called the board members, who were then present for the purpose of checking in and receiving the personal property, to witness the fact that he was paying Deese $250 in full settlement of all issues between them growing out of the sale of the farm. But it is undisputed that even then Deese did not know the terms upon which the sale had been made; consequently Deese did not ratify a transaction of which he was ignorant.

The total consideration paid and agreed to be paid by the State was $62,235. Deducting the value of the personal property the court found that the purchase price of the land, computed upon the correct acreage, was $147.90 per acre, and ordered an abatement of the purchase price which remained unpaid by the State for the shortage in acreage at the price per acre paid for the land. It is insisted that if the State is given credit for this deficiency, Solmson should also be given credit for it on his note to Deese. But we do not agree with that contention. Deese made no misrepresentation about the

acreage, and the price he was to receive was not dependent on the acreage. The court below took as the basis of the settlement between Solmson and Deese the original agency contract under which Deese was to have $49,000, and Solmson the excess, and this without regard to acreage, and the court deducted in the settlement between Deese and Solmson the entire shortage from Solmson's commission. This was properly done, as the sum remaining after that deduction had been made exceeded the contract price of sale ($49,000) upon which Solmson's commission depended.

The decree took care of certain other items which we need not discuss, as Deese was given judgment for the difference between the sum paid him and $49,000, not including the $250 item above mentioned.

The net result of this decree is that the original agency contract is made the basis of the settlement between the parties with the additional allowance of the $250 paid in settlement of the controversy over the accounts of the tenants.

It is finally insisted that too great a deduction was made on account of the shortage in acreage. But we think otherwise. Solmson does not deny his representation in regard to the acreage, and it is undisputed that there are sixty-six acres less than he represented. It is not charged that Solmson knew this representation was false, but it is not essential that that fact be shown. This was a material matter, and he was bound by his representations, however innocently made. *Neely* v. *Rembert,* 71 Ark. 91. It is true Solmson's deed described the land as being 304.26 acres, "more or less," and as was said in the case of *Harrell* v. *Hill,* 19 Ark. 103, these words, "more or less," are descriptive of the premises to be conveyed, rather than a covenant as to quantity; yet it was there also said that when there is a very great difference between the actual and the estimated quantity of acres of land sold in gross relief would be granted on the ground of gross mistake. Here, in a sale of 304.26 acres, a shortage of sixty-six acres exists, a proportionate part

of the whole so large as to constitute a gross mistake. See also *Neely* v. *Rembert, supra; Drake* v. *Eubanks,* 61 Ark. 120; *Haynes* v. *Harper,* 25 Ark. 541.

It is finally argued that the acreage in the sandbar should be taken into account in determining the deduction to be made. But we do not think so, as it appears that the sandbar was not considered in making the sale except as a thing conveyed in addition to the property for which value was paid.

No error appearing, the decree is affirmed.

BLACK v. BAILEY.

Opinion delivered February 9, 1920.

1. WILLS—ESTATE CONVEYED.—A devise to the testator's children of the estate not otherwise disposed of, and, after expiration of a trusteeship, providing "that if any of my children should die before the expiration of the above trusteeship hereinbefore created leaving issue, said issue shall only take the share that should go to my child if living," vested a fee simple estate in the children, and not a contingent remainder in the grandchildren.
2. WILLS—LEGAL TITLE.—A will which provided merely that the trustee therein named should hold the property in trust with power and authority to manage and control same according to his best judgment for the use and benefit of the testator's children did not vest the legal title in the trustee.
3. WILLS—SPENDTHRIFT TRUST.—A will devising the residue of property to the testator's children subject to the control and management of one of them, named as trustee, until a certain grandchild attained his majority, or, if such grandchild died before such age, the trust to continue for ten years, *held* not to create a spendthrift trust.
4. WILLS—TERMINATION OF TRUST.—Where a testator devised the residue of his estate to his children subject to a trust for the purpose of management and control until a certain contingency, and conditions arose under which no profits could be realized without large expenditures for which no funds were provided, and the children were all *sui juris,* and the continuation of the trust would work a confiscation of the property or greatly burden it with incumbrances, the court will terminate the trust at the desire of all the beneficiaries.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; affirmed.

Holland & Holland, for appellants.

The chancellor erred in his findings of facts and conclusions of law. The trust was created for the benefit of the estate and not merely as a bounty for the children. Dr. Bailey had in mind at the time the trust was created the thought that real estate values in Fort Smith would enhance in value from year to year on account of well known public improvements contemplated. It was the intention of the testator to create a contingent remainder in the minor defendants by the language used in the seventh paragraph. Yet the trust should not be terminated on that account; to do so would be to disregard the purpose for which it was created, the benefit of the estate. The testator had the right to fix such reasonable restrictions and limitations governing the control and management of the estate, its duration and termination, as he deemed equitable and fair, and manifestly from the sixth paragraph he created a trust in the trustee to be held until the grandchild, William Bailey Black, arrived at maturity, and meant to postpone the full enjoyment of the bequest by the legatees to that day. The language can have no other meaning; it is direct and certain and contains no reservations, contingencies or exceptions for the earlier termination of the trust. No grounds for discontinuing the trust are shown, other than convenience and the saving of cost, and that is no reason for its termination. 229 U. S. 90. The decree should be reversed.

T. P. Winchester, John H. Vaughan and *Warner, Hardin & Warner,* for appellees.

No remainder estate was created by the will, but the intention was that the entire estate should vest in his children at his death. 104 Ark. 439-448; 15 N. E. 786. It was the clear intention of Dr. Bailey that his four children should receive an income from his estate for a period of years and then their distributive shares of the estate itself. The court properly terminated the trust,

as all parties (heirs) came into court and requested that the trust be terminated. The chancellor recognized the conditions and unforeseen circumstances and properly terminated the trust, as it was its duty to do, and the decree should be affirmed.

HUMPHREYS, J. This suit was instituted by appellee John Mayne Bailey, trustee in the will of Dr. W. W. Bailey, deceased, against the other appellees and appellants to terminate the trust provided by the will and to construe the will as vesting a fee simple title to certain real estate in Fort Smith in the petitioner and other appellees, the only children and heirs of Dr. W. W. Bailey, and not a contingent remainder in said real estate in appellants, the only grandchildren of said testator.

In substance, it was alleged in the bill that the will vested in appellees a fee simple title to said real estate, subject to a trust imposed upon John Mayne Bailey to manage and control same for the benefit of the appellees until the testator's grandson, William Bailey Black, attained to the age of twenty-one years, or, in the event he should die before attaining his majority, to continue the control and management of same for ten years thereafter, rendering to himself ten per cent. of the net income from the property for his compensation as trustee and the balance in equal parts, semi-annually, to himself and the other appellees; that, at the time of the death of the testator, a part of the real estate comprising the trust was producing considerable net income, but that the purposes of the trust had failed in that the property had not only ceased to pay any net income, but had failed to pay carrying expenses; that the property could not again be made self-sustaining and net-producing without an expenditure of large sums of money; that all the appellees were *sui juris*.

The other appellees answered, admitting all the allegations of the bill and joining with appellee, John Mayne Bailey, in his request for a construction of the will and termination of the trust.

Appellants, minors and the only grandchildren of the testator, after being properly summoned into court, filed answer by a duly appointed guardian *ad litem,* denying seriatim each material allegation of the bill and claiming an interest as contingent remaindermen in the real estate.

The cause was submitted to the court upon the pleadings, the will of Dr. W. W. Bailey and the evidence, upon which it was decreed that appellees took under the will an estate in fee simple in said real estate, and, being the owners of the beneficial as well as the legal title, this terminated the trust. From that decree an appeal has been prosecuted to this court.

Dr. W. W. Bailey was the owner of a large estate in Fort Smith. He died on September 15, 1913, being survived by the appellees, who were his only children and heirs. The appellants are his only grandchildren. On the 25th day of January, 1910, he executed his last will and testament, in which his son, John Mayne Bailey, was appointed executor, who probated the will and qualified as executor after the death of his father. Under his letters testamentary, he administered the will, and, upon final settlement, was discharged as executor. He continued to control and manage that portion of the estate placed in his care and control under the terms of the will until the present time. For a number of years, the property thus placed under his control in trust paid a net income, but thereafter not only ceased to pay a net income but was not self-sustaining, and, in order to make it a paying proposition, it would entail an expenditure of fifteen or twenty thousand dollars in the way of remodeling and repairing the rental property. No fund was provided under the will for such an expenditure. That portion of the will drawn in question for construction is designated by paragraphs 6 and 7, which are as follows:

Paragraph 6. "It is my will and my intention that, after my funeral expense and the expenses of my last sickness and all my just and lawful debts, and the distribution of gifts above made to my children, who are all the children I have, that all the rest, residue and remainder

of my estate, which I may possess at the time of my death, both personal and real, except whatever interest I may have in the estate of my father, Joseph H. Bailey, shall be held in trust, by a trustee hereinafter named, until my grandchild, William Bailey Black, shall have become the age of twenty-one (21) years, my said estate, except whatever interest I may have in the estate of my father, Joseph H. Bailey, to be held in trust for the use and benefit of my children, Isabella M. Black, Kate T. Parker, William Worth Bailey, Jr., and John Mayne Bailey, they being all the children I have.

"If my said grandchild, William Bailey Black, should die before he attains the age of twenty-one years, then it is my will and intention, and I direct that said trust estate shall be extended for ten years after the death of said grandchild, provided he should die before he reaches the age of twenty-one years.

"It is my will and my intention, and I hereby appoint my dearly beloved son, John Mayne Bailey, as trustee of my estate, with full power and authority to handle, manage and control my estate as such trustee, as in his judgment may seem best, for the use and benefit of my children, Isabella M. Black, Kate T. Parker, William Worth Bailey, Jr., and John Mayne Bailey, and their heirs, it being my intention that my said trustee, John Mayne Bailey, shall divide the rents and profits equally among my heirs at law, Isabella M. Black, Kate T. Parker, William Worth Bailey, Jr., and John Mayne Bailey, or their heirs, semi-annually, etc."

Paragraph 7. "It is my will and intention and I do hereby give, devise and bequeath, at the expiration of the above and aforesaid trusteeship hereinbefore created, all of my estate, both real and personal, not hereinbefore disposed of, to my children, Isabella M. Black, Kate T. Parker, William Worth Bailey, Jr., and John Mayne Bailey, and to their heirs forever, share and share alike; provided that if any of my children should die before the expiration of the said trusteeship hereinbefore created,

leaving issue, said issue shall only take the share that would go to my child if living."

We are unanimously agreed that the language used in neither paragraph warrants the conclusion that it was the intention of the testator to create a contingent remainder in the trust estate in the appellants. The only language pointed out as indicating such intention on the part of the testator is found in paragraph 7, and is as follows: "Provided that if any of my children should die before the expiration of the above trusteeship hereinbefore created leaving issue, said issue shall only take the share that should go to my child if living." The language just quoted is nothing more than a direction that during the continuation of the trust and before the termination thereof, in the event one of the testator's children should die, his issue should inherit according to the law of descent and distribution. It was a mere declaration of law and not the expression of an intention to create a remainder interest in the grandchildren. It follows that by the will a fee simple title to the trust estate vested in the appellees, unless it can be ascertained from a reading of the two sections that it was the intention of the testator to vest the legal title to the trust estate in the trustee for the period of the trust. Had such intention been in the mind of the testator, it would have been very easy to vest the legal title in so many words in the trustee. Instead of doing so, paragraph 6 provided that the property in question should be held in trust by the trustee with power and authority to manage and control same according to his best judgment for the use and benefit of the testator's children, naming them. The trust was created for the purpose of control and management, and not for the purpose of temporarily vesting the legal title to the property. The only attempt to vest the title occurs in paragraph 7, in which paragraph the title was vested in the four children, John Mayne Bailey, William Worth Bailey, Isabella M. Black and Kate T. Parker. It is apparent from a reading of both paragraphs that not only the beneficial interest was intended

for the children by the creation of the trust, but that the title itself was to vest in his children and not in the testator's trustee. We think the proper interpretation of paragraphs 6 and 7, when read together, is that it was the intention of the testator to vest the entire estate in his children with a postponement of their right to enjoy the possession thereof in severalty for a period of years, towit: until the testator's grandchild, William Bailey Black, attained his majority, or, dying before attaining such age, for a period of ten years after his death.

There is no language or clause in the will to indicate that the purpose of the testator was to create a spendthrift trust. The only purpose seems to have been to hold the property intact for a period of years for the use and benefit of his children. It was producing a good income at the time of his death, and it was perhaps in his mind that it would continue to do so during the management and control thereof by his son, John Mayne Bailey. Conditions have arisen which were apparently not in the mind of the testator at the time he executed the will, or at the time of his death. No net profits can be realized on the property without very large expenditures, for which no fund was provided. No one, save the appellees, according to the interpretation placed upon the will by this court, has any interest in the property. They are all *sui juris*. A continuation of the trust will perhaps work a confiscation of the property, or, at least, greatly burden it with incumbrances. It was manifestly not the intention of the testator that the property should be thus consumed. The whole estate having vested in the appellees, and all desiring a termination of the trust, we see no good reason why it should not be terminated. Such doctrine was clearly announced in the case of *Booe* v. *Vinson,* 104 Ark. 439.

No error appearing, the decree is affirmed.

McCULLOCH, C. J. (dissenting). It seems clear to me from the language of the will that the legal title was conveyed to the trustee under paragraph 6, and that the

title was not intended to be vested in the *cestuis que trust* under paragraph 7 of the will until the period of the trust expired. It is provided in paragraph 6 that the property devised "shall be held in trust" by the trustee named, and that the trustee should have "full power and authority to handle, manage and control" the estate for the use and benefit of his four children named in the will, or their heirs. It is expressly provided in paragraph 7 that the devise over to the four children should take effect "at the expiration of the above and aforesaid trusteeship hereinbefore created."

The concluding portion of paragraph 7 unmistakably manifests the fact that, the testator being conscious of having devised the legal title in trust to the trustee mentioned, and having provided that the direct devise to his children in paragraph 7 should not take effect until the expiration of the trust, it was necessary to indicate the effect of the devise in the event of death of one of his children before the expiration of the trust. This language does not relate to the disposition of the property during the period of the trust, for nothing is said in paragraph 7 about the disposition of the property during that period. On the contrary, this language very plainly relates to the final disposition of the property at the expiation of the trust.

I am unable to discover any sound reason why the court should disregard the intention of the testator himself and break up a trust merely out of consideration of convenience. The creation and maintenance of such a trust does not offend against any established rule of law or any principle of equity, and there is no reason why the courts should set their judgment above the will of the testator. In dealing with this question in a similar case, the Supreme Court of the United States said: "Upon what principle, then, is a court of equity to control the trustee by compelling a premature payment? It is a settled principle that trustees having the power to exercise discretion will not be interefered with so long as they are

acting *bona fide.* To do so would be to substitute the discretion of the court for that of the trustee. Upon the same and even stronger grounds a court of equity will not undertake to control them in violation of the wishes of the testator. To do that would be to substitute the will of the chancellor for that of the testator." *Shelton* v. *King,* 229 U. S. 90.

This case does not fall within the decision in *Booe* v. *Vinson,* 104 Ark. 439. In that case the controlling fact was that the charitable bequest of the body of the estate after the expiration of the trust failed entirely and brought about a union of the beneficial estate under the trust and the remainder in fee, and this court decided that that was an unanticipated situation which would call for a judicial abrogation of the trust. In the present case there is no such situation presented, and the only change suggested is that the devised property had ceased to be remunerative. It is to be presumed that the testator himself took such contingencies into due consideration and elected to tie his estate up in a trust until the grandchild became twenty-one years of age. I am unable to discover any sound reason for the court interposing its powers to frustrate the design of the testator in this regard.

The logical result of this decision is that courts of equity are authorized to break up a trust at any time it is thought that the continuation thereof would result improvidently. This is a limitation upon the right of disposition of property which has not been heretofore declared by the lawmakers, and is not sanctioned by any line of authorities which have come to my attention. Mr. Justice SMITH concurs in this dissent.

ROGERS v. ROBERTSON.

Opinion delivered February 9, 1920.

1. APPEAL AND ERROR—INSTRUCTION—HARMLESS ERROR.—Where defendant's pleadings admitted execution of the contract sued on, an instruction that plaintiff had the burden of proving the contract was harmless error though the contract was admitted where the court further instructed the jury as to such admission.
2. TRIAL — INSTRUCTION — GENERAL OBJECTION.—An instruction containing a slight ambiguity should be objected to specifically.
3. TRIAL—INSTRUCTION—GENERAL OBJECTION.—An objection to an instruction in that it uses a word improperly or inexactly should be pointed out specifically.
4. SALES—INSTRUCTION.—In an action by buyer for breach of a contract to sell hay where the seller claimed that the buyer did not order delivery within reasonable time and broke the contract, an instruction that if the parties made any changes in the written contract by telephone conversations the jury should determine what changes were made, and then apply the rules of law to the changes, was not abstract, there being evidence as to numerous telephone conversations relative to the contract.

Appeal from Prairie Circuit Court, Southern District; *George W. Clark,* Judge; affirmed.

Andrew I. Roland and *Cooper Thweatt,* for appellant.

The court erred in giving the three instructions on its own motion. The court in effect instructed the jury that appellant Rogers did fail to order out the cars and this was erroneous and greatly prejudicial. There is no evidence that any changes were made in the written contract by telephone or otherwise, but if so there was no new consideration for such change. 112 Ark. 165-223.

L. P. Biggs, for appellee.

1. The instructions complained of are not properly in the record, as they are omitted in the bill of exceptions. 94 Ark. 147; 102 *Id.* 143.

2. But if given they are not abstract nor prejudicial and they were only objected to generally and not specifically. 2 Jones on Ev., p. 8; 110 Ark. 117; 118 *Id.* 72; 76 *Id.* 348; 105 *Id.* 157; 86 *Id.* 103.

HUMPHREYS, J. Appellant instituted suit against appellee in the Southern District of the Prairie Circuit Court to recover $812.50 damages for failure to ship him thirteen cars of No. 1 hay at $13.50 per ton. f. o. b. appellee's loading track at Screeton, Arkansas, as per an alleged contract of date July 5, 1917.

Appellee answered, denying all the material allegations of the complaint and filed a cross-complaint, alleging that, on June 26, 1917, he entered into a contract with appellant to sell him ten car loads of No. 1 hay at $13.50 per ton, f. o. b. Screeton, Arkansas, and on July 2, 1917, sold him an additional five cars on like terms; that appellant ordered out two cars, but failed and refused to order out or accept the other thirteen until after the expiration of the contract, to appellee's damage in the sum of $455, for which he asked judgment against appellant.

Appellant answered the cross-bill, admitting the execution of the contract at the time alleged by appellee, but denying that more than two cars were to be shipped immediately, and affirming that thirteen cars were to be held subject to his order; that he thereafter ordered them shipped before the expiration of the contract, but shipment was refused; and denied that appellee was damaged in any sum by reason of his failure to order or accept the hay, as alleged in the cross-bill.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment against appellant in the sum of $195, from which judgment an appeal has been duly prosecuted to this court.

The negotiations for the sale and purchase of the hay in question began by telephonic communication, which was confirmed and completed by letters of date June 26, July 2, July 5, July 9, all in the year 1917. The contract, as disclosed by the letters, constituted a sale and purchase at $13.50 per ton of fifteen cars of hay f. o. b. Screeton, Arkansas—two for immediate shipment and thirteen for shipment subject to the order of appellant, which, according to the construction of this court, meant,

to be shipped under the order of appellant within a reasonable time from the date of the contract, otherwise the contract would lack mutuality to support it.

There was a gradual decline in the value of hay after the execution of the contract until some time in September, after which time the value increased gradually until it reached a maximum value of $28.50 in November or December of the same year.

The additional evidence of appellee tended to show that he urged appellant to order the hay shipped from time to time until October, both over the telephone and by correspondence, but was unable to prevail upon him to take it; that from thirty days to six weeks was a reasonable time to hold hay subject to shipping orders; that appellant, when pressed, refused to accept the hay, and advised him to sell it at Screeton.

The additional evidence of appellant tended to show that no request was made for him to accept or order the hay shipped at any time after the execution of the contract; that he never consented for, nor directed, appellee to sell the hay at Screeton; that in October and November he ordered the hay shipped from time to time, but failed to secure any shipments or receive any explanation for a failure to ship.

The court instructed the jury upon its own motion, without numbering the several instructions, but, according to the subject-matter covered, the parties have divided and discussed them as three separate instructions. The objections and exceptions to the instructions, as shown by the perfected bill of exceptions, are severally and separately to each instruction.

It is insisted that the court committed reversible error in giving the first instruction, because it placed the burden upon appellant to establish the execution of the contract, when the execution thereof was admitted under the pleadings. No prejudice could have resulted to appellant on this account, because the court further on in the same instruction advised the jury that appellee, in his answer and cross-bill, admitted the execution of the

contract. This was tantamount to instructing that the burden imposed upon the appellant had been met by the admission of appellee.

Again, it is insisted that the court took one of the vital issues of fact from the jury in the wording of the second instruction given for which the cause should be reversed. The instruction is as follows: "If you find from the evidence that the defendant (referring to appellee) did not violate this contract, that he was ready and willing at all times to meet its terms and conditions, and was prevented from doing so by the failure on the part of Mr. Rogers to order out the cars; and that hay declined in the market below the price for which the hay was sold with the time within which plaintiff Rogers had to order out the hay, then your verdict should be for the defendant."

We think a fair construction of the language challenged as erroneous is that if the jury should find that Mr. Rogers failed to order out the cars under the terms and conditions of the contract and appellee himself was ready and willing to ship the hay at all times and had not violated the contract, then they should find for appellee. The most that can be contended for is that there is a slight ambiguity in the instruction which should have been pointed out to the court by a specific objection, which was not done. Only a general objection was made to the instruction.

Lastly, it is insisted that the court committed reversible error in giving the third instruction to the jury, which is as follows: "I will say further, gentlemen of the jury, if you find by a preponderance of the testimony that these parties made any changes in the written contract by telephone communication, then it is your duty to say as to what changes, if any there be made, and then apply the rules of law as given you by the court to any such changed condition of the contract made over the telephone, if you find such changes made. The burden of proving any changes of the contract made over the tele-

phone is upon the defendant, and that by a preponderance of the testimony."

The alleged error contended for in the instruction is that it was abstract; that there was no evidence offered on either side tending to show a change in the written contract by telephonic communications. Under the terms of the original contract, no time being specified for the shipment of the hay, appellant had a reasonable time in which to order it shipped. There was evidence tending to show that, after the execution of the contract, appellee called appellant over the phone several times, insisting that he take the hay; that appellant answered on one occasion that his customers were building a warehouse and not yet in shape to take it, and on another occasion that he did not know whether he would take the hay. By the use of the word "change" in the instruction, the court evidently had in mind the issue of when and whether the contract was breached by appellant in failing to order the hay shipped, as relating to the amount of damages in case the contract was breached. It appeared from the evidence that hay varied in price at different times subsequent to the execution of the contract. So the time of breach, if one occurred, was material in determining the amount of damages occasioned on account of such breach. In this sense, the instruction was not abstract. If the word "change" was inaptly used by the court, attention should have been called to the fact by a specific, and not a general, objection.

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

HOLLAND v. BONNER.

Opinion delivered February 16, 1920.

1. EVIDENCE—BURDEN OF PROOF.—The burden of proof is on the plaintiff to establish the allegations of her complaint.
2. DESCENT AND DISTRIBUTION—ADVANCEMENT.—Proof that a parent conveyed land worth from $6,000 to $8,000 for $500 *held* to make a *prima facie* case of advancement, to the extent at least of

the difference between the consideration expressed and the real value of the land conveyed.

3. DESCENT AND DISTRIBUTION—PREFERENCE OF ONE CHILD.—A parent has the right to make such disposition of his property as he pleases; hence the presumption that he will not give one child a greater portion of his property than another is not conclusive and may be rebutted.

4. DESCENT AND DISTRIBUTION—ADVANCEMENT—BURDEN OF PROOF.—Where land conveyed by a parent to a child for $500 was worth from $6,000 to $8,000, the grantee has the burden of proving that the conveyance was not an advancement.

5. DESCENT AND DISTRIBUTION—"ADVANCEMENT" DEFINED.—An "advancement" is a gift by a parent to a child in anticipation of what it is supposed the child will be entitled to on the death of the parent.

6. DESCENT AND DISTRIBUTION — ADVANCEMENT — INTENTION.—Whether a conveyance or transfer of money or property by a parent to a child is an advancement or a gift depends on the intention of the parent; and if it appears that he intended a gift, it will not be treated as an advancement.

7. DESCENT AND DISTRIBUTION — ADVANCEMENT.—Evidence *held* to show that a conveyance by a parent to a child was not an advancement.

Appeal from Randolph Chancery Court; *Lyman F. Reeder,* Chancellor; affirmed.

W. L. Pope, for appellant.

1. Kirby's Digest, sections 2650 to 2653, are evidently designed to enlarge the common law doctrine of advancements and to ascribe to the donor that intention most favorable to an equal distribution of his property among his children. Such has always been the doctrine of this court. 45 Ark. 481; 68 *Id.* 405; 69 *Id.* 629; 97 *Id.* 568.

2. When the difference between the price paid and the actual value of the property is apparent and great, the conveyance will be regarded as an advancement to the extent of that difference. 18 C. J. 921; 1 R. C. L. 668; 58 Ia. 55; 53 S. C. 350; 57 Ga. 520; 118 N. W. 374. Since it was proved and the court so found that the land was worth from $6,000 to $8,000 at the time the deed was

made, and since the deed itself expressed the consideration of love and affection, a presumption was at once raised that the excess in value was an advancement. 18 C. J., p. 920 (see 923); 1 R. C. L., p. 665, § 17. The intention of the intestate should prevail. Declarations made prior to the advacement and statements made thereafter are admissible to show an advancement. 1 R. C. L., sec. 17; 4 Enc. of Ev., p. 610; 50 N. J. Eq. 577; 14 *Id.* 240. For the rules of evidence involved, see 4 Enc. of Ev., pp. 585 to 624. There is no testimony establishing a state of facts that a court of equity would enforce specific performance of a parol sale of land. 63 Ark. 106. Never did Mr. Armstrong do more than express an intention to some day deed Mrs. Bonner the land. There is an essential difference between an expressed intention to do a thing and an absolute undertaking to do it. 71 Ind. 288; 3 N. E. 516; 12 N. E. 295. In this case all the equities favor the appellant, and under the rule laid down in 68 Ark. 405 the various amounts received by Mrs. Bonner from her father in land, rents, sales of timber, etc., should be held as advancements, and the court erred in not so holding.

E. G. Schoonover, for appellee.

The findings of facts by the chancellor was upon conflicting evidence and the preponderance sustains his findings and should not be disturbed. 1 Michie's Dig., pp. 377-379; 82 Ark. 492. The testimony shows that the transaction was a sale of the land, and not an advancement.

WOOD, J. Appellant instituted this action against the appellee in the chancery court of Randolph County.

The appellant alleged in her complaint in substance that A. O. Armstrong died in 1919, leaving his widow, M. E. Armstrong, and the appellant and the appellee, his only children and heirs at law; that he died seized of 565 acres of land; that before his death he purchased a certain eighty acres as a home for the appellee and allowed her to live upon the same for a number of years

without paying any rent and allowed her to sell valuable timber from the land but retained the title in himself and continued to pay the taxes thereon; that a short time before his death he deeded the land to the appellee as an advancement to her out of his estate, since which time appellee had continued to hold the land and enjoy the rents and profits therefrom. She alleged that she was entitled to one-half of the estate of her father subject to the dower rights of her mother, M. E. Armstrong, and that the appellee was entitled to the same; that the eighty acres of land above mentioned deeded by their father to the appellee were of greater value than most of the other land of the estate, being of the value of $10,000-$12,000.

Appellant, therefore, prayed for a partition of the lands and that commissioners be appointed and instructed to set aside to the appellant and the appellee, after carving out the homestead and dower interest of their mother, an undivided one-half interest in all of the lands owned by her father at the time of his death and including the eighty acres which he prior to that time had deeded to the appellee.

The appellee answered the complaint and alleged that her father, A. O. Armstrong, on the 5th of March, 1903, purchased the eighty acres of land in suit for the sum of $450, which at that time was a fair and reasonable value for the same, and that he immediately thereafter sold the same to the appellee by parol; that she at once took possession of the lands which were wild and built a house on the same and continued to reside thereon until May, 1918; that she made other improvements which she described; that under the terms of the oral contract of sale she was to repay her father the amount he paid for the lands, and she took possession and improved the lands upon the faith of that contract; that the lands had greatly increased in value; that on the 26th day of April, 1918, her father and mother executed to appellee a deed to the property at which time she paid her father $100 in cash and executed to him her four promissory notes in the sum of $100 each as the purchase price

for the lands; that since the execution of the deed she had paid one of the notes, and the others were in the hands of the administratrix, M. E. Armstrong, as a part of the assets of the estate; that it was expressly understood and agreed between the appellee and her father and mother at the time of the execution of the deed that the transaction was a sale and not a gift, and that she was not to be held to account for the value of the land as an advancement out of her father's estate, but that upon payment of the notes she was to have the absolute title to the lands free from any claims of the estate.

Appellee joined in a prayer to the extent that the other lands, not including the eighty acres, be partitioned between appellant and the appellee subject to the homestead and dower rights of their mother.

The court found the facts to be that the lands were purchased by appellee's father for her in the year 1903 for the sum of $450, and that in December, 1903, she went into possession of the land under a parol contract with her father to sell her the lands for the same consideration which he paid; that on the 26th of April, 1918, he executed a deed to the appellee for a consideration of $500; that A. O. Armstrong from the time of his purchase of the lands until the time he executed the deed to the appellee had paid the taxes; that the land at the time of his purchase was heavily timbered; that the appellee and her husband had cut and removed therefrom timber to the value of several hundred dollars; that the land had greatly increased in value and at the time of the decree was worth from $6,000 to $8,000.

The court found that the deed to the eighty acres by A. O. Armstrong to the appellee was in pursuance of the parol contract of sale to her and was not an advancement and could not be considered as a part of the assets of the estate of A. O. Armstrong to be divided between the appellant and the appellee.

The court, thereupon, entered a decree dismissing appellant's complaint for want of equity as to this eighty acres, from which is this appeal.

The deed to the land in controversy from appellee's father and mother to appellee was executed April 26, 1918. The consideration expressed in the deed was "the sum of five hundred dollars," and, "the love and affection that we have for our said daughter."

The undisputed testimony shows that at the time the deed was executed the land was worth between six and eight thousand dollars. The appellant testified that after the deed was executed she had a conversation with her father in the course of which he said to her, "You and her (appellee) are the only two children and I will not make any difference between them, I expect you and Lizzie to share equal." He also stated "that the value of the land was more now than when he bought the place that they (appellee and her husband) were living on; that all would be made right."

One witness on behalf of the appellant testified that about thirteen years ago he was cutting timber for A. O. Armstrong on a tract of land adjoining the land in controversy. At that time Bonner was cutting timber on the eighty now in suit. Witness asked Armstrong "if it was Bonner's land," and Armstrong replied: "It may be some day when I get ready to give it to him."

Another witness heard Armstrong say something over two years before the trial "that Bonner has got no farm; that is my farm; he never paid the taxes on it."

Another witness, about six years before the trial, heard Armstrong say that the land in suit belonged to him, that it did not belong to her (appellee).

Still another witness, who had lived with Armstrong ten years, heard Armstrong say "a number of times" that "he intended for Sylvia (appellant) to have an equal charge with Lizzie" (appellee). These conversations occurred more than five years before the trial, "might have been nine years."

It was conceded that the land was assessed in the name of A. O. Armstrong from 1903 to 1918, and that during that time he paid the taxes.

The above is the material testimony upon which the appellant relies.

The appellee testified that she requested her father to buy the land for her and to hold it in his name until she paid for it or got money enough to make a payment on it. He bought it for the sum of $450. Appellee was to pay her father the sum of $500. She was to pay back the purchase money. She went into possession after her father got the deed. Her husband was in the sawmill business. The land was timbered, and they sawed all the timber that was suitable for sawing. They put sixty acres in cultivation, built dwelling and tenant houses, spent all the money derived from the place in the last ten years in improvements on same. It was the understanding between herself and father that the place was hers. She was to have it when she paid for it. He bought the land from M. R. Armstrong. The price he paid ($450) was reasonable at that time. Until he made her a deed, the land being still in his name, he paid the taxes. Appellee proposed twice to borrow money and pay for the land, but her father preferred that she should wait and pay it out without interest. The deed from M. R. Armstrong to A. O. Armstrong was introduced and the consideration named therein was $450.

The testimony of Mrs. M. E. Armstrong corroborated in all essential particulars the testimony of the appellee. She stated that the land was bought for appellee and turned over to appellee for a home. Appellee and her husband made the improvments on it; they had lived on it for twelve or fourteen years. At the time the place was purchased for appellee she offered to pay for it, but her father told her to go ahead and improve the place. Witness testified, among other things, concerning the deed made in 1918, that she was present when the deed was made. The appellee had paid her father one hundred dollars on the land. He was old, being ninety-four years and a few months when he died. Was talking about making a will, and said there was no use making a deed, that appellee would get the land any way,

that he intended for her to have it. He further said she, appellee, had "deviled him into making a deed." At the time the deed was made it was the understanding that appellee was to have the land absolutely, subject to the payment of the purchase money notes. She was not to account for any part of it in the distribution of the assets of the estate, except these notes.

The lawyer who prepared the deed and notes stated that he did so at the request of A. O. Armstrong. The material part of his testimony is as follows: "I understood from his conversation and from what he told me that he was making this deed to carry out his part of the contract of sale he had made verbally to his daughter a number of years ago; that he was conveying to his daughter all his interest and claims against this land except to the extent of the unpaid $400 of the purchase money, and that neither he nor his estate had any other claims against it."

The burden was upon the appellant to prove the allegations of her complaint. That is, the burden rested on her primarily to prove that the conveyance of the land in controversy was, not a simple gift, nor a sale from A. O. Armstrong to the appellee, but that same was given to her as an advancement. The appellant having proved by the undisputed evidence that the value of the land was $6,000 to $8,000 at the time of the execution of the deed, and that the consideration expressed therein was only $500, it was a *prima facie* showing of an advancement, to the extent, at least, of the difference between the consideration expressed and the real value of the land conveyed. For the law presumes that the natural affection of parents is as strong for one child as another, and that in the distribution of property parents will treat their children equally and fairly.

Therefore, when appellant adduced evidence which proved that her father had deeded to the appellee a tract of land worth between $6,000 and $8,000 for the sum of $500, she established a *prima facie* case of advancement,

as already stated, to the extent of the difference between the consideration paid and the real value of the land.

The parent, however, has the absolute right to make such disposition of his property as he pleases. Therefore, the presumption that he will not give one child a greater portion of his property than another is not a conclusive one, but one that may be overcome or rebutted by proof to the contrary.

Proof on the part of the appellant of the deed from A. O. Armstrong to the appellee and the disparity between the consideration paid and the actual value of the land at the time of the conveyance shifted the burden to the appellee to prove that the conveyance was not an advancement but a sale.

An advancement is a gift by a parent to a child in anticipation of that which it is supposed the child will be entitled to on the death of the parent.

The question as to whether or not a conveyance or transfer of money or property is regarded as a simple gift, or advancement, or a sale, is to be determined by the intention of the parent. The question as to what was the intention is generally purely one of fact to be ascertained from the circumstances of the transaction. The donor's intention is the controlling principle, and if it can be said from all the circumstances surrounding a particular case that the parent intended a transfer of property to a child to represent a portion of the child's supposed share in the parent's estate such transfer will be treated in law as an advancement. Conversely, if it appears that the ancestor intended that a gift to his child should not be treated as an advancement such intention will prevail. 1 R. C. L., p. 656, § 5, p. 665, § § 1617-23-27, and other cases in note; *Ruch* v. *Biery*, 110 Ind. 444; *McMahill* v. *McMahill*, 69 Iowa 115; *Wallace* v. *Reddick*, 119 Ill. 151.

The appellee does not contend, as we understand the record, that the deed in controversy was intended as a simple gift. Appellant contends that it was a gift by way of an advancement, and the appellee that it was a sale.

Applying the above familiar rules of law of advancements to the facts of this record, we are convinced that a clear preponderance of the evidence shows that the deed in controversy was made in pursuance of an understanding between the appellee and her father that the latter should purchase the lands in controversy and convey the same to the appellee; that the transaction was a sale and not a gift by way of advancement. It was not a voluntary transfer without consideration, but on the contrary was a sale for a consideration which at the time of the original transaction represented the fair value of the land. The deed was but the culmination of a transaction which antedated that instrument some fifteen years.

It was the consummation and evidence of a complete contract which was first entered into between the appellee and her father in the year 1903. The promise of A. O. Armstrong in 1903 to convey the land to appellee was, of course, not binding upon him in law, because it was not in writing, and there was no part of the consideration paid when appellee took possession. But A. O. Armstrong nevertheless considered his promise then made to appellee as binding upon his conscience, as evidenced by the execution of the deed in pursuance of such promise.

The findings of the chancellor are in accord with our own. The decree is, therefore, correct, and it is affirmed.

HINKLE v. LASSITER.

Opinion delivered February 16, 1920.

1. EVIDENCE—HEARSAY.—In an action by a broker for a commission for the sale of land, involving the collateral issue as to whether such broker had procured a purchaser, it was competent for the broker to prove the conversation between the alleged purchaser and himself as original evidence to show that he had procured a purchaser as agreed.
2. EVIDENCE—CONCLUSION.—Where, in an action by a broker for commissions, defendant objected and the court erroneously refused to permit plaintiff to prove the conversation between plain-

tiff and one to whom he claimed to have made a sale, defendant can not complain that the witness, instead of relating the conversation, stated a conclusion, namely, that plaintiff made a sale.

3. EVIDENCE—CONCLUSION.—Testimony of a witness that plaintiff effected a sale is a statement of an ultimate fact, and not a conclusion.

4. NEW TRIAL—DISCRETION OF COURT.—Motions for new trial for newly discovered evidence are addressed to the sound legal discretion of the presiding judge, and it is only in case of an apparent abuse of that discretion that the Supreme Court will interfere.

5. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—A motion for new trial for newly discovered evidence is not sufficient where it fails to state facts showing that due diligence was used to discover and produce the evidence at the trial.

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

W. K. Ruddell and *Pace, Campbell & Davis,* for appellant.

1. It was error to permit witness Britt to testify that appellee sold the land to Vance, as it was clearly the expression of a conclusion of law. 13 Ark. 461; 97 *Id.* 176; 70 *Id.* 423; 62 *Id.* 510; 114 *Id.* 516; 1 Thompson on Trials, § 377; 66 Ark. 494; 91 *Id.* 427.

2. The case should be reversed because of newly discovered evidence which was not merely cumulative, but was such as would probably have changed the result of the trial. Hayne on New Trials, 424-5; 129 Cal. 690; L. R. A. 1916 C, 1162; 83 Ia. 548; 24 S. D. 32; 133 Am. St. 945; Kirby's Dig., § 2422. Due diligence was shown. 88 Am. St. 73. See also 112 Am. Neg. Cas. 38. The two facts necessary to a recovery, *i. e.*, that appellee sold appellant's land and that appellant had agreed that appellee should have all over $1,000 he sold the land for, were not established by the competent testimony. As to incompetent testimony, see 105 Ark. 205; 89 *Id.* 556. The burden was on appellee to show that appellant was not prejudiced by the incompetent testimony of Britt. *Ib.* and 8 Wyo. 58.

S. M. Bone, for appellee.

1. There was no error in permitting witness to state that appellee sold the land to Vance. It was not a conclusion or opinion but the statement of a fact. 17 Cyc. 223.

2. The trial court did not err in refusing a new trial for newly discovered evidence, as there was no allegation of diligence, no affidavit to the statement of facts and the alleged evidence was simply cumulative. Kirby's Digest, § 6215; 2 Ark. 346.

3. Motions for new trial are addressed to the sound discretion of the court, and it is only in case of abuse of discretion that this court interferes. 85 Ark. 179; 41 *Id.* 229; 54 *Id.* 364; 106 *Id.* 379. Reasonable diligence was not shown. 85 Ark. 179; 28 *Id.* 121; 38 *Id.* 498; 73 *Id.* 528. The evidence here was cumulative merely. 2 Ark. 33; *Ib.* 346; 5 *Id.* 256, 403; 11 *Id.* 671; 17 *Id.* 96; 60 *Id.* 481; 103 *Id.* 581; L. R. A. 1916 C, 1162, 1198 (note B). See also 77 Kan. 663; 96 Pac. 143.

WOOD, J. This action was brought by the appellee against the appellant to recover the sum of $500 alleged to be due appellee from the appellant as commission on the sale of certain real estate.

The appellee alleged that the appellant gave him written authority to sell the land.

The appellant admitted that he gave the appellee written authority to sell the land as described in appellee's complaint, but denied that appellee sold the land upon the terms agreed upon between them and denied that he was indebted to the appellee in any sum.

The appellee testified to and exhibited an instrument which, after describing the land, recites: "I hereby authorize Barry Lassiter to sell the above tract of land which I own. Signed, John A. Hinkle, Batesville, Arkansas, July 16, 1918."

The appellee stated that the contract between him and the appellant was that if appellee sold the land appellant was to give him as his commission all that the

land sold for over $1,000; that he procured a man by the name of Captain Vance to purchase the land, sold the land to him and sent him to the appellant, who closed the sale. Appellant received as the purchase price the sum of $1,500. After the deal was closed the appellee demanded of the appellant his commission in the sum of $500, which appellant refused to pay.

The appellee further testified that he, his son, and appellant were the only parties present when the contract was made for the amount of appellee's commission.

The above is the substance of the material testimony for the appellee. His testimony was corroborated by his son, Virgil Lassiter.

Elijah Britt testified that he was present when Captain Vance came to see Lassiter about the purchase of the land in controversy in the summer of 1918. He was asked the following questions:

"Q. Well, I will ask you if Lassiter sold the land to Vance at that time?

"A. Yes, sir.

"Q. Did he give him the numbers of the land?

"A. Yes, sir."

The appellant objected and asked that the question and answer about selling the land to Vance be stricken out. The court refused the request, and appellant duly excepted to the ruling of the court.

The appellant testified that he gave appellee the written authority to sell the land above set forth but that it was not an exclusive authority, that he told appellee that the price for the land was $1,500; that about a week after this, appellee told appellant that the purchaser appellee had in view had fallen down on him, and appellant told the appellee that he could have a little further time. Two or three weeks after the last conversation with appellee Joe Magness came to appellant and asked appellant to allow him to sell the land. Appellant told him that he could sell the same for $1,500, and in a short time Magness came back and told appellant that he thought he had the land sold and asked appellant to get up the ab-

stract. In the meantime appellee told the appellant that Magness and Vance were going to sell the land. Vance and Magness were partners in the real estate business, and appellant carried on his negotiations with Magness.

Captain Vance testified that Magness got the right from the appellant to sell the land in controversy and that he and Magness were to get all over $1,500. They bought the land from the appellant about the 10th of August. The deed was made to J. D. Magness and the consideration was $1,500. They were buying the land to sell again.

Magness and another witness testified corroborating the testimony of Captain Vance.

The jury returned a verdict for the appellee in the sum of $500.

There was a motion for a new trial and among other grounds the appellant set up that since the trial he had discovered that B. H. Hinkle and Robert Gray would testify in substance that they heard a conversation between the appellant and appellee concerning the sale of the land in controversy, in which the appellee requested the appellant to give the appellee authority to sell the land and during the conversation they heard the appellant tell the appellee that $1,500 was his price for the land, and that appellee could have all over that price. Appellant stated that he had no way of knowing before the trial that the above witnesses had heard the conversation as set forth in their affidavits, which accompanied the motion.

The motion was overruled, and judgment was entered in favor of the appellee, from which is this appeal.

The appellant urges two grounds for reversal.

First, because of the error of the trial court in permitting Elijah Britt, witness for the appellee, to testify over the objection of the appellant that appellee sold the land to Vance.

Second, because the court erred in not granting the motion for new trial on the ground of newly discovered evidence.

(1) The court did not err in permitting Britt to testify that appellee sold the land to Vance.

In the first place, after the witness had stated that he was present when Captain Vance came to see appellee about some land and heard a statement that Vance made about buying some land and heard the conversation between the appellee and Vance concerning it, witness was asked by the counsel for the appellee the following question: "Q. Do you know anything about the sale of this land, the Hinkle land, that Mr. Lassiter had an option or authority to sell?" Witness answered, "Well, Mr. Vance came up there to see if Mr. ——."

Here the appellant objected to witness "stating anything that Mr. Vance said there."

The court sustained the appellant's objection to this, and thereupon appellee's counsel asked the witness if Lassiter sold the land to Vance there at that time, which question witness answered in the affirmative.

It will thus be seen that appellant invited the error of the court, if it be an error, in permitting the witness to state that the appellee sold the land to Vance, instead of permitting the witness to testify as to the conversation between the appellee and Vance and giving the statement of Vance concerning the purchase of the land. The issue for decision was whether or not the appellee was entitled to the amount sued for as a commission. That issue involved the collateral issue as to whether or not the appellee had sold or procured a purchaser who was ready, willing, and able to buy the land upon the terms agreed upon between the appellee and appellant, and on that issue it was competent for the appellee to show that he had procured Vance to purchase the land and to give in that connection the conversation that Vance had had with him concerning the purchase.

Such statements of Vance in a conversation between him and the appellee concerning the sale or proposed sale of the land to Vance were not hearsay, but original evidence.

Since appellant by his objection precluded the witness from giving the details of the conversation between Vance and the appellee which caused the witness to state that the appellee sold the land to Vance, the appellant is not in an attitude to complain of the ultimate fact to which the witness testified, towit: "That appellee sold the land to Vance."

In the second place, if witness Britt, after hearing the conversation between Vance and appellee concerning the sale and purchase of the land, knew from the conversation and negotiations between them that appellee had sold the land in controversy to Vance, he could so state, and his statement in that form would be the statement of a fact and not a conclusion of law.

Of course, if the issue to be determined is such that it appears from the testimony that the witness is stating his deductions or conclusions from the facts of any given transaction and that he is not stating a fact, then the testimony would be incompetent.

Here, it is manifest from the nature of the transaction that the witness was not stating or purporting to state a legal status or drawing a legal inference from what he heard. He was simply stating as a fact that appellee sold the land to Vance.

In 17 Cyc. 222 is the following statement of the law applicable here: "The existence of a particular legal status cannot be stated as the conclusion of the witness. The exercise of the judge's discretion in rejecting such conclusions is guided by two main considerations which may be stated as follows: (1) To what extent legal inference predominates over statement of fact; and (2) how far the conclusion relates to a matter in issue, and so within the distinctive province of the jury. It follows therefore, that where the conclusion offered, although to a certain extent resting upon the application of legal principles, is in main a mere statement of fact, and especially where the subject-matter is only collaterally involved, a witness will be permitted to state it."

The statement of Britt did not involve the whole merits of the controversy because, even though appellee had sold the land to Vance, nevertheless he would not be entitled to a commission unless he had sold upon the terms agreed upon between the appellee and the appellant.

(2) The court did not err in holding that appellant was not entitled to a new trial on the ground of newly discovered evidence.

The appellant alleges in his motion that "he did not know and had no way of knowing" of the newly discovered evidence at the time of the trial. Motions for new trial on the ground of newly discovered evidence are addressed to the sound legal discretion of the presiding judge and it is only in case of an apparent abuse of that discretion or of justice that this court interferes. *Ward* v. *State,* 85 Ark. 179.

"To entitle a party to a new trial on the ground of newly discovered evidence the appellant must show that he used due diligence in discovering and producing the same, or that the newly discovered evidence could not have been procured by the exercise of due diligence on his part to produce it." *Southern Cotton Oil Co.* v. *Campbell,* 106 Ark. 379, and cases there cited.

Here appellant did not allege in his motion or adduce any testimony which tended to prove that he had exercised any diligence to discover and produce at the trial the newly discovered evidence.

A motion for a new trial on the ground of newly discovered evidence is not sufficient where it fails to state facts showing that due diligence was used to discover it before and produce it at the trial. *St. L. S. W. Ry. Co.* v. *Stanfield,* 63 Ark. 543; *McDonald* v. *Daniels,* 103 Ark. 589, and other cases cited in 4th Crawford's Digest, p. 3817, sec. 42.

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

MORO SUPPLY COMPANY v. GRIFFIS-NEWBERN COMPANY.

Opinion delivered February 16, 1920.

CONTRACTS—WHEN BINDING.—Defendant wrote plaintiff: "R's balance with you is $122.80. You can make a draft on us for the amount with note attached, and we will honor same, with note transferred to us." Plaintiff accepted by indorsing the note and inclosing it in a letter to defendant, informing it that the mortgage securing the note and the account (making up the $122.80) was on file, and requesting defendant to mail a check covering the same. *Held* there was a complete and binding contract.

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

Jonas F. Dyson, for appellant.

The court erred in refusing to direct a verdict for appellant, as appellee promised in writing to pay Russell's account, $122.80. The statute of frauds does not apply, as the promise was in writing and an original and not a collateral undertaking.

Daggett & Daggett, for appellee.

The statute of frauds does not enter into this case. The offer made by appellee was not accepted by appellant and no contract resulted because (1) an indebtedness in the amount contracted for was not tendered or delivered; (2) the endorsement was not made prior to the date the offer was rescinded; (3) the note for $5 was not endorsed to appellee; (4) draft was not made with note for $122.80 attached in accordance with the offer made by appellee.

WOOD, J. The appellant instituted this action against the appellee and alleged in his complaint that appellees were indebted to appellant in the sum of $122.80, being the amount of an account which one Charlie Russell owed appellant for cash and supplies furnished him during the year 1917, which account the appellee in writing promised to pay. The appellee denied the allegations of the complaint.

One D. H. Smith testified that he was the president of the appellant, a corporation that was organized and doing business in this State; that appellant furnished one Russell supplies to make a crop for the year 1917, and to secure the amount furnished him Russell executed to the appellant a mortgage on a cow, yearling, and his crop. As a part of the arrangement, Russell executed to the appellant a promissory note for $5. This note and the amount of the account was secured by the mortgage. Appellant had furnished Russell during the year 1917, and on March 4, 1918, he owed appellant on his account a balance of $122.80. Appellant refused to furnish him for the year 1918, and Russell said he would get some one in Marianna to furnish him.

Appellant received from appellee a letter dated March 4, 1918, which reads as follows: "Charles Russell has made arrangements to trade with us, and his balance with you is $122.80. You can make draft on us for the amount with note attached, and we will honor same, with note transferred to us. Yours truly, Griffis-Newbern Co."

Appellant had had no previous conversation with appellee concerning the account. Upon receipt of the above letter appellant endorsed the note and enclosed same in a letter to the appellee, informing appellee that the mortgage securing the note and the account was on file and requesting appellee to mail a check to cover same.

On the 14th of March, 1918, the appellee wrote appellant to the effect that since writing the first letter Russell had made misrepresentations on account of which appellee could not pay to appellant the account of Charles Russell. With this letter appellee returned the note to appellant.

Appellant never received any payment from the appellee and therefore instituted this action.

W. D. Newbern testified that Russell made certain representations to the appellee concerning his stock and the amount that he owed the appellant which induced the appellee to write to appellant the first letter above set

out. In the meantime one Mr. Gresham informed the appellee that Russell was working his land on shares and had no stock. Appellee had received a letter from the appellant which had enclosed only the note of $5. The appellee became suspicious and then wrote the appellant the second letter above referred to. The appellee had already taken a mortgage on the stuff of Charlie Russell before it wrote the appellant the first letter. Charlie Russell informed the appellee as to the amount of his account with the appellant or had the statement of the account with him. The arrangement that appellee had with Russell was to pay his note and account to the appellant and get a mortgage on his stock and crop. Appellee thought the note was secured by the particular stock.

The appellant asked the court to instruct the jury to return a verdict in its favor, which request the court refused. The court, thereupon, instructed the jury to return a verdict in favor of the appellee, which was done. From a judgment rendered in favor of the appellee is this appeal.

The undisputed evidence shows that the appellee promised in writing to pay the appellant the amount of Charles Russell's account, which appellee stated was $122.80. This was in fact the amount of Russell's account with the appellant and is the amount for which the appellant brought this action. Appellant, upon receiving the letter of the appellee promising to pay Russell's account, enclosed the note of Russell for $5 endorsed to the appellee and requested the appellee to send a check.

The only reasonable conclusion that can be drawn from the correspondence between the appellant and the appellee and the testimony, is that the appellee agreed to pay appellant the amount of the account which Charles Russell owed appellant, and that appellant upon such promise accepted same and surrendered to the appellee the note, informing the appellee that the mortgage covering the account was on file.

It was wholly unnecessary for the appellant to inform the appellee in its letter accepting the appellee's

offer to pay off the amount of Russell's account; for appellee's letter stated the correct amount of that account which it assumed to pay. The answer of appellant to that letter surrendering the note, as we construe it, was an unequivocal acceptance of appellee's offer which made the contract complete and binding.

The judgment is, therefore, reversed, and judgment will be entered here for the appellant against the appellee for the amount claimed.

SWEET SPRINGS MILLING COMPANY v. GENTRY, BUCHANAN & COMPANY.

Opinion delivered February 16, 1920.

1. EVIDENCE—PAROL EVIDENCE CONTRADICTING WRITING.—In case of a sale of personal property by a written contract a warranty of its quality is a part of the contract of sale, not a separate and independent collateral contract, and proof of such warranty can not be added to the written agreement by parol evidence.
2. EVIDENCE—PAROL EVIDENCE.—Where a written contract for the sale of flour was not made by sample, and failed to state that the flour was to be equal in quality to other flour kept in stock by the seller, or that it was to be satisfactory to the buyers, it was error to permit the buyers to introduce parol evidence in regard to such matters, and to the effect that the seller's salesman told them that if the price of flour declined they might countermand the order.
3. COSTS—ON REVERSAL.—Kirby's Digest, section 970, providing that if a judgment be reversed in the Supreme Court the appellant shall recover his costs, is imperative, and not modified by Kirby's Digest, section 6277, providing that where defendant makes an offer of compromise, which is not accepted, and "plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer."
4. COSTS—OFFER OF COMPROMISE—EFFECT.—Where plaintiff rejected defendant's offer of judgment, and a judgment for defendant was reversed on appeal, if defendant keeps the tender good, and the plaintiff fails to recover more than the amount thereof, defendant is entitled, under Kirby's Digest, section 6277, to have his costs taxed against plaintiff from the time of the offer.

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

STATEMENT OF FACTS.

Appellant sued appellees for damages for the breach of a contract of the sale of a car of flour by the former to the latter. The contract is as follows:

"Contract between The Company, Olathe, Kansas,
and
"Ship to Gentry, Buchanan & Co.
"At Prescott, Ark.
"When: In 30 days F. O. B.
"Routing.....
"Terms: Arrival B/L attached.
"Through Bank of Prescott, Bank.

"No. bbls.	Brand.	Size pkg.	Price.
50	In Wood Big S.		11.30
100	"	48	11.10
60	"	24	11.20

"Make lowest charge you can on wood above 48s.

"These goods are sold at prices, on terms and time of shipment specified above and are not subject to change or countermand without the written consent of both parties. Should either party refuse to fulfill their part of this transaction, the other party shall buy or sell, as the case may be, charging the loss to the defaulting party. No verbal conditions or modifications are valid.

"Shipping instructions to be furnished ten days before shipping date.

"This order is subject to confirmation by the..... ....., their Olathe office.

"Signed, Gentry, Buchanan & Co., Buyer.
"C. R. Wood, Salesman."

The agent of appellant had run out of blank forms of contract, and the contract in question was made upon the form of another company from which appellant purchased flour. The written order was accepted by appellant, and it stored the flour in its warehouse ready for shipment.

According to the testimony of one of the appellees, appellant's salesman guaranteed the flour to be as good as any flour appellees had in their storehouse. The agent also told appellees that if the price of flour declined the order might be countermanded. Subsequently another flour salesman told appellees they would have trouble with the flour branded Big S. They then wrote to appellants for a sample of this brand. Appellees tested it and did not find it to be as good flour as represented. According to appellees' testimony the salesman guaranteed the flour to be satisfactory. Appellees refused to take the car of flour. Hence this lawsuit.

The jury returned a verdict for appellees and the case is here on appeal.

H. B. McKenzie, for appellant.

1. The court erred in admitting parol testimony setting up a new contract differing from the written contract. 105 Ark. 50. If after inspecting the samples there was found any reason for rescinding the contract, it should have been exercised promptly. Any unreasonable delay or action taken in recognition of the contract as a binding obligation amounts to ratification or election to abide by the contract and bars a subsequent rescission. 24 A. & E. Enc. of Law, p. 1111. After breach by the buyer or refusal to take the goods ordered there was nothing for the plaintiff to do except present a bill for the loss or damage under the terms of the agreement for the loss or damage by reason of the breach and which the buyer agreed to pay by the written terms of the contract. 92 Ark. 111; 106 *Id.* 310; 107 *Id.* 106.

2. Instruction No. 1 asked by plaintiff should have been given. The amendment to the answer should not have been permitted to stand, as it clearly sets up facts, conditions, etc., totally different and contrary to the written contract. 67 Ark. 62.

In order to admit parol evidence of collateral agreements relating to the same subject-matter as a written

agreement between the parties, it must appear that the writing was not intended to embrace the entire agreement. 17 Cyc. 716. Written evidence is of a higher grade than oral testimony, and when there is no ambiguity in the written contract oral testimony is not admissible to explain or modify it or change it. 4 Ark. 179.

McRae & Tompkins, for appellee.

Appellants guaranteed the flour to give satisfaction, and it failed to do so and defendants were not obliged to accept it. Proof of a collateral written agreement, not inconsistent with the terms of a written agreement, and constituting a part of the consideration thereof, may be made by parol evidence. It does not vary the written contract. 102 Ark. 669; 27 *Id.* 510. Parol evidence is admissible to prove a contract partially reduced to writing. 55 Ark. 112; 78 N. Y. 74; 34 Am. Rep. 512. Appellants admit the guaranty of the flour, and the evidence shows and the jury found that the flour did not measure up to the guaranty, and the question of varying a written agreement by parol testimony is not in this case. Appellees had the clear right to cancel the order because the flour did not measure up to the admitted guaranty. 113 Mass. 136; 24 Fed. 893; 79 Ark. 506-514; 36 Fed. 414. A buyer can not arbitrarily reject. 79 Ark. 54. He must act in good faith. 17 L. R. A. 207.

It is too late to raise the question of waiver here, as it was not raised below. 74 Ark. 88; 83 *Id.* 10; 95 *Id.* 593.

HART, J. (after stating the facts). Counsel for appellant moved to exclude the testimony of appellees and excepted to the ruling of the court in admitting it. The court erred in its ruling. There was no implied warranty as to the quality of the flour. The contract itself was silent in this respect. In the case of a sale of personal property a warranty of its quality is a part of the contract of sale and is not a separate and independent collateral contract. Therefore proof of such warranty cannot be added to the written agreement by parol evidence. To justify the admission of a parol promise by one of the

parties to a written contract, on the ground that it is collateral, the promise must relate to a subject distinct from that to which the writing relates. Our court has expressly held that a bill of sale which contains no warranty cannot be added to by proof of a contemporaneous oral warranty. *Lower* v. *Hickman,* 80 Ark. 505. In discussing the question, Chief Justice HILL said: "A warranty is so clearly a part of a sale that where the sale is evidenced by a written instrument it is incompetent to engraft upon it a warranty proved by parol. The character of the written instrument is not important, so long as it purports to be a complete transaction of itself, and not a mere incomplete memorandum or receipt for money or part of a transaction where there are other parts of it other than warranties. It may be a complete contract signed by both parties and comprehensive and exhaustive in detail, and contain many mutual agreements, terms and stipulations, or it may be a simple bill of sale, or sale note evidencing the sale. The principle is the same in any of these transactions, and oral evidence of a warranty is almost universally excluded when a complete written instrument evidences the sale. It is not important that the instrument be signed by both parties, for acceptance of the other may be equally binding, and the principle here invoked is as often applied to unilateral as to bilateral instruments."

The same reasoning applies with regard to the testimony of the test made of the sample flour sent by appellant to appellees after the contract had been executed. The sale was not made by sample, and the contract was silent in this respect. The contract having failed to show that the sale was by sample or that the flour was to be equal in quality to other flour kept in stock by appellees, or that it was to be satisfactory to appellees, it was clearly error to permit appellees to introduce parol evidence in regard to these matters. It was likewise error to permit appellees to introduce parol evidence to the effect that appellant's salesman told them that, if the price of flour declined, they might counter-

mand the order, for such testimony plainly varied the terms of the written order, or contract.

For the error in admitting such testimony the judgment must be reversed and the cause remanded for a new trial.

HART, J., (on rehearing). Counsel for appellee have filed a motion to retax the costs and for final judgment here, and for grounds therefor say that, before the trial in the court below, they served upon appellant's attorney an offer in writing to allow judgment to be taken against them for the sum of $52.50, and that no acceptance of said offer was filed as required by statute. They claim that inasmuch as the plaintiff failed to obtain judgment for that amount, that it should pay the costs as prescribed in section 6277 of Kirby's Digest. This section has no application to the present case.

Appellant failed to obtain judgment in the court below for any sum because the court erred in the admission of certain evidence offered by appellee and to secure a reversal of that judgment it was necessary for appellant to prosecute an appeal to this court. Our statute provides that if the judgment be reversed the appellant shall recover his costs. On appeals from judgments at law it is obligatory upon this court to follow the statute. *American Soda Fountain Co.* v. *Battle,* 85 Ark. 213, and *Price* v. *Madison County Bank,* 90 Ark. 195.

It is true as contended by counsel for appellee that the measure of damages on the retrial of the case will be as laid down in *Kirchman* v. *Tuffli Bros. Pig Iron & Coke Co.,* 92 Ark. 111. If on the retrial of the case in the circuit court appellee keeps the offer under the statute good and appellant should fail to obtain judgment for more than the amount tendered, then section 6277 of Kirby's Digest will apply, and appellants would be taxed with the costs from the time of the offer.

It follows that the motion must be denied.

HOME MUTUAL BENEFIT ASSOCIATION v. MAYFIELD.

Opinion delivered February 16, 1920.

1. INSURANCE — CONSTRUCTION OF POLICIES.—Policies of insurance should be interpreted by the rules governing other written contracts where the meaning of the language used is clear and explicit; but where there is doubt as to the meaning of the language used, they should be construed strictly against the insurer and favorably to the insured.
2. INSURANCE—LOSS OF EYE—CONSTRUCTION OF POLICY.—Where a policy provided that, in case of accident or disease resulting thereafter by or because of which insured should suffer the loss of one or both eyes, insured might mature the full value of the policy or certificate, the policy insured against the loss of an eye from disease, whether the disease existed at the time of the policy or began afterwards.
3. INSURANCE—MISREPRESENTATION IN APPLICATION.—Where an applicant for insurance against the loss of his eyes from disease commits a fraud in misrepresenting the condition of his eyes, such fraud will avoid the insurance.

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

STATEMENT OF FACTS.

T. B. Mayfield sued the Home Mutual Benefit Association upon two certificates of insurance.

The material facts are as follows: The Home Mutual Benefit Association is located at Fayetteville, Arkansas, and is engaged in the business of writing life and accident insurance on the mutual or co-operative plan. On the 22d day of November, 1915, the defendant issued to the plaintiff a life and accident certificate by which the association was bound at the death of the plaintiff, or upon his suffering the total loss of one or both eyes by disease, to pay him a certain stipulated sum. A like policy was issued to the plaintiff by the defendant on the 28th day of December, 1915. By the terms of the certificate it was provided that the application should be considered as part of the contract. In the application certain questions were asked and answered as follows:

"Have you a certificate in this association? No.

* * * * * * * * * * *

"Are you crippled? No. If so wherein and to what extent ..... Are both of your eyes good and healthy? Yes."

The application then states that these statements are made to enable the applicant to obtain a membership certificate in the Home Mutual Benefit Association of Fayetteville, Arkansas. The benefit certificate also contains the following:

"It is especially provided that, in case of accident or disease resulting hereafter by or because of which the applicant shall suffer the loss of one or both hands, or the total loss of at least four fingers on either hand, at or above the knuckle joint, or the loss of one or both feet, at or above the ankle, or total loss of one or both eyes, or shall suffer a paralytic stroke resulting in the loss of the use of one or more limbs, he or she may have the privilege of maturing the full value of this certificate at the time of the determination of the result of such accident or disease or at any future time during the life of the applicant, all subsequent assessments having been paid, the actual value of the certificate to be paid to the applicant on the execution of cancellation receipt thereof."

T. B. Mayfield, the plaintiff, was a witness in his own behalf and testified that he had lived at Alma, Arkansas, for the past twenty years; that he made application for the two benefit certificates sued on in November and December, 1915; that since the taking out of the two policies he had lost the sight of his left eye entirely and claims the benefits of the insurance on that ground.

On cross-examination he stated that he had lived at Alma for the past twenty years and was past 57 years of age. The trial was had on the 14th day of July, 1919, and the witness stated that he lost the sight of his eye about eight or nine months ago. He was asked when his eye first became affected and answered, "I do not know, I never had as good eyes as some people." He further stated on cross-examination that he could not see out of

his eyes good for twenty years and that he could never see in his life as good as lots of people.

Several witnesses on behalf of the defendant testified that they had known the plaintiff at Alma, Arkansas, for between fifteen and twenty years and that the condition of his eyes had been bad during all that time; that at night his eyes were so bad that he had to be led around town, and that he could not see to go about at night.

One witness testified that Mayfield had been forced to quit business, which was that of a merchant, on account of his eyes. Another testified that Mayfield had to be led around town in the daytime for the past fifteen years.

T. B. Mayfield was recalled and testified that both his eyes were about the same until about a year ago; that at that time sharp pains would shoot through the eye that went out and that just afterwards he lost the sight of his eye. He denied that he had been led around in the daytime on account of defective eyesight. He said that he was only led around at night, and that there was no change in his eyesight until about a year ago. On cross-examination Mayfield stated that he never did have good eyes, and that at the time he signed the application for insurance it was a little dark in the room, and that he told the agent he could not see to write his name.

Two other witnesses were introduced by the plaintiff who testified that they were present when he signed the application for insurance and heard him tell the agent that his eyes were weak. One of them said that the agent asked him if he was blind and that Mayfield replied, no; but that he could not see as well as some men could. Mayfield told the agent that his eyes were not good and asked the agent to sign his name to the application on that account.

The jury returned a verdict for the plaintiff, and from the judgment rendered the defendant has appealed.

Allen G. Flowers, for appellant.

The verdict is not sustained by the evidence but is contrary to both the law and the evidence. The applica-

tion provides that in case of accident or disease *resulting hereafter,* etc. The application and certificate constitute one inseparable contract which is unambiguous and binding on appellant and appellee. It plainly provides that appellant would not become liable unless the loss of the eye was occasioned by disease or accident *resulting after* the signing of the application and the issuance of the certificate. This being true, it was error to submit the question to the jury.

J. E. London, for appellee.

This case falls squarely within the rule in 129 Ark. 450. Appellee informed the agent correctly and truly as to the condition of his eyes, and there was no fraud practiced; he told the truth and he was accepted under the policy. The knowledge of the soliciting agent was the knowledge of the company. 129 Ark. 450; Cent. Digest, §§ 968, 975, 997; 1 Bacon, Life & Acc. Ins., § 274, There are no errors in the instructions. The jury were properly instructed. 129 Ark. 450; 79 *Id.* 315; 52 *Id.* 11-14; 11 S. W. 1016; 65 Ark. 54; 71 *Id.* 295; 81 *Id.* 508; 102 *Id.* 146.

HART, J. (after stating the facts). It is earnestly insisted by counsel for the defendant that the evidence is not sufficient to warrant the verdict.

According to the testimony of the plaintiff, Mayfield, he took out the policies sued on in November and December, 1915, and since that time has kept the premiums paid. He admitted that his eyesight had been weak for fifteen or twenty years, but stated that he told this fact to the agent when he made his application for insurance. The trial was had in July, 1919, and Mayfield said that his eyes continued to be about the same until about a year ago, at which time sharp pains began to shoot through his left eye and that he soon afterwards lost the sight of it.

It is contended by counsel for the defendant that this testimony is not sufficient to support the verdict for the reason that the policy did not insure the plaintiff against

any disease of the eye which existed at any time prior to the date of the application, but only from such diseases as might occur after the execution of the policy. Counsel insists that under the testimony the jury could not tell whether or not the disease which caused the loss of plaintiff's left eye existed at the date the policy was written or whether it occurred after the policy was executed.

We do not agree to the construction placed upon the policy by counsel for the defendant. So much of the clause in question as is applicable to the present case may be stated as follows: "It is specially provided that in case of disease resulting hereafter by or because of which the applicant shall suffer the total loss of one or both eyes," etc. It is true that it is well settled in this State that policies of insurance should be interpreted by the rules governing other written contracts where the meaning of the language used is clear and explicit. It is equally well settled that in cases where there is doubt as to the meaning of the language used the policy should be construed strictly against the insurer and favorably to the insured. The reason is that policies of insurance are made on printed forms carefully prepared by experts employed by the insurer. The insured has no option as to the form of the contract and no voice in its preparation. The object of the contract is to afford indemnity against loss, and the policy should be so construed as to effectuate this purpose rather than in a way which would defeat it. One of the dictionary meanings of the word "result" is to terminate, or to end. When given this meaning, the clause would read: It is expressly provided that in case of disease terminating or ending hereafter by or because of which the applicant shall suffer the total loss of one or both eyes, etc. In other words, the policy was intended to insure the applicant against the loss of his eyes from disease, regardless of the fact of whether the disease existed at the date of the policy or first began afterwards. The intention was that the loss of the eye, or the result from the disease should happen after the policy was executed. This is borne out by

the application. By the terms of the policy the application was expressly made a part of the contract of insurance. The applicant was asked if he had a certain specified disease, and was then asked if both of his eyes were good and healthy. He answered, yes. Then follows a clause that these statements are true and correct, and that they are made to enable the applicant to obtain a membership certificate in the defendant association. The object of the question was to ascertain if the applicant's eyes were in such a healthy condition as to warrant the association in insuring him against the loss of them from disease. Of course the loss of the eye must result after the execution of the policy. The company would be equally liable whether the disease originated before or after the execution of the policy, provided the loss of the eye was the result of the disease and happened after the execution of the policy, and there was no fraud perpetrated by the applicant in obtaining the insurance. The association was interested in knowing the condition of the applicant's eyes in order to determine whether he was a fit subject for insurance against the loss of his eyes. If the applicant perpetrated a fraud in this respect, it would avoid the insurance.

In *Mutual Aid Union* v. *Blacknall,* 129 Ark. 450, the court held that a life insurance company will be bound under a policy of life insurance, where the applicant and insured made false statements concerning his physical condition, where the agent soliciting the insurance was also charged with the duty of writing the data concerning the applicant's physical condition, and where the agent, in course of the examination, learned the applicant's true condition. The court further held that if an agent, in collusion with the applicant, even though acting within the apparent scope of his authority, perpetrates a fraud upon the insurance company by making false and fraudulent representations upon which the insurance is obtained, such fraud will vitiate the policy. See also *Walker* v. *Illinois Bankers' Life Ass'n,* 140 Ark. 192.

The court instructed the jury on the question of fraud in procuring the policy in accordance with the principles of law just announced. The finding of the jury on this question was in favor of the applicant, and it can not be said that there is no evidence to support it. The insured testified that he made a full and fair disclosure of the condition of his eyes to the agent, and his testimony was corroborated by other witnesses who were present when the application for insurance was made.

Counsel for the defendant also assigns as error the action of the court in refusing to give an instruction asked by the defendant. We need not set out this instruction, for the object of it was to tell the jury that if it should find that the disease which resulted in the loss of plaintiff's eye was in existence at the time the policy was executed, the company would not be liable. We have already discussed the meaning of that clause of the policy upon which the instruction in question was predicated, and for the reason there given we think that the policy was not susceptible of the meaning placed upon it by the association and that the court did not err in refusing the instruction.

It follows that the judgment must be affirmed.

CASEY v. CASEY.

Opinion delivered February 16, 1920.

1. FALSE IMPRISONMENT—ACTS OF JUDICIAL OFFICERS.—Where a judicial officer has jurisdiction of the person and of the subject-matter, he is exempt from civil liability for false imprisonment so long as he acts within his jurisdiction and in his judicial capacity.
2. CORPORATIONS — FAILURE OF OFFICERS TO RECORD TRANSFER OF STOCK.—Kirby's Digest, section 859, as amended by acts 1909, page 643, declaring the failure of the president or secretary of a corporation to comply with the provisions of section 848 to be a misdemeanor, does not make the failure of such officers to comply with section 849, relating to the transfer of stock, likewise a misdemeanor, and hence bank officials who failed to record a transfer of stock are not liable to prosecution therefor.

3. CORPORATIONS—FAILURE OF OFFICERS TO PERFORM DUTIES.—Kirby's Digest, section 859, as amended by Acts 1909, page 643, providing that if the president or secretary of any corporation shall neglect, fail or refuse to comply with the provisions of section 848 "and to perform the duties required of them respectively," they shall be deemed guilty of a misdemeanor, etc., is, as to the clause quoted, too general to be operative.

4. FALSE IMPRISONMENT—LIABILITY.—Where a purchaser of bank stock employed the prosecuting attorney to compel bank officers to make a transfer on the bank's books of stock purchased by him, he is not liable for false imprisonment where, against his advice, the prosecuting attorney in his official capacity began criminal proceedings against such officers.

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

STATEMENT OF FACTS.

S. M. Casey instituted this action in the circuit court against Earl C. Casey, R. R. Case, and J. S. Handford, to recover damages for false arrest or false imprisonment and they seek to justify the same on the ground that it was legal.

The material facts are as follows: The Union Bank & Trust Company was at the time of the transaction complained of, engaged in the banking business at Batesville, Arkansas. D. D. Adams was president, and Charles D. Metcalf, secretary and treasurer, and Albert Sims and J. S. Handford were stockholders of the bank. Handford purchased some shares of stock from Albert Sims and asked the cashier to have the shares of stock transferred to him on the books of the bank. The cashier put him off and consulted with the president and with S. M. Casey, the attorney of the bank, and also one of its directors. Finally the officers of the bank declined to make the transfer, and Handford brought a suit in equity against the bank to compel the transfer on the books of the bank of the shares of stock so purchased by him. This suit resulted in a transfer of the shares of stock to Handford. At least the shares of stock were transferred before the suit was brought to trial. In the meantime Handford had consulted with Earl C. Casey, the prosecuting attor-

ney, and also a practicing lawyer. The object of the conference was to compel the bank to transfer the shares of stock to Handford. Earl C. Casey acted as the attorney for Handford in the equity suit to compel the transfer of the shares of stock, and also told Handford that the president and cashier of the bank and S. M. Casey, the attorney who advised them not to make the transfer, were all guilty of a misdemeanor under our statutes in refusing to make the transfer of the shares of stock.

Handford advised against any prosecution of the parties, but told Earl C. Casey that he left the matter in his hands as his attorney. Earl C. Casey filed before R. R. Case, a justice of the peace, the following information:

"State of Arkansas,

"County of Independence.

"I, Earl C. Casey, prosecuting attorney of the Third Judicial Circuit of Arkansas, state: That I have reasonable grounds for believing that Samuel M. Casey, C. E. Metcalf and D. D. Adams did on the 25th day of June, 1918, commit the crime of a misdemeanor, and prays a warrant for their arrest from R. R. Case, justice of the peace of Ruddell township. (Signed)

"Earl C. Casey."

Upon filing the information the justice of the peace issued warrants of arrest for Samuel M. Casey, C. E. Metcalf and D. D. Adams. The warrants were duly served by the sheriff, and the parties named were released upon their own recognizance. The arrests were made about dark one evening. The parties were notified to appear before the justice of the peace the next morning. At the hearing next morning the prosecuting attorney was permitted to amend his information by inserting the words, "by refusing to transfer stock certificates Nos. 193 and 194, capital stock, Union Bank & Trust Company, Batesville, Arkansas," after the words, "commit the crime of a misdemeanor." So that the information alleged that the parties named did on the 25th day of June, 1918, commit the crime of a misdemeanor by refusing to transfer stock certificates Nos. 193 and 194, capital stock,

Union Bank & Trust Company, Batesville, Arkansas, and prays a warrant for their arrest, etc.

On motion of the prosecuting attorney the cases were continued until another day. The defendants took a change of venue to another justice of the peace and their trial resulted in an acquittal.

At the conclusion of the testimony the court instructed the jury to return a verdict for the plaintiff, S. M. Casey against the defendants, Earl C. Casey and R. R. Case for such compensatory damages as it might find from the testimony resulted to him. The court also submitted to the jury the question of punitive damages under proper instructions.

The jury found for the plaintiff against the defendants, Earl C. Casey and R. R. Case. The jury found for the defendant, J. S. Handford. Judgment was rendered accordingly. The defendants, Earl C. Casey and R. R. Case, have appealed from the judgment rendered against them. The plaintiff, S. M. Casey, has appealed from the judgment rendered in favor of the defendant, J. S. Handford.

Casey & Thompson and *J. A. Watkins,* for appellants.

1. It is admitted that Earl C. Casey was prosecuting attorney and that the information was filed by him as prosecuting attorney. The information was in the form prescribed by Kirby & Castle's Digest, section 7842 and was filed by him before his co-appellant, a justice of the peace, and it was the duty of such justice to issue a warrant. The statute seems to leave the discretion of filing the information entirely within the belief of the prosecuting attorney and provides no tribunal or person to advise or direct him in the filing of the same. The case in 44 N. E. Rep. 1001, seems to cover every feature involved in this case. The prosecuting attorney therefore is a judicial officer in the sense of a judge of a court and exempt from all responsibility in an action or civil suit. Townshend on Slander and Libel (3 Ed.), § 227, pp.

395-6; 2 Gray 124; 18 C. J. 1318. But, if not judicial officers but private citizens, as J. S. Handford was, both malice and lack of probable cause *must be proved.* 63 Ark. 391; 81 *Id.* 422. The entire record shows the good faith and conduct of J. S. Handford in the purchase of the Sims stock, nor was any malice shown in the conduct of Earl Casey. In the light of the entire record the conduct of the officers of the Union Bank & Trust Company and of their learned counsel was reprehensible.

2. Instruction No. 1 for plaintiff took from the jury all questions of fact relating to probable cause and malice and was contrary to law. 33 Ark. 316-321; 19 A. & E. Enc. Law, p. 635. Instruction D for appellant should have been given, and its refusal was error. *Supra.*

Samuel M. Casey and *Ira J. Mack,* for appellee.

1. Appellants have not complied with rule 9 and the appeal should be dismissed.

2. There is quite a difference between an action for false arrest and one for malicious prosecution. 64 Ark. 453-460. So far as Earl C. Casey and R. R. Case are concerned, the question is whether a prosecuting attorney can go before a justice and file an information or charge which states no offense known to the law, and the justice may thereupon issue a warrant of arrest upon such information, and the two (the prosecuting attorney and justice) thus have an arrest made and held for trial, without being liable in damages to the person arrested. See 22 Ark. 221.

In this case plaintiff was not charged with any offense known to the law and appellants who caused his arrest are liable for damages. R. R. Case, though a justice of the peace, was liable for this arrest. 12 A. & Eng. Enc. Law (2 Ed.) p. 700; 72 S. W. 336; 34 Ark. 174; 5 *Id.* 27; 13 *Id.* 380; 95 *Id.* 227; 12 A. & Eng. Enc. L. (2 Ed.), 744-751.

Earl C. Casey procured the warrant but went with the officer when the arrests were made and he was liable. *Ib.,* p. 758 and 754.

The whole proceedings against plaintiff were void. The information and writ did not describe the offense charged, which was necessary. Kirby & Castle's Digest, §§ 2669, 2688.

The instructions properly declare the law. 12 A. & E. Enc. Law (2 Ed.), 775-7; 60 Am. Rep. 396; 107 Am. St. 745; 19 Cyc. 327; 34 Ark. 174.

3. On the cross-appeal against Handford, the proof shows that Handford was the moving cause and *casus belli* of the whole trouble, the ringleader and arch-conspirator in the whole plot.

Instructions 3a and 4a are clearly the law and applicable to the facts. 135 Ark. 76. The verdict, even for punitive damages, was amply justified, because the malice of the prosecuting attorney is transparent, and the justice showed his bias and prejudice and was jointly liable.

HART, J. (after stating the facts). The question of the civil liability of a judicial officer for a false arrest or for false imprisonment has been much discussed both by courts and text writers. On the one hand the inviolability of personal liberty except under the forms of the law is involved, and, on the other, the dignity and independence of the judiciary should be considered. It has been frequently said that the general rule applicable to all judicial officers is that where the officer has jurisdiction of the person and of the subject-matter he is exempt from civil liability for false imprisonment so long as he acts within his jurisdiction and in his judicial capacity. This rule has been recognized by this court in several cases.

In the case of *Trammell* v. *Town of Russellville et al.*, 34 Ark. 105, it was held that one acting judicially in a matter within the scope of his jurisdiction is not liable in an action for his conduct. In the application of the rule it was held that the mayor in issuing a warrant in that case was not liable because he acted in a judicial capacity and within the scope of his jurisdiction. The court said

that the enforcement of the ordinances of the town was a duty imposed upon him by the statute and that the validity of the ordinance was a question he had the power to pass upon. Consequently he was held not liable in a civil action for false imprisonment, although the ordinance in which the arrest was made was held to be invalid.

In the case of *Vanderpool* v. *State,* 34 Ark. 174, which was a prosecution for the crime of false imprisonment under the statute, it was held that every judicial officer, whether the grade be high or low, must take care, before acting, to inform himself whether he has jurisdiction of the subject-matter and of the person of the defendant.

In *Thompson* v. *Whipple,* 54 Ark. 203, it was held that the mayor of a city, as president of its council, had no inherent authority, according to the usages of deliberative bodies, to order a member to be forcibly excluded from a council meeting for disorderly or indecorous behavior which does not threaten personal injury nor arrest the progress of business. Hence it was held that for the execution of such an order both the mayor and officer executing it were responsible in an action for false imprisonment.

Again in *McIntosh* v. *Bullard,* 95 Ark. 227, the court said that false imprisonment is a trespass committed against the person of another by unlawfully arresting and detaining him without any legal authority or by instigating such unlawful arrest. The court further said that it must be alleged that the arrest was without legal authority before an action can be founded upon it for false imprisonment. In the application of the rule the court held that where a justice of the peace is invested by law with jurisdiction over the subject-matter of an alleged offense, he should not be held liable in damages for an erroneous decision to a party who has been injured thereby.

This brings us to the question of whether the prosecuting attorney and the justice of the peace acted without jurisdiction in causing the arrest of the plaintiff. The

evidence does not show that the defendants entered into a conspiracy to do an unlawful act. From all that appears from the record, the defendants, Earl C. Casey and R. R. Case, supposed that their acts respectively in filing the information and in issuing the warrant were lawful. Their intention was to punish the parties named in the warrant for a violation of the statutes of the State. As we have already seen, a justice of the peace is protected against civil suits for any act done in a judicial capacity within the limits of his jurisdiction. In such a case the justice may act freely and fearlessly, even though his judgment may turn out to be erroneous. But when he acts without jurisdiction, he becomes liable for damages at the suit of the party unlawfully arrested and imprisoned.

In the case at bar the prosecuting attorney in his information charged that the plaintiff and other parties named therein had committed a misdemeanor and prayed a warrant for their arrest. The warrant of arrest was issued by the justice of the peace upon this information. Subsequently the prosecuting attorney obtained leave to amend his information to read that the plaintiff and the other parties named therein had committed the crime of a misdemeanor by refusing to transfer stock certificates Nos. 193 and 194, capital stock, Union Bank & Trust Company, Batesville, Ark. This shows that it was the intention to arrest the plaintiff for a violation of section 859 of Kirby's Digest as amended by act 222 of the Acts of 1909. See Acts of 1909, page 643. This section as amended is a part of an act to provide for the creation and regulation of incorporated companies approved April 12, 1869. Section 21 of that act as amended by the act of February 14, 1891, became section 859 of Kirby's Digest.

Section 21 reads as follows: "If the president or secretary of any such corporation shall intentionally neglect or refuse to comply with the provisions of the twelfth section of this act, and to perform the duty required of them, respectively, the persons so neglecting

or refusing shall jointly and severally be liable to an action, founded on this statute, for all debts of such corporation contracted during the period of any such neglect or refusal."

By the act of February 14, 1891, section 21, which had been named as section 980 of Manfield's Digest, was amended so as to leave out the word "intentionally" and to make the president or secretary liable for the neglect or refusal to comply with the provisions of section 971 of Mansfield's Digest, which corresponds with section 12 of the original act.

In Sandels & Hill's Digest the provisions of section 12 of the original act or 971 of Mansfield's Digest were divided into subdivisions by the digester and called sections 1337 and 1338. The word "as," which appears between the words "county clerk" and the word "aforesaid" in the original act, was left out by the digester. Section 1347, which corresponds with section 959 of Kirby's Digest, provides that if the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, etc., the person so neglecting shall be jointly and severally liable, etc. In Kirby's Digest, sections 1337 and 1338, are numbered as sections 848 and 849 and section 1347 is numbered as 859. In this latter section the digester only refers to section 848 and makes no reference to section 849. The section as amended by the Legislature of 1909 reads as follows: "Section 1. Section eight hundred and fifty nine (859) of Kirby's Digest of Statutes of Arkansas be amended to read as follows: Section 859. If the president or secretary of any such corporation shall neglect, fail or refuse to comply with the provisions of section 848 and to perform the duties required of them respectively, the person or persons so neglecting, failing or refusing, shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of any such neglect or refusal, and shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum

not to exceed five hundred dollars ($500), and each and every day such person or persons shall so neglect to comply with the provisions of said section 848 or fail or refuse to perform said duties, shall constitute a separate offense."

It is contended by counsel for the defendants that section 849 of Kirby's Digest makes it the duty of the president and secretary of the corporation to file with the county clerk a certificate of each transfer of stock and that, although section 849 is not referred to in Act 222 of the Acts of 1909, it was the intention of the Legislature to make the failure of the president and secretary to comply with the act in this respect a crime, and that therefore their act in arresting the plaintiff and the other parties named in the information and warrant was lawful. We can not agree with counsel in this contention. The Digests above referred to were compiled pursuant to authority conferred by the General Assembly. In making a digest, it is impractical for the digester to use the number of the sections in the original or amended acts, and he must necessarily adopt his own numbers for the various sections of his digest. For the purpose of this decision it does not make any difference whether or not section 959 of Kirby's Digest should have referred to both sections 848 and 849 instead of only section 848. The Legislature of 1909 had a right to amend the act as it saw fit, and properly referred to the sections of the digest then in official use in doing so. As we have just seen, the digester had divided section 12 of the original act into two subdivisions and called each subdivision a section of the digest. The Legislature must be presumed to have intended what the language used by it plainly and clearly means unless there is something in the act as amended to show a contrary intention. We can not ascribe to the Legislature any secret intention which is opposed to or contrary to the plain meaning of the words used. The act as amended by the Legislature of 1909 is plain and unambiguous. Under its terms it was only made a misdemeanor for the president and secretary to

fail or refuse to comply with the provisions of section 848. There is nothing to show that the Legislature intended that the provisions of the amendatory act should also apply to section 849. On the contrary, it plainly shows that it does not apply to section 849. The amendatory act of 1909 makes no reference whatever to section 849, and it can not be said that the omission to do so was due to inadvertence or mistake on the part of the Legislature. The framers of the amended act of 1909 must be presumed to have intended what their language plainly expresses. If the digester in section 859 had used the words, "sections 848 and 849," and the amendatory act of 1909 had used the words, "section 848," as it did use, it could not be said that the framers of the act left out the words, "section 849," through inadvertence or mistake. As above stated, they did leave out the words "section 849," and they must be presumed to have left them out intentionally; for there is nothing in the context to show otherwise.

It is also insisted that the words "and to perform the duties required of them respectively," as contained in the amendatory act show that it was the intention of the Legislature to constitute the action of the president and the secretary in failing to file a certificate for the transfer of stock a crime. We can not agree with counsel in this contention. These words were contained in the act as originally passed. The provision with regard to the acts of the president and secretary in making the certificate of the transfer of stock is a part of section 12 of the original act. Section 21 is the section which has been amended and under which as amended the prosecution of the plaintiff was instituted. That section made the president and secretary liable for neglect or refusal to comply with the provisions of the twelfth section and the added words, "and to perform the duties required of them," evidently refers to the duties specified in section 12. This is shown by section 863 of Kirby's Digest, which corresponds with section 24 of the original act and provides for the liability of the president, secretary and

directors for failure to perform their duties generally. Moreover, if these words should be construed to refer to the failure of the president and secretary generally to perform their duties and to constitute such acts a misdemeanor the act would be too general to be operative within the meaning of the rule in *Ex parte Jackson,* 45 Ark. 158. In that case the court held that a section of the digest making it a misdemeanor to "commit any act injurious to the public health or public morals, or the perversion or obstruction of public justice, or the due administration of the law," is unconstitutional and void for uncertainty.

Hence it is manifest that it is no crime for the president and secretary of a corporation to fail to file a certificate of the transfer of stock with the county clerk and the prosecuting attorney and justice of the peace were without jurisdiction respectively in filing the information and issuing a warrant of arrest against the plaintiff for a violation of the provisions of act 222 of the Acts of 1909.

The plaintiff has prosecuted an appeal from the judgment in favor of J. S. Handford, but there is nothing in the record upon which to predicate a reversal of the judgment in his behalf. The undisputed testimony shows that he had nothing whatever to do with instituting the proceeding for the arrest of the plaintiff, but on the contrary advised against it. His attorney was the prosecuting attorney of the district who proceeded on his own motion to have the plaintiff arrested upon information filed by himself in his official capacity. It turned out that the prosecuting attorney was mistaken in supposing that the matters charged against the parties constituted a crime under our statute, but Handford was not liable for his action in his official capacity.

It follows that the judgment in favor of Handford will be affirmed, and the judgment against Earl C. Casey and R. R. Case will also be affirmed.

UNDERDOWN v. DESHA.

Opinion delivered February 16, 1920.

1. APPEAL AND ERROR—HARMLESS ERROR.—The admission of incompetent evidence to establish undisputed facts is harmless error.
2. NAVIGABLE WATERS — CONVEYANCE OF ISLAND — CANCELLATION.—Under Acts 1917, page 1468, section 5, providing that *bona fide* claimants of islands formed in navigable rivers shall have a preferential right for one year after the passage of the act to apply for the survey and purchase of the lands claimed by them, and that in case of conflict between applicants the question of preference shall be determined by the Land Commissioner under such rules and regulations as he may prescribe not in conflict with the act, and that the determination of the commisisoner on such contest, in the absence of fraud or collusion, shall be final, *held* where plaintiffs and defendants each made due application to purchase a certain island in a navigable stream, and the commissioner issued a deed to defendant without determining the conflicting claims of plaintiffs, it was proper for the chancellor to annul such deed and direct the commissioner to conduct the hearing provided by the act.
3. NAVIGABLE WATERS—INCONSISTENT POSITIONS.—Though plaintiffs claimed that an island in a navigable stream was an accretion to their land situated on the main land, there was no inconsistency in their attempting to acquire title under Acts 1917, page 1470, section 5.
4. NAVIGABLE WATERS—ISLAND IN NAVIGABLE STREAM—RIGHT TO PURCHASE.—If General Acts 1919, page 256, repealed Acts 1917, page 1468, providing for the acquisition of title to lands in navigable streams, the rights of an applicant for title to such lands are not affected where the application was filed prior to February 1, 1919; the act preserving the rights of those who filed their applications prior to that date.

Appeal from Independence Chancery Court; *Lyman F. Reeder,* Chancellor; affirmed.

W. K. Ruddell, for appellant.

Patents should not be set aside except upon the most convincing evidence. 119 Iowa 6; 97 Am. St. Rep. 279.

It is not possible to divest the title of defendant and allow the commissioner to issue a deed after hearing a contest, as the State was not a party and had parted with its title. No fraud is claimed or shown on part of de-

fendant against the State, and a court of chancery could not vest back the title in the State. 59 Ark. 187; 11 *Id.* 120; 51 *Id.* 390. It is not claimed that defendant committed any fraud but that Commissioner Owens made a mistake in issuing the deed before a contest was heard, and that this was constructive fraud on plaintiffs because he failed to comply with Act No. 282, but, even admitting constructive fraud on part of the commissioner, as it was only a mistake and fraud is never presumed, but must be proven and relief is never granted where the rights of innocent parties may be jeopardized. 12 R. C. L. 399; 10 *Id.* 317. No act of fraud was committed by Underdown against the right of plaintiffs. They knew all the time he claimed the land belonged to the State because it was an island. He practiced no fraud, concealment or artifice. Plaintiffs' own concealment was the cause of their injury, if any. 36 L. R. A. (N. S.) 149, 154. There was no evidence of fraud, which must be proved. 10 R. C. L. 294; 97 Am. St. Rep. 276. Admissions of vendor are not admissible after making conveyance against his vendee. 37 Ark. 145; 108 *Id.* 415; 11 *Id.* 378; 38 *Id.* 419; 3 Crawford's New Digest, p. 2299; 42 Am. Dec. 632, note.

Underdown committed no act to unduly influence the commissioner to issue him a deed, and where a commissioner by oversight issues a deed it would not be fraud, but only mistake. Equity has no power to revise, control or correct the action of public, political or executive officers or bodies at the suit of private persons. 17 Am. St. Rep. 118-121; 52 *Id.* 353-4.

Plaintiffs had no vested rights as settlers on State lands and can not complain of any disposition made by the State. 16 Ark. 414-434; 16 *Id.* 440-458. Donations are only a matter of grace on part of the State. 40 Ark. 244-246; 47 *Id.* 199, 202; 37 *Id.* 132; 31 *Id.* 528.

Occupation and improvement of public land with a view of pre-emption does not confer any right upon the settler against the United States or its right to dispose of the land to other persons. 132 U. S. 35. This would ap-

ply to our Legislature. The Land Commissioner had already issued a deed for this island, and mandamus would not lie to compel him to act again. While equity relieves against mistakes, yet not mistakes of fact, or blind folly, or negligence. 80 Am. Dec. 401-2. See also 28 L. R. A. (N. S.) 785, 884. Plaintiffs knew that Underdown was claiming the land as an island, yet when they wrote to the commissioner they did not ask if Underdown had made any application. Underdown cannot be placed *in statu quo* if his deed is canceled. 53 Ark. 16; 15 *Id.* 286; 25 *Id.* 196. Underdown was a *bona fide* purchaser without notice, and a mistake of the commissioner could not affect his rights. 129 Ark. 305.

Plaintiffs are estopped, as they led Underdown to believe that they were depending on their own title as an accretion to the mainland. One can not take inconsistent positions to someone else's damage. 22 Ark. 445; 85 *Id.* 163; 2 Crawford's New Digest, 1935.

The demurrer to the complaint should have been sustained, as it stated no cause of action and showed no grounds of equitable relief. 57 Am. Dec. 365; 79 *Id.* 667; 6 Am. St. Rep. 601; 53 Ark. 16; 15 *Id.* 286.

Ernest Neill and *Chas. F. Cole,* for appellee.

The proof shows that appellees honestly and in good faith believed that these tracts belonged to them by the law of accretion, they being riparian owners, and they still so believe, and have spent money in improving them.

Appellant's application is not in evidence, nor any copy. This is significant, as his title depends upon a deed from the Land Commissioner under act No. 282, Acts 1917. Outside this act the commissioner had no power or authority to execute the deed. See section 5 of said act. There was a legal and equitable obligation on him to disclose the real facts to the commissioner, and if he failed this constituted fraud. 12 R. C. L., p. 307.

Under the facts of this case appellees had a clear right to ask aid of equity. 1 Pomeroy on Eq., § 423; 30 Ark. 123; 105 *Id.* 587-592. The commissioner had no au-

thority to convey the land except under the terms of act No. 282, and appellant failed to comply with the terms of that, and the lower court so found.

By long possession and improvement of these lands under *bona fide* claim of ownership they have acquired substantial rights recognized by the legislators and which they intended to protect by act No. 282, and that the rights of appellees amounted to a vested and exclusive right to purchase the lands at any time within one year from the passage of said act and the deed to Underwood was wrongfully issued, and chancery alone had the power to correct the wrong. 44 Ark. 452; 49 *Id.* 87; 76 *Id.* 525-7. As to the remedy, see also 32 Cyc. 1050 *et seq.*

The letters of the commissioner were properly admitted in evidence, as no objection was made. 94 Ark. 254, 261.

Act 344 did not repeal act 282 as to future sale of lands.

SMITH, J. Appellees filed a complaint asking the cancellation of a deed executed to appellant on April 3, 1918, by the State Land Commissioner. The complaint imputes no bad faith to the commissioner but alleges that under the circumstances the deed was a fraud upon their rights.

The deed was executed under the authority of act 282 of Acts 1917 (Acts 1917, page 1468), entitled "An act to provide for the sale and disposition of islands formed or which may form in navigable rivers or streams of the State which belong to the State of Arkansas, and for other purposes," and the land sued for was conveyed to appellant by the State Land Commissioner as an island which had formed in White River.

Section 5 of this act provides that all *bona fide* claimants of these islands shall have a preferential right of one year after the passage of the act to apply for the survey and purchase of lands claimed by them, and that in case of conflict between applicants the question of preference shall be determined by the commissioner under such

rules and regulations as he may prescribe not in conflict with the provisions of the act, and that the determination of the commissioner on such contest, in the absence of fraud or collusion, shall be final. There was a prayer in the complaint that appellant's deed be canceled to the end that the commissioner might conduct the hearing provided for by the act on the relative rights of the respective claimants to the commissioner's deed.

The court granted the relief prayed by canceling appellant's deed and referred the cause to the Land Commissioner for his action, and this appeal is from that decree.

It is contended by appellees that they own the land in controversy as an accretion, but that they applied for a deed under this act 282 to prevent a controversy arising over their title. There is a conflict in the testimony as to whether the land was an accretion, or an island, but it was agreed that appellees were the owners of the mainland adjacent to these parcels of land and that one of the appellees had paid the taxes on the land claimed by him for the years 1915, 1916 and 1917, by adding ten and one-half acres to the area of his surveyed land, and that the other appellees paid the taxes on the remainder thereof for 1918 in the year 1919.

Appellant had litigation with one of the appellees over the crop grown in 1917 and lost his suit, it being there successfully shown that the land was an accretion, and because of that fact it is now insisted that it is inconsistent for the appellees to attempt to buy the lands as an island belonging to the State.

At the time of the filing of the respective applications to purchase the land with the State Land Commissioner all the parties hereto had possession of some portion of the land. One of appellees had possession of the land which he desired to purchase through appellant's father as a tenant, and the other appellees also had possession of a portion of the land by tenant; but appellant himself had never been any one's tenant, although he had no

claim to the land except such as grew out of his occupancy of it and his application to buy it.

At the trial in the court below there was offered in evidence certain correspondence between appellees and the Land Commissioner, who had been made a party, from which it appeared that appellees filed their application to purchase the land on February 15, 1918, and that that of appellant was filed on February 20, 1918. The commissioner did not attempt to pass on these conflicting applications. Indeed, his letter stated that he did not know there was a conflict, as he assumed applications were being made to purchase three separate islands. The act provided that the commissioner should appoint a surveyor to make field notes and a plat conforming to the rules and regulations as laid down by the Manual of Surveying for the Survey of Public Lands used in the General Land Office of the United States, and the commissioner appointed the same surveyor to make the survey for each of the applicants. Appellant proved more diligent than the other applicants and got in touch with the surveyor named, and upon the survey then made obtained the deed here sought to be canceled. Objection is made to the competency of these letters. But it appears that an attorney for appellees testified as a witness, and stated that, acting for appellees, he had, within the year, filed with the Land Commissioner the application of appellees to purchase the islands. So that, if the Land Commissioner's testimony is disregarded as incompetent, it still appears from competent testimony that appellees applied to purchase the land within a year from the passage of the act, and that fact is undisputed.

It is not insisted that a finding be made that there was fraud or collusion on the part of the commissioner in issuing the deed; and we think the testimony does not show that such was the case. The finding of the commissioner, which is made final in the absence of fraud or collusion by the provisions of the act, relates to a contest between conflicting applicants to buy the same land; and there has been no such decision between these appli-

cants. Indeed, the decree of the court below provides for this hearing before the commissioner, and if he should decide that appellees are *bona fide* claimants to the land, as the record before us appears to show, it will then be his duty to issue his deed to appellees for the reason that the act gives such claimants a preferential right to buy for a period of one year after the passage of the act. And this is true, notwithstanding the fact that the first survey made was based upon appellant's application, because appellees—if the Land Commissioner find them to be *bona fide* claimants—have the preferential right to buy the land for a period of one year.

We think there is no inconsistency in appellees' position which prevents their buying the land. It is true that in prior litigation with appellant they prevailed in a lawsuit over a crop on the theory that they owned the land in controversy here as an accretion. But it is not undisputed that it is an accretion, and appellees had the right to perfect their title to the land by buying it as an island, it being explained by them that this course was pursued to prevent some one else buying the land as an island and thereby making it unnecessary to litigate the question whether the land was an accretion with some one, who held a deed from the State. The question whether new land was formed as an island or as an accretion to the main shore is one of fact, and is quite a common one, and we think it was the legislative purpose to give riparian owners, situated like appellees were, the preferential right to buy for the period of a year.

It is finally insisted that the act giving appellees the preferential right has been repealed by act 344 of the General Acts of 1919, page 256. It is unnecessary here to decide what effect the passage of the act of 1919 had upon the act of 1917, as it is provided in section 1 of the act of 1919, "That nothing in this bill shall affect the sale of any State lands where written application was filed with the Commissioner of State Lands prior to February 1, 1919." Appellees' application was made prior to Feb-

ruary 1, 1919, and the Land Commissioner's deed would, no doubt, have been issued thereon but for the commissioner's mistake of fact in assuming that the parties desired to purchase three different islands.

Decree affirmed.

HARRIS v. HARRIS.

Opinion delivered February 16, 1920.

DIVORCE—CONCLUSIVENESS OF DECREE—DISMISSAL OF APPEAL.—Where both parties asked relief in a divorce suit, and the court denied relief to either, without prejudice to a further action, whereupon the husband appealed, and the wife was granted a divorce in another action subsequently begun, the appeal will be dismissed; for, while the pendency of the appeal would have been a bar to the second action if pleaded, the husband, having allowed the same to become final, can not proceed with his appeal.

Appeal from Hot Spring Chancery Court; *Jethro P. Henderson,* Chancellor; appeal dismissed.

Robert J. White, for appellant.

The statutory grounds of divorce, desertion and indignities such as to render condition intolerable, must be proven by a fair preponderance of the testimony. 90 Ark. 40; 97 *Id.* 125; 170 S. W. 485; 104 Ark. 385; 105 *Id.* 194; *Blue* v. *Blue,* 174 S. W. 237. The court had jurisdiction to grant the divorce on the cross-complaint. Kirby's Digest, § 2674. Defendant had the right to proceed by cross-bill to obtain affirmative relief. 14 Cyc. 672; 90 Ark. 16; 94 *Id.* 458; Kirby's Digest, § 6088. The complaint having been filed and defendant summoned to answer, the court obtained jurisdiction, and, once having obtained it, retained it for all purposes, and should grant defendant the relief he was entitled to under his cross-bill and the proof. 137 U. S. 171; 48 Ark. 316; 14 *Id.* 356. The original bill and the cross-bill are but one cause (3 Daniel's Chy. Pl. 1943; 3 Ark. 312; 7 Johns. Chy. 252), and it can not be material from what source jurisdiction arose, provided it existed. 46 Ark. 102; 29 *Id.* 612; 7 Howard 660; 81 Ark. 163; 14 *Id.* 345; 19

Id. 139; 22 *Id.* 103; 24 *Id.* 431; 29 *Id.* 612; 46 *Id.* 96; 48 *Id.* 312; 56 *Id.* 93; 48 *Id.* 544; 33 *Id.* 328; 100 *Id.* 28; 31 L. R. A. 160. Appellant was entitled to a divorce on the grounds of desertion, which was fully established by the proof. 76 Ark. 28; 90 *Id.* 16; 94 *Id.* 438; 102 *Id.* 679.

Defendant was entitled to the care and custody of the child as soon as it was old enough not to require the special care of the mother. Kirby's Dig., § 3757; 32 Ark. 92; 30 *Id.* 287.

D. D. Glover, for appellee.

The court was right in its findings and in granting appellee a divorce and custody of the child, and defendant did not appeal from the decree in the second suit filed by appellee.

SMITH, J. Mrs. Irene Harris brought this suit in Hot Spring County, the county of her residence, against her husband, who resided in Logan County, for divorce. In her complaint she asked a divorce on account of cruel and inhuman conduct on the part of her husband, rendering her condition as his wife intolerable, and also alleged desertion. She asked the custody of their infant child and an allowance for its support. Harris filed an answer, denying the allegations of his wife's complaint, and by way of cross-complaint alleged that his wife, without cause, had deserted him, and prayed a divorce on that account.

The court made no finding on plaintiff's allegation of intolerable treatment, but did find that she was not entitled to a divorce for desertion for the reason that the parties had not been separated for a year at the time of filing the complaint. The separation had continued for more than a year, however, when the cross-complaint was filed, but relief was denied cross-complainant for the reason that he was not a resident of Hot Spring County, and that the court, therefore, had no jurisdiction of his cross-complaint. Both the complaint and the cross-complaint were dismissed, but without prejudice to any future action which either party might thereafter commence.

The court, however, awarded the custody of the child to its mother, and made an allowance of $12 per month against the father for its support. This action of the court in regard to the custody of the child and the allowance for its support is, of course, subject to future review in an appropriate action. Harris concedes that the allowance is reasonable, and makes no complaint against it, and on account of the tender age of the child, it being only about a year old, he does not object that its mother has been awarded its custody, subject to his right to visit the child at all reasonable times, a right which, of course, he has and one not denied him by the decree below.

Cross-complainant has appealed, however, from the action of the court below refusing him a divorce, and now insists that the testimony shows his wife deserted him wilfully and without cause, and that the desertion had continued for more than one year at the time he filed his cross-complaint, and that the court was in error in dismissing his cross-complaint for the want of jurisdiction.

It appears, however, from a certified copy of a decree rendered in a suit between the parties to this litigation that upon the rendition of the decree herein appealed from Mrs. Harris brought another suit against her husband, which proceeded to a hearing and final decree, wherein she was awarded a divorce and the custody of the child and an allowance of $12 per month for its support, which decree, in reference to the custody of the child and allowance for its support, was properly made subject to the future orders of that court "or some other court having competent jurisdiction."

The decree in this second suit is conclusive of the rights of the parties on this appeal. It is true the pendency of this appeal could have been pleaded in bar of the prosecution of that suit, but that was not done. This second suit was apparently ignored, notwithstanding the court in which it was pending had jurisdiction of the parties and of the subject-matter, and the issue now presented to us has been there decided. As was said in the case of *Church* v. *Gallic,* 76 Ark. 423, "The pendency of

the first action might have been pleaded in the second suit in bar of the right to maintain the same, but, if not pleaded, or if, after the plea is amended, judgment upon the merits of the controversy in the second suit is allowed to become final, it is a bar to further prosecution of the first suit." See, also, *Jenkins* v. *Jenkins,* 78 Ark. 388; *Hollingsworth* v. *McAndrew,* 79 Ark. 185; *Quellmalz Lbr. & Mfg. Co.* v. *Day,* 132 Ark. 469; *Sallee* v. *Bank of Corning,* 134 Ark. 109.

Having suffered a decree to be rendered against him in this second bill which is decisive of the questions here raised, his right to prosecute this appeal has on that account ceased, and the same must be dismissed. It is so ordered.

BODINE *v.* TAYLOR.

Opinion delivered February 16, 1920.

VENDOR AND PURCHASER—SATISFACTORY TITLE.—Where a contract for the sale of land provided that the vendor should make a good warranty deed, and that in case he can not make a satisfactory deed he was to return an advance payment, there was no requirement that the title should be satisfactory to the purchaser's attorney; and where the vendor furnished a good title, though it was disapproved by the purchaser's attorney, the purchaser can not recover the advance payment.

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

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

Under the original contract appellant contracted for 25 acres of land for $1,000. Defendant could not give him a good title to all the land, and the contract failed and was abandoned by agreement, and a new agreement made, which was void because not in writing. Kirby's Digest, § 3654, subd. 4. No forfeiture is claimed in the answer and no proof of a forfeiture, and the court erred in its findings of fact and its declaration of law, as the new contract was within the statute of frauds.

Philip McNemer, for appellee.

1. There was no defect in the title as to the one acre, as found by the chancellor.

2. Under the contract for 10 acres *more or less* and the general description, there was no failure of title as to the one acre. 19 Ark. 108-9; 101 *Id.* 99. It is appellant's fault, and the court so found, that he failed and refused to take the land as he agreed. He failed to carry out his original contract without reason, as the title was good and he refused to buy at the agreed reduced price, and the decree is correct.

SMITH, J. This is a suit to recover fifty dollars paid by the appellant to S. R. Taylor under a contract for the purchase of a certain piece of land and to subject the land to the payment of the same. The suit was originally filed against S. R. Taylor as defendant, who has since died, and the cause has been revived in the name of appellees. The complaint alleged that on the 7th day of August, 1916, the plaintiff and defendant entered into a contract by the terms of which the defendant agreed to sell the plaintiff twenty-five acres of land in Pulaski County, Arkansas. That the plaintiff agreed to pay therefor a thousand dollars, and that the defendant was to furnish him with an abstract showing a good title to the land. That plaintiff paid fifty dollars to the defendant as an advance payment of earnest money, and agreed to pay the balance when the defendant should furnish the plaintiff a deed and abstract showing a good title to the land. That later the defendant furnished an abstract, which, upon examination, showed that he had no title to one acre of the land, and that there were defects in the title, which showed that the defendant did not have good title to the land.

That the plaintiff refused to accept the deed and refused to pay the balance of the purchase money except upon the condition that the defendant should deduct the value of the shortage or perfect his title. That the defendant refused to deduct the value of the shortage in quantity and refused to carry out and perform his part

of said contract. That the defendant refused to return the fifty dollars paid, and that the plaintiff was entitled to a lien on the land to secure its return.

The prayer was for a decree against the defendant for $50, and that the plaintiff be decreed to have a lien on the land to secure the payment of same, and for an order of sale in case of failure to pay.

Upon filing a motion by the defendant to require the complaint to be made more specific, the plaintiff filed an amended complaint, making the contract of sale an exhibit thereto, and alleged that it was agreed that in case the defendant could not make a satisfactory deed that the defendant should return the advance money. That the plaintiff caused the abstract, which the defendant had furnished him, to be examined by an attorney, who advised the plaintiff that the defendant did not have a good title to one acre of the land, and that it would require a suit in chancery to perfect the defendant's title. That by reason of the imperfection of the defendant's title to one acre of the land the defendant was unable to make a satisfactory deed. That the contract of sale was canceled by agreement of the parties, and that the plaintiff returned the abstract, and that the defendant agreed to return the fifty dollars.

The answer specifically denied each allegation of the complaint and prayed its dismissal.

The contract referred to and made an exhibit to the complaint reads as follows:

"This is an agreement between S. R. Taylor, party of the first part, and R. Bodine, party of the second part. S. R. Taylor, party of the first part, agrees to sell west part of south quarter, section 30, 3 north, range 10 west, containing fifteen acres, more or less, and the south part of the southeast, containing ten acres, more or less; in fact, all of my real estate west of St. Louis, Iron Mountain Railroad, to R. Bodine, for the sum of $1,000 in cash.

"R. Bodine, party of the second part, agrees to deposit $50 to S. R. Taylor for good faith, and to pay him the balance of $950 when S. R. Taylor makes him a good

warranty deed; in case S. R. Taylor can not make a satisfactory (deed) to said land he is to return the said $50 to R. Bodine at once.

(Signed) S. R. Taylor.
(Signed) R. Bodine.
"8-7-16 Date."

This contract was prepared by one McBride, a justice of the peace, who testified that the parties came to his office and asked him to prepare it. That Taylor had the deed which had been made to him for the land, and that both parties read over this deed, and that he then wrote the contract after Taylor had stated to Bodine that he was selling him the land as described in the deed. That witness further testified that Taylor had resided on the land since 1904. The deed referred to described the land by metes and bounds.

The cause was tried below, and is presented here, upon the theory that the title was to be satisfactory to appellant's attorney, and the objection made to it is that there was a shortage of an acre. In the progress of the trial, however, the court made this statement:

"I don't want to direct your case, of course, but I don't know that there was one acre in this call that is affected. I couldn't take Judge Heard's statement. I would have to pass on that question myself. The contract does not call for the title to be passed upon by Mr. Heard."

We do not understand that it has been made to appear that there was a shortage of an acre, and no other objection to the title was made. The court below was correct in the view that the contract did not call for a title which Judge Heard (appellant's attorney) would approve, but called for a good and satisfactory title, this being the proper interpretation of the language employed in the contract of sale. The question, therefore, was not whether appellant's attorney had approved the title. The controlling question is, was there any valid objection to it? The objection made was that there was a shortage

of an acre, and it does not appear that this objection was well taken.

There is conflicting testimony as to the propositions and negotiations occurring after the objection had been made that there was a shortage in acreage; but we think nothing is shown which obligated the seller to do more than to furnish a good title, and, as we have stated, the only objection made to the title is not substantiated by the record before us, and the complaint was therefore properly dismissed for the want of equity.

HINES v. MORGAN.

Opinion delivered February 16, 1920.

1. CARRIERS—LIVE STOCK—DAMAGES FOR FAILURE TO FEED.—In an action by a shipper for damages to mules, evidence *held* to sustain finding that they ate off each other's manes and tails because they were confined in the car without feed or water for more than 36 hours.
2. CARRIERS—LIVE STOCK SHIPMENT—CONTRIBUTORY NEGLIGENCE.—In an action by a shipper of mules, which ate off each other's manes and tails, *held* that the failure of the shipper to place chemicals on the manes and tails was not negligence as a matter of law where such practice was not universal, and was not required by the carrier.
3. CARRIERS—DUTY TO CARE FOR LIVE STOCK—INSTRUCTION.—In an action by a shipper against a carrier of live stock which kept the animals confined without feed or water for more than 36 hours, in violation of the act of Congress of June 29, 1906 (U. S. Comp. Stat., §§ 8651-4), an instruction to the effect that it was the carrier's duty to feed and care for the stock, and that it was negligent in failing to do so, was not prejudicial, and the carrier can not complain, particularly where the assumption was on the condition that the carrier would not be responsible if the shipper who accompanied the animals was himself negligent.
4. CARRIERS — MEASURE OF DAMAGES TO LIVE STOCK.—In an action by a shipper of mules for damages by reason of the loss of their manes and tails, the measure of damages is the depreciation in market value by reason thereof, and recovery can not be defeated on the ground that the mules were as capable of work as before.

Appeal from Ouachita Circuit Court; *C. W. Smith,* Judge; affirmed.

E. B. Kinsworthy and *W. R. Donham,* for appellant.

1. The court erred in giving plaintiff's instruction No. 1. Taken as a whole it fails to show that the eating of the hair off the manes and tails of the animals was caused by hunger or that keeping the mules in the car more than thirty-six hours was the proximate cause thereof. The injury was caused by inherent vices or natural propensities of the animals. 46 Ark. 236; 83 *Id.* 87. Besides, it was the duty of plaintiff to look after the stock as to feed and water, as he accompanied the shipment. No negligence of appellant was proven. Appellee could have avoided the injury by using a chemical preparation suitable and customary in such cases. Appellee's instruction No. 1 was error, as it assumes that it was defendant's duty to feed and care for the stock, when he accompanied it, and the burden of proof was on him to prove negligence, and he has failed. 50 Ark. 397; 81 *Id.* 469; 86 *Id.* 469; 93 *Id.* 537; 101 *Id.* 75. See also 211 S. W. 103.

2. No damage was proved by the eating of the hair off the manes and tails of the mules. The judgment is without evidence to support it.

Powell & Smead, for appellee.

It was not the duty of appellee to use chemicals, and the evidence shows that it is not customary. The railroad accepted the shipment without protest and knowing no chemicals were used. This was an interstate shipment, and it was the duty of the railroad to unload the stock within 36 hours and feed and water them, and a railroad can not contract against liability caused by its own negligence nor limit its liability. 93 Ark. 537; 101 *Id.* 289.

The evidence is undisputed that the animals were nearly starved to death and this caused the eating of the manes and tails by reason of being kept confined in the car for so long a period of time without care and the railroad was properly held liable for the damage.

There is no error in the instructions. 211 S. W. 103 is not in point here.

HUMPHREYS, J. This suit was instituted by appellee against appellant in the Ouachita Circuit Court, to recover $405 as damages, caused by the alleged negligence of appellant to feed and water a mixed shipment of mules and horses. Omitting caption and signature, the complaint is as follows:

"Comes the plaintiff, J. B. Morgan, and for his cause of action against the defendant, Missouri Pacific Railway Company, states:

"That the defendant is a corporation engaged in the business of a common carrier by railway in this State, and that as such it entered into a contract with plaintiff, in writing, by which it undertook to transport for him, consigned to himself, a car load of mules and horses from Iola, Kansas, to Stephens, Arkansas, and that said mules and horses were delivered to defendant by plaintiff in good condition and were accepted by it for such shipment on Thursday, the 6th day of December, 1917. That said shipment consisted of twenty-two mules and five horses. A copy of said contract is filed herewith, marked Exhibit 'A,' and plaintiff asks that same be taken as a part of this complaint.

"That in the course of shipment, said car load of mules and horses reached Van Buren, Arkansas, at 4:30 A. M. on Saturday, December 8, 1917, and were unloaded at Van Buren, Arkansas, at 10:18 A. M. on said December 8, 1917, making forty-one hours which said mules and horses were continuously kept in said car. That during said time said horses and mules were kept in said car defendant negligently failed and refused to either feed or water said stock, and as a result said stock became so nearly starved that all of them had their tails and manes entirely eaten off by each other; that by reason of the negligence aforesaid the general condition of all of said stock was greatly impaired; that by reason of the impaired condition of said stock, and the loss of their tails

as aforesaid, the market value of said stock was reduced $405, and plaintiff has been damaged in that sum; that said damage was the result of the negligence of the defendant as aforesaid.

"That said stock was delivered to plaintiff at Stephens, Arkansas, on December 13, 1917, damaged as above stated.

"Wherefore, plaintiff prays judgment against the defendant in the sum of $405, for costs herein and all proper relief."

Appellant filed answer, denying each material allegation in the complaint, and, by way of further defense, alleged that the damage, if any, resulted to the stock on account of appellee's own negligence in failing to put some sort of chemical on the tails of the animals to prevent them from gnawing or eating the hair off of each other's tails.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, upon which a verdict was returned and judgment rendered against appellant in the sum of $405 as damages. From that judgment an appeal has been duly prosecuted to this court.

The undisputed evidence disclosed that appellee shipped a car, consisting of twenty-two mules and five horses, from Iola, Kansas, to Stephens, Arkansas, on the 6th day of December, 1917; that the stock were in good condition when received for shipment; that the mules and horses were continuously kept in the car for forty-one hours without being fed or watered, or stopping and removed from the car for that purpose; that, at the time the shipment reached Van Buren, Arkansas, the mules and horses had been in the car continuously without food or water for over thirty-six hours; that they arrived at Van Buren at 4:30 A. M., December 8, 1917, and, although being requested to do so, appellant failed to unload them until 10:18 A. M. of said date; that the contract of shipment contained a clause relieving appellant from feeding, watering or removing the stock for that purpose within

thirty-six hours from the date of shipment; that appellee accompanied the shipment from Iola, Kansas, to Van Buren.

The evidence on behalf of appellee tended to show that, after the arrival of the shipment at Van Buren, and after thirty-six hours from the time the stock were received for shipment at Iola, and before they were unloaded to be fed and watered, their tails and manes were entirely eaten off by each other on account of their starved condition; that appellee lost from $15 to $25 per head in the sale of the stock, because the hair on their tails and manes had been eaten off; that it was not the general custom to place chemicals upon the tails and manes of animals to keep them from eating the hair on the tails and manes of each other.

The testimony on behalf of appellant tended to show that it was the custom, especially in the West, for shippers to apply chemicals to prevent stock of this character from eating the hair off the tails and manes of each other, on account of their inherent vices or propensities; that chemicals had not been applied to the tails and manes of the horses and mules constituting this particular shipment.

It is contended by appellant that there is no substantial evidence to support the finding of the jury that the injury resulted to the mules on account of hunger or because they were kept in the car more than thirty-six hours continuously after the date of shipment, or that the injury occurred after the thirty-six hour period. Appellee testified that he saw the stock between 9 and 10 o'clock, after the expiration of the thirty-six-hour period, at Van Buren, and that their tails and manes were eaten off at that place, by each other, on account of their hunger or starved condition. This was substantial evidence tending to show that the tails and manes of the animals were eaten off by each other on account of hunger, resulting from being kept in the car continuously for more than thirty-six hours without feed or water. But it is suggested that there is no evidence tending to show that

it was the duty of appellant to feed and water the stock, and, therefore, a failure to do so did not tend to show any negligence on its part. On interstate shipments it is made the duty of carriers to unload stock of this character at periods of twenty-eight consecutive hours and to place them in properly kept pens for rest, water and feeding for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable cause which can not be anticipated or avoided by the exercise of due diligence and foresight, provided the twenty-eight-hour period of time may be extended to a period of thirty-six hours if written request of the owner of the shipment shall be made separate and apart from the printed bill of lading, and also made the duty of the carrier, in default of the owner doing so, to properly feed and water the stock during the rest period. A heavy penalty is imposed upon carriers for noncomplinace with the Federal act. Fed. Stat. Ann. Supp. 1909, pages 43, 44 and 45. Proof that a carrier has failed to comply with this law is certainly evidence of a substantial nature tending to show negligence on its part. Such proof was made in the instant case. It is true the shipper in the instant case accompanied the shipment, but the first opportunity accorded him to feed and water the stock was after they had been continuously aboard the car for forty-one hours.

It can not be said the undisputed evidence shows it was the duty of appellee to place chemicals upon the tails and manes of the animals, and because of his failure to do so, was guilty of negligence. The evidence tended to show it was not a universal practice, so much so as to make it a custom, and not so necessary that the railroad itself exacted such treatment of shippers before receiving stock for shipment. Neither can it be said that the undisputed evidence showed that appellee was guilty of negligence himself for failure to feed and water the stock at the expiration of the thirty-six-hour period, because it appears that no opportunity was accorded him to do so until the stock had been con-

tinuously confined in the car for forty-one hours. There is therefore substantial evidence to support every material allegation necessary to a recovery, and, for that reason the court was correct in refusing to give appellant's requested peremptory instruction.

Appellant insists that the court committed reversible error in giving instruction No. 1, which is as follows: "You are instructed that if you find from the evidence in this case that the plaintiff delivered to the defendant the car load of mules and horses referred to in the complaint, and that on account of the negligence of the defendant in failing to feed and care for said stock, which occurred more than thirty-six hours after delivery to the defendant of said stock, and that the same were damaged in the manner complained of, you will find for the plaintiff, unless it be shown by the evidence that the plaintiff was himself guilty of negligence in the handling of said stock, which contributed to cause the damage of which he complains."

It is said that this instruction in effect assumed that it was the duty of appellant to feed and care for the stock and that it was negligent in failing to do so. If the instruction made the assumption, it was upon condition that it would not be responsible in the event appellee was himself negligent in not caring for the stock. The law imposed the absolute duty to feed and water the stock at the expiration of the thirty-six-hour release period upon appellant, irrespective of any contract with the appellee shifting the duty. Certainly it can not complain of the conditional assumption if it failed to afford appellee the opportunity to feed and water the stock at the expiration of the release period. There was ample evidence to sustain a finding by the jury that no opportunity was afforded him to feed until five hours after the time limit had expired. No prejudice, therefore, could result to appellant if the instruction did assume that it was appellant's duty to feed and water the stock at the expiration of thirty-six hours.

Appellant insists that no damage was established because the proof showed that the mules could do as much work after their manes and tails had been eaten off as before. This is not the test. The test is, Did the injury to the manes and tails of the animals decrease their market value? The undisputed evidence in this case showed that animals with manes and tails eaten off are not worth as much in the market as if they had their manes and tails.

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

RURAL SPECIAL SCHOOL DISTRICT NO. 30 *v.* PINE BLUFF.

Opinion delivered February 16, 1920.

1. SCHOOLS AND SCHOOL DISTRICTS—AUTHORITY TO ISSUE BONDS.—Bonds issued by the directors of a rural special school district organized under Acts 1909, No. 321, without authority of a majority of the electors, are void, even in the hands of a *bona fide* holder for value.
2. STATUTES—IMPLIED REPEAL.—Courts are slow to construe a statute as impliedly repealed where later legislation shows that the Legislature deemed it still a live statute.

Appeal from Columbia Chancery Court; *J. M. Barker,* Chancellor; reversed.

Stevens & Stevens, for appellant.

1. The bonds were issued without authority of law and therefore void, as there was no election at which directors could be authorized to issue the bonds. Rural special school districts were not to be governed by the laws of special school districts except as provided for in the act. The Acts 1909 and 1911, Acts No. 321 and No. 169, support our contention. Act 25, Acts 1913, does not expressly repeal any law and repeals by implication are not favored. Black on Int. of Laws, p. 351; 36 Cyc. 1071; 111 S. W. 1011; 76 Ark. 443; 34 *Id.* 499; 123 *Id.* 184; 123 *Id.* 481. If the act of 1869, with its amendatory acts, is a general act, it will not repeal the special act

creating and governing rural and special school districts. 29 Ark. 225; 63 *Id.* 397; 72 *Id.* 119; 93 *Id.* 621; 109 *Id.* 24.

2. Special laws to be made effective by the electors are not repealed by general laws. 83 S. W. 831. The two classes of schools are dependent upon the statutes which gave them existence, and neither will be repealed by a law with reference to the other unless expressly so. 69 Ark. 517; 93 S. W. 100; 83 *Id.* 382; 106 *Id.* 448.

There is no manifest intention to repeal Act 321, Acts 1909, and 169, Acts 1911, and both must stand. 112 Ark. 101. Appellee was not an innocent purchaser of the bonds, as the facts put it upon notice of any infirmity in the bonds. 90 Ark. 93; 121 *Id.* 634. The burden was on the board to show that they held the bonds without notice of any infirmity, and that a valuable consideration was paid for them. 48 Ark. 454; 56 *Id.* 510; 80 *Id.* 86.

3. Appellee's contract with Gunter did not authorize it to take a forfeiture on these bonds. 73 Ark. 342; 74 *Id.* 45; 112 *Id.* 6; 105 *Id.* 524.

4. The contract with Judge Gould, compared with the one with Gunter, shows the latter a much better one for the city than the one with Gunter and the inference is that the Board of Affairs of Pine Bluff never intended for Gunter to carry out the contract entered into with him with reference to the first $100,000 to be furnished the city by him.

The bonds and trust deed are void because issued without authority. The city did not act in good faith with Gunter; they gained by reason of his failure. Gunter did not own the bonds, but the appellant. Having lost nothing by Gunter's failure and refused to accept terms from him as to time payments of $100,000, the city could not pervail against Gunter, and ought not to prevail against appellant.

A. R. Cooper and *McKay & Smith*, for appellee.

1. The act, No. 321, Acts 1919, speaks for itself and applies to all special school districts, and the object was to place all on the same basis, an equal and uniform one,

and authorize them to borrow money and execute deeds of trust under appropriate resolutions of the board of directors. The act simply extends the power of special school districts and widens the limited powers conferred on them by special acts and applies to any and all special school districts as distinguished from common school districts. 105 Ark. 77; 88 *Id.* 324.

The general rule is that a general act is not intended to repeal a prior special act. 72 Ark. 119; 50 *Id.* 132. Where a statute is exclusive, that is, covers the whole subject-matter, it repeals by implication all prior statutes, general or special. 97 U. S. 546; 82 Ark. 302.

It was not the policy of the Legislature to single out rural special districts. The act of 1913 was intended to and did include all special districts as distinguished from common school districts and to place them on an equal and uniform basis, and the act of 1917 took up the whole subject anew and promulgated another policy about borrowing money.

2. The city was a *bona fide* holder of the bonds for a valuable consideration without notice of any invalidity or defect. 90 Ark. 93; 94 *Id.* 100; 104 *Id.* 388; 95 *Id.* 368; 96 *Id.* 105; 109 *Id.* 107. The burden was on appellant to show notice. 48 Ark. 454; 112 *Id.* 608; 113 *Id.* 28.

The bonds expressing on their face that they had been issued according to law estop the district from asserting the defenses urged against the city. 161 U. S. 442; 92 *Id.* 484; 106 *Id.* 183. They were executed by the president and secretary of the board in accordance with the resolution of the board and delivered as ordered and estops the board from setting up any defense as that no election was held. The bonds are valid obligations of the district. 161 U. S. 442; 106 *Id.* 183; 92 *Id.* 484. No election was necessary when these bonds were issued. The city was an innocent purchaser without notice for a valuable consideration. No wrong or fraud is shown and the decree should be affirmed.

HUMPHREYS, J. Appellant instituted suit against appellee in the Columbia Chancery Court on the 28th day of March, 1918, to enjoin appellee from disposing of four bonds, numbers 6, 7, 8 and 9, issued by appellant, and to cancel them, together with a deed of trust given by appellant to secure them. The gist of the allegations of the complaint is that, while said bonds and deed of trust constitute an apparent obligation in the sum of $2,000 against appellant district, they were issued as four bonds in the sum of $500 each, of a series numbered from 1 to 22, inclusive, to raise money to build and equip a schoolhouse for said district, by the directors of said district without authority and contrary to law; that no money was ever advanced to appellant upon said bonds or deed of trust.

Appellee answered, denying that the bonds were issued without authority in law, and alleging that it was the *bona fide* holder of said bonds and trust deed for a valuable consideration.

The cause was submitted upon the pleadings, evidence and exhibits, upon which a decree was rendered dismissing the complaint for want of equity, from which an appeal has been duly prosecuted to this court.

The facts are practically undisputed. In August, 1916, appellant district was organized under Act 321, Acts of the General Assembly of 1909. The directors of said district, through its president and secretary, issued a series of bonds, numbered 1 to 22, inclusive, of denominations of $500 each, bearing interest at the rate of six per cent. per annum, payable to bearer, and, to secure said bond issue, executed a trust deed upon the real estate owned by said school district for the purpose of raising money to erect and equip a school building upon the property mortgaged. The bonds and deed of trust bore date of October 15, 1916. The deed of trust was placed of record in the county of Columbia and the bonds were delivered, with interest coupons attached, to ——— Scully, agent of J. O. Gunter, upon the understanding that they would be negotiated and the sum of

$10,500 deposited to the credit of appellant district, subject to its check as the work of constructing the building progressed; that no fund was placed to the credit of the district or received by it for the construction of a building, and that all the bonds, except the four bonds in question, had been returned to the district. No annual school election was held between the time appellant district was organized and the date of the issue of the bonds and execution of the deed of trust, at which the electors of said district authorized the board of directors to borrow money for the purpose of constructing the school building. Subsequently to this time, J. O. Gunter entered into a contract with the Board of Public Affairs of the City of Pine Bluff to finance that city, and placed the four bonds in question in the hands of the city in lieu of an indemnity bond to guarantee performance of the contract on his part. According to the contention of the city, J. O. Gunter breached his contract, and the city appropriated the bonds under the forfeiture clause of the contract in which said Gunter agreed to finance the city. The city was afterward financed through the agency of Judge James Gould.

It is insisted by appellant that the bonds and trust deed are void because issued by the board of directors of said school district without authority. Act 321 of the Acts of the General Assembly of 1909, under which the district was organized, contains the following provision: "That all school districts created under this act shall have the power to borrow money as any other special or single school district in cities or incorporated towns, when a majority of the legal electors vote for same at any annual school meeting." This act was a general act, authorizing people in any given territory in any county of this State, other than incorporated cities and towns, to organize their territory into a special or single school district in the manner provided by the act. The school districts provided for by this act were characterized in an amendatory act of 1911 as "rural special school districts," as distinguished from special school districts in

cities and towns or special school districts created by special act. It goes without saying that if Act 321, Acts 1909, was in force and effect when the bonds were issued and the deed of trust executed on the 15th day of October, 1916, the act of the board of directors in issuing the bonds and executing the deed of trust was *ultra vires,* and the bonds therefore void in the hands of even a *bona fide* holder for value. All parties dealing with public officials must take notice of limitations or restrictions upon their power. In this sense, directors of a school district are public officials. It is contended, however, by appellee that Act 321 of the Acts of 1909, and the amendatory act thereto, No. 169 of the Acts of 1911, were repealed by Act 25 of the Acts of 1913. The latter act does not require the approval of a majority of the electors at an annual election in order for the directors to borrow money. It is urged that the latter act is broad enough in its terms to embrace rural special school districts, and, therefore, by necessary implication, repeals Act 321, Acts 1909, which placed such restriction upon the power of the board of directors to borrow money. The language relied upon in said Act 25, as embracing rural special school districts, is as follows: "All free school districts in the State of Arkansas," etc. The identical language used in the amendatory act aforesaid was used in section 1, act 248, Acts 1905, which it amended, and the original act only included urban special school districts and special school districts created by special act of the Legislature. The purpose of the amending act of 1913 was not to embrace other classes of special school districts not included in Act 248, Acts 1905, but to empower the special school districts already included in said Act 248 to refund any indebtedness which had theretofore been incurred for the erection and equipment of necessary school buildings, and to execute new evidences of indebtedness and mortgages therefor. This intention of the Legislature was clearly evinced in the amendatory act by a repetition of the same language used in the section of the act amended down to the clauses added by way of amendment, which added

clause is as follows: "And to refund such indebtedness and execute new evidences of indebtedness and mortgages therefor." Again, Act 25, Acts 1913, only purports to amend one section of Act 248, Acts 1905, and does not, as contended by appellee, attempt to take up anew the whole subject of borrowing money by all classes of special school districts in Arkansas and cover the entire ground in relation thereto. The amendatory act of 1913 contains no repealing clause, and, being amendatory of one section of Act No. 248, Acts 1905, will not, by implication, repeal any statute not necessarily in conflict with the section as amended. It was said in the case of *Martels* v. *Wyss,* 123 Ark. 184, that, "Repeals by implication are not favored, and when two statutes covering the whole or any part of the same subject-matter are not absolutely irreconcilable, effect should be given, if possible, to both; it is only where two statutes relating to the same subject are so repugnant to each other that both can not be enforced, that the last one enacted will supersede the former, and repeal it by implication." There is no necessary conflict between the section as amended and Act 321, Acts 1909, because both acts are general and may be considered as referring to different classes of special school districts just as they did by the use of the identical language in describing the classes of districts before the adoption of the amendatory act. Subsequent legislation indicates that we are correct in this conclusion. Act 180, Acts 1917, of the General Assembly of the State of Arkansas, in which the Legislature took up the whole subject of borrowing money by all classes of special school districts, referred to Act 321, Acts 1909, as a live statute and not one that had been repealed by Act 25, Acts 1913. The reference appears in section 1 of said Act 180, and is as follows: "Provided, further, that this act shall not be construed as authorizing any board of directors of any rural special or consolidated school district to issue bonds unless authorized to do so by the vote of the legal electors at the annual school election as provided in Act 321 of the Acts of 1909 of the General

Assembly of the State of Arkansas." A court should be slow indeed to construe an act repealed by implication which had been treated by subsequent legislation, touching the same subject-matter, as a living, and not a dead, letter of the law. The court erroneously ruled that the bonds and mortgages were valid subsisting obligations in the hand of appellee against appellant district.

For the error indicated, the decree is reversed and the cause remanded with directions to order a surrender of the bonds and to cancel them and the deed of trust and the record thereof securing them.

HICKS v. KNIGHT.

Opinion delivered February 16, 1920.

DRAINS—AUTHORITY TO MAKE LEVEES.—The Greene-Craighead Drainage District No. 1, created by special act (Acts 1919, No. 413), declaring that the district was organized for the purpose of reclaiming lands from surface water by the construction of the necessary ditches, drains, levees, etc., contemplated the construction of levees on the lower side of lateral ditches to retain the surface water in the laterals and to force it into the main ditch, or ditches, and had no reference to the building of levees to protect the lands against overflow from channel waters in flood time.

Appeal from Greene Chancery Court; *Archer Wheatley,* Chancellor; reversed.

Allen D. Stewart, for appellants.

1. The complaint states facts sufficient to constitute a cause of action, and it was error to sustain the demurrer. Kirby's Digest, § 623; 1 Kinney on Irrigation and Water Rights (2 Ed.), par. 319.

2. Courts may grant injunctions in all cases of illegal or unauthorized taxation or assessments. Kirby's Digest, § 3966; 30 Ark. 101; 59 *Id.* 344, 358; 22 Cyc. 767; 27 *Id.* 1270; 37 *Id.* 1251; 33 Ark. 441.

Special assessments for local improvements can only be justified on the ground of peculiar and special bene-

fits, and where they are exceeded the assessment is unlawful and void. 119 Ark. 188; 86 *Id.* 1-8; 177 S. W. 880; 109 *Id.* 528; 172 U. S. 269; 181 *Id.* 324, 371, 396. The complaint alleges and the demurrer admits that the lands are assessed and taxed in *five other districts,* and that the assessments are excessive and confiscatory and squarely in violation of article 2, section 22, Constitution.

2. The proper notice was not given nor opportunity offered to be heard. 12 C. J. 1260-1; 50 Hun. 347-350; 237 U. S. 413; 74 N. Y. 183; 203 U. S. 323; 207 *Id.* 127; 122 Iowa 94; 162 Cal. 14; 193 U. S. 79. Notice was not given as required by special act 413 and the levees will not benefit appellant's lands at all but will dam up the waters and injure them.

Jason L. Light and *Huddleston, Fuhr & Futrell,* for appellees.

The contentions of appellants that the improvement is not within the scope of the act, that proper notice was not given, and that the assessments are confiscatory, are not well taken. 20 So. Rep. 780; 39 S. E. 752; 71 S. W. 366-7; 62 Fed. 129, 131-3; 36 N. E. 159; 56 N. W. 946; 84 Wis. 438; 54 N. W. 793-5. See also 83 Ark. 54.

HUMPHREYS, J. This suit was instituted by petition of appellants against appellees, as commissioners of Greene-Craighead Drainage District No. 1, in the Greene Chancery Court, to enjoin them from issuing bonds, or other obligations, attempting to fix any liens on any lands in the district, and from awarding any contract or contracts for the construction of levees, drains or bridges in said district.

The bill, in addition to others, contained the following allegations: That an attempt was made to create the drainage district in question by Act No. 413 of the Acts of the General Assembly of the State of Arkansas for the year 1919; that, according to the plans and estimates of the engineers, the estimated cost for caring for the water, which descends upon the surface of the land from falling rains and snows, was approximately $85,000;

that, in addition to these plans and specifications, there was incorporated in the engineer's plans and specifications a system of levees along the St. Francis River, to prevent overflows therefrom, the cost of which was estimated at approximately $200,000; that appellee took a total sum of $328,190, representing an approximate cost of the total improvement, including the levee scheme, as a basis for assessing benefits against the lands in the district. The bill is quite long, and the additional allegations are fairly summarized in the brief of appellant, as follows:

"1. That Special Act No. 413 confers power only to effect reclamation against surface water and not against channel water of the St. Francis River; that $200,000 of the assessments are appropriated to build levees to confine the channel waters of the river within the channel; and that said expenditure of $200,000 for said purpose is unauthorized and beyond the scope of said special act.

"2. That said levees will not benefit appellants' lands, because (a) the only reason for their construction is that it is the opinion of the engineers that when the Mingo Swamp is drained in Missouri that the water level in the St. Francis River will be raised to such height as to require said levees; but that in fact the drainage of Mingo Swamp will not raise the water level at all, and that said levees will be wholly unnecessary; (b) even if the draining of the Mingo Swamp should raise the water level in the river the construction of the proposed levees would not benefit, but would injure, appellant's lands because when constructed these proposed levees would make a dam which would hold all surface water upon their lands and would form a lake which would inundate their said lands—even if said levees should protect their lands from the channel waters of the river they would inundate their said lands by collecting the surface water and throwing it back upon said lands.

"3. That these lands are in five other improvement districts besides that involved in this case; that

practically all said lands are mortgaged for one-half their value; that the aggregate of these fixed charges in many instances greatly exceeds the value of these lands; and that the annual income from these assessed lands will not be sufficient to pay the annual interest, annual assessments in improvement districts and annual general taxes, thus working a complete and total confiscation of the same.

"4. That no notice of the making, equalization, readjustment of assessments and damages was even given appellants."

Appellee demurred to the bill for the alleged reason that it did not state sufficient facts to constitute a cause of action. The court sustained the demurrer and dismissed the bill for want of equity, from which an appeal has been duly prosecuted to this court.

It is insisted by appellants that Special Act No. 413, Acts of the General Assembly of 1919, did not confer power to construct levees along the St. Francis River so as to prevent its flood waters from overflowing the lands, in the district; that it was the purpose and intent of the act to authorize ditches, levees, etc., for the purpose of caring for surface water only, or such waters as diffused themselves over the surface of the ground from falling rains or snows. We think it quite clear from a reading of the whole act that no intention was evinced by the Legislature to authorize the construction of an expensive levee system along the St. Francis River so as to prevent its channel waters at flood time from overflowing the lands in the district. The purpose for which the district was created is expressed in the following language, found in sections 2 and 23 of the act, and reads as follows:

"Said district is organized for the purpose of reclaiming said lands from surface water by the construction of the necessary ditches, drains and levees, and the straightening, widening and deepening of ditches already constructed in said territory. * * *

"The word 'ditch' as used in this act shall be held to include branch or lateral ditches, tile drain, levees, sluiceways, flood gates and any other construction work found necessary for the reclamation of wet and overflowed land."

We do not think the word "levees" in the connection used, in the clause quoted, has reference to levees other than those which may be constructed on the lower side of lateral ditches to retain the water in the laterals and force it into the main ditch, or ditches. We think, therefore, the surface waters intended by the act to be controlled by levees was such surface water only as diffused itself over the land from falling rains and snows, or such waters as flow over the surface from one body to another body of land, or such waters as may be characterized as "swamp" waters; and had no reference whatever to the building of levees to protect the lands against overflow from channel waters in flood time. Had it been the intention of the Legislature to authorize the construction of levees to protect the land against channel waters, it would have certainly evinced this intention by more accurate and definite language. Especially so, had it been intended that the major portion of the improvements were to be levees and not ditches. Certainly, at the time of the passage of the act the Legislature did not have in mind the flooding of the St. Francis River by the drainage of Mingo swamp, located in Missouri, by a system of ditches toward and into the St. Francis River, some sixty miles above the place selected for the construction of levees in the engineer's plan. Certainly it was not in the mind of the Legislature to plan for protection against such a remote contingency at such a great expense. According to the allegations of the bill, the scheme of improvement is entirely unauthorized by the act creating the district. It is clearly within the province and jurisdiction of a chancery court to enjoin a sale of bonds or the award of contracts unauthorized by law, when the issuance of the bonds would cast a cloud upon the lands included in the district.

Under this view of the case, we deem it unnnecessary to pass upon or construe the other grounds of attack upon the act or proceedings thereunder.

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

HUMPHREYS, J. (on rehearing). On rehearing we are asked, notwithstanding the original act failed to authorize the construction of an expensive levee system along the St. Francis River, so as to prevent its channel waters at flood time from overflowing the lands in the district, to set aside the judgment rendered in this cause and uphold the act, because, since the rendition thereof, the Legislature has enacted a curative act, ratifying and validating the plans, maps and profiles for the construction of said levee along the St. Francis River. In support of the request, solicitors for appellees cite the case of *Sudberry* v. *Graves,* 83 Ark. 344, and others to like effect. In these cases, curative acts were taken into consideration in the final determination of the cases after submission, but not after final determination and rendition of judgments therein. We think after the rendition of a judgment or decree in a case the only matters which should be considered upon rehearing are matters that existed at the time of the rendition thereof. The consideration of subsequent legislation after the rendition of a judgment or decree necessarily involves the validity of the subsequent enactment. So many questions might arise concerning the validity and effect of a curative act, we think it best for such matters to be presented in an original hearing. While this court has jurisdiction over its judgments and decrees until the expiration of the term at which rendered and may set them aside in the exercise of a sound discretion, yet the practice has been not to do so except for good reasons overlooked, which existed at the time of the rendition thereof; so, for the reasons suggested, we think the court should refrain from settling new questions on rehearing.

The motion for rehearing is therefore overruled.

GARDNER v. GARDNER.

Opinion delivered February 23, 1920.

DIVORCE — EX PARTE AFFIDAVITS.—A divorce granted upon *ex parte* affidavits will be reversed upon appeal though the appellant did not appear and object to their introduction.

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

John W. Moncrief, for appellant.

Ex parte affidavits can not be accepted as competent evidence to support a decree for divorce. 5 Am. Dec. 419; 34 N. E. 20; 23 So. 703; 34 Ill. 306. The evidence must be upon depositions taken upon due notice. Kirby's Digest, §§ 3166, 3169, 3177-8; 3182-8; 70 Ark. 409.

Robert L. Rogers and *W. F. Terral,* for appellee.

A deposition is simply written testimony, and sometimes used synonomously with affidavit. 25 Fed. Cases 441-2; 53 Am. Dec. 270; 23 Fed. Cas. No objection can be made to the form of the testimony, as appellant did not appear and object to it. 122 Ark. 276; 18 Ark. 59; 88 *Id.* 177. The objection can not be raised here for the first time. 15 Ark. 491; 18 *Id.* 65; 87 *Id.* 243. This court will presume that the depositions were taken as prescribed by statute. 6 Ark. 396; 86 *Id.* 272.

McCULLOCH, C. J. This is a suit for divorce, and the decree in accordance with the prayer of the complaint of appellee was granted on constructive service without appellant having appeared. The appeal was allowed by the clerk of this court.

The ground urged here for reversal is that the decree was rendered on *ex parte* affidavits. The record sustains appellant in this contention, for it recites that the cause was heard on the affidavits of appellee and two other witnesses. It is true that in the record certified by the clerk the testimony of each of the three witnesses is referred to as a deposition. The originals have been brought up

for our inspection, and they are also marked depositions, but they show that they were in fact not depositions, but were *ex parte* affidavits. There is no caption nor certificate of an officer showing that the depositions were taken at a designated time and place. Accepting the recitals of the record as true, which we should do on appeal, it is apparent that the decree was based solely on *ex parte* affidavits introduced in evidence, and it has been decided by this court that it is error to accept such character of evidence, and that it cannot be made the basis of a decree for divorce. *Johnson* v. *Johnson,* 122 Ark. 276.

It is contended by counsel for appellee that no advantage can be taken of the form in which the testimony was introduced because appellant did not appear and object to it. This argument is answered by the decision of this court in the case just cited, where it was expressly held that *ex parte* affidavits could not be received in evidence at all, and that a decree could not be supported by that form of testimony.

The decree is, therefore, reversed and the cause is remanded for further proceedings.

BLAKEMORE *v.* BROWN.

Opinion delivered February 23, 1920.

1. SCHOOLS AND SCHOOL DISTRICTS—TAX LEVY.—Where a levy for district school taxes exceeded the amount voted by the district, the levy is void.
2. APPEAL AND ERROR—BURDEN OF PROVING ERROR.—Where appellee relied on a tax title which appellants attacked on the ground that the levy of district school tax exceeded the amount voted by the district, and the statement in appellee's brief that the lands involved were not in the school district was uncontroverted, it will be presumed to be true.
3. SCHOOLS AND SCHOOL DISTRICTS — QUORUM COURT — ENTRY OF NAMES OF MEMBERS.—Kirby's Digest, section 1498, providing that the names of those members of the county court voting in the affirmative and of those voting in the negative on all propositions to levy a tax shall be entered on the record of the quorum court, is mandatory.

4. SCHOOLS AND SCHOOL DISTRICTS — QUORUM COURT — VOTE ON SCHOOL TAX.—Where the record of the quorum court recited that a quorum of the justices were present, naming them, and that all the justices concurred in a levy of a certain district school tax, this was a sufficient compliance with Kirby's Digest, section 1498.

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

Brundidge & Neelly, for appellants.

The tax sale was illegal and void because the school taxes were not properly levied by the county court. 100 Ark. 494; 29 *Id.* 340. There is no record evidence that the tax was even levied. 103 Ark. 581.

F. E. Brown, for appellee.

The record shows a substantial compliance with our statutes and previous decisions as to the levy of the taxes. 68 Ark. 340; 100 *Id.* 488; Kirby's Digest, §§ 1499, 7594-5, 7678. It does not appear in the record that the land was in the school district, and it was not.

McCULLOCH, C. J. This action involves an attack on the validity of a tax sale under which appellee asserts title to the tract of land in controversy. There were numerous grounds for the attack stated in the complaint, but all of them appear to have been abandoned except the one that the sale was void for the reason that the school taxes were not properly levied by the county court.

The record of the proceedings in the county court showing the levy of the school taxes for the year mentioned was introduced, and it appears from the face of that record that in one of the school districts the tax was not voted for the full amount which the court levied. This, of course, would render void the sale of lands covered by that levy, but appellee calls attention in the brief to the fact that it does not appear in the record now before the court that the tract of land in controversy was situated within the school district mentioned, and it is positively asserted that as a matter of fact the tract is not in that district. It is true that there is nothing in

this record, as abstracted, to show that the land in controversy is in school district No. 54, the one to which the record of the county court relates. If we could take judicial knowledge of the location of particular tracts within the boundaries of a school district (which we do not decide), it is unnecessary for us to attempt to make our theoretical knowledge real by proper investigation since appellant has not challenged the statement of appellee in his brief that the tract of land in controversy is not within that school district. We should assume, therefore, without investigation, even if we could take judicial knowledge of the fact, that appellee's statement is correct, for it devolves on appellant to show that the decree is erroneous.

It is further contended, however, that the record of the county court introduced in evidence in this case shows that there was no valid levy of school taxes in any of the districts of the county, and that the sale of the tract of land in controversy was void, whether it was situated in School District No. 54 or in some other district.

The statute (Kirby's Digest, § 1498) provides, with respect to the records of county court proceedings, that "the names of those members of the court voting in the affirmative and of those voting in the negative on all propositions or motions to levy a tax or appropriate money shall be entered at large on said record."

We have decided that this provision of the statute is mandatory, and that a levy of taxes or the appropriation of funds by the quorum court is void unless the record shows affirmatively the names of the members of the court voting on the question. *Hilliard* v. *Bunker*, 68 Ark. 340; *Alexander* v. *Capps*, 100 Ark. 488; *Morris* v. *Levy Lumber Co.*, 103 Ark. 579.

The record in this case discloses an opening order of the quorum court on the day the tax levies were made, reciting the names of the justices of the peace present, and that those present constituted a majority of the jus-

tices of the peace of the county. Under the heading of "School Tax Levy" there was a recital that the court took up "the matter of levy of school tax for the various school districts" voted on at the district school meetings, that the "same are presented to the court and all of the justices and are by them examined, and the result of said election held in each is by the court and justices ascertained, and from which the court and justices finds that said school districts have voted the following levy for the purposes hereinafter set forth as follows:" Then follows a list of the several school districts, giving the amount of tax voted at the school meetings. Then follows the order relating to levy of tax in district No. 54, and the concluding sentence of the order of the court on this subject is as follows:

"It is further considered, ordered and adjudged by the court, all of the justices concurring, that a levy of special tax on all school districts in the county other than School District No. 54, be and the same is hereby made respectively as herein set forth for the year 1914."

It is therefore seen from the above that there is a recital of the presence of a majority of the justices of the peace, giving their names, at the time the school tax was levied, a recital of the amount of tax voted in each school district, and a further recital of the order of the court, "all of the justices concurring," that the school tax be levied as voted in the several districts. What more, therefore, was necessary in order to constitute an affirmative showing on the record of the "names of those members of the court voting in the affirmative and those voting in the negative" on the proposition to levy the school tax? The record must be considered in its entirety, and, when thus viewed, it shows the presence of the justices of the peace, and that they all manifested in some form their favorable vote for the levy of the school tax. This brings the case within the rule announced by this court in *Hilliard* v. *Bunker, supra,* that where the record shows affirmatively that there was a vote on the

proposition to levy taxes, that the vote was unanimous, and the record also recites the presence of a majority of the justices of the peace of the county and their names, this was a sufficient compliance with the statute.

Counsel for appellant earnestly contends, however, that the recital of a concurrence of all of the justices of the peace does not show that there was a vote on the question or that concurrence was manifested by any overt act of the justices present. It is argued that the concurring attitude of the justices may have been expressed by mere silence and that this is not sufficient compliance with the statute, which requires a vote.

This is, we think, a rather strained interpretation of the words, "all of the justices concurring," as found in the record. There is, as we have already seen, a recital in the beginning that the school taxes for the various districts as certified by the county court were examined by all of the justices, and in the concluding paragraph of the order it was recited that all of the justices concurred in the order of the court levying the taxes. The use of the word "concurring" necessarily implied consent, evidenced in some overt way, and not a mere silent acquiescence or submission. 2 Words and Phrases, p. 1390. The use of the word "vote" would not carry with it any stronger implication of some affirmative act of the justices in manifesting their favorable expression.

We are of the opinion, therefore, that when the record is considered as a whole it shows sufficient compliance with the statute by giving the names of those voting on the proposition to levy school taxes.

Affirmed.

MORRIS v. STATE.

Opinion delivered February 23, 1920.

1. CRIMINAL LAW—INSANITY—INSTRUCTION.—In a prosecution for murder defended on the ground of insanity, an instruction that the law presumes that every sane person intends the natural consequences of his voluntary act unless the contrary appears from

the evidence is not erroneous, as assuming defendant's sanity at the time of the killing, where the question of defendant's insanity was submitted to the jury in other instructions.

2. CRIMINAL LAW—CAPITAL CASES—NECESSITY.—While in capital cases formal exceptions are not required for errors to be reviewed in the Supreme Court, there must be an objection to the particular proceeding below, otherwise there is no erroneous ruling to review.

3. INDICTMENT—FINDING—IMPEACHMENT BY GRAND JUROR.—An indictment can not be impeached by proof that all the grand jurors did not hear the testimony before it was returned into court.

Appeal from Mississippi Circuit Court, Osceola District; *R. E. L. Johnson*, Judge; affirmed.

The appellant, *pro se*.

1. The court erred in the remarks made in the presence of the jury. 107 Ark. 469; 51 *Id.* 147; 54 *Id.* 489; 62 *Id.* 126; 70 *Id.* 420.

2. The bill of exceptions was not properly certified. 9 Ark. 133; 28 N. E. 1022; 16 *Id.* 786.

3. The judge's remarks were prejudicial and error. *Supra.*

4. Instruction No. 9 was error, and it was error to overrule the motion to quash the indictment, as it was not returned according to law.

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

1. There is nothing to show that the interlineations were made by the trial judge or anyone else before the signature of the judge. 84 Ark. 95; 86 *Id.* 360. No exceptions were saved to the statements of the trial judge. 101 Ark. 443; 99 *Id.* 462; 94 *Id.* 465; 105 *Id.* 467; 94 *Id.* 254.

A verdict supported by abundant evidence and properly supported by proper instructions will not be disturbed for improper conduct of the judge unless such conduct was prejudicial. 84 Ark. 81. The remarks must be called to the specific attention of the judge. 106 *Id.* 379.

2. No error in instruction No. 9. 73 Ark. 399; 79 *Id.* 120.

3. Where an indictment is properly returned, it will be presumed it was duly found, and it was not error to refuse to allow a grand juror to testify. 99 Ark. 1; Kirby's Digest, § 2423.

McCULLOCH, C. J. This is an appeal from a judgment imposing the death sentence on conviction of the crime of murder in the first degree. Appellant killed his wife. There were several eye-witnesses, and the killing is admitted. Counsel for appellant conducted the defense on the ground of appellant's insanity, which issue was submitted to the jury on instructions to which no objections have been urged in this court.

One of the grounds urged for reversal is that the court erred in giving an instruction which told the jury that the law "presumes that every sane person intends the natural and probable consequences of his own voluntary act, unless the contrary appears from the evidence," the contention being that this language assumes the sanity of appellant at the time he committed the homicide.

We do not think that the language is open to the interpretation that it constitutes an assumption on the part of the court that the accused was a sane person at the time of the commission of the crime. The question of appellant's insanity was submitted to the jury, and this instruction, especially when considered in connection with the others in the case, cannot be treated as one assuming the fact of appellant's sanity.

Next, it is contended that the court erred in a certain remark made in connection with the ruling sustaining appellant's objection to testimony sought to be introduced by the State. This remark was made by the court in announcing a ruling on appellant's objection to the offered testimony and excluding it from the jury. Under the statutes of this State formal exceptions are not required in capital cases in order for errors to be reviewed in this court, but there must be an objection to the particular

proceeding below, otherwise there is no erroneous ruling for this court to review. *Harding* v. *State,* 94 Ark. 65; *Caughron* v. *State,* 99 Ark. 462; *McElvain* v. *State,* 101 Ark. 443.

Counsel for appellant moved to quash the indictment on the ground that all of the grand jurors did not hear the testimony before returning the indictment, and there was an offer to prove by a member of the grand jury that one of the jurors was discharged after the testimony against appellant had been presented, and that another grand juror was impaneled, and the indictment was returned without submitting the testimony to the new juror. The indictment cannot be impeached in that way. *Nash* v. *State,* 79 Ark. 120; *Worthem* v. *State,* 88 Ark. 321.

These constitute the only grounds urged for reversal, and the testimony was sufficient to sustain the verdict. Judgment affirmed.

SORRELS v. MARBLE.

Opinion delivered February 23, 1920.

1. SPECIFIC PERFORMANCE—DEFAULT OF PURCHASER—FORFEITURE.—Where a contract of sale of land payable in installments provided that upon the purchaser's failure to pay promptly either of the payments all previous payments should be forfeited and the relation of landlord and tenant should arise between the parties, the purchaser's failure to pay the installments promptly was waived where the vendor was permitted to remain in possession, and pay installments and taxes.
2. VENDOR AND PURCHASER—FORFEITURE.—Where a vendor waived a forfeiture for nonpayment of the purchase-money, his heirs were in no situation to enforce a forfeiture by suit when they offered the purchaser no opportunity to perform the contract.

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

Stevens & Stevens, for appellants.

The decree granting the relief prayed in the cross-bill is erroneous. The fact that Emerson waived the

forfeiture as late as 1907 would not give Marble and his estate an indefinite time in which to pay and demand a deed. 77 Am. Rep. 848; 68 Am. Dec. 87. While time is not ordinarily esssential in specific performance, it is material, and the delay must be explained and accounted for. 4 Pomeroy, Eq. Jur., § 1468; 146 S. W. 495. After unreasonable delay relief should not be granted. 2 Story, Eq. Jur., § 742. Evidently Emerson had waited as long as he should, and had notified the negro and canceled his contract and filed it away. The law presumes that every man in his private and official capacity does his duty. 25 Ark. 311; 7 *Id.* 495.

The delay of Marble before death is sufficient to defeat his right to specific performance and the delay of his heirs defeats their rights. 6 Pom. Eq. Rem., § 814.

McKay & Smith, for appellees.

A preponderance of the testimony sustains the findings of the chancellor. Defendants were not barred by limitation or laches. *Hanson* v. *Brown,* 139 Ark. 60; 87 Ark. 394.

There was no necessity for defendants to bring an action for specific performance until the necessity arose. 113 Ark. 433; 9 Johns. (N. Y.), 448; 9 S. E. 91; 10 L. R. A. 125; 31 Pac. 424; 6 Metc. (Mass.), 346.

McCULLOCH, C. J. The decree appealed from compels the specific performance of a written contract for the sale of a forty-acre tract of land in Columbia County. The contract was entered into in the year 1902 between R. L. Emerson, the ancestor of appellants, who was the owner of the land, and J. M. Marble, the husband and father of appellees. The price specified in the contract was the sum of $50, payable in three installments, evidenced by promissory notes bearing interest at the rate of ten per centum per annum from date until paid. The contract provided in substance that upon failure of Marble to make either of the payments when due all previous payments should be forfeited to Emerson, and that "the

relation of landlord and tenant shall arise between the parties hereto for one year from January 1 immediately preceding the date of default."

J. M. Marble took possession of the land under the contract, and built a four-room log house thereon, and occupied the land as a home until his death, which occurred in the year 1913. Marble left a widow and three children, two of whom are adults and one is an infant. They are the appellees in this case. Mr. Emerson died March 23, 1910, leaving his two daughters, one of whom is the appellant, Mrs. Sorrels. J. M. Marble made four different payments to Mr. Emerson on the purchase price of the land, which payments were indorsed as credits on the copy of the contract which Marble held in his possession. The payments were as follows: $7 January 8, 1903; $8 April 5, 1906; $2 April 1, 1907; and $32, date not stated. Marble also paid the taxes on the land from the date of the contract up to the time of his death, and his widow paid taxes after her husband's death up to and including the year 1917.

Appellant, Mrs. Sorrels, took charge of her father's business, which was extensive, after the latter's death, and undertook to collect the outstanding notes and accounts. She found on her father's books the account against Marble and mailed a statement for the amount of balance due the same as other accounts, but she testified that she did not know at that time that it represented the purchase price of the land. She did not know anything about the tract of land until some time during the year 1915, when application was made to her by another person to buy it. She then sent her husband out to see appellees about the land. Later she found among her father's papers the Marble notes and the contract with an indorsement on the contract in the handwriting of Mr. Emerson showing that it had been canceled. She destroyed the notes, but preserved the contract. After the discovery of the above recited facts Mrs. Sorrels proposed to the widow of J. M. Marble a new contract for the sale of the land at a price of $800, payable $100 cash and the bal-

ance in installments. This proposal seems to have been considered to some extent by the widow, but the offer was finally declined, and appellants brought this suit for possession.

Appellees filed a cross-complaint setting up the contract and possession thereunder, and prayed for specific performance. The court found that there was a balance of $40.08 due on the price of the land under the contract with Marble, including interest to date, and decreed performance of the contract on payment of this amount, which appellees offered to pay.

The contract was not strictly performed by Marble or appellees as successors to his rights, but we are of the opinion that there was a waiver of the forfeiture by Mr. Emerson in permitting Marble to remain in possession and make payments on the purchase price and pay the taxes. *Hanson* v. *Brown,* 139 Ark. 60. This waiver continued in force the rights of appellees until the discovery by Mrs. Sorrels of the right of the Emerson heirs to declare a forfeiture and demand possession. If appellants had at that time insisted on performance of the contract they could have declared a forfeiture upon further default, but, instead of standing upon the terms of the contract, they insisted upon a new contract of sale at a considerably higher price. In other words, they gave appellees no opportunity at that time to perform the contract. Appellees rejected the new offer, and this suit was then commenced.

The chancellor was, therefore, correct in holding that the prior defaults in the purchase price had been waived, and that appellees were entitled to a deed on the payment of the balance of the purchase price.

Decree affirmed.

WESTERN UNION TELEGRAPH COMPANY v. DAVIS.

Opinion delivered February 23, 1920.

TELEGRAPHS AND TELEPHONES—FEDERAL CONTROL—RECOVERY FOR MENTAL SUFFERING.—Where the negligent act complained of was committed while defendant's telegraph lines were under control and operation of the United States Government, pursuant to joint resolution of July 16, 1918, and the President's proclamation of July 22, 1918, defendant was not liable for damages for mental anguish under Kirby's Digest, section 7947, and suit can not be maintained under it.

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

Francis R. Stark (New York) and *H. C. Mechem* and *Rose, Hemingway, Cantrell & Loughborough*, for appellant.

The telegraph company is not liable for damages caused by the servants of the United States Government in operating the lines and there is no authority for maintaining this action for a cause which arose under Government control. 210 S. W. 644; 39 Sup. Ct. Rep. 507; 39 *Id.* 502; 39 *Id.* 51; 255 Fed. 99, 604; 256 *Id.* 690; 81 So. Rep. 404, 311; 82 *Id.* 458; 99 S. E. 846; 256 Fed. 690; 175 N. Y. Supp. 84; 204 U. S. 331; 161 *Id.* 10; 1 Cranch 345; 194 U. S. 601; 254 Fed. 880; 258 *Id.* 945-952; 259 *Id.* 361; 260 *Id.* 280; 249 U. S. 533; 255 Fed. 604. See also 1 Sup. Ct. Rep. 499; 81 So. Rep. 417; 69 L. R. A. 924; 134 U. S. 418; 237 *Id.* 189.

Sam R. Chew, for appellee.

This action is based on Kirby's Digest, section 7947, which has been held valid and enforceable. 83 Ark. 39; *Ib.* 476; 121 *Id.* 246; 129 *Id.* 116. The above section is an exercise of the police power of the State. 107 Ark. 174; 85 *Id.* 464; 85 *Id.* 12; 88 *Id.* 353; 92 *Id.* 1. Nothing in the act of Congress affects or impairs the laws of this State as to its lawful police regulations. Act Cong. July 16, 1918; 40 U. S. Rev. Stat.; 257 Fed. 758; *Mo. P. R. R.* v. *Ault*, 140 Ark. 572. There is no merit in the ap-

peal in law or fact and the provisions of the President's proclamation and resolution of Congress, and cases *supra,* call for an affirmance of the judgment.

McCULLOCH, C. J. The judgment below was one for the recovery of damages sustained by reason of negligent delay in the transmission and delivery of a telegraphic message from Little Rock to Van Buren. The recovery of damages was based on a statute of this State which declares that telegraph companies doing business in the State "shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages." Kirby's Digest, sec. 7947.

The message was sent and the negligent act with respect thereto was committed on November 17, 1918, while the telegraph lines were under control and operation of the Government of the United States, acting through the Postmaster General. The authority of the Government to assume such control and operation of the telegraph lines is found in a joint resolution of Congress adopted on July 16, 1918 (40 Stat. 904, c. 154, [Comp. St. 1918, sec. 3115¾x, appendix]), which provides that during the continuance of the war the President "is authorized and empowered, whenever he shall deem it necessary for the national security and defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war." The resolution contained the further provision: "Provided further that nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

On July 2, 1918, the President issued a proclamation assuming control and operation of the telegraph and tel-

ephone lines pursuant to the authority conferred as above, the proclamation following substantially the language of the joint resolution. The proclamation reads that the President does "hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies."

The Postmaster General took control and proceeded to operate the lines after July 31, 1918.

Appellant pleaded the complete control of the Government over the physical properties of the company in the operation of the telegraph business as a defense against any liability which accrued by reason of negligence during such Government control and operation.

The question presented by this plea is the sole question involved in the case, and the contention now is that the telegraph company is not liable for damages caused by the servants of the Government in operating the lines, and that there is no authority under the Federal law for maintaining an action against the telegraph company for a cause of action which arose under Government control.

We are of the opinion that this contention is sound, and must be sustained.

Learned counsel for appellee defend the judgment below under authority of the proviso in the Federal statute which preserves the authority to the States in the exercise of "lawful police regulations." The argument is that the liability imposed on telegraph companies for damages by way of mental anguish resulting from negligence in the transmission of messages is in the nature of a police regulation, the vitality of which is preserved in the Federal statute.

This contention overlooks, however, the decision of the Supreme Court of the United States in the recent case of *Dakota Central Telephone Co.* v. *State of South Dakota,* 250 U. S. 163, 39 S. C. R. 507, which interprets the language of the joint resolution of Congress and gives

a definition to the term "police regulations," that it means the exercise of the police power of the State in a restricted sense, limiting it to that phase of the power which deals with "health, safety and morals," and not in the comprehensive sense which embraces the substance of the whole field of State authority. The assumption of control by the Postmaster General was complete, and constituted a substitution of the Government for the owners of the telegraph lines in the operation of the same. The possession and control of the owners was entirely displaced, and the act of negligence complained of was committed, not by the servants and employees of the telegraph company, but by the servants and agents of the Government. There was no liability resting upon the telegraph company for the act of the Government, and no such liability was created by statute.

The decision of this court in the recent case of *Missouri Pacific Railway Co.* v. *Ault,* 140 Ark. 572, is cited by counsel as supporting the judgment of the lower court, but that case was a suit against a railway company for liability which arose under Federal control authorized under an entirely different statute, which according to our interpretation, preserved as against the owners of railroads liability which arose during Federal control, and expressly authorized an action against the transportation companies themselves. The most serious question in that case was as to the constitutionality of the Federal statute, it being contended that the statute constituted the taking of property without compensation and without due process of law, but we answered that contention by showing that the statute itself provided for ample compensation, to be paid by the Government to the transportation companies, and that there was no taking of property without just compensation in violation of constitutional rights. The statute, or rather the joint resolution, now under consideration does not contain a word which would justify us in holding that it preserved the liability of the telegraph companies, nor does it authorize a suit against the telegraph companies. Compen-

sation is to be paid by the Government for the use of the property, but no authority is conferred to hold the owners of the respective lines responsible for injuries which occur under Government control.

We see no escape from the conclusion that there is no liability in this case for the injury complained of. The judgment is therefore reversed, and the action dismissed.

ZIMMERMAN v. HEMANN.

Opinion delivered February 23, 1920.

1. GIFT—POSSESSION OF MONEY NOT PRESUMPTIVE OF GIFT.—Mere possession of money of a deceased person can not raise any presumption of a gift during deceased's lifetime.
2. WITNESSES—ACTION BY ADMINISTRATOR.—In an action by an administrator to recover money of the decedent, defendant was not a competent witness to prove that decedent had given him the money.

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

STATEMENT OF FACTS.

F. H. Hemann, as administrator with the will annexed, of the estate of C. H. Hemann, deceased, brought this suit in the circuit court against Geo. F. Zimmerman to recover $1,200 with the accrued interest.

In his complaint he alleges that C. H. Hemann in his lifetime was the owner and in possession of $1,200 and delivered it to Geo. F. Zimmerman for safe-keeping. The complaint also alleges that since the death of C. H. Hemann the said Zimmerman has converted the money to his own use.

In the first paragraph of his answer the defendant denies that C. H. Hemann during his lifetime delivered to the defendant $1,200 for the purpose of safe-keeping, and denies that since the death of said Hemann he has converted the money to his own use. In another paragraph of his answer the defendant states that it is true

that C. H. Hemann during his lifetime was the owner and had in his possession the sum of $1,200, but he further states that the greater portion of the last years of C. H. Hemann's life was spent at the home of the defendant, whose wife was a daughter of the said C. H. Hemann. The defendant, further answering, states C. H. Hemann, as a reward for the kindness and courtesy shown him at the defendant's house, gave the defendant said money.

The defendant took the stand in his own behalf and testified that he was the son-in-law of C. H. Hemann, deceased, and that the latter died at his place in March, 1918. He was asked what C. H. Hemann did with the money which is being sued for in this action and answered that Hemann had buried it. He offered to testify further that Hemann during his lifetime gave to the defendant the $1,200 and delivered the same to him about two weeks prior to his death.

This testimony was objected to by the plaintiff, and the court refused to allow it to go before the jury. The court then directed a verdict for the plaintiff, and from the judgment rendered the defendant has appealed.

Trimble & Trimble, for appellant.

On the pleadings and evidence appellee was not entitled to judgment. The burden was on appellee, and and neither bailment nor conversion were proved. 157 N. Y. S. 184; 56 S. E. 642; 16 S. W. 386; 50 Mo. 362; 68 N. H. 173; 81 Conn. 403; 26 N. Y. S. 764; 10 R. C. L. 898; 16 Cyc. 932. Negative allegations must be proved where they constitute part of the original subsequent cause of action on which plaintiff relies. 16 Cyc. 27; 2 Enc. of Ev., 802.

Carmichael & Brooks, for appellee.

Defendant accepted the issue raised by the pleadings and contended that the receipt and retention of the money after demand justified as a gift *inter vivos* that the burden was on defendant. Having done so voluntarily, they can not now be heard to complain for the first time on appeal. 110 Ark. 176; 108 *Id.* 497. All presump-

tions are conclusively in favor of the judgment except what is affirmatively disproved by the record or what the court is bound to take notice of. 2 Ark. 14; 124 *Id.* 389. In actions by or against executors, adminstrators, etc., neither party can testify against the other as to transactions, etc., of the testator or intestate, unless called by the opposite party. 79 Ark. 69; Kirby's Digest, § 3093; 123 Ark. 274. The defendant is bound by the admissions of his pleadings and the objections and exceptions not noted of record nor incorporated in his motion for new trial are waived and questions of procedure not objected to and exceptions saved can not be raised here for the first time.

HART, J. (after stating the facts). The court was right in directing a verdict for the plaintiff. It is true both according to the allegations of the complaint and the averments of the answer that the money was in the possession of the defendant, but the mere possession of the money by the defendant could not raise any presumption of a gift to him. Neither was he a competent witness to establish the fact that Hemann had given him the money in his lifetime. Such testimony would clearly be within the inhibition of the Constitution which provides that in an action by or against the executors and administrators in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statements of the testator or intestate unless he is called to testify thereto by the opposite party. *Wilson* v. *Edwards,* 79 Ark. 69, and *Carter* v. *Younger,* 123 Ark. 266, and cases cited. So all the testimony that went to the jury was that C. H. Hemann lived at the home of the defendant for some time before he died and that Hemann buried the money involved in this lawsuit.

The defendant in his answer admitted that the money was in his possession. No higher proof was necessary than this admission of the defendant that he had the money in his possession to warrant the court in directing

a verdict for the plaintiff. It is true that the defendant sought to justify his possession by a gift from Hemann in his lifetime, but it devolved upon him to establish that fact by proof, and, not having done so, the court properly directed a verdict for the plaintiff.

The judgment will therefore be affirmed.

DAVIS *v.* DAVIS.

Opinion delivered February 23, 1920.

1. DEEDS—DELIVERY.—To constitute delivery of a deed, there must be an intention to pass title to the land conveyed immediately, and that the grantor shall lose dominion over the deed.
2. DEEDS—INSUFFICIENCY OF DELIVERY.—Evidence *held* insufficient to establish delivery of a deed.
3. DESCENT AND DISTRIBUTION—RIGHT OF HEIRS TO SET ASIDE FRAUDULENT CONVEYANCE.—Under Kirby's Digest, section 81, providing that an administrator of a grantor may sue to set aside a fraudulent conveyance by him, the heirs of such grantor may defend a suit by the fraudulent grantee to recover possession of the land so conveyed.

Appeal from Stone Chancery Court; *W. R. McIntosh,* Special Chancellor; affirmed.

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellees to compel appellees to deliver to them a deed to certain lands comprising about 1,300 acres, and for the possession of said lands.

Appellees deny that the deed had ever been delivered or that the appellants were the owners of, or entitled to the possession of the lands in controversy. By way of cross-complaint they allege that appellants and appellees are the heirs at law of W. E. Davis, deceased, who died owning and in possession of said lands; that appellee, W. A. Davis, was appointed administrator of his estate, and that there is no necessity for any further administration. They pray that the lands be divided between the widow and heirs of said W. E. Davis, deceased.

According to the testimony of William A. Davis, one of the appellants, he was a son of R. M. Davis, who died in Stone County, Arkansas, in March, 1915. The lands in controversy consist of two farms, one of which is known as the McDermott place and is located near Penter's Bluff in Stone County. The other is called the Jones bottom farm and is located near Guion in Stone County. R. M. Davis occupied one of the farms in controversy at the time of his death and had lived there with his family for about 16 years. The annual rental value of each of said farms was about $2,500. After the death of his father, witness and his brothers and sisters continued to occupy said lands until about January 1, 1916. At this time they moved to another farm in Stone County which they owned. This farm was only about one-fourth as large as the one from which they moved. W. E. Davis, the uncle of witness, died in July, 1917. After his death a deed was found in his safe to R. M. Davis to the lands in controversy. The witness, his mother and his brothers and sisters made a formal demand of the administrator of the estate of W. E. Davis, deceased, for this deed and upon the refusal of the administrator to deliver possession of the same to them, they instituted this action.

The administrator of the estate of W. E. Davis, deceased, was a witness for appellants. According to his testimony he was a brother of the whole blood of R. M. Davis and of the half blood of W. E. Davis. After the death of his brother, W. E. Davis, he was appointed administrator of his estate. When he opened the safe of his brother he came into possession of a deed purporting to be from W. E. Davis to R. M. Davis to the lands in controversy. Upon the advice of his attorney he refused to deliver this deed to the children and heirs at law of R. M. Davis, deceased.

According to his testimony he was at the home of his brother, W. E. Davis, in July, 1902. He was in the house and R. M. Davis came in and said that W. E. Davis wanted to talk to them. W. A. Davis went with his

brother, R. M. Davis, to the barnyard where W. E. Davis was. He saw R. M. Davis pay some money to W. E. Davis. They told him there was $12,000 in money in the package, and that W. E. Davis had sold the lands in controversy known as the McDermott place and Jones bottom farm to R. M. Davis. W. E. Davis handed the deed to R. M. Davis, who held it a little while and handed it back to W. E. Davis. About an hour after this W. A. Davis went back into the barnyard and found a pocketbook containing some money. W. E. Davis again came along and counted the money and said there was $12,000 in the pocketbook. He then handed a deed from himself to W. A. Davis to other lands in consideration of the $12,000 which he said was in the pocketbook. W. A. Davis held this deed in his hands a little while and gave it back to W. E. Davis. W. E. Davis told his brothers not to say anything about the transaction; that it wasn't anybody else's business.

On cross-examination W. A. Davis admitted that at the time of the transaction in question W. E. Davis had a damage suit for a large amount of money pending against him and was very much afraid that he would lose it. He said, however, that W. E. Davis told him and his brother, R. M. Davis, that he wanted the deeds to stand. At that time R. M. Davis was indebted to W. E. Davis, and W. A. Davis did not know where he got the money which he handed to his brother at the time of the transaction in question. R. M. Davis lived on one of the places as a tenant of W. E. Davis at the time. He continued to reside there as a tenant of W. E. Davis until the date of his death and never at any time claimed to own the lands. He never had possession of the other farm at all. The farms continued to be assessed in the name of W. E. Davis, and he collected the rents and paid the taxes on them. W. A. Davis never claimed the farm described in the deed from W. E. Davis to him and afterward purchased a small quantity of the lands embraced in the deed and paid his brother for them.

The widow of W. E. Davis testified that she had been married to him for 49 years and that they had never had any children; that she signed the deeds in question because her husband told her it was necessary to make the deed so that in the event they got an unjust judgment against him that his brothers could protect him from being ruined by it; that her husband told her that he would never give up the deeds or turn them over to his brothers unless they did get judgment against him; that her husband kept the deeds in his safe up until the time of his death and kept possession of the lands in controversy; that no one ever disputed their ownership in the lands up to the date of her husband's death; that her husband paid the taxes on the lands up to the time of his death; that her husband got out of the trouble he was in two or three years afterward in 1905 or 1906.

Mark R. Davis, a brother of W. E. Davis, deceased, testified that W. E. Davis was sued for a large sum in damages in 1902, and executed a deed to him to some of his lands in order to protect himself against judgment in the damage suit; that W. E. Davis retained the deed in his possession and kept possession of the lands until he died.

Other witnesses for appellees testified that W. E. Davis remained in possession of the lands up until the time of his death, and that R. M. Davis had stated to them that he had no claim to any of the lands he occupied; that he was renting them from his brother.

It was shown that about the same time that W. E. Davis signed the deed in controversy he executed other deeds to other portions of his lands and that the purpose of executing them was to protect himself from a pending damage suit for a large amount. It was also shown that W. A. Davis, the administrator, had stated that his brother had executed the deed in question in this case as well as the one to himself for the purpose of protecting himself against an unjust judgment in a damage suit which was pending against him at the time.

Other testimony will be referred to in the opinion. The court found the issues in favor of appellees, and the complaint of appellants was dismissed for want of equity. The court further found that Catherine H. Davis was the widow of W. E. Davis, deceased; that they had no children and that by law she was vested with the title to an undivided one-half of all his lands in fee simple; that W. E. Davis had 13 brothers and sisters, and that those surviving and the children of those deceased before him were entitled to share equally in his estate. A decree was entered accordingly.

The case is here on appeal.

Elbert Godwin, for appellants.

1. The deed was made, executed and acknowledged, as the testimony shows. Not a single witness or circumstance contradicts the written admission of appellee W. A. Davis, the testimony of Mrs. C. H. Davis and that of Ed Grigsby. 23 Ark. 444. The deed is valid on its face, and no question is raised by appellees in their pleadings or testimony as to the form or substance of the deed.

2. The deed was not delivered, as it was found in the grantor's safe, among his papers, and the presumption is that it was not delivered. 74 Ark. 104; 134 *Id.* 380. Delivery depends upon the intention of the grantor. 77 Ark. 89; 100 *Id.* 427; 15 *Id.* 519; 74 *Id.* 104; 97 *Id.* 283.

3. If the undisputed evidence is true, the grantor, W. E. Davis, lost control of the deed when he gave it to grantee, R. M. Davis, and there was complete delivery. The acceptance of a deed for the benefit of a grantee will be presumed. 77 Ark. 89; 97 *Id.* 283; 63 *Id.* 374; 54 L. R. A. 997, and note. All the presumptions of law and fact show an acceptance and delivery of the deed.

4. If the title passed by the deed, the destruction or surrender of the deed to Emanuel Davis by R. M. Davis did not revest the title in the grantor. 21 Ark.

80; 34 *Id.* 503; 80 *Id.* 8; 43 *Id.* 203; 42 *Id.* 170; 52 *Id.* 493; *Ib.* 509; 80 *Id.* 8.

5. The deed was not a fraudulent conveyance, but, if so, appellees were not entitled to recover. 10 Ark. 54; 19 *Id.* 650; 67 *Id.* 325; 47 *Id.* 301; 52 *Id.* 171. The fraudulent grantee gets a title that he can alienate and thus confer title upon his ailienee. 14 Ark. 69; 55 *Id.* 116. See also Bump on Fraud. Conv., § 450; 67 Ark. 338.

6. In view of the law cited, the widow, Mrs. C. H. Davis, is bound and can not be heard to complain that appellants are entitled to judgment for a half interest to the lands claimed by her. The fraudulent conveyance binds the heirs of Emanuel Davis to the other half interest in the lands. 47 Ark. 301; 59 *Id.* 251; 13 *Id.* 593; 10 *Id.* 53; 19 *Id.* 650.

7. The statute of limitations has not barred appellants by reason of adverse possession for more than seven years. There must be notice of the hostility of the vendor's claim. 84 Ark. 520; 69 *Id.* 562; 58 *Id.* 142; 84 *Id.* 52. A declaration by a grantor in a deed purporting to convey an absolute title for a valuable consideration, made subsequent to the execution of the deed in the absence of the grantee, is inadmissible. 79 Ark. 418; 90 *Id.* 149; 134 *Id.* 149; 83 *Id.* 186.

8. No duress or undue influence of W. E. Davis over appellee, Mrs. C. H. Davis, was shown. 95 Ark. 523. Parol evidence was inadmissible to vary or contradict the terms of a deed. 66 Ark. 393; 64 *Id.* 650; 55 *Id.* 347; 50 *Id.* 393; 1 Greenl. on Ev., §§ 257, 271, 281-2. To set aside a deed for undue influence, it is not sufficient that the grantor was influenced by the beneficiary in the ordinary affairs of life or in close touch and upon confidential terms, but there must be a malign influence from fear, coercion or other cause depriving the grantor of his free agency. 78 Ark. 420; 49 *Id.* 367.

9. There was consideration for the deed. In the absence of fraud or mistake parol evidence is not admissible to contradict or vary the terms of a deed. 17

Cyc. 643. Where a deed is absolute on its face no parol conditions or reservations, etc., can be proved to defeat the grant. 21 Ark. 440; 33 *Id.* 150. There is nothing in the testimony or pleadings that the grantor was actuated by any fraudulent representations of the grantee, but he was acting freely, knew what he was doing and was fully aware of the consideration. 2 Pom. on Eq. Jur. (2 Ed.), § 1036; 71 Ark. 497; 125 Ark. 441. Appellees have not pleaded fraud or mistake nor proved it, and the decree should be reversed. 99 Ark. 350; 71 *Id.* 497.

10. As the lands of both farms are described in the same deed, possession of one was possession of all the lands. 133 Ark. 599; 202 S. W. 107; 135 Ark. 321; 204 S. W. 755; 134 Ark. 548; 204 S. W. 424.

E. G. Mitchell, for appellees.

The deed is absolutee on its face, and there are no conditions or reservations in it. It was lost sight of for many years but found among the grantor's papers and this was *prima facie* evidence that it was never delivered. 74 Ark. 104, 120. Delivery with intention to pass title to the grantee is essential. 1 Devlin on Deeds (last Ed.), § 260. It must pass beyond the grantor's control. *Ib.* 260, A; 98 Ark. 471; 8 R. C. L. 985. As to delivery, see 1 Devlin on Deeds (last Ed.), §§ 262, 289; 8 R. C. L. 978. And the deed must be accepted by the grantee to pass title. 1 Devlin on Deeds, § 289; 13 Cyc. 470; 80 Ark. 8.

W. E. Davis controlled the lands, collected rents, paid taxes until his death, more than 15 years, with the full knowledge of R. M. Davis, who made no objection and no claim of ownership, and his actions and conduct are inconsistent with any claim of his or his heirs. Cyc. 748; *Ib.* 746; 55 Ark. 633; 98 *Id.* 438. On the whole case, the judgment is right and the evidence sustains it.

HART, J. (after stating the facts). In the first place, it may be said that a preponderance of the evidence

shows that the deed under which appellants claim title to the land in controversy was never delivered. The question of delivery is one of fact to be determined by the intent of the grantor, as manifested by his acts or words or both.

In order to constitute a delivery, there must be an intention to pass the title immediately to the land conveyed, and that the grantor shall lose dominion over the deed. *Battle* v. *Anders,* 100 Ark. 427, and *Bray* v. *Bray,* 132 Ark. 438. Tested by this rule, it is manifest there was no delivery. The deed was never filed for record. It never really left the possession of the grantor. It is true that W. A. Davis testified that his brother, W. E. Davis, handed the deed to R. M. Davis and that the latter kept it a little while before he handed it back; but the accompanying facts show that this was all a mere pretense, and was not intended for an actual delivery of the deed. The uncontradicted evidence shows that W. E. Davis continued in possession of the land, collected the rents and profits therefrom, had them assessed in his own name, and paid the taxes thereon until the date of his death. R. M. Davis never claimed any title to the lands, but on the contrary told various persons that he was renting them from his brother and regularly paid the rent thereon. He had no money with which to pay for the lands and was indebted to his brother at that time. A similar transaction was had between W. E. Davis and W. A. Davis upon the same occasion. W. A. Davis said he found the money in the barnyard of W. E. Davis with which he paid for his land. It is a significant fact that he did not know that he would find the money and that just after he found it he met his brother, W. E. Davis, and showed him the pocket book and the money. W. E. Davis, after counting it, said there was $12,000 in the pocket book and at once tendered him a deed which had already been executed. Neither W. A. Davis nor R. M. Davis had any money at the time. The record shows that W. E. Davis was a wealthy man for that section of the country, and the only reasonable hypothesis is that

he furnished the brothers the money with which to carry out the pretended sale so that in the event a large judgment was obtained against him in the damage suit then pending his brothers could hold the lands and protect him. R. M. Davis and W. A. Davis only held the deeds in their hands for a little while in the barnyard when they handed them back to W. E. Davis. He told them that he would put them in his safe and for them to say nothing about the transaction. No claim was ever made by W. A. Davis or R. M. Davis to the lands until after the death of W. E. Davis. The retention of the deed by W. E. Davis under the circumstances as disclosed by the record shows there was no delivery of the deed by him to R. M. Davis with the intention of passing the title to the lands and appellants therefore are not entitled to recover the lands in this action.

For another reason appellants are not entitled to recover. The evidence which we have just recounted as well as the other evidence in the case shows that W. E. Davis executed the deed for the sole purpose of protecting the property from a legal liability. In other words, there was a damage suit for a large amount pending against him at the time and the practically undisputed evidence shows that the deed in question was executed for the fraudulent purpose of placing the property beyond the reach of his creditors and for that reason it is void. But it is contended that appellees are not entitled to bring suit to set aside this conveyance as being made in fraud of his creditors. Counsel are mistaken in this contention. Section 81 of Kirby's Digest provides that an administrator of a fraudulent grantor may bring a suit in chancery to have the deed so executed set aside for the use and benefit of the heirs at law of the fraudulent grantor saving the rights of creditors and purchasers without notice. In construing this statute the court has held that where the executor of an alleged fraudulent grantor was the grantee and refused to bring a suit to set the deed aside, the heirs at law of the grantor have

the right to bring it, making him a defendant. *Moore* v. *Waldstein,* 74 Ark. 273.

The administrator joined with the heirs at law of W. E. Davis, deceased, in their cross-complaint to the present action; but, even if he had not done so, under the case just cited, the heirs at law might have proceeded without him. If under the statute the administrator and heirs at law could bring a suit to set aside the deed of their grantor as having been executed in fraud of his creditors, it follows that they could defend a suit brought against them for the possession of the lands.

Therefore, the decree will be affirmed.

LESSER v. REEVES.

Opinion delivered February 23, 1920.

1. ADVERSE POSSESSION — HOMESTEAD.—As the adult heirs of deceased have no right to possession of the homestead until the youngest child is 21 years old, possession can not be adverse to them until that time.
2. EQUITY—LACHES—LEGAL RIGHT.—The doctrine of laches has no application where the plaintiffs are not seeking equitable relief and the action is not barred by the statute.
3. EQUITY—LACHES.—Without a breach of duty there can be no laches.
4. EQUITY—LACHES—CHANGE OF CONDITION.—Laches is negligence by which another has been led into changing his condition with respect to the property in question, so that it would be inequitable to allow the negligent party to be preferred upon his legal rights to the one whom his negligence has misled.
5. MORTGAGES—SALE UNDER POWER WITHOUT APPRAISEMENT.—A sale under a power contained in a mortgage without complying with the statutory requirement of appraisement is invalid and vests no title.
6. MORTGAGES—POSSESSION OF MORTGAGEES.—Where mortgagees had the right under the mortgage to take possession and rent or foreclose, and did take possession under an invalid sale under a power at which they bought, they will be treated as mortgagees in possession.

7. MORTGAGES—DEED OF MORTGAGEES IN POSSESSION.—One to whom mortgagees in possession executed a deed could acquire thereby no greater title or interest than they had.
8. MORTGAGES — MORTGAGEES IN POSSESSION — ACCOUNTING.—Mortgagees in possession are properly charged with the rental value of the land and credited with the taxes paid and necessary repairs made.

Appeal from Lee Chancery Court; *A. L. Hutchins,* Chancellor; affirmed.

STATEMENT OF FACTS.

On the 1st day of December, 1917, appellants brought this suit in equity against appellees and asked that the latter be declared mortgagees in possession of the land described in their complaint and that an account be taken of the rents and profits between the parties to the suit.

Appellees defended on the ground that there had been a foreclosure of the mortgage in question by a sale under the power contained therein and that the mortgagees had become the purchasers at the sale. They also pleaded the statute of limitations and laches as a defense to the bill.

The material facts are as follows: The land involved in this suit comprises 160 acres and belonged to Thomas Reeves in his lifetime. Reeves occupied the land as his homestead until the date of his death. He executed a deed of trust to the land to secure an indebtedness which he owed to Lesser & Bro. Subsequently Reeves died leaving his widow and three minor children surviving him. The widow remained on the land for two years subsequent to the death of her husband and during this time Lesser & Bro. furnished her with supplies with which to make a crop on the land.

Thomas Reeves left three minor children surviving him; of these Maude was born November 7, 1881, and became twenty-one years of age November 7, 1902. Luther was born March 4, 1888, and became twenty-one years of age March 4, 1909; Mamie was born July 31, 1893, and became twenty-one July 31, 1914. Mamie was married when she was seventeen years of age. Maude

married A. J. Moore while a minor and died in June, 1916, leaving surviving her several minor children.

Mrs. Reeves made two crops on the place after her husband died. She then saw that she was not paying the mortgage indebtedness off and that she was not able to work the land. She married again and lived with her second husband and her children by her first husband in the vicinity of the land in controversy for two years. They all then moved to Woodruff County, where they have since lived.

Luther Reeves testified that he first learned of his interest in the property in 1916; that until that time he thought the property was lost to them and did not make any investigation of his rights. Mrs. Mamie Harp testified to substantially the same state of facts.

George Slaughter was a witness for appellants and was sheriff of Lee County at the time the mortgage is alleged to have been foreclosed by a sale under the power contained in it. He knew Thomas Reeves from 1877 until the date of his death. He said that he had a faint recollection that there was a mortgage on Reeves' homestead and that he performed some official act relative to the mortgage.

A. S. Rogers, also a witness for appellants, testified that he was deputy sheriff under Geo. W. Slaughter and knew Thomas Reeves rather intimately. He stated that he remembered distinctly that there was a foreclosure on the homestead of Reeves and that Slaughter sold it at the front door of the courthouse.

Morris Lesser testified for appellant that he was a member of the mercantile firm of Lesser & Bro., and that Reeves started trading with them in March, 1890; that Reeves executed a deed of trust on his homestead for the purpose of securing them for merchandise and supplies which they should furnish him; that the deed of trust secured an indebtedness of about $434.05. Lesser further stated that he remembered bidding in the land at a sale of it under the power contained in the mortgage; that the widow then left the property and that the mort-

gagees took possession of it; that they rented it out for several years at $75 per annum to various parties; that in 1905 they entered into a contract with A. B. Smedley to rent the land and also gave him an option to purchase it. Smedley went into possession of the land in 1905 under this contract and has been in possession of it ever since. In May, 1910, Lesser & Bro. conveyed the land to Smedley. The rental value during all this time has been $75 per year. Lesser also exhibited a cash book which contained an item under the date of December 15, 1896, showing a charge of $4 for an amount paid for appraising the Reeves place. In the same book under the date of February 15, 1897, Lesser & Bro.'s real estate account is charged with $16.35 on account of the Thomas Reeves place. Lesser stated that this was the cost of the foreclosure under the power of sale contained in the mortgage.

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

The court found that the appellants should be treated as mortgagees in possession, and that the mortgage indebtedness had been paid off, and that Lesser was indebted to appellees in the sum of $51.48.

The court further found that appellees were the owners of the land and entitled to recover possession thereof.

A decree was entered accordingly, and the case is here on appeal.

Daggett & Daggett, for appellants.

1. The chancellor found the facts favorable to defendant, but erred in the application of the law to the facts. He erred in finding that Lesser was a mortgagee in possession, even though the sale was voidable. Plaintiffs were barred by limitation and laches. It is conceded that on the death of Thomas Reeves, intestate, the lands descended to his minor children. Under the decision in *Kissinger* v. *Wilson,* 53 Ark. 403, and similar decisions following it, the minors (with their mother) had a homestead estate in the land and an estate of inherit-

ance. Although not barred by limitation, the doctrine of laches should be applied. 103 Ark. 251; 87 *Id.* 232; 75 *Id.* 312; 19 R. C. L., § 433. Aside from laches the decree is erroneous as to the law applied to the facts. Lesser was not a mortgagee in possession. 42 Pac. 35; 38 N. W. 765. His possession was adverse and he was not a mortgagee in possession. 107 Fed. 545. If such be the rule of construction, the acts of and possession of Smedler and Lesser bring them within it and the action of plaintiffs is to recover the land and for the use and occupancy thereof, against which Lesser or Smedler, by subrogation, would have an offset for the amount of the mortgage which, with interest from January 1, 1891, amounts to $537.30, or a total of $2,106. But plaintiffs are barred by limitation as to recovery of rents except for the three years immediately before suit was brought, with interest, or a total of $286, which should have been declared a lien on the lands. Plaintiffs are barred from the recovery of rents, even though Lesser was a mortgagee in possession under the invalid foreclosure sale. Lesser was chargeable with rents from 1905 to 1918 at $75 per annum, as Smedler continuously occupied the lands under his contract and deed from Lesser. Neither of the plaintiffs can recover rents. Maude's right expired November 7, 1902, Luther's March 4, 1909, and Mamie's July 21, 1914. 95 Ark. 74; 122 *Id.* 539.

2. Plaintiffs are barred from recovery of rents from Smedler by the "Betterment Act." Authorities are not needed, as good faith and honest belief in title held and ignorance of title being questioned by another who holds a better right. Lesser was never a mortgagee in possession, but held under the belief that he owed the land under the foreclosure and under color of title under the deed executed by Julius Lesser.

3. The statement of account by the chancellor is erroneous, as the amount due Lesser was $1,082. The

doctrine of laches should control this case, 55 Ark. 92, but if not the chancellor erred in stating the account.

W. J. Lanier, for appellee.

It is conceded that Mrs. Mamie Harp, the youngest daughter of Thomas Reeves, married A. J. Moore, one of the plaintiffs, with whom she lived and who was the mother of the five Moore children, minors; married when she was 17 years old and died in 1916. Const. 1874, art. 9, sec. 8; Kirby's Digest, § 3882. The appellees are not barred. 53 Ark. 403. Laches is not imputable to infants. Neither Mrs. Moore, Luther Reeves nor Mrs. Harp did anything to mislead or prejudice defendants; neither Lesser nor Smedler could have believed they had title, for the evidence clearly shows that the second trust deed (W. P. Weld, Tr.), under which they claim the land was sold, covered 160 acres—township 3 north, range 3 east. Lesser claims the trust deed was filed in 1894; the records were open to him and Smedler and their attorneys. No trust deed has been issued under the pretended sale and the trust deed had not been lost or destroyed. At the time Lesser claims the land was sold, Mrs. Harp was less than three, Luther only seven and Mrs. Moore only fourteen years of age. Smedler purchased on ten years' time the land when two of the children were minors. He can not be hurt, as he has not paid as much as rents, the buildings were permitted to deteriorate and decay, the fences rotten and land worn out by consant use and inattention and only five acres new land cleared since death of Reeves when Lesser took possession.

The delay worked disadvantage to defendants. Neither negligence nor laches can be imputed to the minor children.

Occupiers of minor's property must pay rents. 61 Ark. 26; 37 *Id.* 316; 52 *Id.* 213; 51 *Id.* 429. Mrs. Moore was married at 17 and continued married until her death and her children were minors and not barred. 67 Ark.

320; 87 *Id.* 428. Abandonment of homestead by widow does not affect minor children. 115 *Id.* 364; 29 *Id.* 625; 92 *Id.* 143. Where there is a legal and equitable remedy to the same subject-matter, the latter is under the control of the same statute bar as the former. 16 Ark. 129; 19 *Id.* 16. Equity by analogy is governed by the statute of limitations the same as law. 20 Ark. 136; 46 *Id.* 25; 47 *Id.* 301; 92 *Id.* 540.

Minors can not abandon their homesteads, and, being subject to the control of others, do not forfeit it. 92 Ark. 143; 37 *Id.* 316; 29 *Id.* 633. Delay for seven years on part of creditors in procuring letters of administration to be issued on estate of debtor is such laches as will defeat creditor's claim, so the debt due J. Lesser & Brother at death of Reeves in 1893 is barred. 56 Ark. 663; 37 *Id.* 155; 48 *Id.* 277; 63 *Id.* 405; 73 *Id.* 440; *Ib.* 185.

Mortgagee in possession is held to the exercise of such care and diligence as a provident owner would exercise and is charged with what reasonable diligence, care and attention he should have received. 2 Jones on Mortg. (4 Ed.), § 1123. Mortgagee suffering insolvent tenant to remain in possession is responsible for rents. *Ib.*, § 1123. A mortgagee does not take the rents absolutely, but subject to the debt and to be applied to the mortgage debt. 36 Ark. 17; 40 *Id.* 275; 38 *Id.* 285; 29 *Id.* 506; 55 *Id.* 326; 37 Cyc. 1140-1; 35 Am. Dec. 39.

Appellants are mortgagees in possession and should be charged with entire rents and interest, credited with taxes, with 6 per cent. interest, and amount due, if any, by Thomas Reeves at his death to J. Lesser & Brother, a balance struck and a decree against appellants for difference; however, if the court should hold rents barred prior to three years before filing suit, then all sums due from Thomas Reeves on date of his death are also barred by laches, together with all taxes prior to three years next before instituting suit.

HART, J. (after stating the facts). The chancery court was right in holding that appellees, who were the plaintiffs below, were not barred by the seven-year statute of limitations. The land in question was the homestead of Thomas Reeves, and he lived on it with his wife and minor children until his death. The adult heirs had no right to the possession of the homestead until the youngest child became twenty-one years of age and the statute of limitations did not begin to run against them until the termination of the homestead of the youngest child. Mrs. Mamie Harp was the youngest child and did not become twenty-one years old until July 31, 1914. This suit was commenced on December 1, 1917. Hence the suit was not barred by the statute of limitations. *Smith* v. *Scott,* 92 Ark. 146.

This is conceded by counsel for appellants. They invoke the doctrine of laches as a bar to appellees' right of action, but we can not agree with their contention under the facts as disclosed by the record. The doctrine of laches has no application where the plaintiffs are not seeking equitable relief, but to enforce a legal title and where their action is not barred by the statute of limitations in reference thereto. *Davis* v. *Neil,* 100 Ark. 399; *Fourche River Lbr. Co.* v. *Walker,* 96 Ark. 540; *Ward* v. *Sturdivant,* 96 Ark. 434, and *Waits* v. *Moore,* 89 Ark. 19. The facts of this case do not bring it within the principles announced in *Ayers* v. *McRae,* 71 Ark. 209, and *Jackson* v. *Becktold Printing & Book Mfg. Co.,* 86 Ark. 591.

In the first mentioned case, there was a foreclosure sale under a mortgage, but the mortgagor knew of the sale, was present at it and purchased a portion of the property included in the mortgage. He was presented with an account of his indebtedness before the sale and made no objection to its correctness. After the sale he made propositions to buy the land back and knew that the mortgagee who purchased at the sale was cutting timber from the land and raised no objection to him doing so. The court held that under the circumstances he was guilty of laches, whether his defense to the irregularity

of the foreclosure sale was substantial or merely technical.

In the last mentioned case there was a foreclosure in equity, and the heirs of the mortgagor were duly served with process. Their attorney and their agent agreed that the decree of foreclosure might be entered in vacation. The court held that the decree was invalid on that account, but that the plaintiffs were guilty of laches which proved fatal to the relief asked for by them. There the mortgagees became the purchasers of the land and were placed in possession of it after the sale had been confirmed. They sold large quantities of timber from the land, changed the fences and in every respect used it as their own. The plaintiffs had been advised that they could set the sale aside because the decree had been rendered in vacation, yet they made no objection to the confirmation of the sale or the entry into possession by the purchasers under the deeds executed to them pursuant to the decree of foreclosure. They knew that the land was being sold off by the purchasers at the foreclosure sale and they did not move to set aside the decree until nearly five years after it was rendered. They did not claim to have been misled by any act of the parties to the suit and no excuse was given for the delay which was attributable to their own negligence. Hence the court held they were guilty of laches in not sooner bringing their suit.

Without a breach of duty there can be no laches. In *Tatum* v. *Arkansas Lumber Co.*, 103 Ark. 251, and in numerous other cases this court has said that there must be some supervening equity calling for the application of the doctrine of laches. In that case we recognized that laches is negligence by which another has been led into changing his condition with respect to the property in question, so that it would be inequitable to allow the negligent party to be preferred upon his legal rights to the one whom his negligence has misled.

Again in the case of *Reaves* v. *Davidson*, 129 Ark. 88, it was contended that the plaintiffs were barred by laches,

and the court said there was nothing in the evidence in the case to show that the defendants had been led into changing their condition with respect to the land, so that it would be inequitable to allow the plaintiffs to be preferred upon their legal rights. Hence the relief was denied.

No misleading conduct can be attributed to appellees in the present case. It can not be said that there was inexcusable delay on their part in ascertaining or asserting their rights, or that their failure to bring the suit sooner was due to culpable negligence and inattention to their rights. The deed of trust in question contained a power of sale, and our statute imposes conditions upon the exercise of the power of sale contained in a mortgage. The statute requires that the property shall first be appraised and that at the sale it shall bring two-thirds of the appraised value. In *Craig* v. *Meriwether,* 84 Ark. 298, it was held that a sale under the power in a mortgage without complying with the statute is invalid, and that no title can be vested thereunder.

In the case at bar, while Lesser testified that there was a sale under the power contained in the mortgage, his testimony is very vague and uncertain. It is not shown that the property was advertised for sale or that it was appraised as required by the statute. The mortgagees became the purchasers at the sale, and no deed was executed to them. Lesser testified that he went into possession of the land after this pursuant to the sale. Mrs. Reeves testified that she made two crops on the land after her husband's death and then left it because she thought she could not pay off the mortgage indebtedness. She lived in Lee County for two years and then moved with her minor children to Woodruff County, where they have since resided. She was not present at the sale under the mortgage and did not know that appellants claimed that a sale had been made thereunder until some time in 1916 when her children went back to

Lee County on a visit to some relatives and ascertained that fact.

According to Lesser the sale was had in 1896. At that time the children were minors, the oldest being only about twelve years old. After they became of age they did nothing whatever to mislead appellants and moved with reasonable diligence in bringing the suit after they discovered that they had an interest in the land. They found this out in 1916 and brought this suit in the latter part of 1917. There was no change in the condition of the parties after they ascertained their rights. Appellants were not misled to their prejudice by any conduct of appellees and the appellees were not guilty of laches. The mortgage indebtedness was due at the time Mrs. Reeves left the land, and the mortgagees had the right to take possession of the land and rent it out for the purpose of paying that indebtedness or to foreclose the mortgage.

As we have already seen, the foreclosure was invalid, and under the circumstances their possession of the land will be attributable to their rights under the mortgage, and they were properly treated by the chancellor as mortgagees in possession. It is true that the mortgagees executed a deed to A. B. Smedley to the land, but of course he could acquire no greater title or interest in the land than they possessed. It is not shown that appellees knew of his purchase or that he was misled to his prejudice by their action in the matter.

The court properly charged the mortgagees with the rental value of the land for each year after they went in possession of it, and allowed them credit for taxes and necessary repairs. Indeed, the proof shows that the houses on the place had been allowed to run down greatly. We do not deem it necessary to set out in detail the evidence with regard to the rents, taxes, etc. This is set out in the decree of the chancellor and an examination of the record leads us to the conclusion that the chancellor's finding is correct. The chancellor held the mort-

gagee liable for a reasonable rent after he took possession of the mortgaged property. It is true that Smedley purchased the land from Lesser and entered into possession under his deed. He made certain payments thereunder which the chancellor credited on the mortgage indebtedness. Smedley acquired no greater rights than Lesser. He entered into possession under the direction of Lesser, and became his tenant. When he purchased from Lesser he only succeeded to his rights. The amounts charged against Lesser, including the payments on the purchase price by Smedley, only amounted to a reasonable annual rent for the property, and the evidence warranted the chancellor in finding that Lesser was indebted to appellees in the sum of $51.48.

It is further contended by counsel for appellant that after the sale by Lesser to Smedley, section 2754 of Kirby's Digest, our betterment statute, applies, and they invoke the rule laid down in *Green* v. *Maddox,* 98 Ark. 397. We do not deem it necessary to decide this proposition. The rights of Smedley under the betterment statute are not before the court. The question is as to the rights of Lesser, and that case has no application to his rights.

It follows that the decree must be affirmed.

FARMERS' STATE BANK *v.* FIRST STATE BANK.

Opinion delivered February 23, 1920.

1. BANK AND BANKING—OWNERSHIP OF DRAFT.—Where the drawer of a draft to which was attached a bill of lading indorsed and deposited it with a bank, which credited the amount to the drawer's account, the bank became the absolute owner of the draft and was entitled to the proceeds.
2. BANKS AND BANKING—TITLE TO DRAFT.—Where a draft was deposited in plaintiff bank to the drawer's account, plaintiff acquired title thereto, notwithstanding the drawer, after a controversy arose over the right to the proceeds of its collection, returned to plaintiff bank the amount of the credit.
3. JUSTICES OF THE PEACE—JURISDICTION.—Where plaintiff bank had acquired title to a draft the proceeds of a draft in the hands

of another bank which had received the draft for collection could not be attached as the property of the drawer; hence issuance of an attachment by a justice of the peace in a county other than the drawer's residence did not give the justice of the peace jurisdiction.

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

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

1. The complaint in case is insufficient, and the circuit court erred in overruling the demurrer to the complaint. Appellee seeks to recover the full amount of the drafts sent to appellant bank for collection and remittance, or in other words appellee seeks to recover as principal the amounts sent for collection to such agent on the ground either that the agent disobeyed instructions or was guilty of negligence in making the collection and returns and that nowhere in the complaint does appellee allege that it has been damaged in any sum by the wrongful act of its agent, nor does it allege any grounds or any occasion for any actual loss on the account of any negligence on part of its agent, the appellant bank. The measure of damages recoverable by the principal against his agent for disobeying his instructions or for wrongful act or negligence is the actual loss sustained by the principal on account of the wrongful act of the agent. Appellee took the checks for collection and failed to perform its duty to collect and remit and appellant was damaged, and appellee was liable therefor. A case directly in point is in 1 L. R. A. (N. S.) 246, citing Story on Agency, section 236, and notes.

2. Under the facts, if the complaint does state a cause of action defectively, the cause should have been dismissed by the chancellor because it is admitted by the cashier of appellee bank and also by W. H. Septer that long before the final hearing in the cause plaintiff had been paid in full the claim sued for and incurred no loss or damage by reason of any of the acts of ap-

pellant, and there could be no recovery. See notes to 1 L. R. A. (N. S.) 246; 99 Ark. 386, 292; 196 S. W. 707.

3. The evidence does not show any wrongful or negligent act by appellant. It collected the full amount of the drafts from the consignee, and on the same day the proceeds were attached they notified appellee and the date set for trial of the attachment suit was more than thirty days from the date set for trial, and appellee had ample opportunity to protect itself, and if it was the true owner of the drafts to intervene and set up its claim legally which it wholly failed to do. Appellant discharged its whole duty to appellee. Acts 1913, p. 94; Whitley on Bills and Notes, etc., p. 248, § 165, and notes.

4. The fact that appellee credited the drawer of the drafts on its books for the full face value of the drafts did not constitute said bank a holder in due course. *Ib.* Whitley on Bills, Notes, etc., § 165 and notes; 180 N. Y. 394; Neg. Inst. Law, Acts 1913, § 91, p. 130-1; 150 U. S. 231; 80 Hun. 258; 30 Kan. 441; 114 N. C. 335; 131 Mich. 674; 122 Minn. 215; 9 Okla. 697.

5. The chancellor treated the payment of appellee by Septor, the drawer of the amount of said drafts as transferee or assignee of the cause of action, and was wrong in his theory under the facts, as Septor was a party to the instruments as drawer of the drafts and primarily liable until they were accepted by the drawee, and he was still liable as first indorser. Neg. Inst. Law, § 126; Whitley on Bills, Notes, etc., § 210, p. 295; Acts 1913, p. 301. Septor being the drawer, the payment to plaintiff during the pendency of the suit was a cancellation or discharge of plaintiff's cause of action. Kirby's Digest, § 6001. Money paid by the garnishee to the judgment creditor on his judgment can not be recalled by defendant. 202 S. W. 848; 65 Ark. 112. As Septor is bound by the judgment of the circuit court, the cause should be reversed and dismissed.

McGill & McGill, for appellee.

The complaint states a cause of action. The defense was that appellee held the drafts for collection only. The decree is right, and is sustained by the law and evidence. 123 Ark. 42; 74 *Id.* 54. Without acting in good faith, the garnishee can not protect himself from liability even to defendant. 133 Ark. 579; 7 Wis. 306; 1 Fla. 233; 46 Am. Dec. 339 and note; 73 *Id.* 410. See 67 So. Rep. 721.

SMITH, J. W. H. Septer, a dealer in grain, feed and hay at Morris, Oklahoma, sold and shipped to W. E. Kefauver, a merchant at Rogers, Arkansas, on September 4 and 5, two carloads of hay under a contract of sale made prior to said dates. The said W. H. Septer shipped the first carload of hay on September 4, and rendered a bill or invoice for same to Kefauver, and on the same date drew a sight draft on Kefauver for $115.48 in favor of the First State Bank, appellee herein, and attached the bill of lading to said draft; and on September 4, in like manner, Septer shipped the second car to Kefauver and sent him invoice for same, and drew sight draft against him in favor of appellee in the sum of $125.57, to which said draft bill of lading was attached, and these sight drafts were deposited by Septer to his account with the appellee bank, and on the day they were drawn Septer was given credit on his pass book for the full amount of said drafts, and these drafts were sent by appellee bank, with the bills of lading attached, to the appellant, Farmers' State Bank, of Rogers, Arkansas, for collection and return. On September 15, 1917, Kefauver went to appellant bank and paid the two drafts amounting to $241.05, but induced the appellant bank to withhold or deduct $39 from said amount on account of the alleged damaged condition of one of said cars of hay, and on the same day appellant, by its draft, transmitted to the appellee bank the face of the draft less the $39 deduction, and thirty-cent collection charge, and at the same time Kefauver wrote Septer that he had deducted the $39. Immediately after receiv-

ing the draft from appellant, Toomer, the cashier of appellee bank, asked Septer if he would stand the $39 deduction, and being told by Septer that he would not, Toomer immediately returned the draft received from appellant bank, refusing to accept the same, and Septer answered the letter of Kefauver, stating that it takes two to make a contract of reduction, and refused to allow said reduction of $39, and thereupon on September 20 Kefauver directed appellant bank to pay the said $39, and immediately, before appellant bank could transmit the amount to appellee bank, Kefauver swore out an attachment against Septer before a justice of the peace and garnished the amount of these drafts in the hands of appellant bank, and made the attachment and garnishment returnable on October 25, 1917, and on the same day the cashier of appellant bank notified appellee by letter that the proceeds of said collection had been attached in its hands, and this notice was received by appellee bank on or before September 22, on which date the cashier of appellee bank wrote to appellant bank that, regardless of the attachment, they expected appellant bank to remit the full amount of said drafts. No appearance or defense was made by Septer to the attachment suit of Kefauver, and no intervention or other claim was filed in said suit by appellee bank, and on October 27 said attachment suit coming on for hearing, and, said appellant bank having answered, the justice rendered judgment against Septer in favor of Kefauver for the sum of $100 and costs, amounting to $114.25, claims for additional damage to other shipments being made in this suit. The justice's judgment ordered and adjudged that the garnishee, appellant bank, pay said sum out of the fund garnished in its hands, and said sum was paid by appellant bank to the constable, and on October 30 appellant bank issued its draft for the amount of said collection, less $114.25, in favor of the appellee bank, and sent the same to it by mail on or about November 1, 1917.

Thereafter, on December 20, 1917, suit was filed by appellee bank against the appellant bank, in which it

alleged, in substance, the issuing of the drafts by Septer in its favor, and that they were sent to appellant bank for collection and remittance, but that the appellant bank surrendered said drafts and the bills of lading attached to Kefauver, and wrongfully refused to remit the full amount thereof, and wrongfully claimed the right to deduct the $39 at first and afterward the sum of $114.25, and refused to pay the face of said drafts, and prayed judgment against the appellant bank for the amount of the two drafts, less the thirty-cent collection charge made by appellant bank, and returned to the appellant bank the draft which it had sent appellee bank on October 30, 1917.

A demurrer to this complaint was overruled, whereupon an answer was filed, praying that Septer and Kefauver be made parties, and by consent the cause was transferred to equity. The court denied the prayer to make Septer and Kefauver parties, and, after a hearing of the cause on its merits, rendered judgment for appellee for the face of the two drafts, less the collection charges, with the costs of suit, and this appeal is from that decree.

It is apparent that the demurrer to the complaint was properly overruled. It is very earnestly insisted, however, that a good and valid defense to the suit was established by the testimony. This defense, in effect, was that appellee had the drafts for collection only, and that appellant was prevented from remitting the full amount of the drafts by the pendency of the garnishment proceeding. It is apparent that this is a question of fact, and, had a jury so found, we probably would not say that the testimony was not legally sufficient to support the verdict. However, we have the finding of the chancellor against the contention made, and we can not say this finding is clearly against the preponderance of the testimony.

The cashiers of two local banks testified that it was not customary for a bank to receive drafts, with bills of lading attached, except for collection; yet they admitted that this was sometimes done.

It is also insisted that the right to maintain this action is defeated by the showing made that before the trial of this cause Septer had repaid appellee bank the amount of the drafts for which he was given credit at the time the transaction occurred.

It is also insisted that the inquiry of Septer made by the cashier of appellee bank, whether he would stand for the reduction of $39 on account of the damaged condition of the hay, indicated that the bank was acting as Septer's agent, and not as owner of the drafts from which it was proposed to make the deduction.

These are the principal circumstances relied upon to overturn the finding of the chancellor.

On the other hand, it is shown that Septer carried a large and active account with appellee bank, and Toomer, its cashier, testified that the bank received the drafts, not for collection, but for deposit, and that the amount thereof became immediately subject to Septer's check. All the entries on the books of the bank, made contemporaneously with the transaction, including Septer's pass book, and also the deposit slips, all of which were made at a time when no litigation was contemplated, corroborate the testimony of Toomer.

In regard to the $39 reduction Toomer testified that when he was advised by appellant bank that the deduction had been made he knew nothing of the merit of the claim on which it was based, but he asked Septer about it and asked him if he wished to allow it, intending, if the allowance was made, to charge it to Septer's account, but, when Septer declined to consent, Toomer wrote appellant bank that appellee bank was the owner of the drafts and to remit their face, less the usual exchange.

It does appear that, after this controversy had arisen but before the trial of the cause in the court below, Septer repaid appellee the amount of the drafts. This apparently was upon the theory that Septer was contingently liable for these drafts, and that it was his duty to wait for the money and to take the chance on its recovery; but, conceding that such was not the law, there is

nothing to indicate an intention to release appellant from a liability then being insisted upon; and that circumstance does not overcome the positive testimony of Septer and Toomer that the drafts were deposited and received in the usual course of business, and that the bank became the owner thereof by becoming debtor to Septer for their face value.

We have several times considered this question, a late case being that of *Brown & Oglesby* v. *Yukon National Bank,* 138 Ark. 210, a case not unlike the instant case on the facts, and we there held that, where a draft is indorsed to and deposited with a bank, which credits the amount to the holder's account, the bank becomes the absolute owner of the draft, and is entitled to the proceeds of the draft in the hands of a garnishee bank. See also other cases there cited.

Counsel for appellant cite and rely upon the case of *Collin County National Bank* v. *Laser Grain Co.,* 130 Ark. 396, as sustaining their contention that appellee was not the owner of the drafts in question. In that case, however, a jury had found, under testimony which we said made a case for the jury, that the draft to which the bill of lading had been attached had been received for collection; but here a contrary finding on the facts has been made.

It follows, therefore, if appellee became the owner of the drafts when they were received as deposits, the judgment of the justice of the peace in the garnishment case was void. Septer did not intervene in that suit, and was made a party by the publication of a warning order. The basis of the jurisdiction which the justice of the peace assumed depended upon the fact that property belonging to Septer had been seized within the jurisdiction of the court, and, as it now appears that this judgment was rendered upon a false assumption, it is void.

The decree of the court below is, therefore, affirmed.

TANKERSLEY *v.* NORTON.

Opinion delivered February 23, 1920.

1. PARTNERSHIP—RIGHT TO DISSOLVE.—Where a partnership agreement was to run for three years, and required that one partner should furnish the land and all necessary dairy equipment, and the other should furnish the labor, and that at the end of that time each partner should own a half interest in the partnership property, the partnership could not be terminated by the partner furnishing the equipment before the other partner had the opportunity to acquire such interest, except for sufficient cause subsequently developed or by the mutual consent of the partners.
2. APPEAL AND ERROR—REMAND OF CHANCERY CAUSE FOR NEW TRIAL.—Where a chancery cause was not fully developed because it was tried upon an erroneous theory, the cause will be remanded with permission to the parties to take further testimony.

Appeal from St. Francis Chancery Court; *A. L. Hutchins,* Chancellor; reversed.

S. S. Hargraves and *Murphy & McHaney,* for appellant.

The court erred in holding that the partnership was one at will, determinable at the pleasure of either party. The decree is not sustained by a preponderance of the evidence, but it shows that it was for at least three years. 227 U. S. 489; 5 Ark. 376; 116 Ala. 247; 158 Ind. 292; 193 Ill. 121; 16 Ill. 402; 84 *Id.* 121. The evidence shows that a dissolution was not sought at a reasonable time. It was unjust and inequitable to permit a dissolution at an unreasonable time as shown by the evidence and also error to appoint a receiver for want of jurisdiction.

J. W. Morrow and *C. W. Norton,* for appellee.

1. The partnership was at the pleasure of the parties and not for a fixed period. The evidence shows this.

2. As to the right to dissolve, see 30 Cyc. .....; 20 R. C. L. 954. The finding of the chancellor is supported by the testimony, and was properly dissolved, as it was evident it could not survive.

SMITH, J. The parties to this litigation formed a partnership to operate a dairy business, concerning the terms and duration of which they disagree. At the suit of appellee it was dissolved, and the decree of dissolution indicates that the court below accepted appellee's version as to the points in dispute, as the court ordered the distribution of the partnership property to the partners who had contributed it, whereas appellant contended that under the partnership agreement he was given a present undivided half interest in all the partnership property.

We would not disturb the finding as being contrary to the preponderance of the evidence (and would, therefore, affirm the decree), but we think the court erroneously found that the partnership was one which either of the parties had the right to dissolve at pleasure.

Upon that issue appellant testified that he was employed at the State Agricultural School at Jonesboro—of which he was a graduate in dairying—at a salary of $75 per month, with room and board. That the partnership became effective March 1, 1919, at which time it was known that the business was one which would have to be established and developed and could not be profitable until that had been done, and it was, therefore, agreed that the partnership should be for a long period of time and until the purposes of the partnership had been effectuated. That appellee agreed to deliver, on land owned by him, on which feed crops were to be cultivated for use in connection with the dairy, eight cows and three calves, in which appellant was to have an immediate, present half interest, and that as the demand for milk and dairy products increased appellee was to furnish additional milk cows for the partnership, as needed, to the extent of twenty fresh cows, and that appellant should have a half interest in all the additional cows furnished by appellee, and their increase, and that appellee was to furnish a barn, gas engine to pump water, and all necessary dairy equipment, together with chickens, a bull and hogs, in all of which he was to have a half interest when furnished, and that, being a single man, he took his

father and his father's family into the business to assist him in conducting it, and that he had agreed to pay them one-half of his profit for this service. That he moved on the farm and proceeded to operate the dairy for a period of three months, during which time a net profit of $55 for each partner was earned, when appellee became dissatisfied, and, without cause, proceeded to dissolve the partnership. Appellant is corroborated by his father in all essential respects. In fact, the father testified that the preliminary negotiations leading to the formation of the partnership were conducted by him, on behalf of his son.

Appellee testified that the partnership was at will, although he admitted that the parties thereto had agreed that the business was one which could become profitable only by development, and that he had agreed that if it continued for three years appellant should have a half interest in the property which he (appellee) had furnished to make the business a going concern.

We think the court below was in error in holding that the partnership was one at will, determinable at the pleasure of either party. Upon the contrary, we think it was one for a period of as much as three years, unless, for sufficient cause, it was sooner dissolved. According to appellee's version—which the court below accepted, and which we also accept—appellant was to acquire no interest in this business until it had continued as much as three years. It can not, therefore, be assumed that it was contemplated that the partnership should be terminated before appellant had had the opportunity to acquire that interest, except for sufficient cause subsequently developed, or the mutual consent of the parties. *Howell* v. *Harvey,* 5 Ark. 270; *Zimmerman* v. *Harding,* 227 U. S. 489; 20 R. C. L., § 178 of the article on partnership.

The question of the existence of sufficient cause for the dissolution of the partnership does not appear to have been fully developed, as appellee tried it in the court

below upon the theory—which the court accepted—that it was a partnership at will.

The cause will, therefore, be reversed with leave to the parties, if they so elect, to take further testimony upon that issue.

ROCHE v. DAY.

Opinion delivered February 23, 1920.

1. APPEAL AND ERROR—CONCLUSIVENESS OF RECORD OF DECREE.—Recitals of a decree can not be shown to be incorrect by letters appended to the transcript.
2. VENDOR AND PURCHASER—NOTICE OF TIMBER CONTRACT.—Evidence *held* insufficient to show that plaintiff acquired land as *bona fide* purchaser without knowledge of the extension of a timber contract.
3. VENDOR AND PURCHASER — PURCHASE SUBJECT TO TIMBER CONTRACT.—Where a timber contract was extended before lands were sold to plaintiff, and the contract of sale gave notice of the extension, and the sale was made subject thereto, plaintiff can not question the validity of the timber contract because the timber contract was not reduced to writing until after the conveyance was made.

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

C. T. Bloodworth and *Edward B. Downie,* for appellant.

1. The finding of the chancellor is clearly against the weight of the testimony.

2. Roche had no notice, actual or constructive, of the extension of time for removing the timber.

3. If the insertion of the clause, "subject to a timber contract expiring March 1, 1920," was notice to Roche, he exercised such diligence as would absolve from the charge of negligence in making inquiry with respect to this matter.

4. If there was an extension of time, the agreement thereupon was not made until long after the deed

from Trotter to Roche was executed and could not affect Roche's title.

5. The deposition of Trotter should have been quashed. 39 Cyc. 1738; 189 Pa. St. 164; 69 Am. St. 794; 72 S. C. 404; 52 S. E. 48; 88 Ala. 527, cited in 2 Pom. on Eq. Jur. (2 Ed.) 601; 108 Ark. 190. The deposition of Trotter was not signed by him as provided by law and should have been quashed.

Oliver & Oliver, for appellees.

1. Appellant had notice of the extension of time to March 1, 1920. See original contract made an exhibit to deposition of Schenck and a copy made an exhibit to deposition of Trotter.

2. Roche bought subject to the extension of time and knew of it. The contract between Trotter and Day was not void under the statute of frauds because the statute was pleaded. 32 Ark. 97; 105 *Id.* 638; 56 *Id.* 263. And if plead appellant could not take advantage of it. 20 Cyc. 306 L; 128 Ark. 42.

3. The deposition of Trotter was not signed, but appellant accepted the court's ruling on it.

4. Appellant was not an innocent purchaser; not a purchaser at all. The evidence is conclusive on all these points, and appellant failed to make a case of a *bona fide* purchaser.

HUMPHREYS, J. Appellant instituted suit against appellees in the Clay Chancery Court, Western District, to enjoin them from cutting timber on a certain tract of land, consisting of 2,463 acres in said district and county.

The bill, in substance, alleged that appellant was the owner of the land and timber standing thereon; that appellees had cut and removed, and were cutting and removing, merchantable timber therefrom and converting same to their own use, without right, to appellant's damage in the sum of $5,000; that they were not financially responsible; that they claimed the right to cut and remove the timber under a pretended extension beyond December 6, 1918, of a timber contract executed in 1911

by Minta L. Scott to T. E. Day; that, if such extension was made, appellant knew nothing of it and was an innocent purchaser of the land.

Appellees filed an answer, admitting that they had cut and removed, and were cutting and removing merchantable timber from said lands after December 6, 1918, but had cut and removed the timber under contract of date June 30, 1917, with John W. Trotter, who had purchased the lands from Minta L. Scott on May 18, 1917, extending the time for removing the timber until March 1, 1920.

The cause was submitted to the court upon the pleadings, depositions and exhibits thereto, which resulted in a finding that appellant purchased the lands with notice that the timber contract, expiring December 6, 1918, had been extended to March 1, 1920, and a decree dismissing appellant's bill for want of equity. From the finding and decree, an appeal has been duly prosecuted to this court for trial *de novo*.

The deposition of John W. Trotter was unsigned. For that reason, appellant filed a motion to quash it. The decree recites that to prevent a continuance for retaking the deposition, appellant accepted the chancellor's ruling, overruling his motion to quash the deposition. The letters appended to the transcript show that the recitals of the decree in this respect are incorrect, but the letters are no part of the record and can not be considered by the court on appeal. This court is bound by recitals contained in the record as certified; hence, must treat the deposition of John W. Trotter as evidence in the case.

The undisputed facts are as follows: In 1911, Minta L. Scott, the owner of the land, sold the merchantable timber on the land to T. E. Day under written contract, on condition he would cut and remove the timber on 200 acres each year, after a certain period, and return the same—the timber right expiring on the 6th day of December, 1918. On the 18th day of May, 1917, Scott sold the land to John W. Trotter with the aid of appellee. On the 15th day of October, 1917, appellant agreed to ex-

change an encumbered flat in Chicago for Trotter's lands in said county, subject to inspection. Appellant's broker, Chas. E. Bates, inspected the lands, and, on account of the timber being sold, refused to advise the sale unless Trotter would pay a difference of $10,000 in cash between the encumbered properties. Trotter acquiesced and a contract was executed on the 27th day of October, 1917, agreeing upon the terms of exchange. By the terms of the contract, it was to remain in the office of Robt. F. Schenck, Trotter's broker. Trotter then produced a late abstract to the lands and opinion of an attorney showing a merchantable record title, subject to certain mortgages and a timber contract of record from Minta L. Scott to appellee, expiring December 6, 1918. On the 30th day of November, 1917, Trotter paid appellant $10,000 in cash and he and his wife executed two warranty deeds, conveying the lands to appellant without timber reservations, in exchange for the Chicago flat with a $60,000 incumbrance. The lands were chiefly valuable for the timber and of little value without it. The deeds of Trotter, conveying the lands to appellant, did not contain a timber reservation or refer to a timber contract expiring March 1, 1920.

The fact about which the evidence is in dispute is whether the contract of sale, of date October 27, 1917, contained the following clause: "Subject to a timber contract expiring March 1, 1920." Upon this disputed point, the evidence of Chas. E. Bates is pitted against that of Robt. F. Schenck and John W. Trotter. Chas. E. Bates represented appellant throughout the negotiations and consummation of the exchange of properties, and Robt. F. Schenck & Co. represented John W. Trotter in the deal.

Charles E. Bates testified, in effect, that the clause in question was not in the contract at the time he signed it for appellant; that Trotter represented to him that there was a timber contract on the land, but could not tell him, in response to repeated inquiries, when it expired; that he concluded from the abstract sent him and

the opinion of the attorney upon the title, that the timber contract shown by the abstract in which the timber rights expired on December 6, 1918, was the timber contract which Trotter represented to him as being on the lands; that he never heard of any extension of said timber contract until notified by letter from appellee T. E. Day on May 17, 1918; that the letter containing the abstract stated: "My (referring to Trotter) abstracts of that land are new ones and brought down to date;" that he called on Mr. Schenck a number of times before the institution of this suit to secure a copy of the contract, but Mr. Schenck was unable to find it, after making a thorough search; that Schenck did not find it until Mr. C. T. Bloodworth went with him to Schenck's office and told Schenck that he had had a talk with Mr. John W. Trotter only the day before and that Trotter had shown him a copy of the contract which had been sent him by Mr. Schenck; that, although a diligent search had been made by him before this statement, immediately thereafter Mr. Schenck produced the original contract which contained the clause: "Subject to a timber lease expiring March 1, 1920;" that prior to producing the contract, Schenck had stated that he did not, and could not, remember just when the timber contract expired; that in Day's letter informing him that the contract had been extended, the following clause appeared: "I have a statement from Mr. Trotter that he incorporated in his deed to you and in your contract that you took this land subject to a timber lease expiring March 1, 1920, as that is the contract I have with Mr. Trotter. Kindly let me know if this is in your deed. I have Mr. Trotter's written statement that this is so, and it is our contract with him."

Appellee testified that his original timber contract was extended by John W. Trotter, who purchased the lands from Minta L. Scott; that he assisted in the negotiations of that deal, and his remuneration was to be the extension of his timber contract with Scott from the expiration thereof to March 1, 1920; that the original agreement for this extension was made April 30, 1917, but was

not reduced to writing for about three months thereafter; that the extension agreement was reduced to writing and dated back to June 30 and signed by himself and John W. Trotter; that it was the understanding at the time that the extension should be mentioned in the deed from Minta L. Scott to John W. Trotter, which was overlooked in the preparation and execution of that deed; that he wrote letters as late as September 7, 1917, showing that the extension contract had not been reduced to writing at that time; that, under his agreement with Trotter, the timber extension had not been incorporated in the deed from Scott to Trotter, and that he therefore consulted Mr. Oliver with reference to his right to the extension; that Trotter had written him repeatedly that the extension was incorporated in his contract of exchange with appellant, as well as in his deeds conveying the lands to appellant; that, for that reason, he wrote the letter to T. E. Day, of date May 17, 1918, asking him whether the timber extension was incorporated in the deeds. The original extension contract of date June 30, 1917, is before the court for inspection of Trotter's signature, it being contended that the signature evidences the fact that it was written after he had broken his arm in the spring of 1918, and not before the contract of exchange of the properties entered into between Trotter and appellant.

John W. Trotter testified that appellant understood at the time the contract for exchange of properties was entered into that the contract was subject to a timber contract which would not expire until March 1, 1920; that the clause "subject to a timber contract expiring March 1, 1920," was in the original and copies of the contract at the time signed; that the copies were made at the time the original was executed; that he compared his copy with the original and took it away at the time; that he informed Day that the same clause was inserted in his deeds to appellant, because he thought, until after suit was brought, that Schenck had inserted it according to instructions. Trotter filed with his deposition his copy

of the contract with appellant, showing that it was made "subject to a timber contract expiring March 1, 1920." Trotter admitted receiving letters from Day in the summer and fall of 1917, relative to the extension of time for moving the timber.

Robt. F. Schenck, in the course of his testimony, produced the original contract on a printed form for the exchange of lands, entered into between appellant and John W. Trotter, in which there appears written in pen and ink under a paragraph "subject to" the following clause: "A timber contract expiring March 1, 1920." There were a number of other entries in the same color of ink and same handwriting, but most of the entries made in the spaces of the blank form were made with a typewriter. Mr. Schenck testified that this clause was in the contract when signed; that, from the beginning, Trotter informed appellant's broker that the timber had been sold; that, after looking at the lands, appellant's broker exacted $10,000 in cash from Trotter, in addition to the first proposal of exchange, because the timber had been sold; that the original contract had been in his office, though lost, since its execution, and that no change had been made in it; that, during the time he was searching for the contract, he told Mr. Bloodworth he did not remember how long the timber contract would run; that he found the contract when Bloodworth and Bates were present, in a pigeon-hole to his desk, after having made a diligent search; that he had no interest in the result of the case.

It is contended that the finding of the chancellor to the effect that appellant purchased the lands with full knowledge of the existence of a timber contract expiring March 1, 1920, was contrary to the weight of the evidence. Both Schenck and Trotter gave positive testimony that the clause "subject to a timber contract expiring March 1, 1920," was in the contract when signed. Trotter testified that Schenck made him a copy, which he compared with the original, and that he retained the copy which included the clause. The clause was in the copy

produced by him and attached to his deposition. The clause was also in the original contract produced by Schenck and attached to his deposition. Schenck testified that the clause was in the contract when signed. Both testified that appellant's broker was informed from the beginning that the timber had been sold, and that was one reason appellant's broker required an additional cash payment of $10,000 to be made to appellant.

Bates, appellant's broker, was quite positive that no such clause was in the contract when signed, else, he says, he would have challenged it. He said he was led to believe, from the abstract and the opinion of Trotter's attorney, as well as his own, that the timber contract referred to by Trotter as being out against the land was the timber contract executed by Minta L. Scott to appellee Day, the expiration of which was December 6, 1918. It is suggested by learned counsel for appellant that there are circumstances in the evidence challenging the truth of Schenck's and Trotter's statements and lending credence to the statement of Bates.

The suggestion is made that the clause was inserted with pen and ink, while other entries were made with the typewriter. An inspection of the contract shows there are entries not challenged also made in the same color of ink and in the same handwriting of the clause in question. So, it can not be well argued that the clause was inserted after the contract was signed because entered with pen and ink. The argument would likewise exclude all other entries and changes made in pen and ink not challenged. The suggestion is also made that because Schenck did not produce the contract before the statement made by Mr. Bloodworth to the effect that he had seen a copy of it the day before in possession of Trotter, which contained the clause, but did produce the original contract immediately thereafter, is a circumstance tending to reflect upon Mr. Schenck's testimony. We are unable to draw any inference from the circumstance tending to show that Schenck testified falsely in regard to the clause being in the contract when signed.

The suggestion is also made that the statements of Trotter and Schenck should be disregarded because Trotter told Day the extension of the timber contract had been incorporated in his deeds to appellant, which was not true. Trotter, we think, sufficiently explains this incorrect statement by saying that he directed Schenck to incorporate the clause in the deeds and thought he had done so until after this suit was instituted.

It is also suggested by appellant that if a comparison of Trotter's signature on the extension contract, which was dated back to June 30, 1917, is made with the signature to the letters written prior to the execution of his contract of sale to appellant, it will appear that the extension contract was not reduced to writing until after Trotter's arm was broken in the spring of 1918. If not signed until the spring of 1918, it necessarily shows that the timber extension contract was reduced to writing after Trotter sold the land to appellant. Day testified that it was reduced to writing before Trotter sold and conveyed the lands to appellant and such also is the effect of Trotter's evidence. We are of opinion, however, from a reading of the whole evidence, that Trotter extended appellant's timber contract to March 1, 1920, before he made the sale to appellant, irrespective of when it was reduced to writing. Appellant is in no position to question the form of the timber extension contract if he had notice of it and bought subject to it. The gist of his action is that he was an innocent purchaser of the lands without notice of appellee's equities. We think the finding of the chancellor, to the effect that the clause was in the original contract at the time it was signed, is supported by the weight of the evidence. At least, after a careful reading of the whole evidence, we can not say that the finding and decree of the chancellor are contrary to the clear preponderance of the evidence.

The decree is therefore affirmed.

ARKANSAS NATURAL GAS COMPANY v. COMMISSIONERS OF HOPE, FULTON AND EMMET ROAD IMPROVEMENT DISTRICT.

Opinion delivered February 23, 1920.

1. HIGHWAYS—ASSESSMENT OF PERSONAL PROPERTY.—Personal property can not be subjected by the Legislature to assessment for benefits from a local improvement.
2. HIGHWAYS—ASSESSMENT OF PIPE LINES.—Pipe lines laid in the streets of a city are clearly personal property, and can not be classified as real property by the Legislature, as it is only where the character of the property is doubtful that the Legislature has the power to classify it as real estate.

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

Moore, Smith, Moore & Trieber and *Henry Moore, Jr.,* for appellant.

Pipe lines in a city are clearly personal property and not taxable for benefits to construct a road. 129 Ark. 547; 121 *Id.* 113; 81 *Id.* 208. No specific authority is granted by Act 153, Acts 1919. Kirby & Castle's Digest, § 8577; 119 Ark. 255.

The chancellor erred in sustaining the demurrer. Cases *supra.*

U. A. Gentry and *O. A. Graves,* for appellees.

No question is raised here as to the assessment of the main line. Act 153, Acts 1919, makes the pipe lines in a city clearly taxable for local improvements, and the Legislature has the power to do so. The cases cited by appellant do not decide that pipe lines are personal property. 119 Ark. 125; 51 *Id.* 491. Appellant has an interest in the soil, and the Legislature has made the lines subject to assessment for local improvements; and they can not be classed as personal property and the decree should be affirmed.

HUMPHREYS, J. This suit was instituted by appellant against appellees in the Hempstead Chancery Court to restrain the appellees, who were the commis-

sioners of the Hope, Fulton and Emmet Road Improvement District, from levying an assessment of benefits for constructing the road through the district, against appellant's gas distributing lines laid in the streets and alleys of the town of Hope, within said district.

The pleadings consisted of a complaint and demurrer, presenting the sole issue of whether the distributing pipe lines within the city limits of Hope are personal property or real estate. It is conceded and has been recently decided by this court that personal property can not be subjected by the Legislature to assessments of benefits for local improvements. *Snetzer* v. *Gregg,* 129 Ark. 542.

According to the allegations of the complaint, appellant is the owner of the main gas line connecting the Caddo gas fields, in Louisiana, with the city of Little Rock. This main pipe line passes through the Hope, Fulton and Emmet Road Improvement District in Hempstead County, and from a point thereon near the city of Hope, distributing lines branch off of the main line, and, under and by virtue of a franchise granted to appellant by said city, the distributing lines are laid in the streets thereof for the purpose of serving the consumers in the city with gas.

The Hope, Fulton and Emmet Road Improvement District was created by Act No. 153 of the Acts of the General Assembly of the State of Arkansas for 1919. That part authorizing the assessment of benefits against pipe lines is as follows: "Their (referring to the commissioners) assessment shall embrace not merely the lands, but all railroads, tramroads, telegraph, telephone and pipe lines, and other improvements on real estate that will be benefited by the improving of the roads; and wherever the word 'lands' is used in this act, it shall be construed to embrace all property subject to taxation therein. * * *"

In construing section 7 of Act 71, Acts of the General Assembly of 1917, which was a provision quite similar to the one now before the court, this court held that assess-

ments of benefits for constructing the improvement provided for in the act might be levied against interurban telephone, telegraph, power and pipe lines upon the same ground that such assessments may be levied upon the right-of-way of railroad companies. *Mo. Pac. Rd. Co.* v. *Conway County Bridge Dist.,* 134 Ark. 292. The reason or ground for imposing such a tax upon the right-of-way of railroads is that the railroads have an interest in the soil and that such easement or freehold interest may be specially benefited by the improvement. Because a town or city in Arkansas had no right to grant a street railway any easement or freehold interest in the soil or exclusive control over the street on which the track is laid, but can only grant it a franchise to use the street in common with others, and not for its exclusive benefit, this court ruled in *Lenon* v. *Brodie,* 81 Ark. 208, that assessment for benefits could not be levied against the right-of-way of street railroads in the public streets. The same doctrine was announced in *Fort Smith Light & Traction Co.* v. *McDonough,* 119 Ark. 254. It was said in that case (quoting the sixth syllabus): "The tracks of an interurban railway, lying within a city, are not to be classified as real estate for purposes of assessment for a local improvement." In reannouncing the same doctrine in the case of *Board of Improvement* v. *Southwestern Gas & Electric Co.,* 121 Ark. 105, the court took occasion to say: "Authorities are abundant to the effect that the tracks of a street railway laid along the public highway (meaning public streets within the city limits) do not constitute an interest in the soil so as to be classified as real property within the meaning of taxation laws."

Franchises granted by a city to public utilities to lay pipe lines in the public streets are on a parity with franchises granted to a street railway to lay its track and operate in the public streets. Neither confer any easement or freehold rights in the soil. So, pipe lines must be classified as personal, and not real estate, within the meaning of taxation laws. Pipe lines laid in the streets

of a city are clearly personal property, and can not be classified as real property by a Legislature. It is only where the character of the property is doubtful that a Legislature has power to classify it as real estate.

For the error indicated, the decree of the chancellor is reversed and the cause remanded with instructions to overrule the demurrer and to enjoin appellees from levying an assessment of benefits against appellant's pipe lines within the city limits of Hope.

McILROY v. RIVERCOMB.

Opinion delivered March 1, 1920.

VENDOR AND PURCHASER—MENTAL INCAPACITY.—A contract of sale will not be set aside because the vendor at times displayed childishness and lack of mental vigor, but it must be shown that at the time of the contract she was mentally incapable of acting intelligently in matters of that importance.

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

J. W. Grabiel and *John Mayes,* for appellant.

The decree is against the clear preponderance of the testimony. It fails to show that appellee was mentally incapable of acting intelligently in matters of business, and the burden was on her to show this. The evidence shows that plaintiff had no cause of action and no right to recover. 110 Ark. 416; 60 *Id.* 39; 14 R. C. L. 1307, § 480. Appellee was a life tenant in possession, and it was her duty to pay the taxes, etc. 1 Washburn on Real Prop. (4 Ed.), 126. Appellee was competent to transact business and was not overreached or unduly influenced. 44 W. Va. 612; 67 Am. St. 788. Her health and mind were not seriously impaired, and she was capable of transacting business. 8 R. C. L. 944-5, §§ 20-21; 115 Ark. 430; 123 *Id.* 166. The return of the $500 was only an attempt to correct a mistake. Incapacity to transact business affairs is not proved. Cases *supra.* The findings are clearly against the evidence.

B. R. Davidson and *O. P. McDonald,* for appellee.

Appellee had not the capacity or reason or judgment to comprehend the business matters she attempted. She was too weak in mind and body to guard herself against imposition or resist the undue influence used. 15 Ark. 556. The evidence shows that she was frail and delicate, old with weak mentality and unfamiliar with business, and she trusted too much to her friends and she was unduly influenced and overreached, as she was mentally incapacitated. Courts do not relieve against mistakes of law. 131 Ark. 499-500. The findings of the chancellor are right, and the decree should be affirmed.

McCULLOCH, C. J. Appellee's husband died intestate and without issue many years ago, owning a lot or tract of real estate in the city of Fayetteville, Arkansas, which he and appellee occupied as their home, and appellee has continued to occupy it as her home since the death of her husband. She acquired an undivided one-half interest in the fee by purchase from two of her husband's collateral heirs. The house which constituted the dwelling of appellee's husband is still situated on the tract in question, but is, to a considerable degree, dilapidated and out of repair. On May 7, 1912, appellee, for a cash consideration, sold and conveyed to appellant an undivided three-fourths interest in a strip of land off the aforesaid tract of land, and on May 9, 1912, she conveyed to appellant an undivided three-fourths interest in still another strip off the tract. On November 7, 1914, appellee executed to appellant a third conveyance for an undivided three-fourths interest in an additional strip of the land. On April 14, 1917, appellee entered into a written contract with appellant whereby she agreed to sell to him an undivided three-fourths in the residue of said tract, the part on which the dwelling is situated, for the sum of $500, of which $300 was paid in cash, and the remainder was to be payable in installments. There was a stipulation in the contract that appellee should have the use and enjoyment of the premises for the remainder of her life,

but should keep the taxes and improvement taxes paid and keep the premises insured for appellant's benefit.

At the time of the execution of these conveyances by appellee to appellant, and at the time of the execution of the aforesaid contract between the parties, they were under the impression that appellee had an undivided three-fourths interest in the property, but afterward discovered that they were mistaken and that she was the owner of only an undivided one-half of the property in fee, subject to her own homestead and dower interest. After discovery of the mistake, appellee paid over to appellant the sum of $500 by way of reimbursement for the difference in the purchase price between an undivided one-half and an undivided three-fourths interest. This payment was made by appellee to appellant in August, 1917, in the form of a check on a local bank, given at her own residence.

The present action was instituted by appellee on April 16, 1918, to cancel the contract of April 14, 1917, and also to recover the sum of $500 paid as aforesaid to appellant in August, 1917, on the alleged ground that at the time of those transactions appellee was mentally incapable of conducting any business transactions. Appellant answered, denying that appellee was lacking in mental capacity or that there was any unfairness or advantage taken by him in the transactions. The chancellor made a finding of facts in favor of appellee and decreed cancellation of the contract of sale referred to on condition that appellee refund the consideration received. The court also found in favor of appellee for the recovery of the sum paid by appellee in reimbursement of the difference in the purchase price of the interests in the land.

A very voluminous record is presented for our consideration, which involves merely the determination of the question of fact concerning the mental capacity of appellee at the time she executed the contract with appellant and at the time that she refunded the money to him.

It would serve no useful purpose to discuss the testimony in detail.

There are numerous witnesses whose testimony tends in more or less degree to establish the fact that appellee was lacking in mental and physical vigor at the time of the transactions in controversy, and much of the testimony tends to show that she was lacking in sufficient mental capacity to enable her to conduct the transaction intelligently. On the other hand, there were a large number of witnesses introduced who testified that they were well acquainted with appellee, and that, while she was far advanced in years and physically weak, her mental capacity was about normal, or at least that she was possessed of sufficient mental capacity to intelligently transact business. Appellee is more than seventy years of age, and the testimony undoubtedly establishes the fact that she has for several years been in a poor state of health and is physically weak. According to the testimony of a number of witnesses, her mentality is below normal, but we are of the opinion that, according to the clear preponderance of testimony, both in weight and numerical strength, appellee was not lacking in sufficient mental capacity to fully understand the transactions which she conducted with appellant.

She was not a woman of any business experience, so far as disclosed by this record, but she was capable of fully comprehending the extent and importance of the sales of property to appellant, and she was fully conscious of what she was doing when she refunded the sum of money sufficient to make up the difference between the three-fourths interest, which she thought she owned and conveyed, and the one-half interest which she in fact owned. The burden was on appellee to establish her case, and it was not sufficient merely to show that from time to time she displayed childishness and lack of mental vigor, for it devolved on her to prove that at the time she conducted the transactions she was mentally incapable of acting intelligently in matters of that importance.

Our conclusion, therefore, is that the decree of the chancellor is against the preponderance of the testimony, and it is, therefore, reversed and the cause is remanded with directions to dismiss the complaint for want of equity.

ARKANSAS ANTHRACITE COAL & LAND COMPANY v. DUNLAP.

Opinion delivered March 1, 1920.

1. COMPROMISE AND SETTLEMENT — NEW AGREEMENT.—Though a written contract for payment of royalties on coal mined provided for a settlement of disputes by arbitration, the parties could settle a disputed claim by a new verbal agreement without regard to the method of settlement specified in the original contract.
2. APPEAL AND ERROR — CONFLICTING EVIDENCE.—Where an issue was submitted on conflicting testimony and on an instruction requested by appellants, a verdict against them must be treated as settling the issue.
3. COMPROMISE AND SETTLEMENT—VERBAL AGREEMENT.—A complete oral agreement to settle a disputed claim arising under written contract binds the parties, even though it was also agreed that it was to be reduced to writing, which was never done.
4. COMPROMISE AND SETTLEMENT—ORAL AGREEMENT.—Even if the original agreement for payment of royalties was required to be in writing within the statute of frauds, a contract for settlement of a disputed claim under the original agreement was not within such statute.
5. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Where there was testimony legally sufficient to establish an issue submitted to the jury, the verdict is conclusive.
6. COMPROMISE AND SETTLEMENT—EVIDENCE.—In an action to enforce an oral settlement of a disputed claim arising under a written contract, it was competent to prove the making of the settlement.
7. WITNESSES—CONTRADICTION.—A witness can not be contradicted by proof of contradictory statements, without laying the proper foundation.
8. EVIDENCE — ADMISSIONS OF AGENT.—Admissions of an agent within the scope or apparent scope of his authority are admissible when made during the continuance of the agency, but not when made after the agency had ceased.

9. APPEAL AND ERROR—OBJECTION TO EVIDENCE.—An objection to evidence as an implied admission should be specific.

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

Paul McKennon and *James B. McDonough,* for aplants.

1. It was error to admit as testimony the conversation between Webb Covington and James K. Gearhart. 92 Ark. 159; 62 *Id.* 286; 69 *Id.* 648; 21 *Id.* 387.

2. It was error to admit any evidence in the case, as no cause of action was stated in the complaint. Kirby's Digest, § § 6096 to 6119; 64 Ark. 510; 44 *Id.* 205; 8 *Id.* 74; 49 *Id.* 277. The evidence was insufficient to take the case to a jury.

3. The court erred in admitting the evidence of Dunlap to the effect that he dealt with Gearhart as agent, as he had no authority to make the compromise.

4. A directed verdict should have been directed for appellants, as there was no evidence to sustain the verdict. K. & C. Dig., § 823, etc., and § 3996. The property was real estate and could not be conveyed orally. The minds of the parties never met. 135 Ark. 607; 95 *Id.* 155; *Ib.* 421; 90 *Id.* 88; 39 *Id.* 568.

5. The court erred in its instructions, and the case was submitted upon an erroneous theory. The alleged oral agreement was never consummated. The instructions should be based upon the issues raised by the pleadings. 110 Ark. 188; 52 *Id.* 120; 83 *Id.* 395; 87 *Id.* 243; 89 *Id.* 147; 95 *Id.* 85; 96 *Id.* 206.

6. The court erred in refusing the instructions asked by appellants. See cases *supra.*

Covington & Grant, for appellee.

1. Gearhart and Dunlap compromised and settled the disputed royalty upon a basis of $1,000. The jury has so found, and the evidence justifies the verdict. Gearhart had authority to bind appellants in the compromise settlement. 93 Ark. 600; 31 Cyc. 1661. The

evidence was competent and the jury were the sole judges of its weight. 50 Ark. 477; 19 *Id.* 121; 23 *Id.* 50; 26 *Id.* 360-362; 45 *Id.* 165; 41 *Id.* 331-343. See also 105 *Id.* 641.

2. It was not error to refuse to direct a verdict, as there was no conflict in the testimony. 103 Ark. 425; 98 *Id.* 388; 82 *Id.* 66; 80 *Id.* 190. The instructions fairly presented the issues to be tried and there was no error. 49 Ark. 235; 12 *Id.* 746; 127 *Id.* 28. The verdict is sustained by the evidence and should not be disturbed.

McCULLOCH, C. J. Appellants' assignors, and the predecessors of appellees, were originally under written contract with each other for the payment by the former to the latter of certain sums as royalties on coal to be mined from lands owned by the latter. The contract provided for a mode of arbitration of differences which might arise with respect to the amount of coal mined from the land. A controversy arose between appellants and appellees as to the amount due for royalties, and appellees instituted this action on the allegations that an oral contract was subsequently entered into between the parties for the settlement of the dispute by the payment of the sum of $1,000 to appellees in full settlement of the disputed claim. Appellants denied that there was any completed agreement for the settlement of the claim, and the case was tried below upon that issue. The trial resulted in a verdict and judgment for appellees.

It is contended that the case should not have been submitted to the jury for the reason that no cause of action was stated in the complaint and none supported by the evidence adduced. The argument is that, since there was originally a written contract between the parties, or their predecessors in title, which not only fixed the rights of the parties, but provided for a method of settlement of disputes, no cause of action was stated or proved, because it was not alleged or proved that the terms of the written contract were complied with by appellees.

The weakness of the argument lies in the assumption that the parties could not change the terms of the original contract by a new agreement, or settle a disputed claim by a new agreement without regard to the method of settlement specified in the original contract. The settlement of the disputed claim constituted a consideration for the agreement, and there was mutuality in the alleged agreement to settle according to the new terms stated.

Again, it is contended that it is shown by the undisputed evidence that the alleged oral agreement was not consummated, but that it was merely a part of negotiations between the parties which were to result, if finally agreed upon, in a written contract. That was, indeed, the contention of the witnesses introduced by appellants in the trial below, but the testimony on that subject was not undisputed. The testimony adduced by appellees tended to show that the terms of the contract of settlement were fully and definitely agreed upon, notwithstanding the fact that the agreement was to be reduced to writing and signed by the parties, and that appellants in preparing the written contract introduced into it new matter not in accordance with the oral agreement which frustrated the effort to reduce the contract to writing. The court submitted this issue to the jury upon an instruction requested by appellants themselves, and the verdict must be treated as settling the issue against the contention of appellants. If, as stated by the witnesses introduced by appellees, there was a completed oral agreement, the parties were bound by it, even though it was to be reduced to writing. *Friedman* v. *Schleuter,* 105 Ark. 580.

Even if the original written agreement with respect to payment of royalties was a matter within the statute of frauds so as to require evidence of the written agreement, the contract for the settlement of the disputed claim was not one within the statute of frauds, and it is not essential to its validity that it should be in writing.

The testimony adduced by appellees tended to show that this agreement for settlement of the disputed claim

was made with Mr. Gearhart, who was at that time the president of appellant corporations and was the active agent of appellants. There was testimony legally sufficient to establish the fact that the contract was entered into by Gearhart as alleged by appellees, that he was the president and agent of appellants, and that it was within the apparent scope of his authority to effect this settlement. That issue was submitted to the jury, and the verdict is decisive.

It is insisted that the court erred in permitting Mr. Covington, one of the appellees, to testify in regard to a conversation with Mr. Gearhart. Covington testified that the oral agreement was made with Gearhart and that its terms were accepted by appellees. This testimony was, of course, competent, as it had a bearing directly upon the main issue in the case whether or not there had been such contract entered into between the parties. He then testified that subsequently he went to Scranton, Pennsylvania, to see about the consummation of the settlement by payment of the sum agreed on, and that Gearhart stated to him that Mr. Denman, his successor, refused to pay the claim for the reason that appellants were not liable. Objection was interposed to this testimony.

It was not proper to admit this testimony for the purpose of contradicting Gearhart without laying the proper foundation, nor was it competent to prove the statement of Gearhart made subsequent to the transactions in which Gearhart was the active agent of appellants. If the transaction was within the scope, or apparent scope, of Gearhart's authority, then appellants were bound by it, but they were not bound by his subsequent admissions concerning the transaction. However, it does not appear that this testimony was introduced for the purpose of proving an admission on the part of Gearhart that appellants had entered into the contract as claimed by appellees. Mr. Covington was merely completing his narrative concerning the transactions between the parties by stating that after the contract had been

entered into he went to Scranton for the purpose of securing payment of the amount agreed on, but that payment was refused on the ground that Mr. Denman had denied liability on the part of appellants. This testimony did not constitute an express admission on the part of Gearhart that he had previously entered into the contract, and if appellants' counsel feared that the jury might interpret the statement as an implied admission on the part of Gearhart, attention to this should have been called to the court by a specific objection. It is too late now to condemn the ruling of the court on the ground that the testimony of Covington with respect to Gearhart's statement constituted an admission on Gearhart's part that the contract had been previously entered into and was incompetent on that account.

We find that there was sufficient evidence in the record to sustain the verdict, and that the issues were properly submitted to the jury.

Judgment affirmed.

WILLIAMS-ECHOLS DRY GOODS COMPANY v. WALLACE.

Opinion delivered March 1, 1920.

1. CARRIERS—ELEVATORS—CONTRIBUTORY NEGLIGENCE.—In an action for injuries to one riding in an unlighted elevator on a dark day, evidence *held* sufficient to warrant a finding that he was not guilty of contributory negligence in allowing his heel to extend beyond the platform of the elevator.
2. CARRIERS—CONSTRUCTION OF ELEVATOR—NEGLIGENCE.—The fact that the back wall of an elevator was so constructed that a beam jutted into the elevator hole so as to close up the space between the wall and the floor of the elevator, without affording some protection to one who inadvertently overstepped the edge of the elevator floor, was sufficient to authorize a finding of negligence.
3. CARRIERS—OPERATION OF ELEVATOR—INSTRUCTION AS TO NEGLIGENCE.—Where the complaint charged five acts of negligence, some of which apart from the other facts in the case may not have constituted actionable negligence, but all of which, taken together, tended to make out a charge of negligence, it was not error to refuse to exclude those acts from the consideration

of the jury, and an instruction submitting generally the question of negligence to the jury, without enumerating the alleged acts of negligence set forth in the complaint, was not error.

4. DAMAGES—INSTRUCTION.—In an action for damages for painful and disfiguring personal injuries, the court did not err in charging the jury that they should take into consideration the compensation to be awarded with reference to the pecuniary "and other losses," where the testimony showed that plaintiff received a very grievous injury which resulted in severe and long-continued pain and suffering, and a certain amount of disfigurement.

5. APPEAL AND ERROR — PRESUMPTION FROM FAILURE TO ABSTRACT TESTIMONY.—Where appellant failed to abstract the testimony as to appellee's earning capacity, and as to the probability of increase thereof, it will be presumed that the court was justified in submitting the issue.

6. APPEAL AND ERROR — IMPROPER EVIDENCE — EXCLUSION.—Where witness for plaintiff in an action for injuries received in defendant's elevator testified that defendant had since the injury made certain changes in the elevator to obviate danger, the prejudice was removed where plaintiff's counsel called attention to the fact that the testimony was not responsive to his questions and the court directed the jury not to consider it.

7. TRIAL—PROCEEDINGS TO IMPANEL JURY.—Where counsel for plaintiff had reason to believe that a liability insurance company was interested in the result of a personal injury action, it was not improper to permit counsel to interrogate veniremen concerning their connection with any liability insurance companies doing business in the locality.

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

James B. McDonough, for appellant; *J. Sam Wood,* of counsel.

1. It was error to permit plaintiff's counsel to ask the jurors whether they were stockholders in any insurance company writing indemnity insurance. 131 Ark. 6. This case fairly settles the present case. See also 104 *Id.* 1; 154 Pac. 159; 150 N. Y. S. 93; 154 S. W. 1070; 145 Pac. 1066; 172 S. W. 987; 166 S. W. 643; 146 N. Y. S. 762; 102 N. E. 778; 130 Pac. 986. The error was harmful. 90 N. E. 724; 159 N. W. 832. See also 79 N. E. 854; 126 S. W. 242. The only remedy is to reverse

the case to cure the error. 132 S. W. 974; 150 N. Y. S. 1093; 95 N. E. 10; 210 N. Y. 262; 206 *Id.* 20; 96 S. W. 530; 107 *Id.* 264; *Ib.* 1139.

2. It was error not to withdraw the case from the jury because of the voluntary remark of Tom J. Williams as to the place of accident. 78 Ark. 147; 48 *Id.* 460; 70 *Id.* 170; 79 *Id.* 388. No negligence whatever was proven in this case and it was harmful error to permit the voluntary statements of Tom Williams to go to the jury. *Supra.*

3. The court erred in the instructions given and those refused as asked by appellants. There was no evidence to show negligence of appellants and the issue should have been taken from the jury. 95 Ark. 597; *Ib.* 623; 77 Ark. 599; 82 *Id.* 131; 4 Crawford's Digest, pp. 4999 to 5008. The allegation of negligence of Williams in starting the elevator is not supported by any evidence. The scintilla doctrine does not apply. 118 Ark. 349; 122 *Id.* 445; 114 *Id.* 113.

4. It was especially error to give No. 6 for plaintiff. 82 Ark. 499.

5. A directed verdict for defendant should have been given. 85 Ark. 479; 89 *Id.* 562; 105 *Id.* 526; 111 *Id.* 309. The negligence of plaintiff is undisputed and established as matter of law. 89 Ark. 24; 104 *Id.* 267; 107 *Id.* 158.

Vincent M. Miles, for appellee.

1. There was no error in interrogating the jurors. 131 Ark. 6; 127 *Id.* 63.

2. The cases cited by appellant on the errors in instructions are not applicable here. 93 Ark. 397; 80 Cal. 575. Negligence of appellant was shown and the instructions contained no error. 127 Ark. 163; 213 U. S. 150; 128 Ark. 479; 87 *Id.* 109; 90 *Id.* 494.. No contributory negligence was proved. 85 Ark. 479. The jury has settled by their verdict the question of negligence and there are no reversible errors in the instructions.

McCULLOCH, C. J. Appellant, a domestic corporation, is engaged in the wholesale dry goods business in the city of Fort Smith, and operates an elevator which transports passengers and freight from floor to floor in the store building. Appellee received severe personal injuries while ascending from one floor to another in the elevator, and he instituted this action to recover compensation for his injuries, alleging that the same were caused by the negligence of appellant in the construction and operation of the elevator. There was a denial in the answer of each of the allegations of negligence, but a trial of the issues before a jury resulted in a verdict in appellee's favor assessing damages in the sum of $7,000.

Appellee went into the store of appellant to purchase certain articles of merchandise, and was invited by a salesman into the elevator to be carried to an upper floor of the building for the purpose of being shown the articles sought to be purchased. The elevator was used for lifting freight as well as passengers, and was operated by means of a rope cable handled by the operator. When appellee entered the elevator he was accompanied by two of the employees of appellant, both of whom were salesmen, and one of whom was on this particular trip operating the elevator. There was an incandescent electric lamp hanging immediately in front of the elevator, but it was not lighted at that time, though according to the evidence the day was a dark and cloudy one. There was a closed door on the opposite side of the elevator from the side on which appellee and his companions entered. The elevator was enclosed by a brick wall, and beneath the door on the back side was a wooden beam seven or eight inches wide and three and a half inches thick, which extended out into the elevator hole about eighteen inches above the line of the first floor of the building. When the elevator stood at the first floor, there was a clearance of about three and a half or four inches between the elevator floor and the brick wall on the back side, but when the elevator passed the beam just referred to in ascending, this clearance was completely taken up,

and the floor of the elevator came nearly in contact with the beam as it passed. Above the beam there was a space of about eighteen inches, the thickness of the brick wall, between the inside of the elevator hole and the closed door. The brick wall, the beam and the closed door were, according to the testimony, painted the same color, and, in the semi-darkness which prevailed when the light was not turned on, it was not easy to discover the beam jutting out into the elevator hole. When appellee walked into the elevator, he stepped over to the back side and turned around fronting the door through which he had entered and took a position with his heel partly extending over the clearance space between the floor of the elevator and the brick wall at the back. He was not aware of the fact that his heel thus extended over the clearance, nor that the beam jutted out into the hole so as to close up the clearance space as the elevator ascended. Mr. Williams, one of the salesmen, took hold of the cable and started the elevator upward, and as it arose to the beam appellee's heel was caught, and very serious and severe injuries were inflicted.

It is unnecessary to discuss the extent of the injury further than to say that the proof was sufficient to warrant the recovery of the amount of damages awarded by the jury.

There were five acts of negligence charged against appellant, which are set forth in the brief of counsel in the following order:

"*First.* Negligent operation of the elevator without any railing, board or other obstruction around the back of the elevator; *second,* negligently permitting the elevator well to be suddenly reduced by the beam, the beam coming abruptly out from the wall, thus suddenly reducing the clearance; *third,* negligent failure to have a flange of board or metal inclining from the beam downward toward the wall; *fourth,* negligently failing to have a light in front of the elevator; *fifth,* the negligence of Tom Williams in suddenly starting the elevator upward."

It is contended, in the first place, that the evidence is not sufficient to warrant the finding of negligence in either of the respects mentioned. We are of the opinion, however, that there was sufficient evidence to support a finding of negligence on the part of appellant in the construction and operation of the elevator, and also there was sufficient evidence to support the finding that appellee was not guilty of contributory negligence. It was a dark and gloomy day and the electric lamp in the front of the elevator was not lighted. The back wall of the elevator was so constructed as to be deceptive in appearance and to mislead a person entering the elevator for the purpose of ascending to another floor. The jutting of the beam out into the elevator hole so as to close up the space between the wall and the floor of the elevator, without affording some sort of protection to one who inadvertently overstepped the edge of the elevator floor, was sufficient to constitute negligence, or at least to authorize the inference of negligence from those facts.

The court gave, at appellee's request, instructions submitting generally the question of negligence to the jury without enumerating in detail the alleged acts of negligence set forth in the complaint. Appellant asked five separate instructions excluding from the consideration of the jury each of the alleged acts of negligence, and it is now argued, as grounds for reversal, that at least three of those alleged acts did not constitute negligence and were not the proximate cause of appellee's injuries and should have been taken from the jury by the three requested instructions. The instructions which it is contended the court should have given relate to the first, third and fifth acts of negligence set forth above.

Those acts may not of themselves, separate and apart from the other facts in the case, have constituted actionable negligence, but they tended to make out the charge of negligence as a whole, and it would not have been proper for the court to exclude those acts from the consideration of the jury. For instance, the failure to construct a railing or board around the back of the ele-

vator would not of itself have constituted negligence, but it was a fact proper for the consideration of the jury in determining whether or not appellant had adopted proper means of avoiding injury which might result from the uneven surface of the back wall caused by the extended beam. The failure to provide a flange extending from the beam downward to the floor line did not of itself constitute negligence, but it could have been considered by the jury as a proper method to be adopted in avoiding injury. The fact that the elevator was suddenly started after appellee walked in was not of itself negligence, but if there had been more time and deliberation, appellee might have discovered the perilous situation, and it was, therefore, proper for the jury to consider the fact that the light was not turned on and that the elevator was started immediately after he walked in.

There are numerous other assignments of error with respect to the rulings of the court in giving and refusing instructions, but none of them are of sufficient importance to call for discussion, except the one which relates to the sixth instruction, given at the request of appellee, in which the jury were told that in assessing the damages they should take into consideration the compensation to be awarded "with reference to the pecuniary and other losses which plaintiff has sustained," and which also told the jury that they might consider the "probable increase or diminution" of the earning capacity of appellee. It is argued that it was improper to use the words "and other losses," as there was no testimony to support a finding that there were losses other than those mentioned in the instructions. It will be observed that these words were used in connection with the word "pecuniary" and surely it cannot be contended that pecuniary losses were all the only ones that appellee sustained. He received a very grievous injury, which resulted in severe and long continued pain and suffering, and also in a certain amount of disfigurement, and these were all matters for the jury to consider.

Again, it is argued that as appellee was shown to be a man of about 72 years of age, there was no probability of increase of his earning capacity, and that it was error for the court to submit that issue to the jury. It is true that the testimony as abstracted shows that appellee was about 72 years of age, but he was still active in his business as a contractor. Appellant refrains from abstracting the testimony as to appellee's earning capacity and the probability of an increase on account of the conditions of the times, and we must, therefore, assume that there was evidence which has not been abstracted which justified the court in submitting that issue to the jury.

A reversal is sought on the ground that Mr. Williams, one of the witnesses introduced by appellee, made a statement in his testimony to the effect that appellant had, since the injury to appellee, made certain changes in the construction of the elevator so as to obviate the dangers. It is true that Mr. Williams, the witness in question, in responding to questions propounded him by appellee's counsel, undertook to state how the defects in the elevator could be cured, and, after describing the manner in which the defects could be corrected, he added that it had been done in that way, meaning that appellant had made the changes since the occurrence of the injury to appellee. Appellant's counsel at once interposed an objection, and appellee's counsel responded by calling attention to the fact that the statement of the witness was not responsive to his questions, and that he disclaimed any intention of drawing out that class of testimony. The court then directed the jury not to consider the testimony. Of course, the testimony was incompetent, but we think that prejudice was removed by the court excluding the statement from the consideration of the jury.

Finally, it is contended that there ought to be a reversal on account of the alleged misconduct of appellee's counsel in interrogating veniremen concerning connections with liability insurance companies. It appears from the record that before the trial commenced counsel for appellee made inquiry of appellant's counsel, apart

from the court and jury, stating that he had reason to believe that the attorney, Mr. McDonough, represented a liability insurance company, and asked him whom he represented in the case, and Mr. McDonough declined to give any information on that subject. In the examination of the veniremen, appellee's counsel propounded to them the inquiry whether or not they were employed by or were stockholders in any liability insurance company doing business in Fort Smith. It is conceded that appellant was protected to the extent of $5,000 by an insurance policy, but appellant's counsel declined to give information as to the particular company in which appellant carried its liability insurance. Appellee was entitled, in the examination of veniremen, to ascertain whether or not they were interested in any insurance company which carried insurance for appellant, and the questions propounded did not go beyond the limit of propriety so as to unduly emphasize the fact that appellant was protected wholly or in part by indemnity insurance. There is nothing to indicate that counsel for appellee was not acting in perfect good faith in his inquiry of appellant's counsel and also in propounding the questions to the veniremen. Counsel stated that he had reason to believe that the attorney for appellant was representing a liability insurance company, and it turned out to be true that such insurance company was directly interested in the result of the trial. There was nothing in the conduct of counsel for appellee to indicate bad faith. The facts of the case bring it within the rule announced by this court in the case of *Cooper* v. *Kelly,* 131 Ark. 6.

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

SPEAR v. SCOTT.

Opinion delivered March 1, 1920.

1. REPLEVIN—SUFFICIENCY OF EVIDENCE.—In an action to recover possession of certain machinery evidence *held* sufficient to sustain a finding of the jury that defendants failed to deliver part of the machinery in response to plaintiff's demand.
2. REPLEVIN—COSTS.—In an action to recover several pieces of machinery where plaintiff recovered only one of them, he is entitled to recover costs of the action.
3. COSTS—TENDER AS AFFECTING.—In an action of replevin, defendant could not escape liability for costs by tendering the property in the midst of the trial in the circuit court.
4. COSTS—MOTION TO RETAX.—The right to recover the property sued for in an action of replevin must be tested by the evidence adduced in the trial of the action, and not by testimony introduced at the hearing of a motion to retax costs.

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

Sam R. Chew, for appellants.

The proof in the circuit court, as it did in justice's court, failed to show that the original taking was tortious, indeed no taking at all, and wholly failed to show demand made by appellants before suit for delivery of the inspirator. Under the facts it was unjust to tax the costs against appellants. In replevin where the original taking was not tortious, *demand* before suit is *essential.* Here the proof shows no demand made for the inspirator or pump, and no proof of wrongful taking by appellants. 35 Ark. 169; 82 *Id.* 362. Under the proof appellant's motion to retax the costs should be sustained.

O. D. Thompson, for appellee.

The evidence is conclusive that Scott made a demand for the inspirator. There is no error in admitting testimony, nor in the instructions, and the verdict is fully sustained by the evidence. 35 Ark. 169; 82 *Id.* 214.

McCULLOCH, C. J. Appellee instituted this action against appellants before a justice of the peace in Craw-

ford County to recover possession of a belt, a whistle and an inspirator used as a part of a saw mill plant.

It appears from the testimony that appellee sold certain lands and a stock of merchandise to appellants at a stated price, and subsequently there was an agreement for rescission of the sale of merchandise in consideration that appellee was to retain an old boiler and saw rig on the land which had been sold. The testimony tends to show that the belt, the whistle and the inspirator were parts of the machinery mentioned in the contract.

The case was tried in the circuit court on appeal from the justice of the peace, and the verdict of the jury was in favor of appellee for recovery of the inspirator and against him as to the other articles sued for, viz.: the belt and whistle. The court thereupon rendered judgment in favor of appellee for recovery of possession of the inspirator and for the costs of the action. Appellant filed a motion to retax the cost and for a judgment in favor of appellants for the cost of the action on the ground that they had not refused to deliver possession of the inspirator, and that the verdict was in their favor as to the other two articles, which constituted the entire subject-matter of the controversy. The court overruled the motion, and an appeal has been prosecuted to this court.

There was a controversy in the trial of the cause as to whether or not there had been a wrongful detention of the inspirator. Appellee testified that he made demand for each of the articles claimed, but that appellants refused to deliver the articles. He testified that he sent his wagons to get the boiler and engine and the articles involved in this litigation, and wrote a letter asking for these particular articles, and that he received a letter in reply disputing his claim to the whistle and belt and claiming that the inspirator was not there. It was also stated in the letter written by appellants that all of the property that belonged to appellee had been loaded on the wagon except the boiler and engine. Appellants testified on the trial of the case in the circuit court that they

had never claimed the inspirator and did not know that there was one left on the place until after the trial before the justice of the peace. They stated in their testimony that they did not then claim the inspirator, and that appellee could have it when he called for it.

There was enough conflict in the testimony to justify the finding of the jury that appellants failed to deliver the inspirator in response to the demand of appellee. This being true, appellee was entitled to judgment for the costs, notwithstanding his failure to recover the other two articles sued for. According to the testimony, viewing it most favorably to appellee, the first time that appellant offered to surrender possession of the inspirator was in the midst of the trial in the circuit court, when all of the costs of the action had accrued. They could not escape liability for costs by tendering possession of the inspirator at that time, even if the statement of the witnesses on the witness stand could be treated as a tender. It is true that each of the appellants testified at the trial in the circuit court that they had stated in the trial in the justice of the peace court that they had not claimed the inspirator and that appellee was welcome to come and search for it and take it if he could find it, but that statement was disputed by the testimony of appellee that he had no recollection of any such offer before the justice of the peace.

The right to recover must be tested by the evidence adduced in the trial of the action, and not by testimony introduced at the hearing of the motion to retax the cost. The question of wrongful detention having been an issue in the trial of the main action, the verdict of the jury was conclusive, and that question could not be tried over again on motion to retax the cost.

That question was properly submitted to the jury in the court's charge. The court refused to give an instruction requested by appellants but gave one on the court's own motion on the same subject which correctly stated the law applicable to the case.

Finding that there was testimony legally sufficient to support the verdict on the issue as to whether or not the inspirator had been wrongfully detained, it follows that the judgment of the circuit court must be affirmed, and it is so ordered.

HARDIN v. FORT SMITH DISTRICT OF SEBASTIAN COUNTY.

Opinion delivered March 1, 1920.

1. PROSECUTING ATTORNEYS—SALARY—PAYMENT.—Acts 1919, page 248, fixing the amount of compensation of the prosecuting attoreny of the twelfth judicial district, and apportioning its payment between the State treasury and the counties of the district, did not contemplate its payment out of the general revenues of the counties, but out of the fees actually received and paid into the treasury of such counties.
2. PROSECUTING ATTORNEYS—PAYMENT OF SALARY.—Under the above act, the prosecuting attorney is entitled to full salary if earned fees paid into the county treasuries during his full term of office amount to that much, and the fact that the earned fees in a given month are insufficient to pay his salary for that month is no reason why the salary should not subsequently be allowed and paid if the earned and collected fees during the term are sufficient to pay the whole salary.

Appeal from Sebastian Circuit Court, Fort Smith District; *John Brizzolara*, Judge; affirmed.

Edward P. Hardin, Covington & Grant and *George W. Dodd,* for appellant.

The case in 215 S. W. 709 settles the only question raised here, that the county is liable for the salary claimed under Acts 1919, No. 337. The meaning of the Legislature is determined from the language of the act. 36 Cyc. 1116; 104 Ark. 597; 36 Cyc. 1114. The act fixing the salary is not unconstitutional and the judgment should be reversed. 132 Ark. 245.

Vincent M. Miles, for appellee.

The question raised, whether the prosecuting attorney is entitled to the compensation fixed by the act

March 22, 1919, regardless of the amount of fees earned by him and paid into the county treasury or whether he must earn the compensation fixed by the act before he receives it. The constitutionality of the act was settled in 140 Ark. 398. The act was a limitation upon the amount the prosecuting attorney should receive from the fees and perquisites collected by him and turned into the county treasury. 85 Ark. 89; 215 S. W. 709.

McCULLOCH, C. J. Appellant is the prosecuting attorney for the Twelfth Judicial District, which is composed of Scott and Sebastian counties, and he has appealed from a judgment of the circuit court, rendered on appeal from the county court for the Fort Smith District of Sebastian County, refusing to order a warrant on the treasury for the amount of his compensation, as fixed by statute, for the month of November, 1919.

The General Assembly of 1919 (Acts 1919, p. 248) enacted a statute fixing the amount of compensation of the prosecuting attorney of that circuit to be paid by each of the respective counties, and by each of the two districts of Sebastian County. The total amount of compensation, in addition to the salary of $200 to be paid out of the State treasury, was fixed at the sum of $2,700, of which the sum of $1,800 was apportioned to the Fort Smith District of Sebastian County.

The statute was construed by this court in the recent case of *Dobbs* v. *Holland,* 140 Ark. 398. The constitutionality of the statute was attacked on the ground that the office of prosecuting attorney is a State office, and that the Legislature cannot put the office on a salary basis to be paid out of the funds of the respective counties. This court upheld the validity of the statute, however, and as a reason for the decision it was held that the effect of the statute was to provide for compensation payable out of fees earned by the prosecuting attorney as fixed by statute and paid into the county treasury. In disposing of the matter, the court stated in the opinion that it is "a fair construction of the act to say that the Legis-

lature intended that the compensation fixed in the act should be paid out of the fees which the act provided should be collected and paid into the county treasury." The conclusion of the court was summed up in the last sentence of the opinion as follows:

"We conclude, therefore, that the salary of the prosecuting attorney has not been increased beyond the constitutional limitation, but that a compensation has been fixed payable out of the fees which he earns, and that the act does not, therefore, offend against the Constitution."

There is no escape from the effect of the decision in that case that it was not intended that the prosecuting attorney should receive compensation out of the general revenues of the counties, but that the amount of compensation to be paid out of the treasury was to be limited to the amount of fees actually received and paid.

It appears that the fund in the treasury accruing from earned fees of the prosecuting attorney has been exhausted by warrants drawn for the salary of previous months, and the judgment of the circuit court in refusing to order a warrant on the treasury was, therefore, correct.

We deem it not inappropriate to say at this time, in order to avoid future controversy on the subject, that the prosecuting attorney is entitled to the full amount of the salary if the earned fees during his full term of office amounts to that much. The salary is payable in monthly installments, but the fact that the earned fees in a given month are insufficient to pay the salary for that month is no reason why the salary should not subsequently be allowed and paid if the earned and collected fees during the term are sufficient to pay the whole salary. The case is in this respect controlled by the decision of this court in the case of *Rowden* v. *Fulton County,* 132 Ark. 245.

Judgment affirmed.

HUMPHREYS, J., dissents.

NORTH AMERICAN UNION v. JOHNSON.

Opinion delivered March 1, 1920.

1. INSURANCE—FOREIGN FRATERNAL BENEFIT SOCIETY—DOING BUSINESS IN STATE.—Where a foreign fraternal benefit society takes over the business of another society having local lodges and agents in the State and assumes certificates and deals with local agents relative to claims and continuance of business, it is doing business in the State, within the meaning of Acts 1917, page 2087, relating to service of process.
2. 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 the Insurance Commissioner was its agent upon whom legal process directed against it might be served.
3. INSURANCE—BENEFIT CERTIFICATE—LAWS GOVERNING.—Where a certificate issued by a foreign fraternal benefit society recited that the constitution, laws, rules and regulations of its society were made a part thereof, and its laws expressly provided that its contracts should be construed as Illinois contracts, the validity of such certificate must be determined by the laws of that State.
4. CORPORATIONS—POWERS.—Corporations can exercise such powers only as may be conferred by the legislative bodies creating them, either by express terms or by necessary implication.
5. INSURANCE — BENEFIT SOCIETIES — POWER TO MERGE.—Under the laws of Illinois a fraternal benefit society has no power to merge with another fraternal benefit society where its charter did not permit such merger, and the merger was not essential to effectuate the objects and purposes of its creation.
6. INSURANCE—CERTIFICATE ISSUED WITHOUT MEDICAL EXAMINATION. —Under the laws of Illinois a certificate issued by a fraternal benefit society of that State without a medical examination is *ultra vires* and void, and neither party to the certificate can be estopped by any acts under it to deny its validity.
7. INSURANCE—BENEFIT SOCIETY—VALIDITY OF CERTIFICATE.—Though an Illinois benefit society without authority formed a merger with another society doing business in this State, yet where it proceeded to deal with the individual members of the latter society and issued a certificate to plaintiff's decedent conditioned upon his acceptance thereof, the certificate became a contract of the foreign society unaffected by the merger.
8. INSURANCE — ADOPTION OF MEDICAL EXAMINATION.—Where the Illinois statutes made void benefit certificates issued without a medical examination, but left the method of examination to the

society, a certificate issued to a member of another society adopting the medical examination made by that society is a compliance with the statute.

9. INSURANCE—BENEFIT CERTIFICATE—FORFEITURE.—Whether an insured under a benefit certificate, in violation of its terms, used narcotic drugs to such an extent as to impair his health, so as to cause a forfeiture of his benefit certificate, *held* under the evidence to be a question for the jury.

10. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Where it can not be said as a matter of law that there is no substantial evidence to sustain the verdict, it is conclusive on appeal.

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

T. E. Helm and *Sherrill, Buchanan & Mallory,* for appellant.

1. No proper service was had upon appellant, and the court had no jurisdiction, as it was a fraternal beneficiary society of Illinois with its office in Chicago, and it never applied for a license and was never authorized to do business in Arkansas. Acts 1917, § 17, art. 462; 59 Ark. 593, 606-7; 218 U. S. 573; 197 N. Y. 279; 139 Am. St. Rep. 879; 251 Fed. 171; 204 U. S. 8, 21-2. The attempted service upon the State Insurance Commissioner of Arkansas was invalid.

2. The merger between appellant and the Knights & Ladies of Honor was *ultra vires* and void. Rev. Stat. of Ill., ch. 73, § 7; *Ib.,* § 9; Acts 1917, art. 462; 168 Ill. App. 328; 94 Ark. 27, 31-2; 87 *Id.* 587; 95 *Id.* 371; 96 *Id.* 602; 157 Ill. 651; 191 Ill. 40; 168 *Id.* 360; 186 *Id.* 196; 215 *Id.* 193; 187 Ill. App. 469; 141 S. W. 333; 88 *Id.* 261; 118 *Id.* 396; 81 Neb. 380. The powers conferred upon appellant are not such as would permit any implied power to reinsure members of another company.

3. The appellant having no power, either express or implied, to issue the contract involved can not be estopped from setting up *ultra vires.* 185 Ill. 40; 181 *Id.* 44; 186 *Id.* 199; 91 Ill. App. 547; 97 *Id.* 70; 215 Ill. 193; 187 Ill. App. 459.

4. The trial court failed to give full faith and credit to the decisions of the courts of Illinois defining the powers and liabilities of fraternal benefit societies. 185 Ill. 183, 196; 215 *Id.* 193; 187 Ill. App. 469; 237 U. S. 543; 89 Md. 631; 82 Conn. 318.

5. The trial court in failing to follow the decree of *Kenniston* v. *Fraternal Aid Union, N. Am. Union and K. & L. of Honor,* failed to give full faith and credit to the judgment of the courts of Illinois. 191 U. S. 319; 85 Va. 901; 60 Md. 93; 37 Ala. 626; Const. U. S., art. 4, § 1; 218 U. S. 1; 247 *Id.* 151; 245 *Id.* 149; 237 U. S. 545.

6. The court erred in refusing to direct a verdict. The certificate was void. The evidence is conclusive that Johnson's health was impaired by use of narcotic drugs. 129 Ark. 159; 104 *Id.* 545.

7. The court should have given special interrogatory requested by defendant. 36 Ark. 371; 12 L. R. A. (N. S.) 88; 50 *Id.* 900; 87 Kan. 719.

8. The court erred in refusing instruction 6 for defendant. 253 Ill. 462; 31 S. W. 493; 140 Fed. 978; 104 Ark. 544.

W. H. Pemberton, for appellee.

1. The testimony shows that defendant was "*doing business in this State.*" 213 U. S. 245; 115 Ark. 272, 293; 115 *Id.* 528. Service was had upon the Insurance Commissioner and J. L. Hawkins, an agent of appellant, and a certified copy of the complaint was served upon it. 90 Ark. 48.

2. This was a proceeding *in rem* as well as *in personam,* and appellant was properly in court. The entry of appearance by counsel for appellant as to the ownership of funds garnished was full and complete for all purposes.

3. The alleged merger and *ultra vires* does not prevent a recovery in this case. 208 Mass. 411, 94 N. E. 685; 36 L. R. A. (N. S.) 597. This case is on all-fours with this. See also 131 Mass. 258; 96 Ark. 595; 74 *Id.*

377; 91 *Id.* 376; 77 *Id.* 109; 86 *Id.* 287; 82 N. W. 965; 70 Iowa 461.

4. The courts of Illinois have never passed favorably upon the contention of appellant that liability could be escaped by the plea of *ultra vires,* but if so the decisions are clearly in the teeth of the other State and U. S. decisions. 23 Ark. 523; 50 So. 248; 119 S. W. 946; 11 Cyc. 663; 32 Ark. 332; 1 Cyc. 36; 155 Ill. 617. When foreign corporations come into this State to do business they must conform to our laws. 173 Ill. 621; 182 Ill. 551.

5. The verdict of the jury and its answer to interrogatory is amply supported by the evidence and the certificate was not void. In conclusion the court had jurisdiction by service and entry of appearance and the doctrine of *ultra vires* does not appply and there is no reversible error.

Gardner K. Oliphint, amicus curiae.

1. The court had jurisdiction. Defendant's exceptions to the motions to quash were *en masse.* 78 Ark. 7; 105 *Id.* 157. Nor is the first motion abstracted. 81 *Id.* 327; 111 *Id.* 509. The exceptions were waived. 27 *Id.* 506; 79 *Id.* 176. Defendant entered its appearance. 140 Fed. 921; 1 *Id.* 471; 19 Okla. 115; 91 Pac. 864; 136 *Id.* 584; 95 Ark. 307. Defendant waived all objections to jurisdiction by failing to preserve its objections and exceptions and by its special appearances. 77 Ark. 416; 214 S. W. 1.

2. The alleged *ultra vires* of defendant's failure to insist upon compliance with certain of its own requirements. In the absence of proof of Johnson's age, the reinsurance was not contrary to Illinois law. This court need not consider the decisions cited in brief of appellant like 215 Ill. 190, 74 N. E. 121. The corporation, having made a contract of reinsurance and having received full consideration, can not avoid its contract by the plea of *ultra vires.* 120 Ill. 128; 11 N. E. 331; 212 Ill. 532;

74 N. E. 121; 79 *Id.* 133; 102 *Id.* 753; 187 Ill. App. 469; 208 Mass. 411; 94 N. E. 685.

WOOD, J. The Knights and Ladies of Honor was a fraternal insurance corporation organized under the laws of the State of Indiana and licensed to do business in Arkansas. On the 26th of April, 1916, it issued to Richard T. Johnson its certificate or policy of insurance for $2,000 in which Bonnie B. Johnson, the appellee, was named as the beneficiary.

On the 24th of August, 1916, the Knights and Ladies of Honor attempted to merge with the North American Union, the appellant. The appellant is a fraternal insurance society of the State of Illinois. It has never been licensed to do business in this State. After this attempted merger, the appellant on the 25th of October, 1916, issued its "certificate of membership" to Richard T. Johnson, which among other things provides:

"That, under and by virtue of merger and consolidation, made and entered into by and between the North American Union and the Supreme Lodge, Knights and Ladies of Honor, which became of full force and effect on the 24th day of August, 1916, and which said agreement, and all the terms and conditions thereof, together with the constitution, laws, rules, and regulations of the said North American Union, are hereby made a part thereof; that Richard T. Johnson, holder of benefit certificate No. 15422, issued by the said Supreme Lodge, Knights and Ladies of Honor, is entitled to the privileges of membership in the said North American Union, as acquired under, to the extent of, and according to the terms and conditions of said agreement of merger and consolidation, and the laws, rules, and regulations of the said North American Union.

"The North American Union hereby assumes and agrees to pay to the lawful beneficiary or beneficiaries of said member, in the event of the death thereof, while in good standing, and the furnishing of satisfactory proof as to the fact and cause of the death of said member, the

amount of insurance in force and effect, and payable upon the death of said member, according to the provisions of the said benefit certificate and the constitution, laws, rules, and regulations of the said Supreme Lodge, Knights and Ladies of Honor, in force and effect at the time of the execution of said agreement, provided that said member has made all payments in the time, manner and amount required and has complied with the laws, rules, and regulations of the said North American Union now in force, or thereafter enacted or adopted and the terms and conditions of the aforesaid agreement.

"This certificate shall be null and void, unless said member, at the time of the issuing thereof, is in good standing, etc."

Richard Johnson died on the 31st of October, 1917.

The appellee instituted this action against the appellant on the above certificate, alleging that the insured at the time of his death was in good standing with the Knights and Ladies of Honor and with appellant; that the appellant was a foreign corporation and doing business in this State, but had not complied with the laws of Arkansas by appointing an agent upon whom the service of process could be had. She further alleged that one J. L. Hawkins, the garnishee, was the collector and secretary of the appellant and had in his hands money belonging to the appellant. She prayed for a writ of garnishment against him, and that he be enjoined from paying over the funds in his hands to appellant and that she have judgment against the appellant for the amount of the policy.

Summons was issued and was returned "duly served by delivering a true copy thereof to J. L. Hawkins, agent for the within named North American Union and a copy to Bruce Bullion, State Insurance Commissioner, as therein commanded."

The appellant entered its appearance specifically for the supreme purpose of moving to quash service alleging that J. L. Hawkins was not its agent and further alleging that appellant had never engaged in business in the State of Arkansas and had never consented to having summons

served upon the Insurance Commissioner. The court overruled the motion to quash the service. The appellant then filed its answer but without waiving its plea of insufficient service.

In its answer the appellant set up three defenses. First, that the certificate issued by it was void for the reason that the attempted merger between the appellant and the Knights and Ladies of Honor was in violation of law and *ultra vires*. Second, that no application for membership in appellant had ever been made by Richard T. Johnson and no medical examination of him was ever made, and that he, therefore, never became a member of appellant in the manner and form prescribed by the State of Illinois and the laws of appellant in such cases made and provided. Third, that Richard T. Johnson had violated the laws of appellant in that he used heroin and other narcotic drugs to such an extent as to impair his health, which was expressly prohibited by the constitution and laws of appellant, and that in doing so he forfeited all of his rights in the certificate.

The issues of fact were sent to the jury under instructions. The trial resulted in a verdict and judgment in favor of appellee. From that judgment is this appeal.

First. Appellant contends that no service was had upon it and that the trial court was, therefore, without jurisdiction.

The supreme secretary of the appellant testified that the appellant was an Illinois corporation; that J. L. Hawkins, the secretary and collector of Mimosa Lodge of the Knights and Ladies of Honor, held no position with appellant and received no compensation directly or indirectly from appellant; that the local councils of appellant elected their own officers, including secretary and collector or agent, for the collection of dues and assessments of the members of the local council; that the supreme council had nothing to do with whom the local council should appoint to serve as such officer or agent. The supreme council merely received such money as was sent to it by the local treasurer or local officers. The keeping

and maintaining of the membership in good standing by the supreme council is a matter entirely within the control of the local council. He further testified, that the appellant had never done any business in this State.

James L. Hawkins testified that he was the secretary and collector of Mimosa Lodge of the Knights and Ladies of Honor, having been elected to that office by the local lodge prior to the merger with the appellant. He began collecting for the appellant after the merger. He received instructions from the appellant only in a general way. It instructed witness to collect and send the money on two different occasions in a circular letter sent out by the secretary. When collections were made from members of the local lodge, witness gave them a receipt furnished by the supreme secretary of the appellant. The appellant finally refused to send receipts, possibly in June, 1918. This was after the garnishment was served upon the witness. Witness had had some correspondence with the different officers of the appellant.

The correspondence was exhibited. It shows that the witness notified the appellant of the death of members, and received from it blank forms for use in submitting proofs of deaths to the appellant with instructions when same were completed to forward the same to appellant. Also inclosed blanks for suspension notice and certificates of good health and applications for reinstatement, stating that it was the desire of the appellant to have these blanks put in use by all former councils of the Knights and Ladies of Honor and instructing witness how and when to proceed in case of suspensions and reinstatement.

Witness further testified that he forwarded to the appellant on an average of about $275 a month from the time of the merger until the writ of garnishment was served on him. Witness reinstated five or six members according to the directions of appellant, and witness reissued a policy to one of the members on one of its forms. The appellant paid one death claim and had others under consideration. Witness at appellant's instance had pro-

duced proofs of death and under appellant's instructions had collected the war tax from the members of the local lodge of Knights and Ladies of Honor. The appellant sent witness publications for distribution to members of the local lodge, and in a general way appellant urged witness to go ahead, look after the membership, keep up the dues and send a draft to the general office. Appellant urged witness to do what he could to keep the local lodge together.

I *North American Union* v. *Oliphant,* 141 Ark. 346, we said: "We think taking over the membership of the Knights and Ladies of Honor, adopting the local organization of this order as its local organization, 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 representatives to solicit insurance, constitute a doing of business in the State under the statute."

In *Sovereign Camp, Woodmen of the World v. Newsom, ante* p. 132, we held that where a fraternal organization has a central or supreme governing body with local lodges through which the membership is recruited and by the officers of which assessments are collected and remitted, that the local organization and its officers to whom are committed these duties are to be considered the agents of the governing body; that this agency is subject to the ordinary rules applicable to agencies of the same general character in the business of ordinary life insurance; that the officer of a subordinate lodge charged with the duty of notifying the members of assessments made by the supreme lodge for the purpose of paying insurance certificates of deceased members and of collecting and forwarding to the supreme lodge such assessments is an agent of the supreme lodge in the performance of these duties.

It follows from the above decisions that the appellant was doing business in this State and is estopped from denying that the Commissioner of Insurance was

its agent upon whom legal process directed against appellant might be served. The court did not err, therefore, in overruling appellant's motion to quash the service. The service of summons upon the Insurance Commissioner, under the facts disclosed by this record, was sufficient to give the trial court jurisdiction over the appellant. *North American Union* v. *Oliphint, supra,* and cases there cited.

Second. The appellant contends that the merger between appellant and Knights and Ladies of Honor under which the certificate was issued on which this suit was based, was *ultra vires* and void, and that the performance of the alleged contract of insurance on the part of the assured Johnson and the conduct of its officers and agents in accepting the benefits of such performance. did not estop appellant from setting up the defense of *ultra vires,* and from denying liability.

The certificate of insurance issued by appellant upon which this suit is based, if valid at all, is an Illinois contract, and governed by the laws of that State, which is the domicile of the appellant. The certificate itself recites that the "constitution, laws, rules, and regulations of the said North American Union are hereby made a part thereof."

Section 7 of the laws of appellant provide that the contract of membership in the order shall in all cases be construed according to the laws of the State of Illinois.

The laws of the order also form part of the contract of insurance. *Sovereign Camp, Woodmen of the World* v. *Newsom, supra,* and cases there cited.

In *Royal Arcanum* v. *Green,* 237 U. S. 532, it is held that "The rights of members of a corporation of a fraternal or beneficiary character have their source in the constitution and by-laws of the corporation and can only be determined by resort thereto and such constitution and by-laws must necessarily be construed by the laws of the State of its incorporation."

The appellant is a fraternal benefit society organized under the insurance act of 1893 of Illinois, ap-

proved June 22, 1893. Laws of Ill. 1893, p. 130. Neither does that act, nor the charter powers conferred upon appellant under it, authorize fraternal societies to consolidate or merge. Such power is not necessary to enable these fraternal societies or corporations to effectuate the objects and purposes of their creation. Therefore, they do not have such power by implication.

"Corporations can only exercise such power as may be conferred by the legislative bodies creating them, either in express terms or by necessary implication." *Fritze* v. *Bldg. Loan Assn.,* 180 Ill. 183-96; *American Loan & Trust Co.* v. *Minn. & N. W. Ry. Co.,* 157 Ill. 641; *Steele* v. *Fraternal Tribunes,* 215 Ill. 190-3; *Wallace* v. *Madden,* 168 Ill. 356-60; *Nat. Home Bldg. Assn.* v. *Home Savings Bank,* 181 Ill. 35-40; *Alexander* v. *Bankers Union,* 187 Ill. App. 469.

The above is also a well established doctrine of our own court. *Gregg* v. *L. R. C. of C.,* 120 Ark. 426-32; *Rachels* v. *Stecher Cooperage Works,* 95 Ark. 612; also *Simmons Nat. Bank* v. *Dilley Foundry Co.,* 95 Ark. 368; *Richeson* v. *Nat. Bank of Mena,* 96 Ark. 594; *Ozan Lumber Co.* v. *Biddie,* 87 Ark. 587; *Ark. Stave Co.* v. *State,* 94 Ark. 27.

Therefore, the merger of appellant with the Knights and Ladies of Honor was *ultra vires* and void.

The law of Illinois, under which appellant was organized, provides that the certificate of association upon which the Insurance Superintendent is authorized to issue a charter to fraternal insurance societies shall state among other things that "medical examinations are required."

The charter of appellant provides that "applicants for membership will be required to undergo a strict medical examination before being admitted to membership in this corporation."

Therefore, under the laws of Illinois, as well as the laws of appellant, medical examinations are required as a prerequisite to membership in fraternal benefit societies. A certificate issued without such medical examina-

tion is an *ultra vires* act upon the part of the corporation which renders such certificate not only voidable but wholly void and of no legal effect. Hence, neither party to such an alleged contract could be estopped by any acts done under it from showing that the purported contract was in violation of the laws of the State. *Wallace* v. *Madden, supra; Merc. Trust Co.* v. *Castor*, 273 Ill. 332-43; *Steele* v. *Fraternal Tribunes, supra; Theodore R. Converse* v. *Emerson & Co.*, 242 Ill. 619-27; *Alexander* v. *Bankers Union, supra,* where the above and other Illinois cases are cited.

As holding contrary to the above doctrine, learned counsel for appellee cite from other jurisdictions the following cases: *Timberlake et al.* v. *Order of the Golden Cross of the World,* 208 Mass. 411; *Cathcart* v. *Equitable Mutual Life Assn.,* 111 Iowa 471; *Denver Fire Ins. Co.* v. *McClellard,* 9 Pac. 771.

He also cites the following cases of this court: *Ark. Lumber Co.* v. *Posey,* 74 Ark. 377; *Minn. Fire & Marine Co.* v. *Norman.* 74 Ark. 190; *Ark. & La. Ry. Co.* v. *Stroude,* 77 Ark. 109; *Western Dev. & Invest. Co.* v. *Caplinger,* 86 Ark. 287; *Richeson* v. *Bank of Mena,* 86 Ark. 595.

It would unduly extend this opinion to review each of the above cases, but it is believed that a critical examination of them with reference to the facts will discover that they do not contravene the doctrine announced above by the Supreme Court of Illinois. The cases mentioned upon which counsel for appellee relies merely announce and adhere to the well-established rule that when a corporation is proceeding to exercise powers within the scope of the general authority conferred upon it by its charter, or within the general purposes of its creation, and not in violation of the statute under which it was organized, but nevertheless, in a manner improper, irregular, and unauthorized by the laws of the corporation, it will not be allowed to set up the defense of *ultra vires* when sued on contracts which have been performed by the other party and from which it has received the benefit.

But there is a clear distinction between such contracts and those which are entirely foreign to the purposes of the corporation as expressed in its articles of association and charter and which are in positive violation of the statutes under which the corporation is created. Of the latter all persons dealing with the corporation are bound to take notice. See *Timberlake* v. *Golden Cross, supra; Ullman* v. *Golden Cross,* 107 N. E. 960-2.

However, even if we are mistaken in our interpretation of the above cases, let it be remembered that, whatever may be the law in other jurisdictions, the laws of Illinois, as we have seen, must govern in determining the issue as to the liability of the appellant on the certificate upon which this action is based. We are dealing with a contract of fraternal insurance, nothing else. The law of Illinois, as we have shown, requires a medical examination as a condition precedent to a contract of insurance with a fraternal benefit society.

But because the merger of the Knights and Ladies of Honor with appellant was *ultra vires* and void and because the laws of Illinois require a medical examination as a prerequisite to membership in a fraternal benefit society, does it necessarily follow that the certificate or policy of insurance issued by the appellant to Richard T. Johnson is also void and that appellant is not liable thereon? Let us see.

The terms and conditions of the merger are not disclosed in the certificate. Appellant, after the merger, did not treat the members of the Knights and Ladies of Honor as if they had been transferred in a body to appellant by the attempted merger and as if the merger, *ipso facto,* completed the contract of insurance between them and appellant. On the contrary, appellant proceeded to deal with the individual members of the Knights and Ladies of Honor and to propose membership and a contract of insurance with appellant as set forth in the certificate under consideration. The certificate itself and the correspondence concerning it show that the contract

of insurance did not become complete until the certificate was "received, accepted and signed" by Johnson.

The merger agreement being *ultra vires* and therefore void, both appellant and Johnson must be held to have known that the inclusion of that agreement in the contract between them was a vain and idle thing, as no rights could be built upon it. They must be held to have intended that the real and only consideration to appellant was that Johnson should be in good standing and make "all payments required and comply with the laws, rules, and regulations" of appellant; that the consideration to Johnson in return was that appellant should pay to his beneficiary the amount named in the benefit certificate issued to him by the Knights and Ladies of Honor. These were legal and valuable considerations and carried mutual and binding obligations upon which the minds of the parties met. It is manifest that the parties did not intend that the terms of the merger agreement should constitute the consideration of the contract. This *ultra vires* merger can and must, therefore, be eliminated, and effect be given to the contract without it, as the parties intended. *Fort Smith Light & Traction Co.* v. *Kelly,* 94 Ark. 461; *Hanauer* v. *Gray,* 25 Ark. 350; *St. L., I. M. & S. Ry. Co.* v. *Matthews,* 64 Ark. 398-405. See also 6 R. C. L., p. 858, secs. 246-248; *Ragsdale* v. *Nage,* 106 Cal. 332-36, 13 C. J., sec. 525-26. The contract when thus construed was one of the very kind that appellant was authorized to make under the statute and by the express terms of its charter, provided a medical examination of Johnson was required. Was such examination required?

While under the statute of Illinois "medical examination is required," the statute does not prescribe the methods for conducting such examination. The *how, when* and *where* of it is left entirely to the fraternal society. The by-laws of appellant provide that "an applicant shall not be entitled to benefits until he has * * * passed a successful medical examination and has been approved by the supreme medical director and obligated." The benefit certificate of Johnson issued by the

Knights and Ladies of Honor shows that one of the conditions upon which it was issued was "that the answers to all questions propounded in the medical examiner's certificate are true." This benefit certificate was in evidence.

The certificate upon which this action is predicated expressly refers to the benefit certificate held by Johnson in the Knights and Ladies of Honor and assumes to pay the amount of that certificate "according to provisions of the said benefit certificate and the constitution, laws, rules, and regulations of the Supreme Lodge of the Knights and Ladies of Honor," etc.

The by-laws of appellant provide that the applicant must sign the application and medical examination blank prescribed by the laws of appellant; "that membership in the order shall only be permitted such persons as have complied with all the laws, rules, and regulations of the order pertaining to admission of members;" that "no subordinate body of the order nor any of its officers or members nor any officer or member of the supreme council shall have any power or authority for or on behalf of the North American Union to waive, modify, or annul any provision of the constitution or laws of the order;" that "no custom or practice upon their part in derogation of the provisions or requirements shall constitute a waiver;" that this provision "shall be binding on the society and each and every member thereof and all beneficiaries of members."

The supreme secretary of appellant testified that Richard T. Johnson had never made application for membership in appellant; that no medical examination of him was ever made.

Now none of the provisions of appellant's by-laws above mentioned were statutory requirements except the one relating to medical examination. The facts of this record as shown by the recitals of the benefit certificate held by Johnson in the Knights and Ladies of Honor and the recitals of the certificate upon which this action was based show that there was a medical examination of Johnson as a condition precedent to his membership in the Knights and Ladies of Honor, and that appellant ac-

cepted this examination as a sufficient compliance with the statute and the by-laws of appellant requiring a medical examination. In other words, the conduct of appellant under all the circumstances in evidence was tantamount to an adoption by it of the medical examination that had been made by the Knights and Ladies of Honor.

In the above respect the facts are somewhat similar to the case of *Williams* v. *Bankers Union,* 166 Ill. App. 495. In that case Williams was insured in the Bankers Union of the World, a Nebraska society, and a certificate of reinsurance was issued to him by the Bankers Union of Chicago, an Illinois corporation, on which his beneficiary instituted suit against the Illinois corporation. The court in its opinion said: "We are of the opinion that the evidence tended to show a reorganization of the Nebraska society and was in effect a mere continuation of the business of the Nebraska society by the Illinois society *and the medical examination taken by the insured in becoming a member thereof was, under all the circumstances in evidence and so treated by the appellant, a compliance with the statute of this State in respect to the membership of the insured in the appellant society.* It clearly appears that the appellant, with knowledge of said communications, accepted, considered and dealt with the insured as a member and to say that it did not so consider the insured would be to confess being a party to a fraud practiced on all members so secured."

The act referred to above was the same as that under which the appellant here was organized.

In the absence of a statute prescribing the method for a medical examination, it is certainly not an *ultra vires* act for one fraternal benefit society to accept as its own the medical examination made by another fraternal society and it could not be said in such case that no medical examination was required. Even though appellant in accepting Johnson as a member without application and recommendation as required by its by-laws and upon the medical examination made by the Knights and Ladies of Honor was acting contrary to its own constitution and

laws, such acts were not *ultra vires*. The supreme power of appellant that made these laws could change them, and a compliance therewith could be waived through the conduct of duly authorized agents acting within the scope of their authority. See *Timberlake* v. *Golden Cross, supra; Sovereign Camp Woodmen of the World* v. *Newsom, supra,* and cases there cited.

The appellant here dealt directly with Johnson through its general manager who in a letter enclosed the certificate requesting Johnson to sign and attach thereto his benefit certificate in the Knights and Ladies of Honor with the declaration that "in order to keep his membership and insurance in force" it would be "only necessary to make payments promptly and in the same manner as heretofore." On these conditions Johnson accepted the contract on October 26, 1916, and continued to pay the assessments or premiums due thereon until the time of his death, October 31, 1917. All of which appellant received.

The case of *C. W. Kenniston et al.* v. *Fraternal Aid Union et al.* has been brought into this record by agreement. The facts concerning that case so far as it may be necessary to state them here, are substantially as follows:

After the merger of the Knights and Ladies of Honor with appellant, the latter on the 20th of November, 1916, through some of its supreme officers, entered into negotiations with the Fraternal Aid Union of Kansas, under which they agreed upon a merger. On the 1st of August, 1917, C. W. Kenniston *et al.*, former members of appellant, filed a bill of complaint in chancery in the circuit court of Cook County against the Fraternal Aid Union and appellant. Afterward by amendment to their complaint the Knights and Ladies of Honor were also made parties defendant. The object of the suit was to test the validity of the merger of appellant with the Fraternal Aid Union and with the Knights and Ladies of Honor.

The Knights and Ladies of Honor answered the complaint and also filed its cross bill, setting up among other

things that after the merger agreement with appellant the members of the Knights and Ladies of Honor had paid their assessments and dues to appellant, and that its supreme lodge had turned over all of its assets to appellant; that on the 20th of November, appellant entered into a contract of merger with the Fraternal Aid Union of Kansas, and that after such merger agreement the Knights and Ladies of Honor had turned over to the Fraternal Aid Union all of its assets, and that its members since that date had paid their dues to the Fraternal Aid Union; that a majority of the members of the Knights and Ladies of Honor since the merger of appellant with the Fraternal Aid Union had become members of that Order. They alleged that the merger between appellant and the Knights and Ladies of Honor was *ultra vires* and void. They prayed that same be so declared and that all the assets to which the Knights and Ladies of Honor and its members were entitled should be held by the Fraternal Aid Union, and that an accounting be had between the appellant the Fraternal Aid Union, and the Knights and Ladies of Honor, and that they should "have such other and further relief in the premises as the nature of the case should require.

The parties defendant to the original complaint answered same and also the defendants in the cross bill answered the same, and upon the issues thus joined the cause was heard and a decree was entered by consent.

Among other recitals in the decree are the following: "It being the intention hereof that all members of the North American Union and its affiliated societies who have remained with the Fraternal Aid Union shall be given an opportunity to elect whether they will remain with the Fraternal Aid Union or to return to the North American Union after they have been informed of the entry of this decree. * * * Any and all assessments, premiums and contributions paid for the month of October, 1917, and any month succeeding by members of the subordinate lodges of the Supreme Lodge of the Knights and Ladies of Honor located outside of the city of St. Louis

* * * who may elect to remain members of the North American Union shall belong to the North American Union."

The facts of that record and other recitals of the decree show that former members of the Knights and Ladies of Honor who after the merger with appellant, had accepted its certificates of insurance, could by the terms of that decree elect "to remain members of the North American Union."

The decree in that case, after declaring the mergers between the appellant and the Fraternal Aid Union and the Knights and Ladies of Honor void, proceeded to declare the status of the former members of the Knights and Ladies of Honor with reference to the Fraternal Aid Union and the appellant and allowed them "to remain" with whichever organization they desired. That decree declared them already members of the organization which had issued to them benefit certificates upon their election to so remain with such organization. This decree did not require a formal application and observance of the by-laws of appellants as upon original application in order to become a member of appellant. But the decree validated unconditionally the benefit certificate that had been issued by appellant to all the former members of the Knights and Ladies of Honor who elected to remain with appellant and retain its policy or benefit certificate. Johnson was one of those members.

The circuit court of Illinois, although an inferior court, was nevertheless a court of general jurisdiction. It had jurisdiction of the different organizations, and through them, the members thereof, and also of the subject-matter of the mergers and their effect upon the societies and their members. The decree of that court was binding upon all parties to it, until reversed and set aside by the appellate tribunal.

Appellant did not appeal from that decree, but on the contrary consented thereto.

We, therefore, conclude that, under the laws of Illinois as expressed in her statute and declared by her

courts, Johnson at the time of his death was a member of appellant and a rightful holder of its policy of insurance, and that the beneficiary named therein is entitled to recover in this action unless Johnson had forfeited his rights under the policy.

Third. This brings us in the last place to a consideration of appellant's contention that Johnson had used heroin and other narcotic drugs to such an extent as to impair his health in violation of the constitution and laws of appellant. According to the constitution and laws of appellant, a member who uses morphine or other drug to the impairment or destruction of his health shall, *ipso facto,* lose his membership and the benefit certificates, and upon the death of a member from such cause his beneficiary forfeits all rights under the policy.

Johnson, when he became a member of the appellant, had knowledge of these provisions, and a compliance with same on his part was essential to the life of his policy and to give the beneficiary therein the right to recover thereon. *Sovereign Camp Woodmen of the World* v. *Newsom, supra,* and cases cited.

The issues as to whether or not Johnson had violated the constitution and laws of appellant by the use of heroin or other drug to the impairment or destruction of his health and whether or not his death was caused by the use of such drug were under the evidence purely of fact.

It could serve no useful purpose as a precedent to set out in detail and discuss the testimony bearing upon these issues. The testimony is voluminous, and after a careful consideration of it we have reached the conclusion that, although the preponderance of the evidence was against the jury's finding, yet it cannot be said as a matter of law that there is no substantial evidence to sustain the verdict.

We find no prejudicial error to appellant in the instructions and other rulings of the court in submitting these issues of fact to the jury.

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

HAY v. NICKEY BROTHERS.

Opinion delivered March 1, 1920.

1. TAXATION—SUIT TO CANCEL TAX DEED—BURDEN OF PROOF.—In an action to cancel a tax deed and recover damages for timber cut, the burden is on the plaintiffs to show that they are entitled to such affirmative relief.
2. TAXATION—TAX DEED.—A tax deed is void where the forfeiture and sale took place in a county adjacent to that in which the land is situated.
3. TAXATION—SUIT TO CANCEL TAX DEED—LACHES.—A suit to cancel a tax deed based upon a forfeiture and sale in a county adjacent to that in which the land was situated is barred by laches where the plaintiff permitted the defendants to pay the taxes for thirty years in the wrong county, without making an effort to have the lands assessed in the proper county: such conduct constituting an abandonment of the land.

Appeal from Calhoun Chancery Court; *J. M. Baker*, Chancellor; affirmed.

John Baxter, for appellants.

1. Appellants' ancestor, Dan W. Fellows, had title, and the payment of taxes in Calhoun County did not set section 5057 of Kirby's Digest in operation and bar appellants by limitation. The lands being in Calhoun County, the sale for taxes in Bradley County was void. 23 Ark. 370; 37 Cyc. 950; 79 Ga. 721; 9 Ohio 163; 68 Pa. St. 260; 103 Ark. 579; 37 Cyc. 951; 94 N. Y. S. 488. Statutes of limitation are strictly construed and there must be seven consecutive payments of taxes before the bar attaches. 75 Ark. 302; 180 S. W. 752; 102 Ark. 59.

2. Appellants are not barred by laches, as they were never called upon to act.

B. S. Herring, for appellee.

Appellants are barred by laches. 120 Ark. 249; 179 S. W. 489; 99 Ark. 455.

WOOD, J. This action was brought in the Calhoun Chancery Court to cancel a tax deed and recover damages from the appellees for timber cut from all of that

part of the east half of the southeast quarter and the northeast quarter of northeast quarter of section 15, and east half of the northeast quarter of section 22, in township 13 south of range 12 west, lying west of the Moro Creek in Calhoun County, Arkansas.

The appellants (plaintiffs below) after deraigning their title from the United States Government, allege in their complaint that the appellees (defendants below) are claiming the lands under some kind of void deed and have cut and removed large quantities of valuable timber; that the lands are wild and unimproved and have been; that the pretended deeds under which the defendants claimed are void and cast a cloud upon the plaintiffs' title.

Plaintiffs prayed that the deed be canceled and that a master be appointed to determine the value of the timber cut and removed from the lands, and that plaintiffs have judgment for same.

The defendants answered, denying all the material allegations of the plaintiffs' complaint. They alleged that they had title from the State through a forfeiture and sale of the lands for the nonpayment of the taxes. They traced their title through *mesne* conveyances from the State to W. H. Wheeler on June 23, 1887, and alleged "that, since that date, defendants and their predecessors in title had paid all the taxes assessed against said lands, and that said lands had greatly enhanced in value during their possession and ownership, from but a few dollars per acre to more than $20 per acre; and that defendants all the while had at least color of title to the same;" that plaintiffs are barred by laches and limitations.

The lands described in the appellants' complaint are situated on Bayou Moro, a sinuous stream, which constitutes the dividing line between Bradley and Calhoun Counties. Bayou Moro zigags through the land in controversy so that about sixty-eight acres lie in Calhoun County and the remaining 132 acres in Bradley County.

This action is to quiet the title and to recover possession of the lands in Calhoun County and damages for timber cut and removed from those lands.

The appellants deraigned title through a conveyance from the United States to the State of Arkansas, September 28, 1850, and from the State of Arkansas to one Sampson Nutt in 1854 and through various *mesne* conveyances to appellants. But appellants do not show that they or any of their predecessors in title had listed the lands for taxation in Calhoun County or that they had paid the taxes from that time until the institution of this suit in either Calhoun or Bradley Counties.

The undisputed evidence shows that the lands had always been listed and assessed for taxes under the description as contained in the legal subdivisions of the lands in Bradley County, where the greater portion of the lands are situated as shown by these legal subdivisions. The appellees and their predecessors in title paid taxes on the lands so described, listed and assessed, from the year 1888 until the institution of this suit September 11, 1918, a period of thirty years. The deeds under which appellees claim and under which the lands are described were recorded in Bradley County.

In 1888 when W. H. Wheeler, through whom the appellees trace their title, purchased the lands from the State they were wild and uninclosed and were not worth more than $1.25 per acre. The lands have remained wild and uninclosed since that time, but they have enhanced in value until at the time of the institution of this suit they were worth more than $20 per acre. One of the witnesses valued the land as high as $30 per acre in 1914.

It may be conceded that the tax deed under which appellees claim title is void for the reason that the forfeiture and sale took place in Bradley County, whereas, the lands are situated in Calhoun County. *Toby* v. *Haggarty et al.*, 23 Ark. 370. It may likewise be conceded that, for the same reason, the subsequent assessments of the land, and payments of taxes in Bradley County by the appellees and their privies in title, did not give ap-

pellees title by limitation under section 5057 of Kirby's Digest. Nevertheless, the undisputed facts present a typical case of laches on the part of appellants which bars them from the relief they seek. Appellants are asking the affirmative relief of cancellation, and damages as for trespass, against appellees. The burden is upon appellants to show that they are entitled to such relief. It is the duty of every one who owns property to pay the taxes thereon, for in this way only do they contribute to the revenue necessary to meet the expenses of the government which protects them. Appellants, as the owners of the lands in controversy, knew that they were not paying taxes thereon. By the slightest diligence they would have discovered that the taxing officers were treating these lands as situated in Bradley County for the purposes of taxation, and that the appellees and their predecessors in title were bearing the burdens of taxation placed upon them. Even though these officers, in so doing, were making a mistake, yet appellants made no effort to have the lands relisted and assessed in the proper county. This was the plain duty of appellants, and their failure to perform such duty shows that appellants did not intend to pay taxes on the lands and hence had abandoned same. The delay and negligence of appellants worked to the disadvantage and prejudice of appellees. "Laches is an equitable defense based upon the doctrine that equity will not act unless the party has exercised good faith and reasonable diligence." *Chatfield* v. *Iowa & Ark. Land Co.*, 88 Ark. 395, and other cases cited in 2 Crawford's Digest, p. 1875, *et seq.*

In *McGill et al.* v. *Adams*, 120 Ark. 249, we said: "We have uniformly held that the failure to pay taxes on unimproved lands for a long period of time, together with great enhancement in values, constitute abandonment, and that an action seeking equitable relief against one who has paid taxes under those circumstances more than seven years is barred by laches." *Burbridge* v. *Wilson*, 99 Ark. 455.

The decree is correct. Affirmed.

JOHNSTON v. STATE.

Opinion delivered March 1, 1920.

1. CRIMINAL LAW—MOTION FOR CONTINUANCE—NECESSITY OF BILL OF EXCEPTIONS.—Overruling a motion for continuance, assigned as ground for new trial, will not be considered on appeal where the bill of exceptions does not contain the motion for continuance nor show that any exceptions were saved to its overruling, though the motion for continuance is copied in the motion for new trial, which is brought into the bill of exceptions.
2. INTOXICATING LIQUORS—BURDEN OF PROOF OF SALE—INSTRUCTION.—In a prosecution for selling intoxicating liquor, an instruction which, in connection with the indictment, told the jury that it devolved upon the State to prove that the defendant sold some kind of liquor as charged in the indictment, *held* not misleading.
3. INTOXICATING LIQUORS — INDICTMENT.—An indictment charging defendant with "feloniously selling and giving away ardent, vinous, malt, spirituous and fermented liquors; and certain compounds and preparations thereof, commonly called tonics, bitters and medicated liquors," *held* sufficient.

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

R. W. Holland, for appellant.

1. The court abused its discretion in refusing the continuance and forcing defendant to trial. 107 Atl. 554; *Fountain* v. *State,* October Law Notes, pp. 123 and 107.

2. The court erred in refusing instruction No. 4 and the verdict is against the evidence. He was rushed into trial without a chance to procure his testimony.

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

1. The continuance was properly refused. The motions and overruling were not brought into the record by bill of exceptions.

2. Instruction No. 4 is not error and the verdict is supported by the testimony.

WOOD, J. The appellant appeals from a judgment convicting him of the crime of selling liquor.

Counsel was appointed by the court to defend appellant.

At the trial three witnesses testified that they had bought whiskey from appellant within three years prior to the finding of the indictment. Appellant introduced testimony tending to impeach the character of two of these witnesses for truth and morality.

The appellant testified that he had not sold any liquor as charged in the indictment and testified to facts specifically rebutting the testimony of the witnesses for the State.

The court gave, among others, the following instruction, No. 4: "It devolves upon the State in a case of this kind to prove every material allegation in the indictment. And the material allegations in the indictment briefly stated are, 'that the defendant sold liquor, some kind of liquor, as mentioned in this indictment or any kind of intoxicating liquor; that that occurred in Pope County, Arkansas, within three years next before the finding of this indictment.' "

One of the grounds of the motion for new trial is that the court erred in overruling appellant's motion for continuance.

The bill of exceptions does not show that any exceptions were saved to the overruling of appellant's motion for continuance. The motions themselves are not brought into the record by bill of exceptions and therefore we cannot consider this ground of appellant's motion for new trial. *Adkisson* v. *State, ante* p. 34, and cases cited.

While the motions for continuance are set out in the motion for new trial, and the motion for new trial is brought into the bill of exceptions, this does not meet the requirements that the motion for continuance and objections and exceptions to the ruling of the court thereto must be made to appear in the bill of exceptions.

The court did not err in giving instruction No. 4. When all of the language of the instruction is considered together, a fair interpretation of it is that the court meant to tell the jury that it devolved upon the State to

prove that the defendant had sold some kind of intoxicating liquor as charged in the indictment. When the language of the instruction is considered in connection with the language of the indictment its meaning is perfectly plain. The instruction, when thus considered, was not calculated to mislead the jury.

The indictment charged the appellant with "feloniously selling and giving away ardent, vinous, malt, spirituous and fermented liquors and alcoholic spirits and certain compounds and preparations thereof, commonly called tonics, bitters and medicated liquors, against the peace and dignity of the State of Arkansas."

It was a felony under the law of Arkansas to sell such liquor or any kind of intoxicating liquor mentioned in the indictment. Act 30, p. 98, of the Acts of 1915.

The evidence was sufficient to sustain the verdict.

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

BLANTON v. FIRST NATIONAL BANK OF FORREST CITY.

Opinion delivered March 1, 1920.

1. WILLS—"USE AND CONTROL" OF MONEY.—Where a will left half of the estate to the testator's widow and the other half to his children, the widow to have the use and control of the latter half until the children became of age, a bank incurred no liability in allowing the entire funds of the estate on deposit with it to be expended by the widow, so long as it did not participate in any breach of trust resulting in misapplication of the funds.
2. WILLS—"USE AND CONTROL" OF MONEY.—Where a will left money to the testator's children, with the right in the widow to have the "use and control" thereof during their minority, the widow was entitled to enjoy the use thereof for her own purposes, according to her pleasure and necessities.

Appeal from St. Francis Chancery Court; *A. L. Hutchins,* Chancellor; affirmed.

C. W. Norton, for appellants.

To recover, plaintiffs must show (1) receipt of the money by the bank, with knowledge of its trust charac-

ter; (2) appropriation or conversion by the bank of the fund to a purpose contrary to the trust, as in this case, by a credit to the individual account of Mrs. Evans and by allowing same to be checked out until exhausted; (3) that no settlement has been received by the wards from the guardian or any other person for this fund. The law of this case is settled in the former appeal. 136 Ark. 441. Mrs. Evans' testimony is positive that both checks were delivered by Mr. Hughes to Eugene Williams to be deposited in the Bank of Forrest City. A ward can follow trust funds into the hands even of third parties with knowledge. 12 R. C. L. 1172. The testimony is undisputed that no settlement has ever been had by the wards for this fund or any other that went into the guardian's hands.

R. J. Williams and *Mann, Bussey & Mann,* for appellees.

1. On the first appeal (136 Ark. 441) this court settled the law of this case. By the express terms of the will, Mrs. Evans was entitled to the use and control of "all the estate belonging to these children." The term "use" means to make use of—to convert to one's own service, and is synonomous with enjoyment and benefit. 39 Cyc. 845; 111 U. S. 202; 72 Ga. 482; 52 N. E. 599. The word "use" in a will to a wife creates a life estate. 7 Ohio Ct. Ct. 426. The gift to Mrs. Evans was absolute and not for the benefit of the children and no requirement was made to account for rent and profit, and she was entitled to draw it from the bank at will. Even if the bank had knowledge, the bank would not have been warranted in declining to allow Mrs. Evans to draw on the fund. The testator not having placed any limitation on the use of the property by the wife, the courts can not.

2. Plaintiffs have received the benefits of the estate. The burden was on them to show that Mrs. Evans was indebted to them in at least an amount equal to the amount sued for. The proof shows that plain-

tiffs were not entitled to the amount claimed in the complaint. Eugene Williams was not acting for the bank but for Mrs. Evans and notice to him was not notice to the bank. 107 Ark. 232. A trustee with full control over trust funds in a bank can draw such funds *ad libitum* and the bank incurs no liability if it does not participate in the breach of trust. 107 Ark. 232; 135 *Id.* 291. The complaint was properly dismissed.

WOOD, J. This is a consolidation of two separate causes of action begun by the appellants against the appellees.

The purpose of the action, as set forth in the complaint, was to recover from the appellee bank the sum of $1,070.67, which it was alleged had been delivered to the cashier of the bank to be placed to the credit of Mrs. Mary E. Evans, as guardian; that the cashier, knowing that the money belonged to appellants, wrongfully placed the same to the credit of Mrs. Mary E. Evans, individually, instead of to her credit as guardian, and allowed her to check it out for her personal use.

Appellee Rolfe was president of the appellee bank, and judgment against him was asked because it was alleged that he had failed to file the statement required by section 848 of Kirby's Digest. This is the second appeal in this case.

On the first appeal we held that the facts alleged in the complaint stated a cause of action, and the cause was reversed and remanded with directions to overrule the demurrer to the complaint. *Blanton* v. *Nat. Bank,* 136 Ark. 441.

In holding that the facts alleged in the complaint constituted a cause of action, in the course of the opinion we quoted from 12 R. C. L. (p. 1172) as follows: "On the same principle the ward can follow any other property wrongfully disposed of by the guardian into the hands of third parties, if they had knowledge of such facts as should have put them on inquiry; if, for instance, they had received in payment of a debt of the guardian

funds standing in the name of the ward. * * * It is beyond the power of a guardian or other trustee to bind the estate he represents to any use of its funds by contract with third persons who have knowledge of the character of the property transferred, except in the ordinary and usual course of administration of the trust, and in furtherance of its object. This particularly applies to banks in which funds have been deposited, which by the form of the deposit or otherwise they know to be trust funds, but permit to be transferred to the guardian's personal account or applied to his individual debt."

We further said, "If the funds so received were, notwithstanding the conversion to the individual account of the guardian, used by the latter for the benefit of the respective wards, or if the funds so misappropriated were subsequently accounted for by the guardian and reappropriated and held to the use of the wards, that would be a matter of defense which can be shown in this action by the appellees, but the parties are not bound to go first to the probate court for the adjustment of the accounts, inasmuch as all of the defenses can be heard in the present action."

Upon a remand of the cause the appellees answered, denying specifically all the material allegations of the complaint. They alleged that the funds in controversy were derived from the estate of James P. Blanton, deceased, the father of appellants; that, under the terms of his will, Mary E. Blanton acquired one-half of his entire estate and the appellants one-half, or one-fourth each; that the will of Blanton contained the following provisions: "It is expressly understood that my said wife, Mary E. Blanton, shall have the use of and control of said portions of said estate that I have hereinbefore bequeathed to my said son, John Cecil, and my daughter, Annie Mabel, until the said son and daughter become of age, respectively, at which time my said wife shall pay to my said son his portion of my said estate and to mv said daughter her portion of said estate."

The funds in controversy were a part of the proceeds of a debt which the attorney for the Blanton estate had collected from the Davis estate. The amount collected was $1,606.

W. W. Hughes, the attorney for the Blanton estate, paid to Mrs. Mary Blanton Evans the sum of $535.33, as representing her one-third interest and paid to her as guardian the remaining two-thirds, $1,070.67. These amounts were paid by checks. The check for the interest of appellants recited: "Pay to the order of Mrs. Mary E. Blanton Evans, guardian, etc." The checks were drawn on the Bank of Eastern Arkansas of Forrest City and on the back of each of them was a cancellation stamp showing that they were paid by the Bank of Forrest City, March 24, 1913.

Mrs. Evans testified, in part, as follows: That the checks drawn in her favor by Mr. Hughes were delivered by him in his office to Mr. Williams, cashier of the Bank of Forrest City; that they were delivered to be deposited in the Bank of Forrest City. She did not endorse the checks before they were handed to Mr. Williams. She further testified that the money was deposited in the Bank of Forrest City in March, 1913; that her checks drawn against her account shortly after the deposit of this fund were refused with the statement by the cashier that she had no money there.

She further testified that neither she nor the appellants had received any money from the Bank of Forrest City or the First National Bank (its successor) since the deposit was made in March, 1913; that the living for herself and children had been provided by her husband, Mr. Evans, and her son, Cecil; that no settlement had ever been had by her with her wards for this fund or for any other property that went into her hands as guardian.

It was proved that the indorsement of "Mrs. Mary E. Blanton Evans, guardian," on the back of the check was made by Eugene Williams, the cashier of the Bank of Forrest City. It was also proved that no proceedings

were had in the guardianship of Mrs. Mary Blanton Evans after the grant of letters in May, 1909.

The testimony in the whole record is exceedingly voluminous, and we will, therefore, not undertake to set it out in detail, but the above is the essential testimony upon which the appellants rely. On the other hand, the testimony for the appellees tends to prove that after the death of James P. Blanton, Mrs. Blanton, his executrix, took charge of his estate and handled the same, collecting the rents and other personal assets, and opened up a general account in her individual name with the Bank of Forrest City.

The itemized statement of the account which is in evidence shows that during the time there were many debits and credits. The final balance showing that a sum total of $17,110.19 was deposited and that this sum was drawn out by checks. One of the items on the statement is March 24, 1913, $1,606 deposited, with the word "Davis" written in pencil opposite the entry.

The account shows that at the time the above deposit was made the account of Mrs. Evans was overdrawn $710.88. After the deposit there was a balance in her favor of $895.12. Mrs. Evans continued to check on her account, drawing out the full amount of this deposit and the sum of $718.65, later deposits, showing that on September 22, 1913, as above stated, the checks and deposits balanced.

By the terms of the will of J. P. Blanton, Mrs. Mary E. Blanton was given in her own right one-half of his entire estate and the right to use and control the portions of the estate that were bequeathed to her children.

Mrs. Blanton had taken charge of the estate under the terms of the will so that in reality when the attorney came to pay over to Mrs. Evans the amount collected by him for the Blanton estate from the Davis estate, he made the checks to read that Mrs. Mary Blanton Evans was entitled to only the sum of $535.33, whereas under the terms of the will she was entitled at that time to $803 of such fund, whereas, the amount to be paid her as guard-

ian of the children would have been a like sum. So it is manifest when the provisions of the will are taken into consideration that the attorney made out these checks without reference to the will, supposing that Mrs. Evans was only entitled to one-third.

So the making of the checks to read as above set forth could not have given the appellants any greater rights in the estate than they really had under the terms of the will. At the time, therefore, when Mrs. Evans deposited the full sum of $1,606 in the Bank of Forrest City she in her individual right was entitled to the sum of $803, or half of the deposit. Her account was overdrawn at that time in the sum of $710.88. Now, although the bank had knowledge, through the knowledge of its cashier, Williams, that a part of the funds deposited were trust funds, nevertheless, the bank did not, as the proof shows, permit her to convert a portion of this fund to her own use in the payment of her overdraft in the bank. If the bank was put upon inquiry and was bound by the knowledge that an inquiry would have obtained, then it would have ascertained that Mrs. Evans had possession of the funds as executrix of the estate of her deceased husband, Blanton, and that she was entitled to one-half of these funds in her own right, and that after paying out of her half the overdraft she still would have had the sum of $93.12 of the funds which belonged to her.

Furthermore, the bank would have ascertained that the will of Blanton provided that his wife, Mary E. Blanton, should have the "use of and the control" of such portions of his estate as were bequeathed to appellants. "Where a trustee has full control over the funds deposited in a bank, he may draw them out of the bank *ad libitum*, and the bank incurs no liability in permitting this to be done, so long as it does not participate in the breach of trust, resulting in the misapplication of the funds." *Bank of Hartford* v. *McDonald*, 107 Ark. 232-40.

The law announced in our former opinion is the law of this case as applicable to the facts set forth in the complaint, but the facts developed by the testimony at

the hearing on the merits were as we have set forth above.

These facts clearly show that there was no misappropriation of the funds by Mrs. Blanton. Although the funds were deposited in the bank in her own name, since she had absolute dominion over the same by the terms of the will until her children became of age, and as that period had not arrived at the time of the deposit, the bank incurred no liability in allowing them to be deposited to her individual credit.

While under the will Mrs. Blanton did not have the absolute title to the funds, yet she did have the right to avail herself of the funds and to enjoy the use of them for her own purposes according to her pleasure and necessities. Such right was bestowed by the words "use" and "control," giving the same their plain and ordinary meaning. See Webster's Dict.; 39 Cyc. 845; Words & Phrases, p. 7228.

The language of the will did not place any restrictions upon Mrs. Blanton in the use of the property and the bank would not be chargeable with knowledge of any improper use that she might make of it. But aside from all this, the testimony tends to prove that Mrs. Evans did not make any illegal or improper use of the appellants' estate. On the contrary, the testimony shows that the appellants lived with their mother and that they all drew their support and maintenance from the same fund.

The appellants failed to prove their cause of action. Therefore, the decree of the court dismissing their complaint for want of equity is correct.

Affirmed.

STATE v. ADAMS.

Opinion delivered March 1, 1920.

1. FISH—REGULATION OF TAKING AND USING.—Since fish are *ferae naturae* and common property, the Legislature may pass laws regulating the rights of each individual in the manner of taking and using the same.

2. FISH—LOCAL LAWS.—Where the necessity exists for the preservation of the fish in certain localities, the Legislature may, in the exercise of the police power, pass special laws for such localities.

3. CONSTITUTIONAL LAW—REGULATION OF TAKING OF FISH A LEGISLATIVE QUESTION.—In the exercise of the plenary powers over the taking of fish, the Legislature may regulate the manner thereof, and the necessity of particular regulations is a legislative question, and the courts will not set up their judgment against that of the Legislature and hold a police law to be invalid unless it is clearly shown to have no reasonable tendency to accomplish the desired end.

4. FISH—LICENSE FOR CATCHING BUFFALO, GAR AND CATFISH.—Special Acts, 1919, No. 99, providing that the county judge of Chicot County may issue to the highest bidder a license for the purpose of catching buffalo, gar and catfish in the waters of Lake Chicot with a seine, being intended to propagate and preserve the game fish, can not be held to be arbitrary and unnecessary to accomplish the purpose intended.

5. STATUTES—GENERAL AND SPECIAL ACTS.—A general act does not repeal by implication a prior special act on the same subject, when the acts are not repugnant or inconsistent.

6. FISH—REPEAL OF SPECIAL ACT.—Special Acts, 1919, No. 99, regulating the taking of buffalo, gar and catfish in certain lakes in Chicot County, was not repealed by General Acts 1919, No. 276, amending the laws creating a game and fish commission, etc.

7. CRIMINAL LAW—JUDGMENT OF ACQUITTAL NOT REVERSIBLE WHEN.—A judgment of acquittal of a misdemeanor punishable by fine and imprisonment can not be reversed on appeal by the State.

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

B. F. Merritt, for appellant.

1. Act 99, Acts 1919, is constitutional and 73 Ark. 243 does not apply.

2. It was not repealed by act No. 276, Acts 1919. 45 Ark. 90; 50 *Id.* 132; 68 *Id.* 130; 107 *Id.* 381.

Streett & Burnside, for appellee.

Act 99 is repealed by act 276, but, if not, it is unconstitutional. 110 Ark. 204; 117 *Id.* 54. The $50 paid the State for license and the 16 per cent. exacted by the

county cover the same privilege and is double taxation and void.

HART, J. It is conceded by counsel on both sides that the issues raised by this appeal are:

First. Whether or not act 99 of the Acts of 1919 regulating the seining of fish other than game fish in certain lakes in Chicot County is constitutional; and,

Second. Whether this act has been repealed by the general game and fish law subsequently passed at the same session of the Legislature.

Act 99 was approved February 20, 1919. See Special Acts of 1919, p. 177.

Section 1 of the act provides that the county judge of Chicot County may issue a license or licenses for the purpose of catching buffalo, gar and cat fish in the waters of Lake Chicot and other lakes in Chicot County with a seine not less than 300 feet long and with meshes not less than four inches square and that said license or licenses shall be awarded to the highest competent and responsible bidder after being duly advertised under the terms of the act.

Section 3 makes it unlawful for any person to seine or catch any fish in said waters except as provided by law and makes the violation of the act a misdemeanor.

Section 6 provides that the provisions of the act shall be cumulative of other laws for the protection of fish, and that only such laws as are in direct conflict with the act are repealed.

This court has said that fish are *ferae naturae,* and as far as any right of property in them can exist it is in the public or is common to all. Hence the court has recognized that the Legislature may pass laws regulating and restricting the common right of individuals to catch fish for the purpose of protecting the same from extinction. To accomplish this purpose, the Legislature may pass laws regulating the rights of each individual in the manner of taking and using the common property. *Lewis v. State,* 110 Ark. 204. So where the necessity exists for

the preservation of wild game and fish in certain localities of the State, the Legislature may, in the exercise of the police power, pass game and fish laws for such localities. *Lewis* v. *State, supra,* and *Sherrill* v. *State,* 84 Ark. 470. This power is conceded by counsel, but it is said that such laws must apply in such localities to all persons equally. Counsel claims that it is a matter of common knowledge of which the court will take judicial notice that buffalo and cat fish are edible fish, and urge that it is contrary to the principles of law announced in the above decisions that the catching of these fish with a seine in the waters of Lake Chicot and the other designated lakes in Chicot County should be let to the highest bidder.

In *Smith* v. *Maryland,* 59 U. S. (18 How.) 71, the Supreme Court of the United States recognized that it has become a settled principle of public law that the power resides in the several States to regulate and control the right of fishing in the public waters within their respective jurisdictions.

In *State* v. *Lewis,* 20 L. R. A. 52, the Supreme Court of Indiana, after recognizing this rule, said: "We think this states the true rule, and if, as we have said, the public has an interest in their protection and growth, and the Legislature has the right to prohibit their being taken from the waters during certain seasons of the year, and by certain means, then the Legislature has exclusive control over the matter, and may prohibit their destruction and prohibit their being taken from the waters in any other manner than that prescribed by statute, for, if the Legislature has any control over the subject, it has full control, and is the exclusive judge as to the extent and manner in which they shall be lawfully taken from the water." See also *Lawton* v. *Steele* (N. Y. Court of Appeals), 7 L. R. A. 134, and *People* v. *Collison* (Mich), 48 N. W. 292. So it may be said, in the exercise of its plenary power over the taking of fish, the State may regulate the manner thereof, and the necessity of particular regulations is a legislative question. The courts will not set up their judgment against that of the Legislature

and hold a police law to be invalid unless it is clearly shown to have no reasonable tendency to accomplish the desired end.

Section 4 of the act provides that any species of game fish caught in the meshes of the seine which is being used under provisions of the act, shall be restored unharmed to the waters of the lake. It further provides that the seine shall not be operated during the spawning season, which is defined.

Section 5 provides that the purpose of this act is largely for the propagation, protection and increasing of the game fish in the waters designated. Hence, if the Legislature in its discretion deems it expedient to get rid of the gar, buffalo, and cat fish in order to propagate and preserve the game fish, the court can not say that it did not have the power to do so, and that its action was arbitrary and unnecessary to accomplish the purpose intended.

It follows that Special Act 99 passed by the Legislature of 1919 and approved February 20, 1919, is constitutional.

It is next contended that this act is repealed by Act 276 passed at the same session of the Legislature and approved on the 17th day of March, 1919. This was an act to amend the general laws of the State creating a State Game and Fish Commission, and to protect game and fish and to regulate the killing and taking of the same.

The special act above referred to, under which this prosecution was instituted, was passed by the Legislature for the conservation of the game fish in certain designated public waters in Chicot County, Arkansas. The lakes in question abounded in game fish of all kinds and also in gar, buffalo and cat fish. It was known that these latter preyed upon the game fish and destroyed their spawn, so that it was thought that the game fish were in danger of extermination or at least of being greatly diminished in quantity. Hence it was deemed expedient by the Legislature to pass the special act in question for their protection. So it will be seen that the right to use

the seine to catch gar, buffalo and cat fish was let to the highest bidder in order to protect the game fish and not for the purpose of giving an advantage to the user of the privilege over other individuals. The general act for the protection of game and fish throughout the State did not cover the purpose of the special act. It operated in a different field, and the two acts, instead of being in conflict, supplement each other.

It is well settled in this State that a general act does not repeal by implication a prior special act on the same subject when the acts are not repugnant nor inconsistent. *Jones* v. *Oldham,* 109 Ark. 24.

Again, in *Martels* v. *Wyss,* 123 Ark. 184, the court said: "Repeals by implication are not favored, and when two statutes covering the whole or any part of the same subject-matter are not absolutely irreconcilable, effect should be given, if possible, to both. It is only where two statutes relating to the same subject are so repugnant to each other that both can not be enforced, that the last one enacted will supersede the former and repeal it by implication."

The general act does not in express terms repeal the special act, and, tested by the rule of construction just announced, we do not think there is any real conflict between the two acts, and that the latter does not repeal the former by implication.

The defendant was acquitted, and the appeal in this case was taken by the State. The offense was made punishable by a fine and imprisonment in the county jail. Hence there can be no reversal of the judgment in this case. *State* v. *Black,* 86 Ark. 567, and *State* v. *Smith,* 94 Ark. 368.

It follows that the judgment must be affirmed.

CARTER v. BATES.

Opinion delivered March 1, 1920.

1. PRIVATE ROADS — NATURE.—Private roads, opened and kept in repair by the individuals who petition for their establishment, are yet in a sense public roads, since any one who has occasion to do so may travel them.
2. PRIVATE ROADS—ESTABLISHMENT.—Where the land over which an adjoining owner petitioned to establish a road was a valuable tile-drained farm which would be greatly injured by the proposed road, and the road could be established along another route on petitioner's land, a little longer and more expensive, but not prohibitive, it was error to order the establishment over tile-drained land.

Appeal from Perry Circuit Court; *Guy Fulk*, Judge; reversed.

STATEMENT OF FACTS.

Appellee filed a petition in the county court for the establishment of a road from her house across the land of appellants in order to get to another tract of land owned by her for the purpose of cultivating it.

Appellants opposed the opening of the road on the route in question on the ground that appellee could obtain another road mostly on her own land and alleged that the opening of the road on the route in question would be a great inconvenience and loss to appellants.

The county court granted the petition and established a road fifteen feet wide across the lands of appellants. The case was appealed to the circuit court, and was tried there *de novo* upon testimony substantially as follows: J. C. Carter, one of the appellants, testified that the land over which the road was established belonged to his sons; that the proposed road as laid out runs through their field, which has been tile drained; that there is a 100 acres west of the road that is tile drained, and 120 acres east of the road that is tile drained; before the land was tile drained, most of it stood in water from over one inch to three or four feet deep; that 180 acres could not be cultivated before it was tile drained; that most of the land is in the bottom, is rich and valuable for

cultivation; that the road crosses part of eight or nine cross sections of the tiling and is parallel with two main lines of it; that driving across the land in wet weather causes ruts to be formed which finally get down to the tiling and break it when wagons are driven along the road; that the tiling in the field is so arranged that when a section of it is broken it stops the drainage of the field in wet weather and it becomes impossible to cultivate it until the tiling is replaced; that appellee could construct a road from her house to her field on other ground which would be a little longer route and which would for the most part be on her own land; that a part of it would be across the corner of one forty-acre tract of his land, and that he proposed to give appellee the right-of-way over it; that along this route a bayou would have to be crossed, but that it could be bridged at an expenses of from $50 to $75. Other witnesses corroborated his testimony with regard to the cost of building the bridge.

J. D. Hyden testified that he had been accustomed to putting in tile drains on land all his life; that he put in the tile drains on the land in question; that most of the land in question was under water before it was tile-drained; that the road in question crosses one main line of six-inch tiling and eight laterals and approximately parallels two main lines of tiling; that where the six-inch tiling now is the water was from one foot to twelve feet deep before the tiling was put in. The witness corroborated the testimony of Carter that in wet weather the passage of wagons along the road would cause ruts to be formed and finally break the tiling in places, thereby causing the drainage to be obstructed, and the field to overflow with water; that the tiling was laid from twelve to eighteen inches below the surface.

According to the testimony of the witneses for appellee, to establish a road over the route suggested by J. C. Carter would make the distance from her house to her field in question nearly twice as great. It would be necessary to cross a bayou fifty feet wide and very deep. It would cost four or five hundred dollars to bridge this

bayou, and the road over the route in question would be principally used by appellee and the Carters.

The circuit court found the facts in favor of appellee and ordered the road to be established on the route laid out by the county court.

The case is here on appeal.

Geo. E. Floyd, Reid, Burrow & McDonnell and *Gus Ottenheimer*, for appellants.

Section 3010, Kirby's Digest, providing for opening *private* roads must be strictly construed, but strict compliance with its requirements is essential. 15 Ark. 43; 78 *Id.* 18; 104 *Id.* 187; 15 Cyc. 815. The trial was *de novo* in the circuit court, and the judgment there supersedes the judgment of the county court. 100 Ark. 496; 101 *Id.* 106. The judgment here discloses such errors and irregularities as to necessitate a reversal. It condemns land for public use without compensation. No width of the road is prescribed. Kirby's Digest, § 3010; 32 Cyc. 375-377; 9 Ind. 103; 31 Pa. 12, etc. The viewers' report and the order of the circuit court are fatally defective. These proceedings are in derogation of the common law, and the road must be indispensable as a means of ingress or egress, and if there is another way the private road can not be opened. 37 S. E. 181; 45 *Id.* 664; 47 *Id.* 967; 38 Mich. 214; 78 Ark. 18.

The damages were not properly assessed. 78 Ark. 83. The measure of damages is the market value of the land taken and the damages resulting to the owner's remaining land from building, floods, overflows, etc. 39 Ark. 167; 44 *Id.* 258; 44 *Id.* 360; 78 *Id.* 83; 51 *Id.* 330; 15 Cyc. 687.

J. E. Chambers, J. H. Bowen and *Sellers, Gordon & Sellers,* for appellee.

The case was tried *de novo,* and the circuit court adopted the judgment of the county court and contains all necessary facts to give complete jurisdiction. The motion for new trial does not set up the failure or omis-

sion to properly describe the road or failure to assess the damages. All parties to the action are charged with the duty to see that the judgment is properly entered of record, and they are charged with knowledge and it was their duty to see that the record disclosed the width of the road and assessed the damages. The evidence fully justifies the court's findings that the road was a necessity, damages awarded properly, and the judgment should be affirmed, or, if reversed, it should be remanded only to fix the width of the road and the amount of damages.

HART, J. (after stating the facts). Although the statute calls roads of this kind private roads because the costs of opening and keeping them in repair are to be borne by the individuals who petition for their establishment, yet they are in a sense public roads. That is to say, although they may be only a branch to the main public road, yet any one who has occasion to do so may travel them. *Pippin* v. *May*, 78 Ark. 18. In that case in discussing whether the petition for the establishment of such a road should be granted the court said: "In determining whether such a road is necessary, the court must, of course, take into consideration, not only the convenience and benefit it will be to the limited number of people it serves, but the injury and inconvenience it will occasion the defendant through whose place it is proposed to extend it. After considering all these matters, it is for the court to determine whether the road is, within the meaning of the law, necessary or not."

Tested by this rule, we think the circuit court erred in holding that the road should be established. The undisputed evidence shows that appellants have a very valuable farm over which it is proposed to establish the road, and that it is tile drained; that the establishment of the road in question and travel over it will cause ruts to be formed, so that wagons will break the tiling; and that the tiling is so constructed that when one section is broken this will obstruct the drainage and cause the

whole field to overflow with water. As we have already seen, any one who has occasion to do so may travel this road, if established. The injurious consequences which will inevitably result to appellants from the establishment of the road in comparison to the service it will be to appellee and others who may have occasion to travel it, are so great that the court was not justified in ordering the road opened. It is true that appellee showed that the only other route was longer and more expensive to her, but she does not show that the cost of it was prohibitive, and the court, under the circumstances as disclosed by the uncontradicted testimony, was not justified in ordering the road opened because of the great injury and inconvenience to the appellants, when compared with the benefits to appellee.

It follows that the judgment must be reversed, and the cause will be remanded for further proceedings according to law and not inconsistent with this opinion.

ELLEGE v. HENDERSON.

Opinion delivered March 1, 1920.

1. EVIDENCE—LATENT AMBIGUITY OF WRITTEN CONTRACT.—Where a contract contains words of latent ambiguity, oral testimony is admissible to explain its meaning.
2. EVIDENCE—WRITTEN CONTRACT—PAROL EVIDENCE.—Where a contract for sale of a hotel stipulated "that all equipment and furnishings now in and around said house are to go to H. for the consideration of $4,000 as above stated, except the personal effects of said E.; in other words, the hotel is to be left fully equipped for business as it now stands," parol evidence was admissible upon the question whether "personal effects" should be restricted to such tangible property as is or may be worn or carried about the person, or should include the furnishings and equipment of two rooms occupied by E.

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

STATEMENT OF FACTS.

This is an action in replevin by John C. Henderson against Alice Ellege to recover certain personal property. The suit is based upon a contract between the parties, which is as follows:

"In consideration of your having this day given us a check for $500, and agreeing to pay us two thousand dollars within ten days and executing in favor of us vendor lien note for $1,550 against the lots covering 100 by 140 feet, on which now stands the Ellege Hotel, Horatio, Arkansas, said notes to run for one year and bear 8 per cent interest, we agree and will execute a warranty deed to said property in your favor and to furnish abstract showing good title to the property. It is understood and agreed by us that all equipment and furnishings now in and around said house are to go to Henderson for the consideration of $4,000 as above stated, except the own personal effects of said Elleges. In other words, the hotel is to be left fully equipped for business as it now stands. Possession is to be given within twenty days if it be required by said Henderson."

The articles involved in this suit were the beds, bedding, dressers and other furniture of two rooms of the hotel which Mrs. Ellege sold to Henderson. Mrs. Ellege conducted a hotel with twelve or fourteen rooms for guests. Mrs. Ellege, her husband and her son occupied two rooms down stairs, which were specially furnished by her. She claims that under the contract the beds, bedding, dressers and other furniture in these two rooms were reserved. She said that these two rooms and the furniture therein had never been used for hotel purposes. She admitted that Henderson had occupied one of the rooms for a time while her son was absent, but said that this was done as a matter of accommodation to him and not as a part of the business of running the hotel.

The court excluded this evidence from the jury and directed it to return a verdict for the plaintiff. The defendant has appealed.

Will Steel, for appellant.

1. The contract is ambiguous in its terms, and its interpretation should have been left to the jury. 115 Ark. 166; 113 *Id.* 556. The contract should be considered as a whole. 96 *Id.* 320. Two of the clauses in the contract are ambiguous. Our contention is that "all the equipment and furnishings now in and around the hotel" did not go to Henderson, but there were excepted "the own personal effects of said Elleges." This refers to specific description of property which precedes it and from which the description is taken; the doctrine of *ejusdem generis* prevails and should govern. 73 Ark. 600; 104 *Id.* 264. Parol evidence was admissible to explain the ambiguity in the words used, "effects, equipment, etc." 112 U. S. 495; 40 Ind. 593; 20 Vt. 195; 6 How. (U. S.) 301; 42 S. W. 938.

2. Plaintiff's instruction No. 2 was error. 89 Ark. 368.

Lake & Lake, for appellee.

The contract is not ambiguous but clear and definite, and parol testimony was not admissible; it was the duty of the court to interpret it. 105 Ark. 213; 75 *Id.* 55; 79 *Id.* 172; 101 *Id.* 353. The court properly refused to submit to the jury the meaning of the language used. 186 S. W. 622; 99 Ark. 112; 9 Cyc. 578; 113 Ark. 556; 23 Wallace 492. The intention of the parties is clear and definite, and the parties were not old nor ignorant. On the whole case the judgment is correct, and there is no error in the instructions.

HART, J. (after stating the facts). It is sought by the plaintiff to uphold the judgment on the ground that the contract is not ambiguous and that the court properly construed it not to reserve the articles sued for.

On the other hand, it is contended by the defendant that the contract is ambiguous, and that oral testimony was admissible to explain the meaning of the words, "personal effects," as used in the contract. Ordinarily

it is the duty of the court to construe a written contract and declare its meaning to the jury. Where, however, the contract contains words of latent ambiguity, oral testimony is admissible to explain the meaning of such words. *Wilkes* v. *Stacy,* 113 Ark. 556.

Tested by this rule, we think the court erred in instructing a verdict for the plaintiff. We do not think that the words, "personal effects," as a matter of law should be restricted to such tangible property as is worn or carried about the person. In construing the meaning of these words, particular regard must be given to the connection in which they are used. Each case must be construed according to the connection in which the words are used, regard being had to the situation of the parties and the surrounding circumstances.

Mrs. Ellege was conducting a hotel which had twelve rooms which were used in the business. Her husband, her son and herself occupied two rooms downstairs, which were furnished by her for that purpose. She sold her hotel and its furniture to Henderson. When they moved out, she carried with her the furniture in the two rooms occupied by her family. Henderson claimed the furniture under the contract of sale. She sold the hotel for $4,000. The first part of the contract deals with that phase of the subject. Then follows this clause: "It is understood and agreed by us that all equipment and furnishings now in and around said house are to go to Henderson for the consideration of $4,000 as above stated except the own personal effects of said Elleges. In other words, the hotel is to be left fully equipped for business as it now stands." It will be noted that the language quoted deals with the disposition of the equipment and furnishings in the hotel. The agreement, in brief, is that all equipment and furnishings now in the hotel are to go to Henderson except the own personal effects of the Elleges.

When the parties in a contract enumerate a particular class and immediately couple with that class the words, "personal effects," these words must be applied

to articles *ejusdem generis* with those specified in the preceding part of the sentence. The parties were dealing with a disposition of the equipment and furnishings of the hotel and a fair and reasonable interpretation of the words, "except the own personal effects of said Elleges," would show that the parties referred to furnishings of the hotel which had been for the personal use of Mrs. Ellege and her family. It can not be said as a matter of law that the parties were referring to articles usually worn on the person when as a matter of fact the sentence deals with the disposition of the furnishings of the hotel and it might be fairly said that the words personal effects as used in this sentence by the parties referred to the furnishings used by Mrs. Ellege; otherwise, why except the personal effects of Mrs. Ellege from the furnishings if they were not of the same class as those mentioned in the first part of the sentence. This view is strengthened when we consider the words following. They are explanatory words and show that the parties meant that only the equipment and furnishings which had been used by Mrs. Ellege in the proper conduct of her hotel business should pass under the sale.

Therefore, we are of the opinion that the contract is ambiguous, and that oral testimony is admissible to explain the meaning of the words used, and that the court should have submitted to the jury to determine in what sense they were used. *Paepcke-Leicht Lbr. Co.* v. *Talley,* 106 Ark. 400.

It follows that the court erred in directing a verdict for the plaintiff and in not allowing the explanatory testimony of Mrs. Ellege to go to the jury. On this account the judgment must be reversed and the cause remanded for a new trial.

BLACKBURN v. COFFEE.

Opinion delivered March 1, 1920.

1. ADVERSE POSSESSION—RECOGNITION OF ORIGINAL OWNER'S TITLE.—Where adverse possession of land has vested title, a mere recognition of the possessor's title by the possessor could not revest title already acquired.
2. ADVERSE POSSESSION—TITLE ACQUIRED.—Where adjoining owners by mistake thought that a division fence was the line between them, one who held under claim of ownership up to the fence for more than seven years acquired title by adverse possession.

Appeal from Johnson Circuit Court; *Hugh Basham,* Judge; affirmed.

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

The court erred in directing a verdict for appellee. "Open notorious possession" as applied to adverse holding of land by another means that the claim of ownership must be evidenced by such acts and conduct as are sufficient to put a man of ordinary prudence on notice that the land is held by the claimant as his own. 1 R. C. L. 13. Mere possession is not sufficient. *Ib.;* 52 Am. Dec. 618; 35 Am. St. 613. The fact that all previous owners held to a conditional line even for a long period of time is not inconsistent with a purpose and intent to hold only such, as each was entitled to hold under his deed and to observe the true line when established. The intention with the possession was taken and maintained is controlling as to adverse holding. 1 R. C. L. 49. If, through ignorance, inadvertence or mistake, one occupied up to a given line beyond his actual boundary because he believes it the true boundary line, but has no intention to claim to that extent if it should be ascertained that such line is on his neighbor's land, the indispensable element of adverse possession is wanting. The intention is not absolute but provisional. 1 R. C. L. 50. If the land owner, acting under a mistake as to the true boundary line, incloses land of another believing it his own, encloses it, claims title and holds possession for the statutory period, he becomes the owner, for the posses-

sion and claim of title, though founded on mistake, is adverse, but this would not be so if his intention was to claim only to the true line, but the possession would not be adverse beyond such line. 59 Ark. 628; 1 Cyc. 1037; 80 Ark. 445. The question is solely one for the jury. No intention to hold adversely or in hostility to the rightful owner is shown here on the part of any one connected even remotely with the ownership. 114 Ark. 376; 111 *Id.* 604; 97 *Id.* 47. It was error to take the case from the jury. 71 Ark. 445; 210 U. S. 281; 119 Ark. 589; 120 *Id.* 43-206; 98 *Id.* 334-370; 105 *Id.* 136; 111 *Id.* 309. See also 97 Ark. 438; 76 *Id.* 88; 63 *Id.* 94; 77 *Id.* 556; 103 *Id.* 425; 117 *Id.* 665; 89 *Id.* 368; 100 *Id.* 71; 104 *Id.* 267; 88 *Id.* 550.

W. E. Atkinson, for appellee.

1. If J. B. Wilson and J. C. Baskin were adjoining land owners and established a division line, and each took possession, held, fenced and cultivated the land according to said line, the agreement was binding on them and all claiming under them. 23 Ark. 708; 71 *Id.* 248; 75 *Id.* 405.

2. An agreement may be inferred from long acquiescence and occupation according to such line and the parties are bound thereby. 23 Ark. 708; 75 *Id.* 405.

3. If appellee or his grantors, or both, have had continuous adverse possession, cleared, fenced and cultivated the land during the statutory period under the belief that it was included in their deed, then he is entitled to judgment, though the land was not included in the deed. 100 Ark. 71; *Ib.* 555; 53 *Id.* 74; 59 *Id.* 626. If the intention was to hold adversely, the statute runs regardless of the mistake as to boundary or title. 77 Ark. 201; 100 *Id.* 71. The intention governs. *Supra.* See also 104 Ark. 274; 90 *Id.* 178.

4. Efforts to compromise which failed can not be given in evidence, nor can evidence or oral agreement to change the boundary line. 118 *Id.* 10.

5. There was no prejudice in an instruction which assumes as true matters which are established by undisputed evidence. 89 Ark. 178; 95 *Id.* 168. The court properly instructed a verdict, as defendant was clearly entitled to the land, and there is no evidence to the contrary.

HART, J. This is an action in ejectment by F. A. Blackburn against J. G. Coffee to recover ten acres of land. At the conclusion of the evidence the court directed a verdict for Coffee and Blackburn has appealed.

According to the testimony of J. G. Coffee, he is seventy-three years of age and was born and raised on a tract of land which includes the strip in controversy. In about the year 1849, J. G. Wilson entered from the government the eighty acres of land on which Coffee now lives and it included the ten acres in controversy. In 1850 Wilson conveyed by deed to J. C. Baskin a tract of land, and they established what they called a conditional or division line. The deed to Baskin only conveyed thirty acres of the forty acres in which the ten-acre tract in controversy is situated; but the conditional or division line between the parties gave to Baskin the ten-acre tract in controversy. They built a division fence and a ditch, and the fence and ditch have been there ever since. Coffee plowed the land when he was only eight years of age and remembers that the fence was the division line between Wilson and his stepfather, J. C. Baskin. Baskin claimed the ten acres in controversy until the date of his death in 1863. Since that time Coffee and his grantors who obtained title from J. C. Baskin have cultivated up to the division line referred to and claim the land up to that line. Coffee has owned the place where he now lives for thirty-seven years.

J. M. Laster was a witness for the defendant and is seventy-eight years of age. According to his testimony, he first remembered being on the place sixty-five years ago and knew that the present fence was regarded as the line between the parties. They each cultivated up to

the fence. The fence as it was constructed then is at the same place except that Coffee has put in a lane and moved his fence back to that extent. Since he has known the land, each party has cultivated up to the cross fence, and it has been regarded as the line between the two places.

Two other men of about the same age as Laster, who had lived in the neighborhood all their lives, testified to substantially the same state of facts as Laster.

According to the testimony of the plaintiff, Blackburn, he had the land surveyed and found that the deed to Coffee and his grantors did not include the ten acres in controversy. Coffee had told him that his deed only called for thirty acres and that he did not claim any more land in that forty-acre tract. The survey showed that the ten-acre tract in controversy was not included in the thirty acres called for in Coffee's deed. Coffee then recognized that the ten acres in controversy belonged to Blackburn.

Blackburn offered to let Coffee have it for $500 and settle the matter. Coffee agreed to this, but subsequently backed out. Coffee denied having made this agreement with Blackburn.

The circuit court in directing a verdict excluded this testimony of Blackburn and this action of the court is now assigned as error calling for a reversal of the judgment.

The correctness of the ruling of the court in excluding Blackburn's testimony depends upon whether or not Coffee's grantors had already obtained title to the ten acres in controversy by adverse possession. This offer to purchase from Blackburn by Coffee would be to a certain extent a recognition of Blackburn's claim and would have a tendency to show that Coffee's possession was not adverse, if it had occurred before the statutory period had run and the title by adverse possession had been acquired. But if at the time it was made Coffee's grantors had already been in possession of the land for over seven years claiming to hold it adversely and had thereby become vested with the title by limitation, a mere recogni-

tion of Blackburn's title could not revest the title in him when the title had already been acquired by another by adverse possession. This court has expressly held that recognition of another's title after the full statutory period has elapsed will not have that effect. *Shirey* v. *Whitlow,* 80 Ark. 445, and *Hudson* v. *Stillwell,* 80 Ark. 575. Here the undisputed evidence shows that the parties erected a fence and ditch on what they called the conditional or division line. It is evident, when reading the whole testimony, that they used the words, "conditional line and division line," as meaning the same thing. It is true Baskin only got a deed from Wilson to thirty acres in the forty-acre tract in which the ten acres in controversy are situated; but the evidence shows that the parties at the time thought that the division fence was the line between the parties and that the deed to Baskin included the ten acres in controversy. Wilson and Baskin each cultivated the land on his side of the division fence. They regarded it as the line between them. Baskin intended to claim up to the fence. He believed that he owned the ten acres in controversy. It was within his enclosure, and he held it continuously under such claim of ownership until he died in 1863 without any recognition of the possible right of another thereto on account of any mistake in the boundary line. Therefore the holding and possession of Baskin was adverse. It was continued for more than seven years and had the effect to divest the title out of the former owner and invest it in Baskin. *O'Neil* v. *Ross,* 100 Ark. 555, and cases cited.

The testimony not only of Coffee, but of several other old men who had lived in the neighborhood all their lives, shows that when the fence was established in 1850 it was believed to be on the true line. Baskin claimed up to the fence. He claimed to a line visible and known, and his actual possession was coextensive with that boundary. He acquired title by adverse possession, and, under the authorities above cited, it operated as a complete investiture of title, and a subsequent executory agreement with Blackburn to pay him for the ten acres in controversy

would not remove the statute bar and reinvest the title in Blackburn.

It follows that the judgment will be affirmed.

WATSON v. ARTHUR.

Opinion delivered March 1, 1920.

1. PLEADING—SUFFICIENCY OF COMPLAINT.—Where the sufficiency of a complaint is tested on demurrer, every inference reasonably deducible therefrom must be considered.
2. USE AND OCCUPATION—ALLEGATION OF OWNERSHIP.—In an action to recover the rental value of land, a complaint alleging that plaintiff had foreclosed a deed of trust of the land, and that a commissioner's deed had been delivered to him, sufficiently alleges, as against a demurrer, that plaintiff was the present owner of the land.
3. USE AND OCCUPATION—ALLEGATION OF RENTAL VALUE.—In an action to recover the rental value of land occupied by defendant, allegations in the complaint to the effect that defendant collected $150 from one to whom he had rented the land sufficiently showed that the land had a rental value, though the sum collected was not conclusive of the amount thereof.
4. USE AND OCCUPATION—LIABILITY OF OCCUPANT.—The relation of landlord and tenant need not be established in an action of use and occupation; it being sufficient to prove ownership on one hand and occupation on the other.
5. USE AND OCCUPATION—PERSON LIABLE.—An owner of land may treat the possession thereof by the tenant of another as the possession of the latter, and may recover the rental value of the land from him.

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

Avery M. Blount and *Saye & Saye*, for appellant.

The court erred in sustaining the demurrer because (1) the allegations of the complaint showed title in plaintiff sufficient to maintain action. 53 Ark. 449; 79 *Id.* 544; 127 *Id.* 147; 191 S. W. 919; 15 Cyc. 95. (2) The complaint states facts sufficient to constitute a cause of action under Kirby & Castle's Digest, section 5503; 25 Ark. 134; 27 *Id.* 55; 64 *Id.* 240; 105 *Id.*

307; 79 *Id.* 544. No demand for performance was necessary. 13 Ark. 69.

J. N. Rachels, for appellee.

Appellant relied on Kirby's Digest, section 4700, and the complaint failed to state a cause of action or to establish it. 25 Ark. 134; 27 *Id.* 55; 105 *Id.* 307; 57 *Id.* 215; 134 *Id.* 240.

SMITH, J. In the complaint filed in this cause it was alleged that on March 4, 1914, appellant was the owner of certain lands, which she then conveyed to J. S. Matthews for the sum of $850, which said sum was secured by a deed of trust on said lands. That on January 6, 1916, Matthews, by quitclaim deed, conveyed the land to appellee, F. M. Arthur, who, on the ..... day of March, 1916, conveyed the same, by quitclaim deed, to one Andrews.

That default having been made by Matthews in the payment of the purchase money, a suit was brought to foreclose the deed of trust securing it, and a decree to that effect was obtained. The complaint proceeds to recite that the commissioner named in the decree sold the land, filed a report of sale, which was duly approved and confirmed, and that the commissioner had executed and delivered his deed, which had been duly approved by the court, to appellant, who was the purchaser at said foreclosure sale, a copy of the deed being attached as an exhibit to the complaint.

The complaint further alleged that "plaintiff further states that defendant, F. M. Arthur, failed to deliver up possession of said lands until January, 1918. That during the year 1917 defendant, without plaintiff's knowledge and against her will and consent, retained possession of said above described lands, and rented or leased a part of same to one F. H. Barrett, and collected the rent for same to the amount of $150, and has converted same to his own use and benefit." There was a prayer for judgment for $150.

A demurrer to this complaint was sustained, and the cause dismissed, and this appeal is from that order.

Appellee defends the action of the court upon several grounds. It is first insisted that the complaint shows Barrett, and not appellee Arthur, to be the occupant in possession of the land, and counsel, therefore, says: "Certainly, Barrett might by some way be sued for use and occupation of the farm, but by no law could Arthur be sued." It is also asserted that the complaint does not allege appellant to be the owner of the lands, or that, if she ever had the title, she has not since conveyed it away; that the complaint does not allege that the lands had any rental value, or that appellant had been deprived of their use, or, if so, that she had been damaged thereby.

It must be confessed that the complaint leaves something to be supplied by intendment; but it must also be remembered that its sufficiency is being tested on demurrer, and that when so tested every inference reasonably deducible therefrom must be considered. *Sallee* v. *Bank of Corning,* 122 Ark. 502. When so tested, we think it fairly appears that the complaint has alleged that appellant is the present owner of the land by virtue of the commissioner's deed, and was such owner during the occupancy for which she sues. The complaint does not specifically allege that the lands had a rental value; but it does allege that appellee collected $150 on that account; and we think this is sufficient to allege that the lands did have a rental value. Of course, the sum collected by appellee is not conclusive of the amount of such value.

We conclude, therefore, that appellant has alleged facts entitling her to recover against the occupant, for in the case of *Dell* v. *Gardner,* 25 Ark. 134, the court, in construing the statute which has since become section 4700 of Kirby's Digest, said: "It is not necessary, says the court in *Hull* v. *Vaughan,* that the relation of landlord and tenant should be distinctly made out between the parties; if there is, in point of fact, an ownership on the one hand and an occupation on the other, that will suf-

fice; and this rule, so conducive to the ends of justice, we will adopt in this case, in which the entry appears to have been peaceable, and the occupation acquiesced in by the owners." This doctrine has since been repeatedly reaffirmed. *Bright* v. *Bostick,* 27 Ark. 55; *Beardsley* v. *Nashville,* 64 Ark. 240; *Cooley* v. *Ksir,* 105 Ark. 307.

Upon the proposition that the complaint shows Barrett, and not Arthur, to be the occupant, it suffices to say that appellant may elect, as she has done, to treat Barrett's possession as that of Arthur, and may hold Arthur as the occupant, although his possession was by tenant. One is in possession of land whose tenant occupies it for him.

It appears that our use and occupation statute was modeled after the English statute on that subject, although, as was said in the case of *Dell* v. *Gardner, supra,* our statute is more comprehensive than the English statute. Yet, in the case of *Bull* v. *Sibbs,* decided in the Court of King's Bench in 1799 (8 Durnford & East's Reporter, 327), where a suit was brought under the use and occupation statute—when common law pleading in all its inflexibility was in force—the court said of the defense, that the defendant was not himself in possession, "that if Ditchell occupied the land under the defendant, the latter was answerable to the plaintiff in this form of action; that the occupation by the tenant of the defendant was, as far as it respected the plaintiff, an occupation by the defendant himself." See, also, 1 Underhill on Landlord & Tenant, sec. 364.

The decree is, therefore, reversed.

WIEGEL v. ROAD IMPROVEMENT DISTRICT NO. 1 OF PRAIRIE COUNTY.

Opinion delivered March 1, 1920.

1. APPEAL AND ERROR—FORMER DECISION AS LAW OF CASE.—The construction of the contract sued on upon former appeal is the law of the case.

2. SALES—FIRST BREACH OF CONTRACT.—Under the rule that he who commits the first breach of a contract can not maintain an action against the other for a subsequent failure to perform, where the seller of trap rock failed in its duty to furnish the various sizes of rock in the proportions ordered, he can not sue the buyer for failure to make payments at designated times.

Appeal from Prairie Circuit Court, Southern District; *Geo. W. Clark,* Judge; affirmed.

Edward B. Downie, Price Shofner and *Mehaffy, Donham & Mehaffy,* for appellants.

It was the duty of the buyer to furnish the cars. 45 N. E. 126; 27 Atl. 836; 123 Fed. 655; 133 *Id.* 409; 40 L. R. A. 534. See also 6 L. R. A. (N. S.) 928 and cases cited. But if not appellee at no time claimed failure to get cars as a violation or breach of the contract, but the claim was that Wiegel failed to furnish the rock as required by the contract. Where a contract is for mutual acts, the refusal of one to perform justifies the other in treating the contract as rescinded. 38 Ark. 174; 22 *Id.* 258. See also 79 *Id.* 271; 194 S. W. 508; 67 *Id.* 156. Practically all the authorities sustain appellants' contention that there was a breach of contract by the district. 56 Ark. 320; 64 *Id.* 228; 88 *Id.* 491, 422; 98 *Id.* 472; 105 *Id.* 171; 98 *Id.* 160; 43 *Id.* 193; 79 *Id.* 582; 93 *Id.* 453; 9 Cyc. 641, 643; 61 L. R. A. 407; 1 Sutherland on Dam. (4 Ed.), § 66; 178 Pac. 906. No view of the evidence and contract can be taken which justified damages against Wiegel, but the evidence is conclusive that appellee violated the contract and Wiegel was justified in declining to furnish more rock.

Emerson, Donham & Shepherd and *Charles B. Thweatt,* for appellee.

The evidence sustains the finding that the district ordered the rock delivered—five cars a day. The contract is plain as to the authority of the district to order the rock, and Wiegel did not comply with his contract. Shortage of cars was no defense. 149 U. S. 1; 35 Cyc. 245; 36 Pa. Sup. Ct. 475. See also 93 Ark. 446; 104 Pac.

1115; 176 Ill. App. 178; 141 *Id.* 603; 134 Fed. 294; 23 R. C. L., p. 1430, § 254. Wiegel agreed to fill all orders for rock, and hence it was his duty to procure cars. 73 Kan. 422; 6 L. R. A. (N. S.) 928. The decision on the former appeal settles the law of this case. 126 Ark. 31.

SMITH, J. This is the second appeal in this cause, the opinion on the former appeal being found in 126 Ark. 31.

The law of the case was declared on this former appeal, where the contract out of which this litigation arises was set out, so it remains only to determine whether the law as there declared was properly applied at the trial from which this appeal comes, and we restate here only such facts as must be recited in the decision of that question.

We said, in construing the contract under which the parties operated, that the district was not required to take the entire output of the plant, but that the engineer of the district had the right to order the rock in such proportions as the district needed. We, therefore, held against Wiegel's contention that he had only agreed to furnish the output of his plant, and that it was not the duty of the district to take the entire output, but that the district had the right to order rock in such proportions as it pleased.

Notwithstanding this construction of the contract, it is contended that Wiegel was performing the contract when the district breached it by refusing to furnish cars to haul the rock, or to pay for the rock already delivered.

The parties agree that the law is that he who commits the first breach of a contract cannot maintain an action against the other for a subsequent failure to perform, and that the decisive question in the case is, who committed the first breach?

The briefs contain an interesting discussion of the duty to furnish cars to haul the rock as between the parties. But we find it unnecessary to decide that question of law to dispose of the question of fact involved.

To begin with, it is undisputed that Wiegel's contract only permitted him to charge the district 62 cents per yard for the rock, whether it was No. 1, 2, 3 or 4, whereas, because of the advance in the price, No. 1 rock was then worth $1 per yard and No. 3 rock $1.35 per yard, and could not be obtained at a less price. It is, therefore, apparent that it was greatly to the district's advantage to have the contract performed, and the repeated and insistent letters written to Wiegel, calling on him to ship the rock, and assuring him that money to pay for it was lying idle in the bank, leaves no doubt that the district desired its execution.

An order for five cars a day was placed, it being explained to Wiegel that a larger quantity could not be distributed over the road to be improved, and if more was shipped demurrage would have to be paid on unloaded cars, but that the contractor had the necessary teams to distribute that quantity of rock, and if it were not furnished, the district would be required to pay for the services of unemployed teams with their drivers.

A general order to ship the rock in the proportion of two cars of No. 1 to one car of No. 3 was given; yet it appears that only on five days were shipments made in the quantity ordered, and an even less effort was made to ship it in the proportions ordered.

The contractor and the engineer testified that the original plan for the construction of the road, which was made and approved before the contract with Wiegel was entered into, and which was never afterward changed, was to build the first course four inches thick with No. 1 rock, and the second course two inches thick with No. 3 rock, and that it was better for the road for not more than a thousand feet to a quarter of a mile of the first course to be put down before the second course was put on top of it. That the hauling and traffic over the No. 1 course cuts up and jars the large rock loose and the course will not be compact and smoth to receive the finishing course of No. 3 rock, and the road would not, therefore, be as good as it would be if the No. 3

rock was put on promptly. The commissioners testified that on June 10th they went to Wiegel's plant, and found the crushed rock bins empty, and the plant idle, and unloaded cars standing on the sidetrack, and that thereafter they frequently wrote Wiegel and 'phoned him and made several trips to see him urging him to ship No. 3 rock, during all of which time Wiegel insisted that he was shipping all the No. 3 rock his plant produced, and that this condition continued until July 16th, when the course of No. 1 rock was 13,400 feet ahead of the course of No. 3 rock. Wiegel admits that at this time No. 1 rock was worth $1 per yard and No. 3 rock $1.35 per yard.

The contract called for payments by the district on or about the first and fifteenth of each month, and payments in full for all rock shipped prior to June 1st were made, but no payment was made subsequent to that date. Wiegel now insists that the failure to make the payments on June 15th and July 1st constituted a breach of the contract on the part of the district, and excused him from further performance. We do not think so. Wiegel was already in default, and, in our opinion, a letter written by his attorney on July 9th explains Wiegel's failure to continue shipments. This letter reads as follows: "You are laboring under a misapprehension as to the amount of No. 3 rock you are entitled to receive. The contract called for 1, 2, 3 and 4, and this is the character or numbers of the stone produced by the crusher. The 1s form about 50 per cent. of the output, 2s 25 per cent., 3s 15 per cent., and 4s 10 per cent. The contract price is such a low figure that it cannot be presumed for a moment that any one of these grades was intended to form the whole, or a large part, of the contract, leaving the remainder of the output unused by you. Under the contract you are to use the four different grades, and there is no reason to believe that they were to be furnished in different proportions than that of the output. This I think is the chief fault that you seem to find with what you have received."

It is apparent from this letter that Wiegel construed the contract as requiring the district to take the entire output of the plant, mill run, and that he was not willing to continue shipments unless the district did so. The answer to this letter, as well as the entire correspondence, makes it plain that the district was willing and able to pay for the rock, if it could be furnished in the proportions ordered, and we, therefore, think the testimony warranted the court in finding that Wiegel was the party who first made default.

It appears that Wiegel was given credit for the rock shipped after June 1st at the contract price, and was charged with the excess over the contract price on the rock which the district had to buy elsewhere. This the contract expressly authorized, and the judgment to that effect is therefore affirmed.

STANFIELD v. ROAD IMPROVEMENT DISTRICT NO. 2 OF CLEVELAND COUNTY.

Opinion delivered March 1, 1920.

1. HIGHWAYS—JURISDICTION OF COUNTY COURT.—Road Laws 1919, volume 2, No. 689, creating a road improvement district, does not infringe upon the jurisdiction of the county court, since it requires the approval by the court of the nature of the improvements and of any changes in the line of the road.
2. HIGHWAYS—CONSTRUCTION OF ACT.—The above act does not intend to authorize the building of a road beyond the boundaries of the district.
3. HIGHWAYS—IMPROVEMENT OF STREETS.—Road Laws 1919, volume 2, No. 689, providing for building a road from a certain point along a designated route to a certain town and on and along such streets thereof as the commissioners may select, authorizes the improvement of such street or streets only as supply a link in the road as it runs from the point selected as its terminus in the town.
4. HIGHWAYS—IMPROVEMENT OF STREETS.—The above act is not invalid for including a portion of the streets of a town as part of the general highway to be improved.

5. HIGHWAYS—CONSENT OF LAND OWNERS.—Constitution, article 19, section 27, requiring as a condition to assessment for local improvements in a municipality that the improvement be based on the consent of a majority in value of the property owners, has no application to improvement districts not wholly within the city or town.

6. HIGHWAYS — ASSESSMENTS EXCEEDING BENEFITS.—The contention that the assessments for a highway improvement will exceed the benefits is not available in a suit to enjoin the construction of the road, where the act creating the district provided for a subsequent hearing on that issue.

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

S. J. Hunt and *Toney & Craig*, for appellant.

1. The act is unconstitutional and void for many reasons. It conflicts with article 19, section 27, Constitution. It is unjust and arbitrary, as it includes a large territory it can not benefit and omits lands lying nearer and more contiguous, and the improvement is indefinite and uncertain. It also conflicts with article 7, section 28, Constitution. It usurps the jurisdiction of the county court. 89 Ark. 513; 92 *Id.* 93; 118 *Id.* 119; 118 *Id.* 294.

2. It does not describe any road to be improved. 120 Ark. 277.

3. It was not presented to the Governor within the time prescribed by law. 26 A. & Eng. Enc. L. 551; 18 Ind. 25; 6 So. Cas. 390. The act is void upon its face. The record shows the act was signed by the Governor 23 days after its passage. 71 Ark. 527; 10 R. C. L. 28.

Chas. A. Walls and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

1. The legal presumption is that officers do their duty, and that the bill was duly presented to the Governor in time, and it is immaterial when he approved it, as it became a law at the end of 20 days in the absence of a veto. 147 U. S. 91; 44 Ark. 536; 75 *Id.* 120; 76 *Id.* 201; 5 *Id.* 559; 40 *Id.* 200-214; 27 *Id.* 278; 110 *Id.* 275; 131 *Id.* 291; 214 S. W. 2; 131 Ark. 295; 214 S. W. 2; 90 Ark.

603. See also 75 Ark. 124; 71 *Id.* 727; 72 *Id.* 250; 83 *Id.* 448.

2. Evidence to impeach an act must be found in the act itself or in the journals or official records of the Legislature or the Secretary of State. 120 Ark. 131.

Rowell & Alexander, for appellee.

We concur in the brief filed by our co-counsel, and will only cite in addition 71 Mo. 266; 175 Ala. 579. See also 36 Cyc. 290; 26 A. & E. Enc. (2 Ed.) 551; 8 Minn. 366; 64 S. E. 845; 37 L. R. A. 391 and note.

SMITH, J. This suit was brought to enjoin the construction of the road authorized by Act No. 689 of the Session Acts of 1919, and this appeal is from a decree of the chancery court dismissing the complaint filed for that purpose as being without equity.

It is first contended that the bill was not presented to and approved by the Governor within the time limited by the Constitution. But the decision of that question is controlled by the opinion of this court in the case of *Rice* v. *Lonoke-Cabot Road Imp. Dist. No.* 11 *of Lonoke County, post* p. 454, in which case the decision is adverse to appellant's contention.

Other attacks against the act are directed to section 2 of the act, which reads as follows:

"Section 2. Said district is hereby organized for the purpose of building a road, beginning at Calmer at an intersection with the Warren and Pine Bluff road; thence in a general westerly and northwesterly direction to Rison and on and along such streets in said town of Rison as the commissioners may select.

"The improvement to be made by said district are to be made on route designated in this act, or substantially along this route, the nature of the improvements and any changes in the line of said road to be approved by the county court of Cleveland County.

"Said road to be constructed of material selected by the commissioners and approved by the county court."

It is insisted that the act is void because it does not sufficiently designate the road to be improved, that it would be possible to build a road answering the designation contained in the act, a considerable portion of which would lie without the boundaries of the district as defined in section 3 of the act; that the act infringes upon the jurisdiction of the county court by authorizing the construction of new road; that the act authorizes the commissioners to improve any street, or all the streets, in the town of Rison, and, when so construed, an improvement is authorized which is too diverse to be constructed as a single district; and, finally, that the act is void for the reason that it deprives the officials of the town of Rison of the control of their own streets, and authorizes their improvement without requiring the consent of a majority of the property owners to be affected, in violation of article 19, section 27 of the Constitution.

It is recited in the act that "Said district is hereby organized for the purpose of building a road, beginning at Calmer at an intersection with the Warren and Pine Bluff road, thence in a general westerly and northwesterly direction to Rison." And it is conceded that there is an old established road running practically as described in the act. It is said, however, that the act does not require the improvement of this road, and that authority is conferred to improve a new and different one, and that if the road were to run south of west forty-four degrees for six miles, after leaving Calmer, it would then be without the district, and that it might then run northwest, or practically so, into Rison, leaving a large portion of the road without the district.

These fears appear, however, to be groundless. A survey of the road has been filed along with the plans of the district, and has been approved by the county court. It does appear that some changes in the existing road are made; but these were made for the purpose of shortening the road and otherwise improving it; but this action required the precedent approval of the county court, and, therefore, as we have frequently recently de-

cided, there is no invasion of, or infringement upon, the jurisdiction of the county court. Nor was there any legislative intent to authorize or require this district to construct and build a road lying without its boundaries.

We think the act does not authorize the improvement of all the streets of the town of Rison, or such portions of them generally as the commissioners may elect to improve, but that it authorizes the improvement only of such street or streets as supply a link in the road as it runs from the point selected as its terminus in Rison. The language of the act is "on and along such streets in said town of Rison as the commissioners may select." We think this language means a projection or continuation of the road along such street or streets in the town of Rison as is necessary to reach the county courthouse, the point selected as the terminus, and was not intended to confer, and does not confer, upon the commissioners power to improve the streets of that town generally.

What we have said is not in conflict with our opinion in the recent case of *Payne* v. *Road Improvement District No.* 1 *of Marion County,* 141 Ark. 288. There the act provided that the district should "build, improve, 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 of the act there construed provided that "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."

We there said that section 4 made it the duty of the 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," and that the framers of the statute meant to include the public streets of the three incorporated towns mentioned. Having reached the conclusion there announced, that the act embraced all the streets and alleys of the three towns mentioned, we said the act was invalid, because it joined together as a single improvement the improvement of all the streets and alleys of three different incorporated towns in the same county, but widely separated from each other. But here only the streets in the town of Rison are embraced, and such streets only in that town are to be improved as are necessary to make a continuous, unbroken highway to the courthouse.

That case does, however, answer the argument that the act is void because it deprives the officials of the town of Rison of the control of their streets, for we there said: "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 Dist.,* 125 Ark. 325; *Bennett* v. *Johnson,* 130 Ark. 507."

In answer to appellant's contention that the act violates section 27, article 19 of the Constitution, in that it does not require the consent of the property owners of the town of Rison for the improvement of the streets of that town, it may be said that the cases of *Bennett* v. *Johnson,* and *Nall* v. *Kelley, supra* (as well as the cases there cited), decide that the section of the Constitution mentioned has no application to districts covering territory not wholly within the limits of a municipality.

Appellant finally complains that his assessments will exceed his benefits. But that question is not before us for decision in this cause, as appellant will have his

day in court upon that issue when his assessments are made by the assessors. Section 10 of the act contains a provision for a hearing on that issue. *Bush* v. *Delta Road Imp. Dist. of Lee County,* 141 Ark. 247.

No error appearing, the decree is affirmed.

HART, J. (dissenting). I dissent in this case on the ground that the act is in conflict with article 19, section 27 of the Constitution of the State of Arkansas, which provides that nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law to be based upon the consent of a majority in value, of the property holders owning property adjoining the locality to be affected. *Nall* v. *Kelley,* 120 Ark. 277; *Bennett* v. *Johnson,* 130 Ark. 507, and other cases are cited in support of the holding that a portion of the streets of a town which are a part of a rural highway may be included in an improvement district to improve the highway. These decisions, however, do not give the commissioners the power to select other streets which are not a part of the rural highway and improve them. To do so would be in plain violation of the section of the Constitution just referred to. The majority opinion brings this case within those decisions by construction. It certainly can not be done under the language of the act.

Section 2 of the act defines the purpose of the district as follows: "Said district is hereby organized for the purpose of building a road, beginning at Calmer at an intersection with the Warren and Pine Bluff road, thence in a genral westerly and northwesterly direction to Rison and on and along such streets in said town of Rison as the commissioners may select." Road Acts of 1919, vol. 2, p. 2740.

The court construed this language to be a continuation of the rural highway along such street or streets in the town of Rison as is necessary to reach the county

courthouse, which it says is the point selected as the terminus of the road. Neither the commissioners nor the court have any power to thus restrict the plain meaning of the language of the act. It is true the commissioners selected the courthouse as the terminus of the highway, and only intend to improve the streets leading from the rural highway to the courthouse, but the act must be construed by its plain language, and not by what the commissioners have done. The act gives the commissioners power to improve such streets in the town of Rison as they may select. The words "such streets" have a plural reference, and under the plain language of the act the commissioners might improve other streets than a continuation of the rural highway to the courthouse. The act should be construed according to the plain and ordinary meaning of the words used instead of the construction placed upon them by the commissioners. In other words, the commissioners by merely improving the streets leading from the rural highway to the courthouse could not change the plain meaning of the words used by the framers of the act. The act must be construed according to the language used in it, and not according to the acts done by the commissioners, or the construction placed upon it by them.

Therefore, I think, when the words used in the act are given their plain and ordinary meaning, the act is in violation of the provisions of the Constitution above referred to.

MITCHELL v. SCHULTE.

Opinion delivered March 1, 1920.

1. MECHANICS' LIEN—TIME OF FILING.—A mechanics' lien not filed within ninety days is void.
2. CONTRACTS—CONSIDERATION—DOUBTFUL OBLIGATION.—A forbearance to prosecute a doubtful claim until a certain time is a sufficient consideration to support an agreement to pay it.

3. CONTRACTS—CONSTRUCTION.—A letter, "I write you in regard to lien filed by L., formerly known as B. L. Company on my house for unpaid lumber bill. Please do not file suit but give me more time, say until December 1, 1917, and I will pay same," was a promise only to pay the lien and not to pay any debt which the contractors owed the material man, and, the lien being void, the writer was not liable by reason of the promise.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; reversed on cross-appeal; affirmed on direct appeal.

Daily & Woods, for appellant.

The letter of Miss Schulte obligated her to pay the full amount of the lumber bill for which the lien was filed. She knew that Foster owed the amount, and that a lien was filed against her property, and that there was a dispute between Foster and Boyer as to a certain payment. With complete knowledge of these facts she voluntarily agrees to pay the lumber bill in consideration of the withholding the bringing of a suit to enforce the lien for a definite period of time. 31 Ark. 222; 106 *Id.* 1; 110 *Id.* 225. The finding of the chancellor is clearly against the preponderance of the evidence. Forbearance to sue is a sufficient consideration to support a contract. 13 C. J., p. 344, par. 194. The proof shows that Mitchell's claim was *bona fide.* All the items actually went into the building except the last three, and the judgment should be increased $200, with interest from the date of her letter.

T. P. Winchester, for appellee.

Excluding her letter, appellee was under no moral or legal obligation to pay appellant. The statute when applicable gives a lien but imposes no personal obligation; it prescribes the time within which the lien may be fixed and declares the method. The lien was filed October 20, 1917. The chancellor's findings are supported by a preponderance of the evidence. The plaintiff was not entitled to a lien and had none under the law. In her letter she did not agree to pay the lien on

her house; she simply promised to pay the lien, and appellant had none. She did not promise to pay the debt. Forbearance to sue worked no detriment or loss to appellant. His suit was brought in time under the statute. Plaintiff had no lien and no right to a lien. 68 Ark. 505-520; 27 *Id.* 407; 128 *Id.* 249; 69 Ark. 406. The letter to Dailey did not bind appellee to pay the balance ($67.56.) on the lumber blil. Her promise was not to pay the lumber bill but *the lien,* and the decree for $57.56 should be reversed on cross-appeal and affirmed on the appeal.

HUMPHREYS, J. Appellant instituted suit in the Chancery Court of Sebastian County, Fort Smith District, against appellee, the owner of a lot in Fort Smith, and Foster and Paget, contractors, to recover a balance of $268.26 and to enforce a material man's lien against the lot, on account of material alleged to have been sold to, and used by, the contractors in the construction of a dwelling thereon.

The material averments in the complaint were that appellant owned the lot; that appellant's predecessor in business, H. B. Boyer, sold Foster and Paget, contractors, the material for the construction of a dwelling thereon; that they owed a balance of $268.26 on the account; that he gave the required notice to appellee and filed a material man's lien against the property within the time fixed by law; that appellee agreed in writing to pay the amount of the lien in consideration of an extension of time for the enforcement of the lien by suit. The prayer was for a personal judgment against the contractors and appellant, the declaration of a lien against the property and an order of sale to satisfy same.

Appellee filed an answer, denying each material allegation in the complaint, and, in addition, alleged, in substance, that she had paid the contractors the contract price for the dwelling erected by them on said lot in the spring of 1917, except $137 which she paid to appellant after the lien was filed; that the lien was filed

more than ninety days after the last item of material was furnished for the construction of the dwelling; that the written promise only bound her to pay any valid and enforceable lien against her property; that the amount for which the lien was claimed had been paid to appellant and improperly credited by him to the Trailor job, for whom the contractors were building a house at the same time they were constructing her dwelling.

The cause was submitted to the chancellor upon the pleadings, the statutory notice to appellee and the lien filed on October 22, 1917, pursuant thereto, the assignment of the lien by H. B. Boyer to appellant, the letter of date October 24, 1917, written by appellee to appellant's attorney, the attorney's reply thereto, and the evidence, which resulted in a decree in favor of appellant against O. B. Foster for $268.26, against appellee for $67.56 and a denial of the lien.

From the refusal of the court to adjudge the full amount of the claim against appellee and to fix and enforce a lien therefor against the property, appellant has prosecuted an appeal, and from the decree against appellee for $67.56, appellee has prosecuted a cross-appeal, and the cause is before this court for trial *de novo*.

Appellant's predecessor in business, H. B. Boyer, furnished O. B. Foster and his partner, Paget, the material used by them in constructing the residence for appellee on the lot in question. Appellee paid Foster the contract price except $137 retained by her to force the contractors to finish the house, which they never did. During the construction of the residence, the contractors were also building a house for.....Traylor. According to a preponderance of the evidence a payment of $200 by O. B. Foster on appellee's job was improperly credited to Traylor's job, and an item for screen material, of date July 26, 1917, was improperly charged against appellee's job. These findings of fact, after a careful consideration of the evidence, dispose of appellant's contention that the findings by the chancellor in these particulars were contrary to the preponderance

of the evidence. After notice to appellee of appellant's intention to file a lien, she paid appellant the amount of $137 withheld by her to force a completion of the house. This payment, together with a deduction of $200 item paid by Boyer on appellee's job and improperly credited to the Traylor job; and the item of $1.40 for screening improperly charged against appellee's job, reduced appellant's claim against appellee to $67.56, which formed the basis for the judgment rendered against her by the chancellor, from which she has prosecuted a cross-appeal. Eliminating the item improperly charged for screening, the last item of material furnished to the contractors by appellant for the construction of appellee's house, was furnished July 10, 1917. The lien was filed October 22, 1917, more than ninety days after the last item was furnished and, in consequence of the failure to file it within the statutory period, was a void lien. This finding of fact also disposes of appellant's contention that the chancellor's finding that no lien existed against the property was contrary to the weight of the evidence.

Appellant contends that, notwithstanding the invalidity of the lien, appellee is bound to pay the debt in consideration of a forbearance by appellant to institute proceedings immediately to enforce the claim. It is suggested that if the claim be regarded as doubtful, or void and in good faith believed to be well founded, that a forbearance to prosecute it until December 1, 1917, was a sufficient consideration to support an agreement to pay it. A number of decisions are cited in support of that doctrine. *Matthews* v. *Morris,* 31 Ark. 222; *Lay* v. *Brown,* 106 Ark. 1; *Brinkley Car Works & Mfg. Co.* v. *Cook,* 110 Ark. 325. While the rule thus announced is sound, it does not reach the real point for determination in this case. The real point involved here is whether by the writing appellee bound herself to pay appellant's claim. This must be determined by a proper interpretation of the letter written by appellee to appellant's attorney and his reply thereto. The letters are as follows:

"Mr. Harry E. Daily,
City.
Dear Sir:

I write you in regard to lien filed by L. D. Mitchell, formerly known as Boyer Lumber Company, on my house, 2308 Tilles Avenue, for unpaid lumber bill. Please do not file suit but give me more time, say until December 1, 1917, and I will pay same.

Yours truly,
Ella Schulte,
2308 Tilles Ave."

"Miss Ella Schulte,
2308 Tilles Avenue,
Fort Smith, Arkansas.
Dear Miss Schulte:

We are in receipt of your letter of the 24th inst. with respect to the L. D. Mitchell lien, in which you agree to pay same on December 1, 1917, and in reply thereto beg to state that this meets with the approval of our clients, and no action will be taken by us before that time.

Very truly yours,
Kimpel & Daily."

Appellant's contention is that the writing is broad enough to obligate appellee to pay the entire claim or indebtedness. We do not think the contention sound. The language of the letter written by appellee to appellant's attorney indicates appellee's intention to liquidate a valid and subsisting lien against her property, if given time. The promise was to pay the lien, not to pay any debt which the contractors owed appellant for material furnished for the construction of the house. That it was the lien to which appellee was addressing herself is more clearly evidenced by the reply of the attorney, which, in part, is as follows: "We are in receipt of your letter of the 24th inst. with respect to the L. D. Mitchell lien, in which you agree to pay same on December 1, 1917." We are unable to construe the language of the letter into an obligation to pay a void lien which

did not imperil her property or to pay the debt of another which did not hazard her property. Under this interpretation of her obligation, it was improper to render the personal judgment against her for $67.56.

The decree on the direct appeal is therefore affirmed, but reversed and remanded on the cross-appeal with instructions to dismiss the bill against appellee for the want of equity.

McCULLOCH, C. J. (dissenting). The decision of the majority totally diregards the contract between the parties as evidenced by the two letters set forth in the opinion. They say that the correspondence refers to the lien, but not to the payment of the debt, and refers to a lien filed in apt time, not to one which, for any reason, is invalid. In this view of the matter, the contract had no binding force whatever, for if the lien was valid it needed no new promise to make it effective, and if the promise did not amount to an obligation to pay the debt for which the lien was asserted, it did not rise to the dignity of a contract at all.

There was a conflict in the testimony as to the payments on the account of appellant, as well as to the time of completion of appellee's house by Foster, the contractor, but it may be conceded that the findings of the chancellor on these disputed questions of fact were not against the preponderance of the evidence. There is, however, no dispute as to the correspondence between appellant and appellee, nor as to the circumstances under which it arose. Appellant had, after giving notice to appellee, filed a lien in accordance with the statute (Kirby's Digest, section 4981) which provides that persons asserting such liens must file "with the clerk of the circuit court of the county in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after the things aforesaid shall have been furnished or the work or labor done or performed, a just and true account of the

demand due or owing to him, after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit."

It is well settled by numerous decisions of this court that forbearance to institute legal proceedings for a time on an asserted claim, or to refrain therefrom altogether, is sufficient consideration to support a new obligation, and that the agreement for compromise of a disputed claim, even one which is in fact without merit, also constitutes a sufficient consideration for a new promise. Those principles are distinctly recognized in the opinion of the majority, and authorities are cited in support of them. Other cases not mentioned in the opinion may be cited: *Buckner* v. *McIlroy,* 31 Ark. 631; *Willingham* v. *Jordan,* 75 Ark. 266; *Fender* v. *Helterbrandt,* 101 Ark. 335; *Nothwang* v. *Harrison,* 126 Ark. 552; *Jonesboro Hardware Co.* v. *Western Tie & Timber Co.,* 134 Ark. 543; *Simonson* v. *Patterson,* 139 Ark. 106; *First National Bank* v. *Allen,* 141 Ark. 328.

But the majority hold that these authorities have no application, for the reason that, under proper interpretation of the correspondence, appellee did not promise to pay the debt, or to discharge any lien except a valid one filed in apt time. This is a narrow view to take of the language of the letters. The lien had been filed stating the amount of the debt claimed, and notice thereof to appellee had been given. The letter referred to the filing of the lien "for unpaid lumber bill," and promised in consideration of forbearance, to "pay same." Pay what? The debt for which the lien was asserted. There was nothing else to pay, and that is what the letter meant if any meaning at all is to be attributed to it. And, even if the lien was filed too late, the promise to discharge it in consideration of forbearance for a time to sue constituted a waiver of the failure to file within the time prescribed by statute, or, at least, an agreement not to plead it.

Mr. Justice SMITH shares these views.

RICE v. LONOKE-CABOT ROAD IMPROVEMENT DISTRICT No. 11 OF LONOKE COUNTY.

Opinion delivered March 1, 1920.

1. STATUTES—PRESENTATION OF BILL TO GOVERNOR.—Where the contrary does not appear from the records of the General Assembly, it will be presumed that the Senate enrolling committee performed its duty, under Constitution, article 6, section 15, by presenting a bill within the required time to the Governor for his consideration and approval or rejection.
2. STATUTES—PRESUMPTION AS TO TIME OF PRESENTATION.—Though a bill was approved by the Governor more than 20 days after adjournment of the Legislature, it will be presumed that it was presented to the Governor within 20 days, as it will be presumed that the enrolling committee performed its duty.
3. CONSTITUTIONAL LAW—PRESUMPTIONS AS TO STATUTES.—Presumptions should be indulged to uphold the validity of laws, and not to strike them down.
4. STATUTES—TIME OF APPROVAL.—Under Constitution, article 6, section 15, the approval of a bill by the Governor after the time fixed by law for his approval, namely 20 days, was unauthorized and did not affect the bill, which had already become a law without his approval.
5. STATUTES—ENROLLED BILL.—An "enrolled bill" in legislative parlance, is a reproduction or copy of the identical bill passed by both houses of the General Assembly.
6. STATUTES—MODIFICATION OF BILL.—The enrolling clerk or committee has no power or authority to modify a bill passed by the General Assembly in any respect.
7. STATUTES—APPROVAL OF BILL.—The purpose of the Governor in signing an enrolled bill or in permitting a bill to become a law without his signature is to approve the identical bill passed by the Legislature, and the effect of his act is not impaired or invalidated by additions, omissions or misprisions of the enrolling clerk in copying the bill.
8. STATUTES—IMPEACHMENT OF ENROLLED BILL.—An enrolled bill is not conclusive of the enactment, and may be impeached by an inspection of the original bill, by indorsements thereon, by the journals and other official records in the office of the Secretary of State.
9. STATUTES—OMISSION IN ENROLLED BILL.—Road Laws 1919, volume 2, No. 669, creating a road improvement district, *held* not invalid because the enrolled bill signed by the Governor omitted the description of land embraced in the district; the omission being an obvious clerical error.

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

Carmichael & Brooks, for appellant.

The bill that passed the House and Senate was not signed by the Governor, and the bill signed by the Governor did not pass the House and Senate. 41 Ark. 475; 72 *Id.* 569; 49 *Id.* 333; 83 *Id.* 465; 86 *Id.* 529; 71 *Id.* 541.

Chas. A. Walls, for appellee.

The records show that every constitutional requirement with reference to the passage of the bill was met. The cases cited by appellant have no application. There is no question but that the enrolling clerk inadvertently omitted certain sections of land in copying the original bill, but the Secretary of State printed the act correctly from the original bill and it was published correctly. It was an obvious clerical error and the Governor intended to approve the bill passed by both houses. The case in 34 Ark. 263 controls this. 40 *Id.* 211; 51 *Id.* 566; 61 *Id.* 240. It is the duty of the courts to ascertain the intention of the Legislature and ignore mere clerical errors. 54 *Id.* 172, 240-1; 72 *Id.* 565. Mere clerical errors do not invalidate an act. 163 Ark. 109; 133 *Id.* 64; 130 *Id.* 503; 136 *Id.* 524; 131 *Id.* 295. Courts have the right and it is their duty to correct mistakes like this. 34 Ark. 263. Act 669 as printed by the Secretary of State is the law, and the omission of land by the enrolling clerk was a clerical error, and the decree should be affirmed.

HUMPHREYS, J. Appellant, and others similarly situated, instituted suit against appellee in the Lonoke Chancery Court to enjoin the Board of Commissioners of the appellee district, and the assessors of said board, from proceeding to build, or attempting to build, any road within the proposed district, upon the ground that Act 669 of the Acts of 1919 of the Legislature of Arkansas, under which said district was created, is void, for the alleged reasons, *first,* that the

bill was not presented to the Governor for approval within the time required by law; *second,* that the enrolled bill signed by the Governor was different from the engrossed bill passed by the Legislature, in this, that nineteen sections of land in township four north, range nine west, included in the engrossed bill, were omitted from the enrolled bill signed by the Governor.

Appellee filed answer, joining issue upon the material allegation set out in the complaint.

The cause was submitted to the court upon the merits, and, by decree, the act was upheld as valid; whereupon the court dismissed appellant's bill for the want of equity, from which dismissal an appeal has been duly prosecuted to this court.

The undisputed facts are that Senate Bill No. 509 which is the bill in question, passed both houses of the Legislature in the words and form as originally introduced, without modification or change in any respect; that the enrolled act of said Senate bill was approved by the Governor on April 3, 1919, on the twenty-first day after the adjournment of the Legislature, and was numbered Act 669 of the Acts of 1919; that the enrolled bill omitted from the engrossed bill, or the bill passed by both houses of the General Assembly, nineteen sections of land in township four north, range nine west, which appeared in the engrossed bill as one of seven paragraphs describing the lands within the district; that the road to be improved runs from the town of Cabot, which is in township four north, range nine west, to the public road in Improvement District No. 4; that the lands omitted from the enrolled bill were adjacent to the towns of Austin and Cabot, included in the bill, and to the road to be improved in said township and range; that the original, as well as the enrolled, bill is in the official archives of the Secretary of State, and was published by the Secretary of State as the law, including the omitted nineteen sections of land; that there is nothing on the journal records of either the House or Senate showing when the enrolled bill was presented to the

Governor; that, under the rules, it was the duty of the Senate Enrolling Committee to present the bill to the Governor for approval.

The first question to be determined is whether the bill was presented to the Governor for approval within the time required by section 15, article 6 of the Constitution. That section requires that bills must be presented to the Governor within twenty days after adjournment of the session at which passed. *Monroe* v. *Green,* 71 Ark. 527. The record in the case just cited showed that the bill was presented to the Governor twenty-three days after the Legislature adjourned. In the instant case, the record is entirely silent as to when the bill was presented to the Governor for approval. This court will indulge the presumption, where the contrary does not affirmatively appear from the records of the General Assembly, that the Senate enrolling committee performed the duty imposed upon it to present the bill to the Governor within the time required by law for his consideration and approval or rejection. This rule of presumptions in favor of the validity of legislative enactments can not be more clearly stated than was done in the case of *Harrington* v. *White,* 131 Ark. 291. The rule formulated there is as follows: "An act of the Legislature signed by the Governor and deposited with the Secretary of State raises the presumption that every requirement was complied with, unless the contrary affirmatively appears from the record of the General Assembly." The rule thus announced is sustained by the cases of *Chicot County* v. *Davies,* 40 Ark. 200; *Glidewell* v. *Martin,* 51 Ark. 559; *State* v. *Corbett,* 61 Ark. 226; *State* v. *Bowman,* 90 Ark. 174; *Mechanics Building & Loan Association* v. *Coffman,* 110 Ark. 269; and has been reannounced and sustained in the recent cases of *Perry* v. *State,* 139 Ark. 227, and *Helena Water Co.* v. *Helena,* 140 Ark. 597. The reason of this rule of presumptions is grounded in public policy and respect of a co-ordinate department of government, so said Mr. Justice SANDELS in the case of *Glidewell* v. *Martin,* 51

Ark. 559. The reasons for the rule are so clearly and ably expressed by that profound master of law, the writer can not refrain from indulging in the following quotation from him:

"From considerations of public policy and because of the respect due the action of a co-ordinate department of government, the courts, long since, began to supply the omissions of journal clerks by presumptions as to the regularity of the proceedings of the General Assembly. This has been found most salutary, and the attitude assumed by the judiciary in this regard, has gone far toward establishing and maintaining public confidence in the stability of legislative action. Many cases of flagrant hardship are thus prevented, while by the operation of the rule, few, if any, have sustained substantial injury. The courts are gravitating toward the English rule so thoroughly discussed by Mr. Justice Smith, in *Chicot County* v. *Davies,* 40 Ark. 200; for while they say that the enrolled bill is not conclusive of the valid enactment of the law, and that we may look beyond it to the journals, they supply by presumption everything necessary to its validity, save where the journal affirmatively shows a violation of the Constitution."

It is suggested that the presumption must be indulged that the bill was presented to the Governor more than twenty days after the *sine die* adjournment of the Legislature because approved by the Governor more than twenty days thereafter. The approval of the bill by the Governor after the time fixed by law was unauthorized and in no wise affected the bill. Presumptions should not be founded on the unauthorized acts of officials. Presumptions are not indulged to strike down laws, but the validity of laws may be upheld by them. We think the only effect resulting from the unauthorized approval of the bill by the Governor was to corroborate the presumption that it was presented to him. In other words, the approval of the bill by the Governor lends credence to the presumption that the enrolling committee performed its duty by presenting the bill to him

within the time required by law. It will be presumed therefore that the bill in question was presented to the Governor within twenty days after the *sine die* adjournment of the Legislature, and, not having been vetoed, became a law twenty days after said adjournment without his signature.

The chief insistence for reversal is that the bill approved by the Governor was a different bill from the bill passed by the Legislature. An enrolled bill, in legislative parlance, is a reproduction or copy of the identical bill passed by both houses of the General Assembly. The enrolling clerk, or committee, has no power or authority to modify a bill passed by the General Assembly in any respect. It follows that the purpose and intention of the Governor in signing an enrolled bill, or in allowing an enrolled bill to become a law without his signature, is to approve the bill passed by both branches of the Legislature, or to acquiesce in such bill becoming a law. In approving an enrolled bill, therefore, it may aptly be said that the Governor intends to, and does, approve the original or identical bill passed by the General Assembly. For this reason, additions, omissions or misprisions of the enrolling clerk in copying the bill to be signed by the Speaker of the House and President of the Senate and to be presented to the Governor, do not impair or invalidate the act. Otherwise, legislation would depend entirely upon the accuracy of the enrolling clerk and care of the enrolling committee. No rule of law is better established in this State than the rule to the effect that an enrolled bill is not conclusive of what bill was enacted. An enrolled bill may be impeached by an inspection of the original bill, indorsements thereon, journals and other official records of the Legislature and official records in the office of the Secretary of State. *Arkansas State Fair Association* v. *Hodges,* 190 Ark. 131; *Helena Water Company* v. *Helena* 140 Ark. 597; *Booe* v. *Road Improvement District No.* 4, 141 Ark. 140. If an enrolled bill signed by the President of the Senate and Speaker of the House

is not conclusive and determinative of what bill was enacted by the General Assembly, no sound reason can be assigned why it should be conclusive and determinative of what bill the Governor approved. In other words, the additions, omissions or misprisions contained in an enrolled bill should not bind the Governor to the letter of the copy by reason of his approval any more than the Senate and House whose President and Speaker signed it. In the case of *Haney* v. *State,* 34 Ark. 263, this court corrected a manifest and material error in an enrolled bill which had been signed by the President of the Senate and Speaker of the House and the Governor, by inserting the word "fourth" for the word "fifth" so as to make the act conform to the intention of the Legislature in enacting, and the Governor in approving, it. The correction made to conform to the intention of the Legislature and Governor was material, because, unless made, the act was void. In making the correction, the court took occasion to say: "A mistake of this nature may be corrected by the courts, upon as sound principle as a mistake in a deed. It is not judicial legislation, nor judicial interference with the legislative will. It is in support of the legislative will, and wholly distinct from the reprehensible practice of warping legislation to suit the views of the courts as to correct policy." The court, however, in making this correction threw out the warning that before correcting a bill so as to conform to the intention of the Legislature, "courts should be thoroughly and honestly satisfied of the legislative intent, irrespective of the policy of the act."

It is apparent from the face of the enrolled bill that lands in township four north, range nine west, are intended to be included but were omitted in copying from the original bill. This is evidenced by the fact that the town of Cabot, in said township and range, is included in the district. Certainly, the town would not have been included in the district and the adjacent lands omitted. It is also evidenced by the fact that the road to be improved runs from Cabot to Lonoke, and, in doing so,

passes through said township and range. It could not have been the intention to exclude lands adjacent to the proposed road in said township and range. By reference to the original bill published by the Legislature, it is apparent that the enrolling clerk omitted to incorporate in the enrolled bill the paragraph in the original bill describing nineteen sections of land traversed by the proposed road. The paragraph was in the original bill and rendered the district symmetrical in form. It is true the omission from the enrolled bill constituted a material discrepancy between the enrolled and the original bill, but, nevertheless, the omission was a clerical error, apparent from the face of the bill, and what should have been incorporated in the enrolled bill is ascertainable from an inspection of the original bill in the office of the Secretary of State. Concerning just such an omission from an enrolled bill, or perhaps of one more material than in the instant case, this court used the following language in the case of *Athletic Mining & Smelting Co.* v. *Sharp,* 135 Ark. 330: "It is said that the words included in brackets in the fourth and fifth lines of section 2, Act 175, Acts 1913, were placed in the act by the Secretary of State without authority, and that when the section is read eliminating those words, it is clear that the Legislature intended to take away the defense of contributory negligence only in death cases brought against corporations for damages. Eliminating those words from the section, appellant is perhaps correct in his contention that the act would apply only in death cases, but upon examination of the original act in the office of the Secretary of State, we find that those words inserted by the Secretary of State were a part of the act, and were inadvertently omitted from the enrolled bill by the enrolling clerk. Without the use of the words inclosed in brackets, the section is almost meaningless or at least quite ambiguous. The failure to insert the words was an obvious omission or misprision of the enrolling clerk. The Secretary of State therefore properly inserted them in the printed act."

The case last cited is directly in point and rules the instant case in this regard.

The judgment is affirmed.

McCULLOCH, C. J., and HART, J., dissenting.

SMITH, J. (concurring). I agree that under the facts here stated the presumption should be indulged that the bill in question was presented to the Governor within twenty days after the adjournment of the Legislature and, not having been vetoed, became a law without the Governor's signature.

But the proposition, that a bill can become a law when the Legislature has passed one bill and the Governor has approved another, is, in my opinion, so fundamentally unsound that I must express my dissent, and, in doing so, explain my vote in upholding the act.

In my opinion the case of *Athletic Mining & Smelting Co.* v. *Sharp,* 135 Ark. 330, is controlling here. I dissented in that case, and have endeavored here, with all the earnestness I possess, to show the majority the unsoundness of the rule there announced, and here reaffirmed, but without success. The majority has deliberately reaffirmed that case, and I am as much bound by it as if it had my approval, and upon the authority of that case I must vote to uphold this act, because I can draw no distinction between that case and this one.

The decision is, however, so contrary to sound legal principle, and so void of support in precedent (I say this with the greatest respect for the views of the judges who make the opinion on that subject), and is of such vital importance as a question of polity, in that it nullifies, in a measure, at least, a constitutional prerequisite in enacting our laws, that I am constrained to express my dissent.

The Constitution does not contemplate that the Legislature alone can enact laws. Upon the contrary, as well said by the Supreme Court of Alabama in the case of *Moog v. Randolph,* 77 Ala. 597: "The clear logic of the case lies in the axiom, that a bill is *an entirety,*

and a law is the product of the combined, harmonious and unanimous action of the legislative and executive departments of Government, each acting strictly within the scope of its constitutional authority, and according to the prescribed forms of the constiutional mandate. When, therefore, as we have said, the measure assented to by one of these departments is not, in substance and legal effect, the measure assented to by the other, but differs from it materially in its operation as a law, it is in no proper sense a constitutional or valid enactment."

In the opinion in the instant case we have all recognized the necessity of executive consideration and approval before a bill can become a law; but what becomes of that executive function and prerogative, if it is not essential that the Governor consider and act upon the same bill passed by the Legislature?

Here, admittedly, the Legislature passed one bill, and the Governor approved another, for the majority opinion makes the difference between the two bills, and the materiality of the difference between the two bills, very patent, for it is there said: "By reference to the original bill published by the Legislature, it is apparent that the enrolling clerk omitted to incorporate in the enrolled bill the paragraph in the original bill describing nineteen sections of land traversed by the proposed road." And, in addition to this recital of fact, the majority opinion expressly states that "It is true the omission from the enrolled bill constituted a material discrepancy between the enrolled and the original bill."

This statement follows the premise, found in the majority opinion, that "In approving an enrolled bill, therefore, it may aptly be said that the Governor intends to, and does, approve the original or identical bill passed by the General Assembly." From a premise so unsound no correct conclusion could be expected.

No doubt the Governor might approve the original bill, if it were presented to him for his approval; but here the original bill was not presented to him. Upon

the contrary, a materially different bill was presented to him for his approval. Are we warranted in assuming that the Governor is a mere automaton, whose business it is to sign anything presented to him? Is it not the theory of the Constitution that the Governor shall exercise an independent and intelligent judgment in considering and approving bills which are to become laws, and is he not warranted in basing that consideration upon the bill presented to him, and does he not have the right to assume that the bill presented to him for his consideration and approval is the very bill which the Legislature has passed? Have we not here sustained the very act under review by indulging the presumption that officers do their duty, and if there is such a presumption may the Governor not rely upon it in determining what action he will take upon a particular bill, or any bill, presented to him for his approval? And is it to be assumed that, because he is willing to give assent to the bill becoming a law which is presented to him, he would also assent that any other bill dealing with the same subject, although materially different, should likewise become a law?

In my opinion this was not the conception of the executive function entertained by the framers of our Constitution, who, in writing section 15, of article 6, of the Constitution, dealing with the subject, provided that "Every bill which shall have passed both houses of the General Assembly shall be presented to the Governor; if he approve it, he shall sign it; but if he shall not approve it, he shall return it, with his objections * * *."

In addition to the case of *Athletic Mining & Smelting Co.* v. *Sharp, supra,* the majority opinion cite, as supporting their view, the cases of *Arkansas State Fair Assn.* v. *Hodges,* 120 Ark. 131; *Helena Water Co.* v. *City of Helena,* 140 Ark. 597; *Booe* v. *Road Improvement Dist. No.* 4, 141 Ark. 140; *Haney* v. *State,* 34 Ark. 263. An examination of these cases will disclose the fact that, with the exception of the case of *Athletic Mining & Smelting*

Co. v. *Sharp,* none is relevant to the point under discussion, for in none of those cases was it contended that the Legislature had passed one bill and the Governor had approved a different one.

An infinite number of cases may be found like that of *Haney* v. *State,* from which the majority quote, in which ambiguous acts have been construed for the purpose of extracting the legislative intent; but it is quite obvious that is not the point now being considered.

In this connection, I must be permitted to say that, because of the importance of the point involved, I have made a very diligent search of the authorities, and have found no case, except that of *Athletic Mining & Smelting Co.* v. *Sharp,* which supports the proposition that a bill approved by the Governor, materially different from the one passed by the Legislature, becomes a law. I do not refer to the cases decided in jurisdictions holding that the enrolled act is conclusively presumed to be regularly enacted; but my reference is to the decisions of the courts in those States having our rule, that published acts may be impeached by records of which we may take judicial knowledge.

There are a great many cases dealing with the materiality of the difference between the bill passed by the Legislature and that approved by the Governor, in some of which it was held that the difference was material and in others that the difference was not material. But the controlling point in all of those cases was that of materiality, and it was held, without exception, so far as I am advised, that if the bill passed by the Legislature is materially different from that approved by the Governor no valid act has been passed.

The rule is stated in volume 1 of Lewis' Sutherland Statutory Construction, section 52, as follows: "When it appears that the bill passed by one branch of the Legislature was in materially different terms from the bill passed by the other branch; or when one branch wholly failed to pass it; or when the bill approved by

the Governor and authenticated as the law requires is materially different from the bill passed by the two houses, it will be held a nullity."

See, also, cases cited in note to this section; and see, also, the Am. & Eng. Enc. of Law (2 Ed.), vol. 26, pages 546 (d) and 547 (c); Century Digest, vol. 44, columns 2327, 2328, 2329, 2330; Decennial Digest, vol. 18, p. 751, § 39; 36 Cyc. 966, note 77.

Among the cases to which our attention has been called is that of *Bennett* v. *Johnson,* 130 Ark. 507. But the point there was that certain lands had been twice described in the act, and we held this as an obvious error. But neither in that case, nor in any other case to which my attention has been called prior to that of *Athletic Mining & Smelting Co.* v. *Sharp, supra,* has it ever been held that it is immaterial that the Governor does not sign the same, or substantially the same, bill passed by the Legislature, if the variance arises out of a mere clerical error or misprision of an enrolling clerk or other clerical officer.

The true rule is that the cause of the error or misprision is unimportant—the Governor must approve the same, or substantially the same, bill which has been passed by the Legislature; and if there is a difference the determining test is that of materiality. If there is a material difference, the bill does not become a law, and the cause of the difference is wholly unimportant. Our own recent case of *State* v. *Crowe,* 130 Ark. 272, recognizes the necessity of presenting to the Governor for his approval the identical bill passed by the Legislature.

I, therefore, vote to uphold the act under consideration, but I do so only because of the binding effect of the prior decision of this court in the case of *Athletic Mining & Smelting Co.* v. *Sharp, supra.*

Upon this branch of the case I am authorized to say that the Chief Justice concurs in the views here expressed.

HART, J. (dissenting): Under article 6, section 15, of our Constitution, bills which have passed both house of the General Assembly must be presented to the Governor for his approval.

In *Dow* v. *Beidelman,* 49 Ark. 325, it was held that a bill that has passed both houses may be presented to the Governor for his approval after the final adjournment of the General Assembly.

Joint rule 12 of the last General Assembly adopted at its regular session reads as follows: "When a bill has been signed by the Speaker of the House, and President of the Senate, it shall be delivered to the Governor by the joint committee on enrolled bills, who, through their chairman, or some member of the committee, shall report to the house in which the bill or resolution originated, the day on which the same was delivered, and the report shall be entered on the journal of such house."

The rules were adopted pursuant to article 5, section 12, of the Constitution, which provides that each house shall have the power to determine the rules of its proceedings.

It further provides that each house shall keep a journal of its proceedings. I think that it is plain that under the clause of the Constitution just referred to that this rule has the force of law. It was made to give full operation to the Constitution. Therefore the court can take judicial notice of the legislative record and ascertain when the bill under consideration was presented to the Governor. The Joint Committee on Enrolled Bills took a receipt from the Governor's office when the bill was presented to him, and that receipt shows the date of its presentation. It is true the date of the presentation of the bill has not yet been recorded in the journal; but the delay or failure even of the proper officers to do this should not prevent the court from having the benefit of that record for the purpose of ascertaining when the bill was presented to the Governor. The record of

the date the presentation was actually made and is kept by the secretary of the Senate in the case at bar, the bill presented having originated in the Senate. This is not in the nature of parol evidence, but is a written record of the date of the presentation of the bill given by the Governor's office to the Committee on Enrolled Bills under the rules of procedure of the Legislature adopted pursuant to a provision of the Constitution, and constitutes a part of the official record of the history of the bill of which the court may take judicial notice. It shows that the bill was presented to the Governor before the twenty days had expired, but the Governor did not sign the bill until after twenty days had expired. As said by Judge BATTLE in *Monroe* v. *Green,* 71 Ark. 527, the presentation required by the Constitution is for the purpose of enabling the Governor to examine it and to determine whether he will approve or veto it. The fact that the Governor signed the bill shows that he wished to approve it, but the fact that he signed it after twenty days had expired shows that it was not presented to him in time to inspect and consider it in the orderly dispatch of the business of his office within the twenty days allowed by the Constitution. Therefore I respectfully dissent from the opinion which holds that the bill become a law.

MCCULLOCH, C. J. (dissenting). I am fully in accord with the views expressed by Mr. Justice SMITH in his concurring opinion to the effect that the approval by the Governor of an enrolled bill materially different from that passed by the two houses of the General Assembly renders the enactment void. I dissent from the conclusion of the majority on that ground, for there is no rule of property involved in the decision of the court in the case of *Athletic Mining & Smelting Co.* v. *Sharp,* 135 Ark. 330, and I am so thoroughly convinced of its incorrectness that I think it ought to be overruled at this time. The conclusion announced in that case is directly opposed to the plain mandate of the Constitution,

which makes the Governor an essential part of our scheme of legislation in that it provides that each bill must be presented to him for his opproval. If a materially different bill is presented to the Governor, then he is given no opportunity to approve or disapprove the legislation sought to be enacted by the two houses of the General Assembly.

I dissent on the further ground that the record does not show that the bill was presented to the Governor within the time required by the Constitution, and that no presumption can be indulged, under the circumstances of this case, that there was such presentation. The Chief Executive is, as before stated, an essential factor in our legislative scheme, and this results from the plain mandate of the Constitution which requires that all bills must be presented to the Governor, and specifies the time within which this must be done.

All of us are agreed that no bill can become a law unless presented to the Governor within the time specified in the Constitution. This constitutional mandate necessarily charges each of the branches of the Legislature with the duty of complying with all the requirements necessary to complete the enactment so as to make it a valid law. This includes the duty, not only to pass a bill through the two houses of the Legislature, but to present it to the Governor within the time specified. There is no initiative put upon the Governor with respect to the enactment of laws, and he is only required to receive and consider a bill when presented to him for his approval. The duty, therefore, rests upon the General Assembly, not only to present a bill to the Governor, but also to make a record whereby the evidence of that fact may be preserved so that there can be no uncertainty about the proper enactment of a law. The framers of the Constitution doubtless contemplated that in authorizing the two houses of the General Assembly to make rules some method would be provided for preserving the records of the persentation of the bills to the

Governor. Such a rule was provided with respect to bills presented to the Governor during the session of the Legislature, but this rule does not seem to apply to the presentation of bills by the enrolling committee after the adjournment of the Legislature. If a bill, after being presented to the Governor in apt time, is neither approved nor vetoed by him, it becomes a law notwithstanding, but there is no provision in the Constitution itself imposing an affirmative duty on the Governor in such a case, and unless the General Assembly by rule, or by an enactment of some kind, provides a method of placing on record the fact that a bill has been presented to the Governor, there is no way for the courts to ascertain whether or not the requirements of the Constitution have been complied with. Where the Governor signs a bill within the time prescribed by law and places it in the archives, there is a conclusive presumption that the bill was presented to him in time; but if he fails to so deposit the bill, or if he signs it and files it with the Secretary of State after the expiration of the time, then there should be no presumption that it was presented to him within time.

There is a presumption that the Governor performed his duty in the manner required by the Constitution, and since this bill was not signed by the Governor and by the presiding officers of the two houses of the General Assembly until the twenty-first day after the adjournment of the Legislature, the presumption should be indulged that the bill was not presented to the Governor in time to give him an opportunity to examine and approve it within twenty days after the adjournment. If we are to indulge the presumption that the enrolling committee discharged its duty by presenting the bill in apt time, this necessarily carries with it the presumption that the Governor failed to discharge his duty by examining and approving the bill within the required time. The majority, therefore, in adopting one presumption have broken down another. Let us suppose

a case where the Governor has vetoed a bill after the expiration of twenty days from the adjournment of the Legislature. Of course, his veto would be ineffectual, but would there still be a presumption indulged that the bill had been presented to the Governor in apt time, and that he had waited until after the expiration of his time so as to make his veto ineffectual? All of this goes to emphasize the necessity of providing some method whereby the presentation to the Governor can be manifested upon some permanent record, and not leave it merely to conjecture or presumption.

I think it is better that this particular statute, and all others in like situation, should fail rather than to establish a precedent which will afford an opportunity to nullify a plain provision of the Constitution and render highly uncertain an important function which the framers of the Constitution placed upon those who are charged with the duty of enacting laws.

McCOLLUM v. NEIMEYER.

Opinion delivered March 1, 1920.

1. LIMITATION OF ACTIONS—DEMAND PAPER.—Demand paper is due immediately, and the statute of limitations begins to run from the date of the instrument.
2. SALES — AGREEMENT TO REPURCHASE — REASONABLE TIME.—An agreement to purchase certain stock sold if in the future the buyer should not want it and to allow him 6 per cent. for the time that he held it *held* to mean that if within a reasonable time he did not want the stock the seller would take it off his hands and allow him the amount he had paid and 6 per cent. interest for the time he had kept it.
3. SALES—AGREEMENT TO REPURCHASE—REASONABLE TIME.—Where the seller of stock agreed to repurchase it if the buyer at any time in the future did not want it, a demand by the buyer on the seller to repurchase the stock made after 11 years had elapsed was after an unreasonable length of time.
4. LIMITATION OF ACTIONS—DEMURRER.—In a suit at law, the statute of limitations could not be raised by demurrer unless it appeared in the complaint that no facts existed which exempted the action from operation of the statute.

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

Troy W. Lewis, for appellant.

1. The promise was a collateral undertaking which created no debt until demand for performance; and, demand having been made February 28, 1918, and refused, the suit is not barred by limitation. 4 Ark. 214; 9 Pick. (Mass.) 490.

2. Where the time of payment is not determined but remains to be fixed by one of the parties, a demand is necessary before suit. 4 Ark. 533.

3. The statute of limitations runs only from the time of contingency happening and not from the time of the promise. 1 Wm. Blackst. Rep. 352.

4. The statute of limitations has no application where the undertaking provides, "if plaintiff should thereafter become dissatisfied with the purchase defendant would repay the money with interest," and, as to reasonableness of time, that should be left to a jury. 157 Pac. 590; 80 Oregon 468.

5. Where the parties contemplated a delay in making a demand to some indefinite time in future, the statutory period of bringing the action is not controlled by the rule of reasonableness of time in asking performance. 110 Minn. 213; 124 N. W. 994; 32 L. R. A. (N. S.), note to p. 492.

6. Where a speedy demand or notice to pay would reasonably violate the intent and purpose of the contract, a demand need not be made within the statutory period. 125 Ind. 421; 25 N. E. 542.

7. Even in cases of money payable on demand the parties may so frame their contract as to make a preliminary demand a prerequisite to the right to sue, and the statute does not run until performance is demanded and refused. 28 Minn. 501; 11 N. W. 64.

8. Where an action is based on a breach of an undertaking, the action does not accrue until the contract is broken. 1 Sandf. 98; 6 Hare 386.

9. The court can not say as matter of law that the statute has run against an undertaking that must be left to a jury to determine from the merits of the case. 32 L. R. A. (N. S.) 492.

Kinsworthy, Henderson & Kinsworthy, for appellee.

The action is barred or it will not be barred until *eternity.* 17 R. C. L. 755-6; 4 Ark. 214; 136 Pac. 1152; 50 L. R. A. (N. S.) 594; 32 L. R. A. (N. S.) 487. The construction of the cause of action was purely one of law for the court.

HUMPHREYS, J. On January 29, 1919, appellant instituted suit against appellees in the Pulaski Circuit Court, Third Division, to recover $1,500 and interest thereon at the rate of six per cent. per annum from April 8, 1907, upon a repurchase contract of $1,500 of the stock of the A. J. Neimeyer Lumber Company, a corporation.

The gist of the complaint is that appellant was induced on April 8, 1907, by A. J. Neimeyer, who was the president of said corporation and a large stockholder therein, to purchase $1,500 worth of stock at par, in said corporation, with the understanding that he, A. J. Neimeyer, should repurchase the stock if in the future appellant should not want it, at the par value thereof, with six per cent. for the time appellant held said stock; that on the 28th day of February, 1918, appellant demanded of said appellee that he repurchase said stock in fulfillment of said agreement, but that said appellee failed and refused to do so. The letter containing the inducement for the purchase of the stock was made a part of the complaint, and is as follows:

"A. J. NIEMEYER LUMBER CO.
Manufacturers of Yellow Pine Lumber
Equitable Bldg.
"St. Louis, Mo., 2/23/07.

"Mr. W. T. McCollum,
c/o Columbia Lumber Co.,
Buckner, Ark.

"Dear Will:

"We are in receipt of a check from Dr. Smith for $600 for stock in our company.

"Now, it has occurred to me that you can afford to take more stock than $600 and I make this offer to you, that you increase it to $1,000, giving us your note for $400, paying it when you can and the note will draw 6 per cent. interest.

"I think this would be a good thing for you to do. It will help you to save your money and I also am satisfied this stock will be a fine investment for you.

"If in the future you should not want this stock, I will take it off your hands and agree to allow you 6 per cent. for the time that you hold it.

"I trust that everything is getting along nicely at lumber and that you help in the woods to keep everything moving along to the best advantage possible for the company.

"Yours very truly,
N/H "A. J. Neimeyer."

"Mr. McM. took 1,500 and paid for it and has stock certs."

On May 28, 1919, appellee A. J. Neimeyer filed a demurrer to the complaint upon the grounds (1) that the complaint did not state facts sufficient to constitute a cause of action; (2) that the action was barred by the statute of limitations; (3) that the action was barred by laches.

Upon hearing, the court sustained the demurrer, and, appellant declining to plead further, dismissed the complaint, from which dismissal an appeal has been duly prosecuted to this court.

Appellant contends that the cause of action did not accrue under the terms of the contract until the 28th day of February, 1918, the date of his demand on appellee and appellee's refusal to repurchase the stock aforesaid. The soundness of this contention depends upon the correct interpretation of the following clause in the contract: "If in the future you should not want this stock, I will take it off your hands and agree to allow you six per cent. for the time that you hold it." It is quite clear from reading the clause in connection with the rest of the letter containing it that it was not in contemplation of either party that appellant should make an immediate demand for repurchase of the stock. It was suggested in the letter that, by paying a part cash and executing a note for the balance of the purchase money for the stock, it would enable appellant to save his money. This would indicate that no immediate election as to whether appellant would keep or return the stock was in contemplation of the parties. The fact that, in case appellant did not want the stock, he should receive six per cent. interest on it for the time he should hold it, indicates that it was not in contemplation of the parties that appellant should elect even in a very short time whether he would keep the stock. Under this interpretation of the clause, it cannot be brought within the rule controlling demand paper. Demand paper, under the rule announced in this State, is due immediately, and the statute begins to run from the date of the instrument. *Sturdivant* v. *McCorley,* 83 Ark. 278.

We think the proper interpretation to place upon the clause in question is that it was in contemplation of the parties, if, within a reasonable time, appellant should make up his mind that he did not want the stock, appellee Neimeyer would take it off his hands and allow him the amount he had paid therefor, together with six per cent. interest for the time he had kept it. We think it would be a strained construction to say the clause meant that appellant should have all time, or forever, in which to make the election. Such an interpretation would

exempt the obligation from the statute of limitations altogether. The rule announced in *Brooks* v. *Trustee Co.*, 136 Pac. 1152, is sound, and we adopt it. It is as follows (quoting syllabus 1): "An agreement by a seller of bonds to allow plaintiff to withdraw from her purchase at any time upon return of the bonds after consultation with third persons necessitates plaintiff's making an election whether to take the bonds or not within a reasonable time." It will be observed from a reading of the clause in question that the only preliminary action necessary to complete the accrual of his right to return the stock and demand the amount paid therefor, together with six per cent. interest, rested in him. The contingency upon which his right or claim rested was a power exclusively in himself. Unless required to act within a reasonable time, he could, by non-action, eliminate or postpone indefinitely the operation of the statute of limitations. The doctrine announced in Ruling Case Law, Vol. 17, p. 756, and supported by a large array of authorities, is particularly applicable to the instant case. It is as follows: "When some preliminary action is an essential prerequisite to the bringing of a suit, and such action rests with the claimant, he cannot defeat the operation of the statute of limitations by a failure to act or by long and unnecessary delay in taking the antecedent step. It is not the policy of the law to permit a party against whom the statute runs to defeat its operation by neglecting to do an act which devolves upon him in order to perfect his remedy against another. If this were so, a party would have it in his own power to defeat the purpose of the statute in all cases of this character." It is conceded that appellant made no demand under the option clause in his contract for a return of his money with six per cent. interest thereon for more than eleven years after the certificate of stock was issued to him. In our opinion, as a matter of law, this was an unreasonable length of time to wait before making the demand, and, on that account, the action would be barred if not taken out of the opera-

tion thereof by the existence of grounds of avoidance. This is a suit at law and the statute of limitations could not be raised by demurrer unless it affirmatively appeared in the complaint that no facts existed which exempted the action from the operation of the statute. This rule on pleading was announced in the early case of *Collins* v. *Mack,* 31 Ark. 684, and reiterated in the following cases: *Hutchinson* v. *Hutchinson,* 34 Ark. 164; *St. L., I. M. & S. R. Co.* v. *Brown,* 49 Ark. 253; *Rogers* v. *Ogburn,* 116 Ark. 233. The complaint in the instant case does not affirmatively show that no facts exist which would take the action out of the operation of the statute.

The court, therefore, erred in sustaining the demurrer to the complaint and, for that reason, the judgment is reversed and the cause remanded with directions to overrule the demurrer to the complaint.

RULOFF AND BERGER v. STATE.

Opinion delivered March 8, 1920.

1. JURY—DISQUALIFYING OPINION.—Veniremen who stated that they had heard and read a great deal about the case and had formed an opinion concerning its merits which it would require evidence to remove were not incompetent where it did not appear that their opinions were formed from talking with witnesses or any one who knew or professed to know the facts, and where they stated that, notwithstanding their opinions, they believed they could try the case according to the evidence and the court's instructions.
2. CRIMINAL LAW—TIME OF PERMITTING CHALLENGE TO JUROR.—Under Kirby's Digest, section 2357, providing that a peremptory challenge to a juror must be taken "before he is sworn in chief," it was not prejudicial error to permit the prosecuting attorney to exercise a peremptory challenge on a juror whom he had accepted where at the time defendants had a peremptory challenge left.
3. CRIMINAL LAW — EVIDENCE — MINUTES OF EXAMINING COURT.—Where in a felony trial the circuit court, on conflicting evidence, found that the examining court, before commencing examination of witnesses, inquired of defendants whether they desired

the aid of counsel, and allowed them reasonable time to procure same, the minutes of the testimony of witnesses testifying before such court are admissible.

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

A. J. Murphy and *Murphy & McHaney,* for appellants.

1. The court erred in holding Jim Tisdale a competent juror and in changing its ruling and excusing him for cause for the purpose of restoring one challenge to appellants. Kirby's Digest, § 2357.

2. It was error to hold that W. K. Woodcock was a competent juror. 135 Ark. 520.

3. The court erred in permitting the State to read in evidence the statements purporting to be the testimony of Patrick Stearns Kramer and Sam Dillard *et al.,* taken before the municipal judge, Ledgerwood, the record and evidence showing that defendants were not asked if they had or desired counsel. Kirby's Digest, § 2137; 105 Cal. 641; 39 Pac. 29; 93 Cal. 277; 88 *Id.* 84.

4. The court erred in overruling defendants' objection to the question by the prosecuting attorney asked Belding, and in permitting the prosecuting attorney's closing argument to go to the jury, and other statements in his argument.

5. The court erred in giving, refusing and modifying instructions.

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

Section 2137, Kirby's Digest, is not mandatory but directory merely. 98 Ark. 505; 34 *Id.* 492; 52 *Id.* 275; 21 *Id.* 329; 26 *Id.* 328. 83 Ark. 277 covers appellants' contention. See also 95 Ark. 172. Where a witness is dead or beyond the jurisdiction of the court, what such witness testified to on a former occasion is competent. 58 Ark. 353; 29 *Id.* 17; 33 *Id.* 539; 40 *Id.* 454; 47 *Id.* 180;

60 *Id.* 400; 68 *Id.* 441; 90 *Id.* 515; Kirby's Digest, § 2148; 76 Ark. 515; 83 *Id.* 272.

Matters of argument of counsel are within the discretion of the court and here no abuse is shown. 23 Ark. 32; 193 S. W. 89; 74 *Id.* 256; 112 *Id.* 452; 119 *Id.* 101.

There are no reversible errors in the instructions and the evidence sustains the verdict.

McCULLOCH, C. J. This appeal is from a judgment convicting the appellants of the crime of robbery.

In the course of the selection of the jury, three of the veniremen answered in substance that they had heard and read a great deal about the case and had formed an opinion concerning its merits which would require evidence to remove. It was not shown that the opinion was formed from talking with witnesses or any one who knew or professed to know the facts. The jurors in answer to the questions stated that notwithstanding their preconceived opinion they believed they could try the case according to the evidence and the instructions of the court.

The court first refused to excuse any of these jurors for cause, but afterward as to one of them changed its ruling and excused him for cause. At the time of this ruling appellants had exhausted their challenges, but the ruling had the effect to give to appellants the right to exercise another peremptory challenge.

After a certain juror had been accepted by the State and the appellants, and after a recess of the court, the prosecuting attorney asked permission to exercise peremptory challenge on a juror whom he had already accepted, which the court permitted over the objection of appellants.

After this ruling of the court one juror remained to be selected. The next venireman called, over the objection of appellants, was held to be qualified and the appellants exhausted their last peremptory challenge upon him. The next juror, over the objection of appellants,

was held to be qualified and was selected, which completed the panel.

There was no reversible error in the rulings of the court. The answers of the jurors show that their opinions were based upon rumor. At least the appellants did not show that they had talked with witnesses or any one who assumed to know the facts. The preconceived opinion, which, *prima facie,* rendered the jurors incompetent was overcome by the further examination in which the jurors disclosed that they would be governed in rendering their verdict by the evidence and the instructions of the court.

The record does not show that at the time the court permitted the prosecuting attorney to exercise a peremptory challenge on a juror who had been previously accepted that the appellants' right to peremptory challege had then been exhausted. The panel had not been completed, and the appellants at that time still had the right to one peremptory challenge.

The rulings of the court in passing upon the qualifications of these jurors, and thus completing the panel by which the appellants were tried, were in conformity with previous decisions of this court. *Sneed* v. *State,* 47 Ark. 185; *Williams* v. *State,* 63 Ark. 527; *Sullins* v. *State,* 79 Ark. 127; *Daughtry* v. *State,* 80 Ark. 13; *Decker* v. *State,* 85 Ark. 64; *McGough* v. *State,* 113 Ark. 301; see also § 2357, Kirby's Digest.

The only limitations found in the statute (Kirby's Digest, § 2357) with respect to the time for the exercise of the right of peremptory challenge is that it must be before the juror "is sworn in chief," but another limitation necessarily implied is that it should not be exercised at such time as to prejudice the rights of the other party in the exercise of challenges. *Sneed* v. *State, supra; Williams* v. *State, supra; McGough* v. *State, supra.*

When the prosecuting attorney challenged the previously accepted juror, appellants had, as before stated, one more peremptory challenge left to them. It does not appear from the record before us at what stage of the

formation of the jury this particular venireman was originally accepted, nor how many challenges appellants had left at that time. It does not show that appellants' rights with respect to the exercise of their challenges were in any wise altered by the challenge made by the State. All that the record shows in this matter is that when the State was allowed to challenge this juror, appellants had one challenge left, and this is sufficient to show that no prejudice resulted. *McGough* v. *State, supra.*

The appellants next contend that the court erred in permitting the State to read in evidence to the jury statements purporting to be the testimony of Patrick Stearns, W. Kramer, Sam Dillard and J. F. Potts, taken before the municipal judge, Ledgerwood, who presided at the examining court. The appellants urge that the court did not comply with that part of section 2137 of Kirby's Digest, which provides as follows: "The magistrate, before commencing the examination, shall state the charge and inquire of the defendant whether he desires the aid of counsel and shall allow a reasonable opportunity for procuring it."

The judge who presided at the preliminary examination testified on this issue as follows: "They (appellants) were not represented by counsel. I don't remember that I said anything to them before I began the examination. I asked them if they were ready for trial, was all, and if they had anything to say, and neither of them wished to make any statement."

Witness was asked the following question: "Before entering upon that examination, did you ask them if they wanted counsel or time to get counsel or anything of that sort?" He answered, "I don't believe I did, Mr. Murphy." Witness was asked the following question by the court: "Q. Did neither of them say anything about wanting to get counsel?" "A. No, neither one of the boys said whether they wanted to get counsel or not. I didn't ask them if they wanted counsel. They were not represented there at the trial. When any one is not rep-

resented by counsel I try to make the examination as fair to the defense as I can."

R. B. Cotham testified that he was the official court stenographer; that in the performance of his duties he sometimes took down testimony in preliminary hearings; that he took and transcribed the testimony of several witnesses in the case of the State against the appellants. Witness idenfified the manuscript that was presented to him as his official transcript of that testimony. Witness was asked the following question: "Q. You took down everything that occurred at the trial, did you?" "A. Yes, sir; I think I did." "Q. The preliminaries of the examination as well as the other matters?" "A. I am not so sure about that, Mr. Murphy, as to whether I took all of the preliminaries down or not." "Q. Well, I see it says here, 'The State of Arkansas (after styling the case) appears by prosecuting attorney John Hoskins, Esq., and the defendants, Gus Berger and George Ruloff, appear in person but not being represented by counsel. The State of Arkansas, in order to sustain its charges against the defendants, introduced the following testimony.' Now were Ruloff and Berger asked if they wanted counsel or if they had counsel?" "A. I don't remember of any such question being asked them at that time."

The appellants testified that they were not asked by any one before the examining trial whether they wanted an attorney or counsel to represent them.

Joe Wakelin, for the State, in rebuttal testified as follows: "I was present in the municipal court when the preliminary hearing of Ruloff and Berger was had charged of robbery." Witness was asked: "At the beginning of the trial what action did the court take?" Witness answered, "Well, as near as I remember, the court told them that they were charged with robbery and asked them if—I think he asked them if they wanted any counsel or had anything to say."

On cross-examnation witness was asked: "And do you say that he (the court) asked them if they wanted counsel?" He answered: "I don't remember whether

it was 'wanted' or if 'they had' and he told them what they were charged with."

"Q. Did he say either one? Did he say, 'Have you counsel?' or 'Do you want counsel?' "

"A. Yes, one or the other, I am not positive which it was."

"Q. What was it attracted your attention to that fact?"

"A. Well, I was just listening to the trial."

"Q. How come you to be there?"

"A. I was one of the ones that was in the chase."

A majority of the court have reached the conclusion that the above testimony made an issue of fact before the circuit court as to whether or not the judge who conducted the examining trial, before commencing the examination, inquired of the appellants whether they desired the aid of counsel, and that the trial court could have found and did find from the above testimony that the presiding judge at the examining trial before commencing the examination did inquire of appellants whether they desired the aid of counsel and did allow them a reasonable opportunity for procuring counsel. The conclusion is reached that there was a conflict in the testimony on this issue and that there was substantial evidence to sustain the finding of the trial court. Such being the finding of fact by the trial court, this court does not feel called upon to determine whether or not the admissibility of the former testimony of the absent witnesses depends upon an affirmative showing of strict compliance in the committing court with the provisions of the statute (Kirby's Digest, § 2137).

Other rulings are presented which we have considered and find correct. They do not involve the laying down of any precedents that would be of value to the profession, and we, therefore, do not deem them of sufficient importance to discuss in this opinion.

Affirmed.

WOOD, J. (dissenting). From the conclusion of the court that section 2137 of Kirby's Digest has been complied with, I dissent.

The testimony of Wakelin, giving its strongest probative force, shows that at the beginning of the trial the municipal judge asked appellants, "Have you counsel?" or "Do you want counsel?" Conceding that this testimony was some substantial evidence to prove that the magistrate before commencing the examination inquired of appellants whether they desired the aid of counsel, still the testimony does not show, nor tend to show, that the examining court allowed appellants a reasonable opportunity for procuring counsel.

The witness does not testify that the appellants answered the question propounded. There is not a syllable of testimony in the record proving, or tending to prove, that the examining court advised appellants that they were entitled to be represented by counsel or that it gave them, or offered to give them, an opportunity to procure counsel. The testimony of the presiding judge, himself, and of the court stenographer, shows that no such suggestion was made to the appellants, and that no opportunity was offered or given them to procure counsel.

The burden was upon the State to prove facts sufficient to lay the foundation for the introduction of secondary evidence.

The undisputed testimony, as I view the record, proves that such foundation was not laid in the particulars above mentioned.

The court, therefore, erred in permitting the introduction of this secondary evidence. The testimony was material and highly prejudicial to the rights of appellants, and if the above statute is mandatory, the error is one for which the judgment should be reversed and the cause remanded for a new trial.

Since the majority of the court refrain from deciding whether the statute is mandatory or directory, I need not discuss at length that question. Be it said to the

glory of American jurisprudence that the Constitution of the United States and the Constitution of every State in the Union guarantee, in some form, that in all criminal prosecutions, the accused shall have the right to be represented by counsel. Amendments to Constitution of U. S., art. 6; Kettleborough on State Constitutions.

The language of our Constitution is, "In all criminal prosecutions the accused shall enjoy the right * * * to be heard by himself and his counsel." Const. of Ark., art. 2, § 10.

This provision of the Constitution is mandatory. The provisions of the statute, under review, were undoubtedly intended by the Legislature to make effectual to every person accused of crime, the above all important and sacred guaranty of the Constitution, at the very incipiency of a criminal prosecution instituted against him. That is the time, above all times, when he most needs the aid of counsel.

There is no doubt in my mind that the Legislature intended that the accused at that time should be advised of his constitutional right to have counsel. That is the reason why the statute requires that the magistrate shall inquire of him as to whether he desired counsel. If he answers in the affirmative, the court "shall allow him a reasonable opportunity for procuring it." Not only must the magistrate inquire of the defendant whether he desires the aid of counsel, but he must also allow a reasonable opportunity for procuring it. The mandate of the statute as to the inquiry and as to reasonable opportunity are alike imperative.

A compliance with the requirements of the statute in both particulars is absolutely essential to the jurisdiction of the examining court to proceed, because the mandate of the statute is that "the magistrate *before commencing the examination* shall," etc.

To deprive persons accused of crime of the right vouchsafed by the above statute is but to "cut the heart out" of the constitutional provision itself which com-

mands that he "shall enjoy that right." *People* v. *Napthaly,* 105 Cal. 641.

The admission of the above testimony was, therefore, error for which the judgment should be reversed and the cause remanded for new trial.

MILLAR *v.* MAUNEY.

Opinion delivered March 8, 1920.

1. MINES AND MINERALS—ABANDONMENT OF MINE—EVIDENCE.—In a suit by the owner of realty to cancel a diamond mining lease, on the ground of abandonment of operations by the lessee, evidence *held* insufficient to show an abandonment.
2. MINES AND MINERALS—COSTRUCTION OF LEASE.—A lease of land for the purpose of developing its value as a diamond producing property, providing for cancellation in case of abandonment or cessation of work for three months, and giving lessee a right to adopt the underground system of mining, *held* to authorize lessee to sink a shaft running into the property from a point outside of the leased premises.

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

McRae & Tompkins, for appellants; *Fordyce, Holliday & White* (of St. Louis, Mo.), of counsel.

1. Even according to Mauney's construction of the lease, there was no actual breach. The chancellor found no actual breach. Since the lessors failed to avail themselves of their right to value the diamonds, they can not be heard to complain of lessee's failure to do so.

2. The action of lessees in praying the chancellor for a construction of contract for future operations thereunder is not a breach and affords no grounds of forfeiture. 63 W. Va. 502; 61 S. W. 338; 80 *Id.* 941; 90 Tex. 143; 142 S. W. 967; 100 Ark. 561.

3. Even admitted inability to perform the contract within the time specified does not afford ground for rescission prior to the date fixed for complete performance. 21 Fed. 107; 117 U. S. 49; 29 Fed. 984; 90 Tex.

139; 37 S. W. 598; 16 Q. B. Div. 460; 55 L. J. Q. B. (A. S.) 162; 166 Ala. 295; Benjamin on Sales, par. 424.

4. If there had been a breach of the terms of royalty, it would afford no ground for cancellation of the contract by a court of equity. Equity will not interfere unless it is certain that plaintiff has not a plain, adequate and complete remedy at law. 147 Fed. 931; 100 *Id.* 561; 26 *Id.* 309; 134 *Id.* 15. It is a prerequisite for cancellation of a contract that defendant be placed *in statu quo.* 1 Black on Rescission and Cancellation, § 197; 131 S. W. 1061; 76 Fed. 624; 15 Ark. 286; 25 *Id.* 196; 53 *Id.* 16; 30 L. R. A. 44. Here it is impossible for defendant to be placed *in statu quo.*

5. Equity abhors forfeitures and is reluctant to enforce them even where expressly provided for. 59 Ark. 405; 25 *Id.* 285; 42 *Id.* 330; 129 Pa. 81; 95 Ark. 567; 98 *Id.* 328; 51 Mich. 482; 44 Minn. 312; 97 Ind. 247. This is especially true of leases. 100 Ark. 561; 41 *Id.* 532.

6. War is an accident excusing performance of a time contract and relieves against forfeiture. 25 Ark. 138; 26 *Id.* 240.

7. Plaintiff does not come into equity with clean hands. Nonperformance will be excused where performance is prevented by the conduct of the other party. 7 Ark. 123; 102 *Id.* 152; 85 *Id.* 596; 100 C. C. A. 263; 176 Fed. 701.

8. The supplemental agreement relieves the lessees of any breach for nonperformance. 26 Ark. 240. The intention of the parties must be given effect to. 13 C. J. 521; 2 Page on Contracts, § 1104; 24 Ark. 415; 106 *Id.* 400; 107 La. 445.

9. The lessees are entitled to the affirmative relief prayed in the cross-bill. Where equity takes jurisdiction for one purpose, it should retain to adjudicate all the rights of the parties. 92 Ark. 15; 99 *Id.* 438; 105 *Id.* 558; 48 *Id.* 286; 75 *Id.* 52; 111 *Id.* 329; 77 *Id.* 510; 113 *Id.* 100. The court will place itself in the position of the parties who made the contract and carry out the

objects sought to be accomplished. 2 Page on Cont., p. 1745, § 1123; 143 U. S. 596; 95 *Id.* 23; 115 Ala. 258; 61 Mich. 327; 155 Mo. 643; 61 Neb. 861; 68 N. H. 216; 23 Fla. 368; 133 Ill. 234; 108 Fed. 171; 54 L. R. A. 247. The lease should be construed so that the shaft may be started off the leased property if necessary. 18 R. C. L. 1191; 17 Eng. Rul. Cas. 766. The whole case should be construed so as to allow the successful completion of the project to the financal gain of all the parties. 2 Page on Cont., p. 174, § 1121; 127 Fed. 418; 126 Mo. 104.

10. Wilder was a necessary party. 39 Ark. 182-188; 4 Crawf. Dig., p. 3891, § 22.

W. C. Rodgers, for appellee.

1. Not having claimed that the lease should be so construed so that the shaft could be started off the leased property if necessary, appellants can not ask the court to change the contract they executed and make another for them. 79 Ark. 460; 61 *Id.* 315; 82 *Id.* 11; 76 *Id.* 582; 108 *Id.* 536; 122 *Id.* 542; 134 *Id.* 413; 90 *Id.* 93; 124 *Id.* 313; 102 *Id.* 580; 83 *Id.* 314; 72 *Id.* 490. The law of this case is settled on former appeal. 134 Ark. 15. Antecedent propositions, correspondence, writings, etc., are all merged into the written contract. 104 Ark. 488; 102 *Id.* 333; 129 *Id.* 358; 112 *Id.* 5; 108 *Id.* 507.

2. This case was tried *de novo* by the chancellor and he is presumed to have disregarded all incompetent testimony. 97 Ark. 136; 99 *Id.* 224. The contract is the foundation of the action and is made part of the complaint. 29 Ark. 447; 33 *Id.* 725; 68 *Id.* 265; 91 *Id.* 403; 99 *Id.* 222; 104 *Id.* 462; 108 *Id.* 364; 132 *Id.* 545; 135 *Id.* 41.

Every material allegation not denied is taken as true. 73 Ark. 224; 91 *Id.* 37. Self-serving declarations are *not* competent testimony. 21 Ark. 356; 23 *Id.* 286; 34 *Id.* 486; 72 *Id.* 412; 123 *Id.* 272; 130 *Id.* 149; 130 *Id.* 326; 90 *Id.* 151; 74 *Id.* 443. The law does not require the doing of a vain or useless thing. 96 Ark. 379; 133

Id. 27; 104 *Id.* 129; 109 *Id.* 467; 114 *Id.* 364; 121 *Id.* 264; 136 *Id.* 44.

The objection to Mauney's wife's testimony and that of the husband of Mrs. Kempner, but the objections can not be sustained. 206 S. W. 326; 102 *Id.* 460. The decree is right and should be sustained, even if some of the reasons given are wrong. 49 Ark. 22; 73 *Id.* 422; 75 *Id.* 107; 79 *Id.* 602; 85 *Id.* 4; 12 Utah 104; 52 Miss. 227; 15 Wis. 50; 85 Ark. 129; 102 *Id.* 439; 127 *Id.* 158; 108 *Id.* 283; 123 *Id.* 535; 125 *Id.* 458; 113 *Id.* 384; 132 *Id.* 504.

The decree shows that the findings are sustained by the evidence. The plea of nonjoinder must be made by demurrer, and was not well taken. 48 Ark. 454; 43 *Id.* 230.

McCULLOCH, C. J. This is an action instituted by appellee in the chancery court of Pike County to cancel a lease executed by them to appellants of certain land for the purpose of testing the dirt for diamonds and for developing a diamond mine thereon. The ground set forth in the complaint for the cancellation of the contract is that appellants have ceased operations under the contract and have abandoned it. The action is a renewal of former litigation between the parties with reference to the same subject-matter, viz., the cancellation of the lease. In the last of the former suits between the parties the chancery court denied relief to appellees and on appeal this court affirmed the decree. *Mauney* v. *Millar,* 134 Ark. 15. The facts are set forth in detail in the former opinion and reference thereto is made for rehearsal of the facts contained in the present case. In the opinion we said: "The right of action in this case, if there is one, extends back no farther than the last of the adjudications thereof and must be tested solely by proof tending to show a breach of the contract since that time. After consideration of the testimony we have reached the conclusion that there is not a preponderance against the finding of the chancellor. The contract contains no express provision for forfeiture of the lease, and counsel for defendants invoke the estab-

lished rule that a tenancy can not be terminated for breach of covenant by the lessee where there is no express provision for a forfeiture, and that a court of equity will not lend its aid to declare a forfeiture on account of a breach of the contract." * * * "There is another principle, however, equally well established that where one party to a contract has completely abandoned performance, a court of equity will give relief by canceling the contract, and that principle is applicable to a contract of this kind where the sole benefit is to result from continued performance, such as one to develop a mine to pay royalty or divide the proceeds."

In addition to the facts set forth in the former opinion, the following clauses of the contract should be set forth in order to completely understand the merits of the present controversy:

"*Seventh.* In the event the lessee, his associates and assigns, become fully convinced that diamonds or other valuable minerals do not exist in the said leased land in commercially paying quantities, and that further operations for this reason would not be warranted, then the said lessee and assigns may, at their option, surrender and cancel this lease without further obligation of lessee, his associates and assigns. And upon such cancellation by the lessee he, his associates and assigns, shall have the right to remove any and all buildings and equipment of whatever nature, placed on or in the properties leased hereunder, at the expense and cost of said lessee, his associates and assigns, within a reasonable time. It is further stipulated and agreed that the said lessee, his associates and assigns, shall pay all taxes lawfully accruing against the land hereby leased from time to time during the life and continuation of this lease, except the taxes for the year 1911."

"*Eighth.* The lessees shall in no event cease work for a longer period than three months continuously, unless a necessity therefor should arise by the act of God, or from contingencies beyond the control of the lessees, or from physical or other conditions which are not the

fault of the lessees, and which could not reasonably be guarded against. But this clause of this lease shall not operate or be construed to release the lessees from washing and treating for diamonds as much as 10,000 loads of dirt every year, and as much more as can reasonably be done."

There was a supplemental contract between the parties with reference to the same matter dated May 6, 1912, which was about a month after the execution of the original contract. The supplemental contract was not pertinent to the issues involved in the former case, but it is important to consider the same in the present case. It reads as follows (omitting caption and conclusion):

"As supplemental to the lease contract heretofore executed by M. M. Mauney and wife to Howard A. Millar and associates, it is agreed by and between said parties as follows: When in the course of the mining operations contemplated by the lessee and his associates, it becomes necessary to make a change in the method of operating to the underground system, the lessee, his associates and assigns may take such time as is actually necessary to make such change, without forfeiting their rights as lessees. But such change, when begun, must be completed as soon as it can reasonably be effected. The said M. M. Mauney and Bettie Mauney, his wife, in consideration of the benefits of said lease, hereby let and leased to the said Howard A. Millar, his associates and assigns, the tract of land designated upon the plat of the town of Kimberly, as 'Miller Diamond Washing Plant,' which plant is recorded in the office of the recorder of Pike County, Arkansas; said parcel of land being east of Garnet street and south of Gosnell street, in said town of Kimberly; also all of the land east of said tract and south of the public road or Garnet street, lying west of Prairie Creek.

"The said lessors also agree with the said Howard A. Millar, his associates and assigns, to lease to them from time to time such land as they may need for flooring purposes in the east half of the northwest quarter of the

southeast quarter of section 20, township 8 south, range 25 west, and that part of the northeast quarter of the southeast quarter of section 20, township 8 south, range 25 west, lying west of Prairie Creek, at an annual rental of $6 per acre. And the said lessees are to notify the lessors at least one year in advance of the amount of land they will need for flooring purposes in order that the lessors may use or lease to others such of said land as is not needed by the lessees, for agricultural or other purposes. But the rights given by this supplemental agreement are not to extend beyond the life of said lease."

Appellants in their answer denied each of the allegations of the complaint with respect to their acts constituting an abandonment of the contract, and alleged that they had been proceeding in good faith in the performance of the contract, notwithstanding the conduct of appellees in attempting to obstruct them in various ways in the performance of the contract. Appellants alleged that appellees had harassed them with numerous lawsuits and with criminal prosecutions, and in various other ways unnecessary to mention in this opinion. They further allege that they had been hindered by the wartime conditions from prosecuting the work of operating the mine by reason of the fact that labor was scarce, that diamond mining had been declared among the nonessentials by the Government authorities, that many of the employees had been drafted into the army, and that appellants themselves had been drafted into war work. They also alleged that there were no facilities in this country for cutting and polishing small diamonds and that war conditions prevented appellants from having that work done abroad. They allege that, notwithstanding these hindrances, they had washed the minimum amount of dirt as specified in the contract up to the commencement of this action. It was also alleged in the answer that it had been determined in December, 1917, that it would be necessary to resort to the underground system of mining as provided for in the supplemental contract, and that war conditions had prevented the prepara-

tion for the change, but that appellants had now "located the place for the constructing of the shaft, and that it would be necessary probably to go to a depth of 500 feet to determine whether or not the diamond bearing dirt is offset by the nondiamond-bearing rock, and that unless it does exist to a depth of 500 feet there is not sufficient quantity of diamond-bearing dirt to justify the expenditure of the sums necessary to commercially mine the land," and that "it has been found advisable to construct this shaft off of the Mauney property, and that before they can go to this expense it is necessary that the court construe the lease as to whether or not they have the right to construct this shaft off the Mauney property." The answer contained a cross-complaint, the prayer of which was that the court construe the lease "as to whether they will be required to wash 10,000 loads of dirt before a new plant can be erected, and decide whether they can construct the diamond mine shaft off the Mauney property."

On the trial of the cause the chancellor decided that there had been an abandonment of the contract by appellants, and entered a decree canceling the contract. The decision of this court in the former case is conclusive of the fact that there had been no abandonment of the contract up to this time. This suit was begun a short time after the decision in this court, and, as stated in the former opinion, the right of action "extends back no farther than the last of the adjudications" between the parties.

There is a conflict in the testimony as to whether or not appellants had washed the minimum quantity of dirt specified in the contract, viz., 10,000 loads per annum; but we are of the opinion that, according to the preponderating weight of the evidence, appellants had complied with the contract to that extent. The testimony on this subject introduced by appellee is fragmentary and indefinite, whilst that introduced by appellants is direct and positive. Appellants kept an accurate account of the amount of dirt washed from the Mauney mine, and it ex-

ceeds the minimum amount specified in the contract. We think the proof does not show that there was an abandonment of the contract, nor that there was merely a desultory attempt to comply with its terms sufficiently to escape the charge of abandonment.

We are of the opinion that the evidence shows that appellants were attempting in good faith to perform the contract the best they could in the untoward circumstances which surrounded the venture. We held in the former opinion that, there being no forfeiture clause in the lease, nothing short of complete abandonment of performance of the contract would justify a court of equity in granting relief by canceling the contract.

The question introduced in the present litigation concerning the change in methods of mining from surface mining to the underground system is one which was not involved in the former litigation. It appears from the testimony that during the progress of mining operations it was discovered that most of the washable ground on the small five-acre tract constituting the Mauney mine was covered with non-diamond bearing rock, which obstructed access to the dirt and that on this account it was necessary to change to what is termed in the supplemental contract as the underground system, by tunneling under this rock, which was of uncertain thickness, possibly 500 feet. The engineers decided that it was necessary to sink a shaft or slope under the rock, and that on account of proper drainage it was necessary to start the shaft or slope just off this property on the adjoining property rather than on the leased premises. These facts are set up in the answer and cross-complaint of appellants, and are established by the testimony which they introduced. These facts are not controverted by appellees. Appellants present these facts as one of the answers to the charge against them of having abandoned operations, and also ask for the construction of the contract so that they may know whether or not they are within their rights in starting the shaft off of the leased premises. It is proper, therefore, for us to consider this

feature of the contract and to construe it in order to ascertain whether or not the appellants are proceeding by a method not authorized by the contract. The testimony is not elaborated so as to show whether or not the particular spot selected as the location for starting the downward shaft is well chosen, or that it is necessarily the only place for it, nor even is it shown that it is absolutely essential that a shaft be started off of the leased premises, though the testimony is that it was found necessary by the engineers to do so, and that this place was selected as the proper location. If, as a matter of fact, it is unnecessary to go off the leased premises to start the shaft, or if the selection of the particular location is such as to operate to the disadvantage of the mining operations, appellees would have the right to interfere, but the question is presented as a matter of defense, and we deem it proper to decide it, whether or not under the contract appellants have the right to start the shaft off of the leased premises if it is found necessary to do so in order to properly reach the washable dirt under the rock on the leased premises.

We are of the opinion that they have that right under the contract, for there is nothing in the letter of the contract which forbids it. The controlling feature of the contract is to test and develop a mine and to operate it for a period of fifty years for the mutual profit of the lessors and the lessees. The supplemental contract grants to appellants unqualifiedly the right to change to the underground system. If it was intended to restrict the rights of appellants in the selection of the method of operating the underground system, it should have been made to appear by the letter of the contract, or by fair and necessary implication. The contract contains no expression to that effect, nor can it be implied from the language of the contract. The rule is laid down in an encyclopedia that "where a coal lease simply provides that the lessor has leased all the coal underlying his land and does not expressly require the sinking of shafts, the lessee is not bound to open the mine by means of a shaft

on the lessor's land, but may do so by means of a shaft and drift from other land, provided he uses reasonable diligence." 27 Cyc. 707. The following authorities cited, support the text: *King* v. *Edwards,* 32 Ill. App. 558; *Van Meter* v. *Chicago & Van Meter Coal Mining Co.,* 88 Ia. 92; *Lewis* v. *Fotheringill,* L. R. 5 Ch. 103; 17 Eng. R. C. 766; *James* v. *Cochrane,* 7 Exch. 170; *Wheatley* v. *Westminster Brymbo Coal & Coke Co.,* 22 L. T. R. (N. S.), 7.

It is important to consider that feature of the contract which provides that when the lessees "become fully convinced that diamonds or other valuable minerals do not exist in the said leased land in commercially paying quantities, and that further operations for this reason would not be warranted, then the said lessee and assigns may, at their option, surrender and cancel this lease without further obligation." They are required under the contract to operate the mine in good faith, but they are not compelled to do so when in good faith it is determined that the mine can not be successfully operated. This gives them the right to determine the means and method of operating, and, as before stated, there is nothing in the contract which limits their underground method to sinking the shaft on the leased land itself.

Our conclusion is, therefore, that they are within their rights when it is shown that it is reasonably necessary to start the shaft off of the leased land, and that the selection of such a location does not constitute a departure from the terms of the contract so as to be treated as an abandonment.

The conclusion of the chancellor on the question of abandonment is, we think, against the preponderance of the testimony, and the decree is therefore reversed, and the cause is remanded with directions to dismiss the complaint for want of equity.

HUMPHREYS, J. (dissenting). The sole purpose of the contract, the alleged breach of which is made the

basis of this suit, was that the 10 acres of land covered by the lease might be developed and operated as a diamond mine within the shortest practicable period of time. To that end, it was provided in the lease that the lessees should proceed in good faith and with diligence to wash as much dirt as could reasonably be washed in excess of 10,000 loads of dirt each year for the recovery and extraction of diamonds. The purport of the contract was that much more than the minimum amount of material should be washed. Touching upon this phase of the contract in the case of *Mauney* v. *Millar,* 134 Ark. 15, this court said: "The contract clearly contemplated a persistent effort to develop the mine. It provides for a minimum amount of dirt to be taken out and washed, but further provides that the work shall be carried on with diligence, and that as much as reasonable should be taken from the mine." It was also announced in that case that a substantial failure on the part of the lessees to carry out the terms of the contract would work a forfeiture thereof and entitle the lessors to a rescission of the contract and cancellation of the lease. The complaint in the instant case charged that appellants had failed to wash as much dirt for the recovery and extraction of diamonds as was reasonably possible, with the facilities at hand, between April 10, 1917, and April 10, 1918. This allegation was controverted. The evidence of many witnesses was directed to this issue. After a careful study and elaborate analysis of the evidence, the chancellor found this issue with appellees. The finding of the chancellor is supported by a decided preponderance of the evidence. There is scarcely any dispute in the testimony to the effect that the plant was not operated over one-half of the time between these dates, and, by a great weight thereof, not over one-fourth of the time. The most appellants contend for in this particular is that the minimum amount of dirt, to-wit, 10,000 loads, was washed. The excuse offered for not washing more finds scarce, if any, support in the

evidence. The exigencies of the war are interposed as an excuse. The evidence failed to show that the employees of the mine were affected by the draft between April 10, 1917, and April 10, 1918. Only two negroes were subject to draft, and, according to the clerk and members of the local board, they were not drafted until after April, 1918. The general proof upon the supply of labor in that particular community was to the effect that there was plenty of labor to be had during that period of time. In fact, there is evidence tending to show that applications for labor were declined. Unnecessary litigation was also offered as an excuse for not milling more dirt, but the record fails to show that any litigation was pending during that period which materially interfered with the progress of the work. It developed that the plant was destroyed, but this did not occur until long after the expiration of the particular period of time in question. As further excuse or justification for not milling more dirt, appellants alleged the execution of a supplemental contract to the original, permitting them, when necessary, to change from surface to underground mining, and it provided that, during the time necessary to make the change, appellants should be exexempt from washing dirt. It is also alleged that, in order to change to an underground system of mining, it will be necessary to move the plant from Kimberly and sink a shaft to the depth of about 500 feet on adjoining land and tunnel from the shaft through other land and under the land covered by the lease; and that it will be necessary to postpone the sinking of the shaft until a construction of the supplemental lease can be had by the courts, in order to ascertain whether the plant can be removed from Kimberly to, and the shaft sunk on, adjoining lands. In the first place, the necessity for changing from surface to underground mining is not sufficiently established by the evidence. According to the great weight of the evidence, the diamond bearing dirt on the surface has been exposed and is ready for

treatment for the recovery of diamonds. Under the terms of the supplemental lease, the lessees were not given authority to determine when underground mining became necessary. That was an open question, and, before such change could be justified, the necessity or exigency must actually exist. As before stated, the weight of the evidence in this case shows that no such exigency had arisen. Nor did the supplemental contract warrant a discontinuance of surface mining until a construction of the contract could be obtained from the courts. The mere fact that contracts are ambiguous, or susceptible to several constructions, will not warrant a delay in the execution thereof during the pendency of suits for the construction thereof. If this were the law, delays in the execution of contracts would be innumerable and the courts flooded with such suits. Nor does the supplemental contract contain any warrant for developing the mine and sinking the shaft for that purpose on adjoining land. The purpose of the contract was to develop, as rapidly as possible, a producing mining plant at Kimberley, on the land leased. The supplemental lease must be read in connection with the original lease, and the original lease calls for the mining site to be at Kimberley, and not on adjoining lands. It was provided in the original lease that the lessors might have the right to enter upon the lands and constantly inspect the operations so as to protect themselves from loss of diamonds in which they shared under the terms of the lease. To place such a construction as appellants contend for on the supplemental lease would deprive appellees to a large extent of these protective reservations in the original lease. There might be some basis for the construction placed upon the supplemental contract by appellants if they had purchased all the diamonds on the land in question, because, in that event, it would not concern appellees very much as to the manner in which they were procured, whether by surface mining or by underground mining, or whether the mine underneath was reached by

shaft and tunnel on adjoining lands or on the lands in question. But, where the purpose of the lease was to develop a great commercial mine, its location and the manner of reaching it were of great moment, especially when the lessees, under the terms of the contract, had an interest in every diamond recovered.

The desultory and ineffective manner in which appellants attempted, during the period in question, to develop the mine, constituted a substantial failure on their part to carry out the contract according to its terms. For this reason, I think the chancellor's decree should have been affirmed.

Mr. Justice HART concurs with me in this dissent.

MAUNEY v. MILLAR.

Opinion delivered March 8, 1920.

1. LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS.—Pertinent and relevant statements in judicial proceedings are absolutely privileged, regardless of the truth of the statements or of the existence of express malice.
2. LIBEL AND SLANDER—PLEADING AS PRIVILEGED.—Where defendant, in an action to cancel a diamond mining lease for breach of contract to operate the mine, denied the breach and alleged that the delay in performance had been caused by plaintiff burning the plant erected for the purpose of washing diamond-bearing dirt, such allegation was absolutely privileged, and could not form the basis of an action for libel; being pertinent and relevant to the issues involved in the action.

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

W. C. Rodgers and *Ozero C. Brewer,* for appellant.

The court erred in sustaining the demurrer. The communication was not privileged; the charge was libelous; was published with malice and was false. Const. 1874, art. 2, § 6; Kirby's Digest, § 1850. The demurrer admits all the allegations of the complaint. 42 La. Ann. 955. The language was slanderous *per se.* 1 Bibb (Ky.)

593; 90 Ark. 117-125. It is libelous to charge one with arson. 86 Ark. 56; 90 *Id.* 121; 55 *Id.* 501; 1 Marv. (Del.) 408. The matter was not privileged. 83 Fed. 803; 3 How. (U. S.) 289; 61 Minn. 479; 100 Mo. 412; 42 N. Y. 161; 1 Denio 41; 120 Mass. 177; 6 Gray (Mass.) 94; 59 Fed. 540; 66 Conn. 175. If actuated by malice, there is no privilege. 65 Iowa 355; 40 Minn. 475; 69 *Id.* 482; 60 S. W. 567; 73 Tex. 568; 48 La. Ann. 1116; 107 Mich. 67; 118 Ga. 865; 66 Conn. 175; 42 S. E. 295; 38 Fla. 240; 105 Iowa 488; 125 Mich. 192; 69 Miss. 168; 195 Pa. St. 52; 139 *Id.* 334; 127 Mass. 316; 123 N. Y. 420; 100 Ark. 483. See also 152 Mo. 268; 122 *Id.* 355; 52 Ark. 187; 106 *Id.* 20; 55 *Id.* 598; 75 *Id.* 159; 83 *Id.* 80; 35 *Id.* 110; 97 *Id.* 98. The presumption is that a libel is not privileged. 60 Cal. 527; 123 N. Y. 420. The object of our Code is that the pleadings should state facts—not conclusions of law. 126 Ark. 210; 83 *Id.* 80; 132 *Id.* 390; 132 *Id.* 461. None of the allegations of the cross-complaint entitle defendants to no relief. 134 Ark. 15. We have shown the utter fallacy of every contention of the defendant. 122 Ark. 508; 93 *Id.* 373; 107 *Id.* 445; 113 *Id.* 138; 101 *Id.* 352; 96 *Id.* 166. When the reason for a rule fails the rule also fails. 91 Ark. 418; 109 *Id.* 467; 101 *Id.* 335; 126 *Id.* 399. A man will not be permitted to profit by his own wrong. 110 *Id.* 340, 402, 441; 119 *Id.* 617-620; 122 *Id.* 276; 123 *Id.* 466; 103 *Id.* 28-34. The great underlying principle of privileged communications is public policy. 66 Mich. 166; 89 Fed. 540.

McRae & Tompkins, for appellee.

Every act of the lessors tending to harass and annoy the lessees was pertinent and material and relevant. 1 Jones on Ev., § 135; 5 Paige 522; 53 L. R. A. 445-8; 81 Am. Dec. 50; 44 S. E. 357; 44 *Id.* 357; 14 Atl. 518; 3 L. R. A. 417. See also 13 L. R. A. (N. S.) 825; 104 Ky. 695; 56 Pac. 376; 112 Fed. 853; 58 Am. Rep. 574; 26 Am. St. 195; 219 Pa. 85; 48 Am. St. 841. If the matter was pertinent or material, it was privileged. The mat-

ter was for the court and was properly decided. Cases *supra.*

McCULLOCH, C. J. This is an action to recover damages for libel, alleged to have been published by appellee in an answer and cross-complaint filed by him in a certain action instituted by appellants in the chancery court of Pike County to cancel a contract for the lease of certain lands to be used in the operation of a diamond mine. The complaint in the present action sets forth all of the pleadings in the proceedings in which the alleged libelous matter was published, and the particular matter charged to be libelous was set forth as one of the allegations of appellee's cross-complaint as follows:

"On the 13th day of January, 1918, as defendants believe by the instigation and procurement of the plaintiffs, the plant that had been erected for the washing of the diamond-bearing dirt as well as another plant belonging to defendants on what is known as the Ozark property, and an eight-room house, the two plants being one mile apart, were burned on the same night."

The court sustained a demurrer to the complaint, and, as appellants declined to plead further, a judgment was entered dismissing the action.

It is alleged in the complaint that the libelous charge was published with malice, and that it was false. All of the facts, including the whole of the pleadings in the original action, having been set forth in the complaint, a demurrer properly raises the question of the sufficiency of the allegations of the complaint to constitute a cause of action. The inquiry narrows down to the question whether or not the publication of the alleged libelous matter was absolutely privileged.

There are two classes of privileged communications recognized in the law governing the publication of alleged libelous matter: One of these classes constitutes an absolute privilege, and the other a qualified privilege, and, according to the great weight of authority, pertinent and relevant statements in pleadings in judicial pro-

ceedings are held to be within the first class mentioned, and are absolutely privileged. The authorities are not entirely free from conflict. There are a few cases holding that statements in pleadings, whether pertinent and relevant to the issues involved, are absolutely privileged, and there are also a few cases which hold that pertinent and relevant statements in pleadings are privileged on condition that they are made without malice, but, according to the great weight of authority, as before stated, pertinent and relevant statements in pleadings are absolutely privileged. The test as to absolute privilege is relevancy and pertinency to the issue involved, regardless of the truth of the statements or of the existence of actual malice. 17 R. C. L., p. 335; case note to *Kemper* v. *Fort,* 12 Am. & Eng. Ann. Cas. 1022; 13 L. R. A. (N. S.) 821; *Myers* v. *Hodges,* 53 Fla. 197; *Gaines* v. *Aetna Ins. Co.,* 104 Ky. 695; *Abbott* v. *National Bank of Commerce,* 20 Wash. 552, 56 Pac. 376; *Gardemal* v. *McWilliams,* 43 La. Ann. 454, 9 So. 106; *McGehee* v. *Insurance Co.,* 112 Fed. 853.

The following statement of law as to the liberality of the courts in determining what is or what is not pertinent is made in Ruling Case Law, volume 17, p. 336, as follows: "As to the degree of relevancy or pertinency necessary to make alleged defamatory matter privileged the courts favor a liberal rule. The matter to which the privilege does not extend must be so palpably wanting in relation to the subject-matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety. In order that matter alleged in a pleading may be privileged, it need not be in every case material to the issues presented by the pleadings. It must, however, be legitimately related thereto, or so pertinent to the subject of the controversy that it may become the subject of inquiry in the course of the trial."

The complaint in the present case discloses the relevancy and pertinency of the alleged libelous statements. The purpose of the original action was to cancel a lease on account of a breach or breaches of contract alleged to

have been committed by appellee. In the answer appellee, as the defendant in that action, denied the breach of the contract on his part and alleged that the delay in the performance of the contract had been caused by acts of appellant, among other things, the burning of the plant erected for the purpose of washing of diamond bearing dirt. The allegations of the answer, including the allegation now under consideration, presented issues in defense to that action, and were pertinent and relevant to the issues involved.

The alleged statement was, therefore, absolutely privileged, and the court was correct in sustaining the demurrer to the complaint. Affirmed.

EDWARD THOMPSON COMPANY *v.* HENSON.

Opinion delivered March 8, 1920.

COURTS—JURISDICTION OF CIRCUIT COURT.—An action on an account for $27 and on nine notes for $10 each *held* not within the jurisdiction of the circuit court.

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

Jas. H. Johnson, for appellant.

The only question is, did the court have jurisdiction? If it did, it erred in sustaining the demurrer. The contract of the purchase and the notes constituted one entire contract and the court had jurisdiction. 59 Ark. 86; 56 S. W. 374; 78 Ark. 490; 95 S. W. 804; 136 S. W. 177; 26 Ark. 240; 28 *Id.* 391; 49 *Id.* 320; 5 S. W. 339; 10 Ark. 326. The contract was not severable. 13 C. J., p. 564, par. 6, § 530; 10 Ark. 326; 140 S. W. 840; 59 Pa. Sup. 8. The contract was entire. 1 Bouvier, Law Dict., p. 660.

Hays & Ward, for appellee.

The amount of each separate demand and not the aggregate determines the jurisdiction. 74 Ark. 615; 83 Ark. 374; 85 *Id.* 213. The court had no jurisdiction and the ruling was correct. Cases *supra.*

McCULLOCH, C. J. Appellant is a foreign corporation engaged in the publication of law books, and entered into a written contract with appellee for the sale to the latter of a current set of law reports at a stipulated price. The contract of sale covered 28 volumes of the published reports at the price of $5 per volume and two digests for $7, and it was stipulated that the payments were to be made, $7 cash, and "the balance in installments of $10 each, to be evidenced by my notes payable every two months from date thereof." The contract also contained a subscription for the unpublished volumes. Appellee executed notes in accordance with the contract, and later received four additional volumes of the reports as the same were published, and made payments in the aggregate of $62, leaving a balance of $117, as evidenced by nine of the notes and an open account for $27.

Appellant instituted this action against appellee in the circuit court of Pope County, exhibiting the original contract and the account and the notes. Appellee entered a plea to the jurisdiction of the court on the ground that the suit was on the notes and the additional account, and was not within the jurisdiction of the court. The circuit court sustained the plea and dismissed the action.

The suit was necessarily on the notes and the open account for $27, all of which constituted separate causes of action within the exclusive jurisdiction of justices of the peace. The facts of the case are identical with the facts in *American Soda Fountain Co.* v. *Battle,* 85 Ark. 213, and the decision in that case is conclusive of the present case.

Judgment affirmed.

NEEL v. WEST-WINFREE TOBACCO COMPANY.

Opinion delivered March 8, 1920.

1. SALES—IMPLIED WARRANTY OF MERCHANTABILITY.—In a sale of manufactured goods, where there is no opportunity for inspection by the purchaser, there is an implied warranty that the articles are merchantable and reasonably fit for the purpose for which they are intended.

2. SALES—BREACH OF WARRANTY—REMEDY OF BUYER.—Where there is a breach of warranty in the sale of goods, the purchaser may rescind the contract or may affirm it and keep the property and when sued for the price set up the breach of warranty by way of recoupment, and a failure to notify the seller of the breach could not defeat the right of recoupment.
3. SALES—RESCISSION—OFFER TO RETURN.—Where there is a breach of warranty in a sale, in order to rescind there must be a return or an offer to return it within a reasonable time; but where the property is entirely worthless and wholly unfit for the intended use, an offer to return the property in order to rescind is not essential.
4. PRINCIPAL AND AGENT—AUTHORITY TO COMPROMISE.—Where a traveling salesman of a tobacco company was authorized to settle a claim against a purchaser of tobacco by having him pay for the tobacco used and return the balance, it was within the apparent scope of his authority to accept payment for the amount used without requiring return of the balance where it was worthless.

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

John E. Miller and *C. E. Yingling*, for appellant.

The testimony shows that the tobacco was wholly unfit for the use for which it was sold, and defendant had the right to rescind the sale, and this leaves only the question as to whether Neel should have returned it or whether it was the duty of Steptoe to have returned it according to his instructions from plaintiff, his principal. The testimony shows that Neel and Steptoe had a conference, and they decided it would not pay to ship it back, and for this reason it was not shipped back, and the company, through its agent, waived its right to have it returned, and defendant is not precluded from setting up a breach of warranty as a full defense to plaintiff's claim. 35 Cyc. 149; Elliott on Cont., § 5114; 24 R. C. L., § 574, p. 293; 168 Ala. 295; Ann. Cases 1912 A 657. The court erred in its peremeptory instruction and the cause should be reversed. *Supra.*

Brundidge & Neelly, for appellee.

It was the duty of the purchaser to return the goods and thus rescind the sale as soon as he discovered that

the goods were not of the quality ordered and not according to agrreement. 24 R. C. L. 291, § 574; 35 Cyc. 150. An offer to restore part only of the goods and pay for the remainder is ineffectual. Ann. Cas. 1912 A 657. The court properly directed a verdict under the testimony. 121 Ark. 290.

McCULLOCH, C. J. This is an action instituted by appellee against appellant on an open account in the sum of $72.48 for a lot of manufactured tobacco, sold and delivered by appellee to appellant under a written contract or order. The case originated before a justice of the peace of White County, and there was no written answer, but appellant defended on the ground that the tobacco was worthless, except a very small quantity of it which he paid for, and that he complied with an agreement made with appellee to pay for the part of the tobacco which he used and sold. The court directed a verdict in appellee's favor on the ground that appellant had not notified appellee of the worthless condition of the tobacco or offered to return the same within a reasonable time.

The tobacco was shipped to appellant from appellee's place of business in Lynchburg, Virginia, on April 2, 1915, and the invoice was, according to the contract, payable four months after date of shipment. The testimony adduced by appellant tended to establish the fact that the tobacco when shipped was worthless and wholly unfit for use or sale, except a small quantity aggregating in price $12.50. It was full of bugs and holes cut by the bugs and with web deposited by the bugs. The testimony further shows that appellant spoke to Mr. Steptoe, the traveling salesman who negotiated this sale for appellee, and informed him of the condition of the tobacco, and that Mr. Steptoe told him not to pay for it until there was an adjustment of the matter. Mr. Steptoe was introduced as a witness and corroborates appellant's testimony. On August 25, 1915, appellant wrote to appellee, informing the latter of the worthless condition of the

tobacco and stating that appellant had been waiting for Mr. Steptoe to come around on his regular trip in order to take the matter up with him for adjustment. It appears from the testimony that there was other correspondence between the parties which has been lost, but there was introduced in evidence a letter from appellee to Steptoe directing him to go to see appellant and get the account adjusted by allowing appellant to pay for the goods used and sold and to return the balance. Steptoe went to see appellant, and appellant testifies that he showed the tobacco to Steptoe and that it was agreed between them that it was worthless, and that it would be an unnecessary expense to appellee to return it. The testimony adduced by appellee tended to show that the tobacco was in good condition when shipped.

In the sale of manufactured goods, where there is no opportunity for inspection by the purchaser, there is an implied warranty that the articles are merchantable and reasonably fit for the purpose for which they were intended. *Weed* v. *Dyer,* 53 Ark. 155; *Bunch* v. *Weil,* 72 Ark. 343; *Main* v. *Dearing,* 73 Ark. 470.

Where there is a breach of warranty, the purchaser may rescind the contract, or may affirm it and keep the property, and when sued for the price set up the broken warranty by way of recoupment. A failure to notify the vendor of the breach of warranty will not defeat the vendee's right of recoupment, for, as said by this court in the case of *Wheat* v. *Dotson,* 12 Ark. 699, the right of recoupment "did not rest on the ground that the contract had been rescinded, and that a return or an offer to return the property was not a prerequisite to the admission of the defense." *Weed* v. *Dyer, supra.*

Where there is a breach of warranty in order to rescind there must be a return of the property or an offer to return it within a reasonable time; but where the property is entirely worthless and wholly unfit for the intended use, an offer to return the property in order to rescind is not essential. 35 Cyc. 149; 24 R. C. L., p. 293.

Appellee relies on a clause in the written order and on the invoice requiring notice within ten days of any "goods short or other claim." This requirement was, according to the testimony, waived by negotiations entered into by appellee with appellant for the adjustment of the disputed claim. There was an issue of fact for the determination of the jury as to whether or not the tobacco was worthless as claimed by appellant, and a verdict in appellant's favor on that issue would be determinative of the defense to the action. There was also a question of fact to be submitted to the jury whether or not there was a settlement of the disputed claim between appellant and Mr. Steptoe, appellee's agent, whereby appellant was to pay for the quantity of tobacco he had sold without returning the portion that was worthless. If that issue had been determined in appellant's favor, it would be a complete defense. Appellee wrote to its agent, Mr. Steptoe, directing him to go to see appellant and get him to pay for the tobacco he had sold and to return the balance which he claimed was unfit for use. It was, however, within the apparent scope of the agent's authority to settle the claim on any terms, and if, as testified by appellant, Steptoe agreed with appellant that the tobacco was worthless, it was unnecessary to return it.

In either case the directed verdict was improper, and the judgment is reversed and the cause remanded for a new trial.

PRITCHETT v. ROAD IMPROVEMENT DISTRICT NO. 3 OF POINSETT COUNTY.

Opinion delivered March 8, 1920.

1. CERTIORARI—VOID ORDERS OF COUNTY COURT.—Certiorari is the proper remedy to quash orders of the county court void for lack of jurisdiction, in a proceeding to organize a road improvement district.

2. HIGHWAYS—CONSTRUCTION OF ACT.—Where the county court eliminated certain lands from a proposed highway improvement district before the assessments were made as not benefited by the

proposed improvement, as provided by section 2 of Acts 1915, page 1400, such lands might subsequently be re-included in the district by an order of the county court under section 15, *Id.*, where authorized changes in the plans introduce new elements which affect such land.

3. HIGHWAYS—CHANGE OF ROUTE.—Where a road district is created under Acts 1915, page 1400, changes with respect to the character of the improvement and the route of the road must be confined to such changes as are consistent with the original plans, and not changes to a different plan or according to a different route; but the addition of substatial laterals and extensions are authorized.

4. HIGHWAYS—CHANGE OF ROUTE.—Where the original plans of a road district called for a certain road 16 miles long, a subsequent change in one mile of the route by shifting it a distance of one-fourth of a mile constituted the adoption of a different route, and not merely a slight change in conformity with the original route, and the alteration was void.

5. HIGHWAYS—CHANGE OF ROUTE—VALIDITY.—In testing the validity of the adoption of the new plans by a road district created under Acts 1915, page 1400, the new plans must be considered as a whole, as the court is not at liberty to discard that which is unauthorized while upholding that which is authorized.

6. HIGHWAYS—ELIMINATION OF LAND FROM ROAD DISTRICT.—Elimination of lands from a road district created under Acts 1915, page 1400, by an order of the county court, as not benefited by the proposed improvement, is conclusive upon the question of benefits unless authorized changes in the plans be made so as to introduce new elements which affect the lands.

Appeal from Poinsett Circuit Court, First Division; *R. H. Dudley,* Judge; reversed.

J. F. Gautney, for appellants.

The county court, July 12, 1917, established this district, No. 3, and "eliminated" the lands of appellants from the district. No appeal was taken and the judgment became final, and the lands could not afterward be included by extending the boundaries of the district and include a different route. The proceedings against appellants' lands are void. 69 Ark. 587; 124 *Id.* 234; 64 *Id.* 108; *Ib.* 555; 123 *Id.* 383; *Ib.* 389; 133 *Id.* 491; 123 *Id.* 205. The lands embraced were not found to be benefited by the commissioners. 69 Ark. 587. The error is

manifest and the injury is substantial. 11 C. J. 130, §§ 83-4. The only remedy was by *certiorari.* 68 Ark. 205; 124 *Id.* 234; 133 *Id.* 491. The order should be quashed.

J. W. Rhodes, Jr., and *Lamb & Frierson,* for appellees.

1. The district is the territory embraced and established by order of the county court and not that included in the original petition, and the land eliminated was foreign to the district and could be added if benefited by change of plans. Act No. 3, Acts 1917, § 16, etc. The proceedings were regular. To hold that the lands could not be added would be to absolutely ignore the word eliminate in the act.

2. The district can in good faith accept the judgment of the court eliminating the lands and then afterward change the plans and ask for the addition of those lands if benefited by the change. This is reason and common sense.

3. The alteration of plans and extension of boundaries was regular and in accordance with the statute. 133 Ark. 491 is not applicable.

4. Certiorari is a writ of discretion and under the facts of this case appellants are estopped, and the court correctly exercised its discretion to refuse the remedy by certiorari. The objection to the evidence of Rhodes and McRaven was waived. As evidence *dehors* the record may be introduced. Kirby & Castle's Digest, § 1432; 123 Ark. 205; 89 *Id.* 605; 52 *Id.* 13. Certiorari can not be used as a substitute for appeal. 52 Ark. 213. See also 5 R. C. L. 254; 11 C. J., p. 88, § 2, p. 128, § 78; *Ib.* § 134, p. 186, § 309, p. 208 and § 374.

4. The detriment to the public may be considered. 89 Ark. 604; 54 *Id.* 372; 52 *Id.* 221; 43 *Id.* 243-262; 124 *Id.* 525; 89 *Id.* 604; 130 *Id.* 39. The judgment is right.

McCULLOCH, C. J. Appellee, Road Improvement District No. 3 of Poinsett County, was duly formed by an order of the county court of Poinsett County entered July 12, 1917, on petition of a majority of the owners

of real property in the proposed district. The route of the road was specifically described in the petition, and was to begin at the town of Marked Tree and run thence east and north to the town of Lepanto, and thence northeasterly to the Mississippi County line, covering a total distance of about fourteen miles.

Appellants were at that time, and are now, the owners of land situated in the district as originally proposed, and they appeared in the county court and presented objections to the inclusion of their lands in the district, and the court in rendering final order forming the district eliminated the lands of appellants from the district. There was no appeal from that order of the county court.

The commissioners of the district proceeded with the plans for the construction of the proposed improvement, but upon the recommendation of the engineers decided to alter the plans by shifting the route of the road one-fourth of a mile from the original route as originally planned for a distance of one mile. Further alterations were made in the plans so as to construct six separate laterals in the aggregate covering a distance of 8¼ miles in length. The plans as thus altered were submitted to the county court by the commissioners and approved, and the court appointed the members of the board of assessors to assess benefits. The assessors proceeded to make the assessment of benefits, and included in their assessment lists the lands of appellants, which had been eliminated from the boundaries of the district. On the filing of the report of the assessors the county court ordered publication to be made, which was done, and the assessments were on a subsequent day approved by order of the county court, and the boundaries of the district were extended so as to include the lands not within those boundaries according to the order as originally entered forming the district. This order was rendered by the court on October 11, 1918, but part of the order, viz.: That part which extended the boundaries of the district, was omitted from the entry and was subsequently, on January 6, 1919, entered *nunc pro tunc,* so as to correct

the omission. Appellants filed their petition in the circuit court of Poinsett County on November 12, 1919, praying for a writ of certiorari to bring up the record of the proceedings of the county court and that those portions of the order of the county court extending the boundaries of the district and approving the assessments on appellants' lands be quashed. The record was brought up under the writ, but on final hearing of the cause in the circuit court relief as prayed for by appellants was denied and their petition was dismissed.

The contention of appellants is that the original order of the county court eliminating their lands from the boundaries of the district, as formed, is conclusive of the power to tax those lands for the construction of the improvement, and that the county court was without jurisdiction subsequently to extend the boundaries so as to reinclude those lands and to assess them. If the contention of appellants is correct that the court had no authority under the statute to reinclude the eliminated lands and to assess the benefits, then the court was without jurisdiction over these lands, and certiorari was the proper remedy to reach the void orders of the county court in order to quash them. *Griffin* v. *Boswell,* 124 Ark. 234.

The road district was created pursuant to the terms of the general statute of March 30, 1915 (Acts 1915, p. 1400), and section 2 of that statute provides that in passing on the petition for the formation of such a district "if the county court is of the opinion that any part, or parts, of the territory included in the petition and plat is not benefited by the proposed improvement, the court may, in the order creating said district, eliminate such territory from the boundaries of the district." Section 15 of the statute reads in part as follows:

"Whenever the commissioners find that other lands not embraced within the boundaries of the district are benefited by reason of the improvement made, or about to be made, they shall instruct the assessors herein provided for to assess the benefits accruing to such lands by

reason of the improvement, and shall file a special report in the county court setting up the lands so benefited together with assessment of benefits made by the assessors of the district. * * * At the hearing which shall not be held earlier than five days after the last insertion of said notice, the county court shall investigate as to whether the land beyond the boundaries of the district are really benefited by reason of the improvement, and, if it finds that said lands are benefited, the boundaries of the district will be so extended as to embrace the land so benefited and the county court at the same time shall also consider the assessment of benefits so made on said land and enter its finding thereon in accordance with section 12 of this act."

One of the contentions of learned counsel for appellees in support of the validity of the court's order reincluding the lands of appellants is that the original order of the county court eliminating those lands from the boundaries of the district and creating the district with those lands eliminated constituted the formation of the district as if these lands had never been included in the petition and left the other provisions of the statute governing such proceedings in full operation. In other words, the contention is that the district stood as if appellants' land had never been included, and that if it was subsequently ascertained by the board of assessors that those lands would be benefited the boundaries of the district could be extended under authority of section 15 of the statute, quoted above, so as to include those lands and authorize their assessment.

This view of the statute would put the two sections (section 2 and section 15) in conflict with each other, for one of the sections authorizes the elimination of lands from the boundaries of the district and the other authorizes the extension of the boundaries so as to include new territory; and if both sections are operative upon the same lands, then the two orders of the court thereunder would be conflicting. The manifest purpose was to provide a method in section 2 for the adjudication

by the county court in advance of the question of benefits to given tracts of land of objecting owners. The owner of land has a right to appear in the county court when the district is to be formed and raise an issue of anticipated benefit to his land, and if the court on the hearing finds that the lands will not be benefited there must be an order excluding the same from the boundaries. Such an order constitutes a final adjudication of the question of benefits to those lands. Section 15 was intended to afford a remedy for the inclusion of lands which had not theretofore been included in the proceedings and which had not fallen within the adjudication of the court with respect to benefits. The two statutes as thus interpreted operate in harmony and present no conflict. This is also in accord with the decision of this court in the recent case of *Harrison* v. *Abington,* 140 Ark. 115, which construed a special statute, but involved the application of the same principle in the interpretation of two apparently conflicting sections of a statute.

The next argument of counsel in justification of the order extending the boundaries so as to include appellants' lands was that there was an alteration of the plan so as to change the route of the main road and to provide for the construction of laterals which brought these lands within the range of anticipated benefits. Some of these lands are situated east and some west of the route according to the original plan. The route was changed to get nearer some of the excluded lands and the laterals were provided in the new plans in order to benefit the excluded lands. The question whether or not the alteration of the plans justified the reinclusion of appellants' lands within the boundaries of the districts turns on the validity of the alteration of the plans. The authority to make alteration is found in section 16 of the statute, which reads in part as follows:

"If the commissioners find it necessary and to the best interest of the district at any time before the improvements are made to make any alteration or change in the plans and specifications, or the route of the road

to be constructed, or that it is necessary to construct any additional laterals or extensions within the boundaries of the district not provided for in the original plans, or find that any road or roads in the course of construction should be extended in the additional territory not included in the original district, they shall have the engineer for said district or the State Highway Engineer, as the case may be, to make plans and estimates of the cost of such changes, laterals or extensions. * * * If the county court finds at the hearing above provided for that it is to the best interest of the district to make any change or alteration, or construct any lateral road or to extend any road into adjoining territory, or to extend the boundaries of the district so as to include adjoining territory, it shall make an order extending the boundaries of the district approving the changes submitted or the construction of any lateral road or extension as the case may be, and from the finding of the county court thereupon appeals may be taken by complying with section 14 of this act."

This section, it will be observed, authorizes three things: The alteration of the plans and specifications with respect to the character of improvement to be made; the change of the route of the road to be constructed; and also the construction of additional laterals and extensions. These are the alterations which form the basis of the extension of boundaries so as to include new territory. In *Rayder* v. *Warrick*, 133 Ark. 491, we construed this section with respect to the authority conferred in the two particulars first mentioned above, and we held that the operation of the statute was limited to immaterial changes in the plans and specifications and the route of the road which do not change the character of the improvement. In summing up on this subject it was said: "We think section 16 intended to give the commissioners the power to alter the plans and to change the route in order to better carry out the improvement as originally contemplated, but it does not authorize them to change the plan of the improvement to a wholly different one

or construct it over a wholly different route. The construction we have placed upon the act tends to give effect to all the provisions of section 1 and section 16 and to harmonize their different provisions; thus breathing life into every part thereof, instead of making them inconsistent with each other."

In the later case of *Hout* v. *Harvey,* 135 Ark. 102, we reaffirmed the interpretation given to the statute in *Rayder* v. *Warrick, supra,* but said that "in each instance it must remain as a question to be determined upon the particular facts, as to whether or not the alterations are such as to fall within the kind authorized by the statute."

Section 16 also came up for interpretation as to that part which authorizes the construction of additional laterals and extensions in the case of *Harris* v. *Wallace,* 139 Ark. 184, and according to the views of the majority of the judges there expressed (notwithstanding the resultant reversal of the case by reason of the conflicting views of the judges) the authority under the statute to construct such laterals and extensions is not confined to immaterial ones necessarily in substantial conformity with the original plans. Treating that decision as establishing the proper construction of the statute, we have an interpretation of the whole of section 16 that changes with respect to the character of the improvement and the route of the road must be confined to such changes as are consistent with the original plans and not changes to a different plan, according to a different route, but that substantial laterals and extensions are authorized.

The further question is then presented whether or not the changes in the route are in conformity with the original plans or whether they constitute an abandonment of the original route and a change to a wholly different route. There was, as before stated, a change in the route by shifting it a distance of one-fourth of a mile, running for a distance of one mile. This necessarily constituted the adoption of a different route and not merely a slight change in conformity with the original

route. It is conceded that this change was made for the purpose of benefiting appellants' lands, which, according to the judgment of the county court, would not have been benefited by the original improvement. This contention of counsel necessarily implies a substantial change in the route. It is, in other words, a substitution of an entirely new route for the one specified in the original plans upon which the petition of property owners was based. That is precisely what we held in *Rayder* v. *Warrick, supra,* could not be done. The laterals contemplated by the altered plans were authorized according to the decision in *Harris* v. *Wallace, supra,* but in testing the validity of the adoption of the new plans we must take them as a whole, for we are not at liberty in this proceeding to discard that which is beyond the statutory authority, leaving intact that part which is within the limits of such authority.

The scope of the present proceeding is confined to the inquiry concerning the right to tax the lands of appellants; and if the alterations as a whole are unauthorized, the right to tax these lands, which is dependent upon the validity of those alterations, fails. This is so because we do not know, and can not know, to what extent the different changes in the plans with respect to the route and the construction of laterals entered into the assessment of benefits. In other words, we hold that the original elimination of these lands from the boundaries of the district is conclusive as to the power to tax them unless authorized changes in the plans be made so as to introduce new elements which affect these lands, and where, according to the face of the proceedings, the alteration of the plans is void, the power to assess these lands fails. In this proceeding we inquire into the validity of the proceedings for the sole purpose of determining the jurisdiction of the court to approve assessments on lands of appellants, and no further.

Finding, as we do, that on the face of the record made in the county court the proceedings against the lands of appellants are void, the judgment of the circuit

court is reversed, and the cause remanded with directions to enter an order and certify it down to the county court quashing those proceedings to the extent indicated.

BOYCE v. CLAPHAM.

Opinion delivered March 8, 1920.

1. DRAINS—APPOINTMENT OF COMMISSIONERS—COLLATERAL ATTACK.—Where the record of the circuit court recites that the three commissioners of a drainage district resigned and their successors were appointed by the court, the appointment of the latter can not be collaterally attacked by a property owner seeking to restrain proceedings by the new board and the issuance of bonds.
2. DRAINS—SALE OF BONDS—ADVERTISEMENT.—Acts 1909, No. 2791, as amended by Acts 1911, No. 221, and by Acts 1913, No. 1771, relating to drainage districts, does not require advertisement of the sale of bonds by the board of commissioners of a district.

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

Rogers, Barber & Henry, for appellant.

The appointment of appellees as members of the board was illegal and void, as three of the old commissioners had not resigned, and there was no advertisement of the sale of the bonds and no competitive bidding. There was no vacancy on the board at the time the court appointed appellees. Act No. 279, Acts 1909, § 4; act 221 amending No. 279. Before removal of an officer, there must be notice and a hearing. 84 Ark. 551 and cases cited. The facts must be found according to the proof. 15 Cyc., § 301, p. 915; 1 Nev. 440. There was no resignation and no vacancy to fill and the removal was void. It is against public policy. 32 Cyc. 1251; 100 Md. 520.

Rose, Hemingway, Cantrell & Loughborough and *Will G. Akers,* for appellees.

1. If the act of the court amounted to a removal it was in all respects valid. Act 279, Acts 1909, § 13. There was notice and a hearing.

2. This is a collateral attack and the commissioners acquiesced.

3. The commissioners were not removed; they resigned. This may be done by parol or in any way evincing declination to serve further. 22 R. C. L. 556-558; 39 Ark. 214; 134 Ark. 292.

4. The sale of the bonds was legal. Art. 19, § 16, Const. 1874. Publication was not necessary. 55 Ark. 148; 55 *Id.* 81; 32 *Id.* 666.

McCULLOCH, C. J. On July 7, 1919, the Pulaski-Lonoke Drainage District was duly organized by order of the circuit court of Pulaski County on petition of a majority of the owners of real property in the district, and three commissioners were appointed. The proceedings were pursuant to the general statutes with respect to the organization of drainage districts. Act No. 279, session of 1909, as amended by Act No. 221, session of 1911, and Act No. 177, session of 1913.

On August 2, 1919, the circuit court of Pulaski County entered an order reciting the resignation of the three commissioners tendered in open court and the appointment of appellees as commissioners to fill the vacancies caused by said resignations. Appellees subsequently took the oath and organized themselves into a board of commissioners and proceeded to form plans for the construction of the improvement and to contract for the sale of bonds.

Appellant, who is the owner of real property in the district, then instituted this action in the chancery court of Pulaski County to restrain proceedings on the ground that the appointment of appellees as members of the board of commissioners was illegal and void in that the three old commissioners had not in fact resigned; and also to restrain the issuance of bonds on the ground that there had been no advertisement of the sale of bonds and no competitive bidding.

In the hearing before the chancery court appellant sought to prove by oral testimony that the commission-

ers had not in fact voluntarily resigned, but had been forced out by the circuit judge. Appellee met this proof with oral testimony tending to show that the old commissioners voluntarily resigned at the suggestion of the circuit judge on account of material disagreements between the commissioners and lack of harmony in conducting the affairs of the district. Under the statute the circuit court was authorized to remove commissioners for cause and upon notice, and to fill vacancies caused by resignations, or otherwise. The order of the circuit court recites the resignation of the old commissioners. This is a collateral attack on the validity of the appointments; and whether the order of the court be treated as a removal of the old commissioners or the resignation of the commissioners, the appointments can not be collaterally attacked by the owner of property in the district.

In answer to the other contention, it is sufficient to say that the statute does not require advertisement of the sale of bonds. Section 15 of the act of 1909, *supra,* provides that "the board may borrow money at a rate of interest not exceeding six per cent. per annum, may issue negotiable bonds therefor, signed by the members of the board, and may pledge all assessments for the repayment thereof." The statute is silent as to the method of proceeding to borrow money and issue bonds. The proof in this case does not show any fraud or bad faith on the part of the commissioners or lack of diligence, or that the bonds were sold for an inadequate price, or that the transactions contained any elements of improvidence.

The decree of the chancery court was correct, and the same is affirmed.

MECHANICS & TRADERS INS. CO. v. MCVAY.

Opinion delivered March 8, 1920.

1. JUSTICE OF THE PEACE—JURISDICTION—WHAT LAW GOVERNS.—In an action on an insurance policy wherein the insurer defended in part upon the ground of the payment of a judgment of a justice of the peace in Tennessee rendered in garnishment proceedings, the legality of the judgment of the justice is governed by the laws of that State.
2. GARNISHMENT—SERVICE OF NOTICE ON AGENT.—Notice of garnishment is insufficient in Tennessee to require appearance and answer by a corporation which is addressed to individuals, naming them as agents of the corporation, and requiring them personally to answer as to the debtor's assets in their hands.
3. GARNISHMENT—NOTICE—WAIVER.—Where notice of garnishment proceedings is served upon agents of a nonresident coroporation, requiring them to appear and answer, appearance and answer of the corporation constitute a waiver of defects in such notice, and give the court jurisdiction over the corporation as garnishee.
4. BANKRUPTCY — JUDGMENT-LIENS.—A judgment declaring a lien upon a debtor's funds in a garnishee's hands, rendered within four months of the filing of a petition in bankruptcy by the debtor, is void, within the Bankruptcy Act, § 67-f (U. S. Comp. Stat., § 9651).
5. BANKRUPTCY — ESTOPPEL.—Where, in an action against an insolvent firm, a judgment in garnishment proceedings against an insurance company, with whom the firm was insured, became a lien within four months prior to the filing of a petition in bankruptcy by the firm, and the insurer set up the subsequent payment of such judgment in satisfaction in part of a claim of the policy, the trustee in bankruptcy was not estopped from setting up the invalidity of the judgment by reason of the Bankruptcy Act, section 67-f, because of statements by the attorneys of the insolvent that the judgment was void for another reason.
6. BANKRUPTCY—TRUSTEE.—A trustee in bankruptcy is trustee of all the creditors, and primarily represents them.
7. BANKRUPTCY—WAIVER.—A bankrupt can not waive the provisions of the Bankrupt Act.

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

Jas. B. McDonough, for appellant.

1. The judgment of the Tennessee court is valid and binding and the satisfaction of it constitutes a com-

plete defense to appellee's cause of action. 198 U. S. 215; 241 *Id.* 518; 174 *Id.* 710; 200 *Id.* 176; 240 *Id.* 620; Shinn on Att. & Garn., § 707; 12 Lea (Tenn.), 398; 90 Tenn. 161; 12 Tenn. (4 Yerg.), 461.

2. Appellee can not now rely upon the insufficiency of the garnishment service in the Tennessee court. *Supra.* See also 45 Ark. 37; 80 *Id.* 543; 33 *Id.* 465; 96 U. S. 258; 122 Tenn. 248; 100 *Id.* 366. The courts of Tennessee, as well as other courts, have upheld garnishment suits of this nature regardless of the question as to the *situs* of the debt. 3 L. R. A. (N. S.) 608 and note; 91 Tenn. 395; 120 *Id.* 302; 243 U. S. 269; 123 Tenn. 428. See also 120 Tenn. 302; 14 Am. & Eng. Enc. of L. 801.

3. The Tennessee judgment being valid, defendant is fully protected by the full faith and credit clause of the U. S. Constitution. Const. U. S., § 1, art. 4; 222 Fed. 453; 174 U. S. 710; 241 *Id.* 518; 198 *Id.* 215; 240 *Id.* 620; 132 Mass. 432; 238 Fed. 285; 242 U. S. 357; 243 *Id.* 271; 189 S. W. 784; 84 S. E. 482; 113 Ark. 467.

4. The adjudication in bankruptcy of Flynn & Ritter did not affect or destroy the garnishment lien of the Austin Clothing Company in the Tennessee court. Bankruptcy Act, §§ 67, 67-c, 67-f, of Fed. Stat. Anno., pp. 1112-1130; 178 Fed. 187; 194 *Id.* 793; 115 *Id.* 906; 47 S. W. 1087; 59 So. Rep. 6; 94 Fed. 476; 1 Fed. Stat. Anno., p. 1113; 185 Fed. 931; 108 Fed. 529; 102 Miss 160. An adjudication in bankruptcy does not invalidate the issuance of an attachment. 126 App. Div. 48; 111 N. Y. 102; 38 S. E. 918; 187 U. S. 165; Collier on Bankruptcy, 1087 and notes; 125 Fed. 154.

5. The claim is barred by limitation in the policy of insurance. 71 N. W. Rep. 172; 21 *Id.* 781.

Daily & Woods, for appellee.

1. The garnishment was valid and a lien on the funds in the hands of the insurance company. 229 U. S. 511; 30 Am. B. R. 619; 140 Pac. 665; 32 Am. B. R. 327; 151 N. W. 752; 34 Am. B. R. 678; 107 Tenn. 148; 64 S. W. 48. The judgment was rendered within four months,

and the insurance company's answer as garnishee was filed within the four months period, and the lien commenced when the insurance company filed its answer as garnishee. It admitted its indebtedness. There was no waiver by the letters written by the agent of Flynn & Ritter.

2. No reply to the set-off was necessary, as it was waived. 69 Ark. 114.

3. The suit is not barred by any provision in the policy. Kirby & Castle's Digest, § 5108.

WOOD, J. Appellant is a fire insurance company of New Orleans, Louisiana. Flynn & Ritter were general merchants, doing business at Monroe, Oklahoma. They had a policy of insurance on their stock of merchandise with appellant. The merchandise was destroyed by fire March 26, 1917. Flynn & Ritter became bankrupt. The appellee, as trustee of their estate in bankruptcy, brought this action against the appellant to recover the sum of $1,000 alleged to be due Flynn & Ritter on their policy.

After the destruction of the stock of merchandise of Flynn & Ritter the loss was adjusted at the sum of $1,000, as the amount which the appellant, by compromise agreement, was willing to pay.

The general agents of appellant in a letter to the attorney of Flynn & Ritter, on September 22, 1917, stated that they were ready to make payment of the above sum as soon as a suit of Austin Clothing Company against Flynn & Ritter, pending in the justice court in Memphis, Tennessee, was dismissed and a certificate given to appellant to that effect. The suit referred to in the letter was a suit brought by the Austin Clothing Company, a corporation, against Flynn & Ritter, in which appellant had been garnisheed. The writ of garnishment against appellant in that suit was directed to and ran in the name of S. M. Williamson & Company, agents, and not in the name of appellant. The ap-

pellant, though a Louisiana corporation, was duly authorized to do business in Tennessee.

The return of the sheriff on the writ was as follows: "Garnisheed S. M. Williamson & Company, agents for the Mechanics & Traders Insurance Company of New Orleans, Louisiana." No personal service was had on Flynn or Ritter and no property of theirs seized.

The attorney of Flynn & Ritter, on October 10, 1917, wrote the general agent of appellant to the effect that the justice court of Memphis did not have jurisdiction over the parties or the subject-matter, giving as a reason that "the situs of the debt was such that the Austin Clothing Company could not legally attach funds in the hands of the insurance company owing Flynn & Ritter."

Appellant, in November, 1917, answered the garnishment issued in the suit of Austin Clothing Company against Flynn & Ritter and set up that under a fire policy, issued by it in favor of Flynn & Ritter, it owed the latter the sum of $1,000.

After the filing of this answer, judgment was rendered by the justice on the 15th of December, 1917, in favor of the Austin Clothing Company against Flynn & Ritter in the sum of $440 and against the appellant in the sum of $462.78. Appellant paid the amount of the judgment against it March 20, 1918.

Flynn & Ritter were adjudged bankrupts January 15, 1918, and the appellee as trustee, as above stated, instituted this action.

Appellant answered and admitted that it owed Flynn & Ritter the sum of $527.22 and alleged that it had tendered that sum to the appellee. It further set up the proceedings above mentioned and the judgment rendered against it by the justice court of Tennessee as a defense to any further judgment in the present action. It alleged that the lien of that judgment was binding from the 11th of April, 1917, the date upon which the writ of garnishment was served upon appellant's agent.

The above are the material facts upon which judgment was rendered in favor of the appellee for the sum of $1,000 with interest, from which is this appeal.

First. The appellant contends that the judgment of the justice court of Tennessee against it was valid and binding, and that the satisfaction of such judgment by it constitutes a complete defense to the appellee's cause of action.

The appellant is correct in his contention that the legality of the judgment of the Tennessee court is governed by the laws of Tennessee, and that according to those laws the judgment rendered against it by the justice court in Tennessee is valid. See *Harris* v. *Balk,* 198 U. S. 215; *B. & O. R. R. Co.* v. *Hostetter,* 240 U. S. 620; *N. Y. Life Ins. Co.* v. *Dunlevy,* 241 U. S. 518; *L. & N. R. R. Co.* v. *Deer,* 200 U. S. 176; Shinn on Attachment & Garnishment, § 707.

It does not follow, however, that because the judgment of the Tennessee court was valid and binding at the time it was rendered, the satisfaction of that judgment is a defense to the present action.

In *Kittrell* v. *Perry Lumber Co.,* 107 Tenn. 148, it is held (quoting syllabus) that: "Notice of garnishment is insufficient to require appearance and answer by a corporation which is addressed to an individual, naming him as agent of the corporation, and only requiring him personally to answer as to the debtor's assets in his hands."

The writ of garnishment in that case was in all essential particulars the same as in the case at bar. The service of the writ upon S. M. Williamson & Company, agents of appellant, did not give the justice court of Tennessee jurisdiction over appellant according to the above decision, and if that were all, the judgment of the Tennessee court against appellant in the garnishment proceeding would have been void. But the proof shows that appellant in November, 1917, filed an answer to the garnishment. It was this appearance and answer of the garnishee which operated as a waiver of the defects in the summons and gave the Tennessee court jurisdiction

over the appellant. *Moody & Bigelow* v. *Alter-Winston & Co.,* 12 Heiskell 142; see also *Hearn* v. *Gruther,* 4 Yerger's, 461-74; *Railway* v. *Brooks,* 90 Tenn. 161.

The lien of the judgment in the garnishment proceeding must, therefore, date from the time of the appearance of the appellant in that proceeding, and not from the date of service of summons upon its agent.

Flynn & Ritter filed their petition in bankruptcy and were adjudicated as bankrupts on January 15, 1918. The lien of the judgment in the garnishment proceeding must run from some time in November, 1917, when appellant first appeared in that proceeding. The time when that lien was obtained was less than two and a half months prior to the adjudication in bankruptcy.

Section 67-f of the Bankruptcy Act, among other things, declares that: "All * * * liens, obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt."

In *Chicago, B. & Q. R. R. Co.* v. *Hall,* 229 U. S. 511-16, the Supreme Court of the United States, construing this section, said: "Barring exceptional cases which are especially provided for, the policy of the act is to fix a four-months period in which a creditor can not obtain an advantage nor a lien against a debtor's property. 'All liens obtained by legal proceedings within that period are declared to be null and void.' That universal language is not restricted by the later provision that the property affected by the * * * lien shall be released from the same and pass to the trustee as a part of the estate of the bankrupt." The court further said: "The liens rendered void by section 67-f are those obtained by legal proceedings within four months. The section does not,

however, defeat rights in the exempt property acquired by contract or by waiver of the exemption."

Flynn & Ritter were insolvent from March 26, 1917, the day on which their stock of merchandise was destroyed by fire. It is not claimed by the appellant that the Austin Clothing Company had acquired by contract with Flynn & Ritter or by their waiver any right in the funds in controversy. Appellant only contends that the Austin Clothing Company had obtained a lien thereon by virtue of its judgment in the garnishment which appellant was bound to pay.

The lien and satisfaction of this judgment would have been a protection to the garnishee and a complete defense to an action in ordinary proceedings brought against it by Flynn & Ritter. Shinn on Attachments & Garnishments, § 707.

But since this is an action brought by the trustee in bankruptcy of Flynn & Ritter, the case is governed by the law applicable to such proceedings. This case is, therefore, ruled by the decision of the Supreme Court of the United States in *Chicago, B. & Q. R. R.* v. *Hall, supra.*

Since the date of the lien of the judgment of the garnishment proceeding was within the period of four months prior to the filing of Flynn & Ritter's petition in bankruptcy, the judgment was void according to that case and the satisfaction thereof no defense to this suit. See, also, *S. Pac. Co.* v. *I. X. L. Furniture Co.,* 140 Pac. 665, 32 Am. Br. Rep. 327; *Wilson v. Van Buren F. Mutual Fire Ins. Co.,* 151 N. W. 752, 34 Am. Br. Rep. 678

Second. The appellant contends that the appellee is estopped from denying that the judgment in the garnishment proceeding and the satisfaction thereof is a complete defense to this action. This contention is grounded upon certain letters written by the attorney of Flynn & Ritter to the general agents of the appellant during the pendency of the garnishment proceedings and concerning those proceedings. Those letters disclosed that the attorney of Flynn & Ritter was protesting that the jus-

tice court of Tennessee had no jurisdiction of the appellant. The reason given in one of the letters is as follows: "The question I desire to raise in this case is as to the situs of the debt, and if neither the garnishee nor the principal debtor was a resident of the State of Tennessee, or proper service has not been had on your company, it is my desire to raise the question of jurisdiction and attack this judgment on that ground."

The appellant contends that because the attorney in this correspondence did not expressly insist on the insufficiency of the service of the writ of garnishment to give the Tennessee court jurisdiction over appellant, but urged another reason, that appellant thereby waived the right to insist on the insufficiency of that service and is estopped to deny the validity of the judgment there obtained as a defense to the present action.

In these contentions the learned counsel for appellant overlook the real merits of this controversy. This suit is not a suit by Flynn & Ritter against appellant to recover in their own right the $1,000 which appellant promised to pay in settlement of the policy of insurance. If this were such a suit, there might be some plausibility in appellant's contention that Flynn & Ritter would be estopped by the conduct of their attorney. The correspondence was all had concerning the garnishment proceeding in the Tennessee court, and the judgment was rendered in that proceeding before the petition of Flynn & Ritter in bankruptcy was filed and before they were adjudicated bankrupt and the appointment of the appellee as trustee of their estate in bankruptcy. Therefore, whatever may have been said by the attorney of Flynn & Ritter to the general agents of the appellant concerning the garnishment proceeding could not have operated as a waiver by appellee of the right to set up the invalidity of the judgment in the garnishment proceeding nor estop appellee from setting up the invalidity of such judgment as a defense to this action.

Appellee in this action does not stand in the shoes of Flynn & Ritter individually, but he is the trustee

of all their creditors and primarily represents them. He, and the bankrupt firm of Flynn & Ritter, and all their general creditors, are alike bound by the bankruptcy act, which, as we have seen, annulled the lien of the judgment in the garnishment proceedings, not because of the insufficiency of the service on the appellant, as garnishee in those proceedings, but because the lien of the judgment in those proceedings was not obtained within a period of four months prior to the adjudication in the bankruptcy proceedings. It is not within the province or power of the bankrupt to waive and thus nullify the provisions of the bankruptcy law.

The petition in bankruptcy sets in motion the provisions of that law, and the adjudication in bankruptcy operates for the benefit not only of the bankrupt but also for his general creditors as well.

Other questions are raised by counsel for the appellant which we have considered but do not find them of sufficient importance to discuss in this opinion.

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

FOX v. HUTTON.

Opinion delivered March 8, 1920.

1. SPECIFIC PERFORMANCE—BURDEN OF PROOF.—A purchaser, suing for specific performance of a contract for the sale of land, has the burden of showing that he has complied, or offered to comply, with the terms of the contract, or that he was ready and willing to do so, or that if there was any failure on his part it was caused by some default or neglect on the part of the vendor to comply with his part of the contract.
2. SPECIFIC PERFORMANCE—RIGHT TO ENFORCE.—In an action to compel specific performance of a contract of sale of land, evidence *held* not to show that plaintiff had done or offered to do all the things required of him before the vendor announced his purpose to treat the contract at an end, and therefore that relief should be denied.

Appeal from Mississippi Chancery Court, Chickasawba District; *Archer Wheatley,* Chancellor; affirmed.

Geo. W. Barham. Chas. F. Sullenger and *A. F. Barham,* for appellant.

1. The oral agreement here was collateral to the written agreement, and did not vary nor contradict it, and is not within the statute of frauds. 10 R. C. L. 1037. Appellee granted the extension of time, and a strict performance of the contract was waived by him. Appellee made no effort to assist appellant in perfecting arrangements for a loan, but actually prevented appellant from obtaining the money, and there was no breach by appellant, and appellee can not rightfully complain of the failure to perform, since the failure was entirely due to appellee's own conduct. 85 Ark. 596. There is no breach where performance is prevented by the conduct of the other party. *Ib.;* 102 Ark. 152; 15 *Id.* 376; 64 *Id.* 228.

2. Appellee waived any breach of contract as to time of performance. His own conduct was the controlling cause of the delay, and he waived strict performance, as well as rendered it impossible, and his case falls within the rule announced by this court. 7 Ark. 123; 59 *Id.* 405; 87 *Id.* 52; 83 Ill. 517; 127 Ala. 602; 70 Fed. 146; 85 Md. 337; 3 Page on Contracts, 1502; 89 Ark. 203-204. He can not insist upon forfeiture. 48 Ark. 413; 54 *Id.* 16; 61 *Id.* 266. Equity abhors a forfeiture and will relieve when expressly or impliedly waived. 1 Pom., Eq. Jur., 452; 59 Ark. 405; 75 *Id.* 410; 83 *Id.* 524; 91 *Id.* 137. Any conduct calculated to induce the other party to believe that a forfeiture will not be insisted on will be treated as a waiver. 102 Ark. 442. See, also, 51 *Id.* 105; 59 *Id.* 405; 77 *Id.* 168.

3. Appellee set an unreasonable time for the performance, and he acquiesced in the delay. After leading appellant to believe he would wait for the money, he gave appellant just four days to produce $12,000. This was unreasonable, arbitrary and unjust.

Nelson & Keck, for appellee.

In the trial below all the issues of law and fact were found for the defendant, and the complaint was properly refused. (1) Hutton agreed to furnish an abstract of title and failed and refused to do so, though aften requested, and rendered it impossible for plaintiff to perform his contract. (2) Plaintiff was ready, willing and able to comply with the terms of the contract, and so notified defendant, who failed and refused to carry out his obligations. (3) Plaintiff rented the lands to defendant for 1918, and should receive the rents. The contract contained mutual obligations and undertakings by the vendor and vendee. It was Fox's fault. When the contract was reduced to writing and signed, nothing was said about an abstract. 124 Ark. 70; 109 *Id.* 82. If there was any subsequent contract, which the court held there was not, it was without consideration and void. 118 Ark. 283. The complaint for specific performance was in the discretion of the chancellor and properly refused. 34 Ark. 663; 21 *Id.* 110.

WOOD, J. This action was begun by the appellant against the appellee for the specific performance of a contract for the sale of a tract of land containing 120 acres in Mississippi County.

The appellant set out the contract, which was dated October 31, 1917. After describing the lands and reciting that appellee agreed to sell and appellant to buy same, the contract provides as follows: "It is herein stipulated and agreed that a copy of this contract shall this day be deposited in the Bank of Manila, with a certified check for $500, executed by said Dr. V. R. Fox, payable to the order of J. M. Hutton, attached thereto as an earnest to witness and bind this contract. It is further stipulated and agreed that said J. M. Hutton is to deliver peaceable possession of said lands to said V. R. Fox or his order, together with a good and merchantable title to all of said lands and execute to said V. R. Fox, his heirs or assigns, a warranty deed to said lands, on or

before January 1, 1918, upon the said V. R. Fox paying to said J. M. Hutton or order the sum of twelve thousand dollars in addition to the aforesaid certified check for five hundred dollars."

The appellant alleged that it was understood at the time of the execution of the contract that it would be necessary for appellant to borrow all or the greater part of the purchase money, and that if appellant did not succeed in procuring a loan by January 1, 1918, appellee would allow appellant such additional time as might be necessary to complete his negotiations for the loan; that a few days after the contract was executed appellant was notified by a loan company that the loan would be made to him upon approval of title; that he employed an abstractor to bring down the abstract of title to date; that after considerable delay appellant succeeded in obtaining abstracts from the loan companies who held liens upon the land; that the last abstract was received February 18, 1918; that appellant placed these abstracts in the hands of the loan company from whom he expected to borrow the money; that this company furnished appellant with the list of requirements necessary in regard to the title before the loan company would furnish the money; that one of these requirements was that appellant should discharge the liens which two loan companies held and to make a correction in the entry made by the clerk showing the satisfaction of a trust deed on the record; that the appellee did not aid the appellant in meeting the requirements of the loan company in perfecting the abstract of title which the loan company exacted before it would make the loan; that appellant worked diligently to perfect this abstract until March 11, when appellee arbitrarily declared that appellant must pay him and close the deal by March 15; that while negotiations were pending the loan company delivered appellee a statement of the amount of interest it would be necesary for appellee to pay before he could discharge their loan; that appellee refused to pay this amount which in itself was sufficient to prevent the making of the loan; that appellee

approached appellant and insisted that it was appellant's duty to pay the interest accruing on the loan from the date of the making of the contract, which appellant agreed to do; that appellant also offered at one time during the negotiations to pay the appellee the sum of $3,000 of the purchase price, which appellee refused; that after the making of the contract with appellee and while appellant was negotiating with the loan company to procure the necessary loan the lands greatly enhanced in value, being worth some $1,500 more at the time the appellee finally repudiated the contract than they were when the contract was executed; that while appellant was negotiating with a loan company the appellee interfered and prevented the loan company from making the loan by telling the agent of such company that he (appellee) was not going to comply with the contract.

Appellant further set up that there was an oral agreement between the appellant and the appellee by which the appellee was to hold the lands during the year 1918 and pay appellant, as rent therefor, one-fourth of all cotton and cotton seed and one-third of all corn raised on the land.

Appellant alleged that he had duly performed the contract on his part and that appellee refused to perform. Appellant, therefore, prayed that the appellee be required to perform his contract upon the payment to him of the purchase money and that appellant have judgment against the appellee in the sum of $2,650 for rent of the lands during the year 1918.

The appellee answered, admitting that he entered into the written contract set up in the complaint, but denied specifically the other allegations and alleged that appellant had never at any time offered to comply therewith, although repeatedly requested to do so. Appellee averred that until the expiration of the time allowed in the contract for the payment of the purchase money he was at all times ready, able and anxious to carry out the terms of the contract; that on account of the refusal of the appellant to comply with the terms of the contract

the circumstances had so altered and changed as to render it inequitable and unjust to require the appellee to convey the lands which circumstances were well known to the appellant during the life of the contract.

The appellant, among other things, testified that the reason that the contract was not carried out on or before January 1, 1918, as specified therein, was that he did not have the abstracts to eighty acres of the land; that it was appellee's place to furnish these abstracts.

Appellant was asked if he requested the appellee to furnish the abstracts and answered that he did after January 1 but not before; that on two different times he requested one Suggatt, who was acting as the agent for both of them in conducting the negotiations, to furnish him the abstract. The abstract of this particular eighty acres, it appears, was in the possession of a loan company. The appellant testified that Suggatt wrote this company for the abstract; that, after appellant realized that he was not going to be able to consummate the deal on or before January 1, 1918, he asked the appellee for an extension of time.

Appellant further testified as follows: "I said, 'Mr. Hutton, I want to ask you in the presence of these witnesses for an extension of time if it takes longer than January 1 to get my loan through.' I also said, 'It may just be a few days and it may be longer,' and he answered, 'Certainly that will be all right.' That was all that was said in regard to the extension of time."

Appellant testified that he got the loan approved a few days after the contract was made, but could not get the money until the Missouri State Loan Company, from which company he expected to borrow, had the abstracts examined. He did not secure the abstracts and send them to said loan company until February 11, 1918. The money was sent here direct, and appellant was ready to close the loan somewhere just after the middle of March. The loan company did not send the money earlier because it had heard through its agent that Hutton had backed out, and they would not send the money until it

was settled. The appellee did not say anything to appellant indicating that he did not intend to comply with the contract until March 11, and then he called appellant to one side and asked him if he was about ready to close the loan and at that time informed appellant that he (appellee) would not wait any longer than March 15. In the course of the conversation the appellee further stated that he agreed to give the extension of time, but did not aim for it to be so long; that he owed the banks the sum of $6,000. Appellant also told the appellee that the delay was on account of the abstracts that he (appellee) was to furnish, and that he (appellant) would pay the appellee then the sum of $3,000; that the appellee replied that would not do any good, as he owed $6,000 to the banks that he would have to pay.

The appellant, in answer to a question, stated that he was never ready at any time to close up the deal as per the terms of the written contract before Hutton backed out, the reason being that he was getting money from the Missouri State Loan Company and that company made certain requirements with regard to the abstracts, which it was appellee's duty to fulfill; that the failure to furnish the abstracts and perfect the loan and close the deal was not through any negligence of appellant.

The appellee testified that appellant never at any time after the contract was executed said that he was ready and willing to comply with the terms of the contract; that he (appellee), in order to make the sale, extended the time to March 15, in order to be able to buy Manila Bank stock which he (appellee) desired to purchase; that he gave appellant the statement of the indebtedness against his land and testified that if appellant had paid or tendered him the purchase price of the lands within the original or extended time he could and would have conveyed a good and merchantable title by warranty deed; that after appellant failed to get the money it was necessary for appellee to raise the money which he did from the Missouri State Loan Company; that appel-

lee had an abstract to all his lands besides the one held by the loan company (referred to by the appellant), and appellee would have been glad to furnish those abstracts to appellant, had he known that appellant wanted them; that neither appellant, Suggatt, his agent, nor Ashabranner, the agent of the Missouri State Loan Company, ever said anything to the appellee about an abstract or called upon him to do anything about the loan.

The appellee filed as an exhibit to his testimony the requirements made of the appellant by the loan company. These show that the abstracts were certified by the abstractor on January 5, 1918. These requirements also show that the only requirements affecting the lands of the appellee were concerning the paying off of the existing indebtedness, and the other requirements affected the lands of appellant. The exhibit shows that practically all the requirements exacted by the loan company pertained to the lands of the appellant which were also to be included in the mortgage to secure the loan.

The trial court found the issues of fact and law in favor of the appellee and dismissed appellant's complaint for want of equity, from which is this appeal.

The appellee did not set up in his answer, nor claim in his testimony, that the appellant had forfeited his rights under the contract by not paying the purchase money according to the time limit specified in the contract. On the contrary, the appellee extended the time twice. The failure of the parties, however, to consummate the contract on the day specified in the contract is important in determining at whose door the fault lies for not completing it on that day, and the other days to which the time was extended.

There is a decided and irreconcilable conflict in the evidence on that issue. The burden was upon the appellant to show as a condition precedent to the relief sought by him that he had complied or offered to comply with the terms of the contract, or that he was then ready and willing to do so, and that if there had been any failure upon his part such failure was caused by some de-

fault or neglect on the part of the appellee to comply with the duties which he was obliged to perform under the contract. *Henley* v. *Hengler,* 118 Ark. 283.

We are convinced that a preponderance of the evidence shows that the appellant had not done or offered to do all that the contract required of him before the appellee announced his purpose to treat the obligation of the contract as at an end. While the testimony of the appellant tends to prove that appellee was to furnish the appellant with abstracts of title to enable the appellant to borrow the purchase money, yet his testimony does not show that he ever made any request of the appellee to furnish these abstracts or notified appellee that it would be necessary for him to furnish same before the day specified in the contract when it should be fully performed. On the other hand, the testimony of the appellee shows that he had an abstract of all the lands, and that he would have been glad to have furnished the same to appellant if he had known that appellant wanted same. The testimony of the appellee shows that there was no defect in his title, that he readily borrowed money on the strength of his title from the same loan company with which the appellant was negotiating. The testimony of the appellee to this effect is corroborated by the agent of the loan company.

The contract carried mutual obligations, and we have reached the conclusion that the appellant has not shown a full compliance on his part with the terms of the contract so as to entitle him to a specific performance thereof on the part of the appellee.

The findings and decree of the chancery court are, therefore, correct.

Affirmed.

HALL BROTHERS v. MOORE & MCFERREN.

Opinion delivered March 8, 1920.

1. CONTRACTS — FORFEITURES.—Forfeitures of contracts are not favored in equity.
2. CONTRACTS—CONSTRUCTION.—Where plaintiffs employed defendants to clear a certain half section for so much an acre, and agreed to rent the land to defendants for five years at $5 per acre, after a certain date when the clearing was to be completed, and thereafter sued defendants for rent at $15 per acre, alleging a forfeiture of the contract for failure to complete the clearing, and defendants alleged that the clearing was not completed because plaintiffs had failed to ditch the land as agreed, a finding of the chancellor that there had been no breach of the contract by defendants because the plaintiffs had failed to comply with their agreement to drain the land was sustained by the evidence.
3. REFORMATION OF INSTRUMENT—SUFFICIENCY OF PROOF.—To entitle a party to reform a contract, the proof must be clear, unequivocal and decisive.

Appeal from Mississippi Chancery Court, Osceola District; *Archer Wheatley,* Chancellor; affirmed.

W. J. Driver, for appellants.

Appellants were entitled (1) to the use of the north half of section 8 for the year 1918 free of rent for the failure to provide drainage and according to the express terms of the contract; (2) in the alternative to the actual damages sustained by reason of the failure to provide drainage, and (3) to reformation of contract to include the south half of section 8, commencing Jauuary 1, 1918, for five years, and the chancellor erred in failing to so find. The attention of the court is called to the following decisions on the questions raised: 90 Ark. 272; 94 *Id.* 471, 493; 112 *Id.* 1.

A forfeiture will not be declared except on compliance with the contract by the complaining party. 100 Ark. 565. Appellee can not complain of the breach of the clearing contract because whatever was done and not done was due entirely to appellees' conduct. 85 Ark. 596; 102 *Id.* 152. See, also, 15 Ark. 376; 22 *Id.* 258; 64

Id. 228. The contract was substantially performed, as the proof showed, and appellants are entitled to the fruits. 131 Ark. 469. A substantial compliance is all that is required to authorize a recovery. 105 Ark. 353. Good faith is requisite. On the question of waiver, see 102 Ark. 79.

Appellants are entitled to reformation of contract to include all of section 8, as the testimony clearly shows. The burden was on appellants, and they have met it squarely. There was no bad faith on part of appellants. The testimony as to section 8 shows an arbitrary and flagrant disregard of appellees' obligations to Hall. They did nothing they obligated themselves to do. A court of equity will not permit such intolerable conduct. The intention of the parties should be ascertained and carried into effect. 3 Elliott on Cont., § 2365. If mistakes are found, reformation to correct them should be granted. 98 Ark. 28; 135 *Id.* 607; 2 Pom., Eq. Jur., 1183; 132 Ark. 227. Not only in mutual mistake, but where there is mistake on part of one party, coupled with fraud on the part of the other, reformation should be granted. 98 Ark. 23; 174 S. W. 1158; 89 Pac. 671; 135 Ark. 293; 132 *Id.* 227. We have brought ourselves fairly within the rule laid down. *Supra.*

J. T. Coston, for appellees.

Hall clearly failed to comply with the contract. The chancellor heard the evidence and refused rightfully to reform the contract and the decree is supported by the evidence. 48 Ark. 501; 32 *Id.* 346. To justify reformation the proof must be clear, unequivocal and decisive. 131 S. W. 701. The mistake was not proved. 77 S. W. 53; 101 *Id.* 724; 131 S. W. 452; 141 *Id.* 943-4. The mistake must be mutual, and the minds of the parties must have met or there is no contract to reform. 20 Wall. 490-1. See, also, 120 S. W. 839; 85 *Id.* 769. Hall was not entitled to reformation under the proof. He failed to build the houses as he contracted to do. When the contract was signed, war was brewing and actually com-

menced soon afterward. Hall failed to clear the land within the time required by the contract. The whole decree is fair and just to both parties and should be affirmed.

WOOD, J. The appellees, hereinafter for convenience called Moore, brought this action against the appellants, hereafter for convenience called Hall, to recover rents for the year 1918 on 320 acres of land at $15 per acre.

Hall denied liability and set up a contract entered into between him and Moore on the 16th of November, 1916, the material parts of which are substantially as follows: Hall agreed with Moore to clear all the north half of section 8 in Mississippi County, Arkansas, for $9 per acre and to clear "everything east of the railroad between now and March 1, 1917," and to finish all clearing west of the railroad by January 1, 1918. Hall agreed to move his force upon the land at once and to have them all on the land not later than December 1, 1916, and to plow the land as it was cleared. Moore agreed to build a house on every twenty acres as fast as possible, to build one barn and one five or six room house like the "Boyle House." Moore agreed to give the first year's rent free of charge for all lands cleared and plowed by March 1, 1917, regardless of whether the contract was completed in full or not. If Hall cleared all the lands east of the Wilson-Northern Railroad on section 8, in time to put in a crop that year Moore agreed to rent him the north half of section 8 for five years longer at $5 per acre. Hall was to pay $5 per acre for all lands that had been plowed on the north half of section 8. Moore agreed to ditch the land (in his own way) the same as other lands in cultivation. In case of failure to ditch the lands on time the contract was to be extended until same was done.

The testimony of Moore tended to prove that from the date of the contract of March 1, 1917, Hall had not complied with the contract by clearing all the land east of the Wilson-Northern Railroad; that there were about

thirty or forty acres of that land not cleared, and that of the lands in the north half of section 8 on both sides of the railroad there were seventy acres that were not cleared and put in cultivation during the year 1917.

The testimony of Hall tended to prove that all of the lands east of the railroad were not cleared by March 1, 1917, for the reason that Moore failed to provide sufficient drainage to enable Hall to clear the lands within the time specified in the contract. Hall contends that under the contract Moore was to ditch the land in advance of the clearing. He also contends that Moore had failed to comply with the provision of the contract which required him to build a house on every twenty acres as fast as possible.

Forfeitures are not favored. It is clear when the contract is considered as a whole that it was not contemplated that Hall would forfeit his rights under the contract if he failed to clear everything east of the railroad by March 1, 1917, and all of the land west of the railroad by January 1, 1918. Time was not made the essence of the contract by the naming of these dates. On the other hand, it is equally clear that it was not in contemplation of the parties that if Moore failed to build the houses or ditch the land in time to enable Hall to clear the lands east of the railroad by March 1, 1917, in such event Hall was to have the use of the land free of rent for the year 1918.

When the provisions of the contract are all considered, we are convinced that it was the intention of Moore to negotiate with Hall for the clearing of 320 acres of land during the year 1917, and that he was offering to Hall as the inducement and consideration, $9 per acre for the clearing and free rent during the year 1917 for all land that Hall might clear and plow by March 1, 1917. As a further consideration and inducement to having all the lands cleared east of the railroad by the first of March, Moore agreed that Hall should have the land both east and west of the railroad embracing the north half of section 8 for a period of five years from January 1, 1918,

the latter date being the time fixed when Hall should finish clearing all of the land.

It appears from the language of the contract that it was the purpose of Moore, for some reason not disclosed in the contract, to have all the land east of the railroad cleared first and to have that done by March 1, 1917, and the entire tract of land cleared by January 1, 1918. The written provision of the contract shows that it was to come to an end and so far as the clearing was concerned on January 1, 1918. Under the terms of the contract, as we construe it, Moore was also bound to ditch the lands that had been cleared the same as other lands that were in cultivation and have the ditching completed by January 1, 1918. But if for any reason the ditching had not been completed by that time then the contract was to be extended until the ditching could be completed.

The testimony shows that by January 1, 1918, Hall had failed to clear seventy acres of the land, thirty or forty acres of which were east of the railroad. Hall claimed, and the testimony adduced in his behalf tended to prove, that he was unable to clear the lands embraced in his contract because it was not sufficiently drained. He also adduced evidence tending to prove that Moore had not complied with the contract in regard to the building of the houses.

The testimony of Moore, however, and evidence adduced in his behalf, tended to prove that Hall was not delayed or obstructed in his clearing operations by any failure on the part of Moore to build the houses mentioned in the contract. Moore also contended that under the contract he was not to drain the land in advance of the clearing but was only to have the same drained after the clearing was done preparatory to the cultivation.

The court below found that there had been no breach of the contract on the part of Hall, such as to cause a forfeiture of his right to clear the seventy acres after January 1, 1918. The court doubtless reached this conclusion for the reason that Moore had failed to properly

drain the land that had been cleared in time for the proper clearing and cultivation thereof.

The trial court found that Moore was entitled to recover of Hall rent at the rate of $5 per acre on all of the lands that had been cleared by January 1, 1918, on the north half of section 8 for the year 1918, and that Hall was entitled to an extension of the contract for a period of five years including the year 1918. The court further found that Moore was entitled to collect rent from Hall at the rate of $5 per acre on such parts of the seventy acres as were then cleared or that might thereafter be cleared, but that Hall was not required to clear the seventy acres until Moore had drained the same.

The court upon these findings of fact entered a decree in favor of Moore on his complaint in the sum of $1,287.50, representing the rent for the year 1918, at the rate of $5 per acre on the land that had been cleared by Hall on the north half of section 8.

It would unduly extend this opinion to set out and discuss in detail the testimony upon which Hall relies to sustain his contention that Moore was not entitled to recover rent for the year 1918 because he had violated the terms of the contract by failing to drain the lands as therein required.

It is also unnecessary to discuss in detail the testimony upon which Moore relies to sustain his contention that Hall had failed to clear the lands as required by the terms of the contract.

We have reached the conclusion that the preponderance of the evidence shows that there was not a sufficient breach of the contract by either party to justify the conclusion that the contract was at an end on January 1, 1918, and that its mutual obligations were no longer binding upon the parties. The trial court ruled correctly in deciding otherwise. A careful consideration of the evidence convinces us that the findings of fact by the trial court are not clearly against the preponderance of the evidence, and its construction of the contract is really more favorable to Hall than perhaps the letter of the in-

strument warrants. However, Moore has not appealed, and therefore has expressed himself as satisfied with the decree awarding to Hall the right to hold the cleared lands for a period of five years from January 1, 1918, at a rental of $5 per acre and to clear and hold the seventy acres at the same rate after Moore had drained the same.

The court was also correct in the conclusion that Hall was not entitled to reformation of the contract so as to give him a lease on all of the lands of section 8 instead of the north half as set forth in the contract.

Hall contends that the contract contemplated that, if he cleared the north half of section 8, as specified in the contract, he was to then have a lease on all of section 8.

The instrument itself plainly expresses that "parties of the first part (Moore) agreed to rent them (Hall Brothers) the north half of section 8, etc." To effectuate the purpose which Hall contends was intended by the instrument, the language "north half of section 8" should have been "section 8" or "all of section 8."

Hall alleges in his cross-complaint that "through fraud and mistake in the preparation of the contract it recited the north half of section 8 instead of all of said section. After a careful consideration of the evidence we have reached the conclusion that this allegation is not sustained by a preponderance of the evidence. In the absence of fraud, to entitle appellant to a reformation of the instrument, so as to make it read as he contends, the proof must be clear, unequivocal and decisive. *McGuigan* v. *Gaines,* 71 Ark. 614; *Ark. Mut. Fire Ins. Co.* v. *Witham,* 82 Ark. 226; *McCracken* v. *McBee,* 96 Ark. 251; *Cheatham* v. *J. W. Beck Co.,* 96 Ark. 230.

The testimony adduced by Hall on this issue, even though it may preponderate in his favor, is not sufficient to meet the above requirements. If the parties had intended to include all of section 8 instead of the north half, then a mere casual reading of the contract would have discovered that the intention was plainly not expressed therein, but on the contrary the purpose to embrace the "north half" was plainly stated. Moore and another

witness testified that Hall read the contract carefully before signing the same.

The most that can be conceded to Hall is that there is a decided conflict in the evidence on this issue with a preponderance in his favor, but that does not fill the measure of the requirements of the law to entitle him to reformation of the contract.

The decree is therefore correct, and it is affirmed.

CARROLL COUNTY v. POYNOR.

Opinion delivered March 8, 1920.

1. APPEAL AND ERROR—WHAT ERRORS REVIEWABLE.—Though there was no motion for new trial, the Supreme Court can review for errors manifest from the face of the judgment where it contains a recital of the facts on which it is based.
2. COUNTIES—COUNTY PURPOSES.—Local registrars of vital statistics appointed under Acts 1913, page 352, are State officers, and their services can not be regarded as a "county purpose" within art. 7, § 28, of the Constitution.
3. COUNTIES—SERVICES OF LOCAL REGISTRARS—LIABILITY.—Acts 1913, page 352, creating the board of health and bureau of vital statistics and providing for payment of local registrars by the counties, being unconstitutional as to the latter provision, the fact that the levying court made an appropriation for the payment of a registrar will not bind the county nor entitle the registrar to have his claim allowed by the county court.
4. COUNTIES—SERVICES OF LOCAL REGISTRARS.—Acts 1917, page 799, providing for payment by various counties of services of local registrars, is not retroactive, and furnishes no basis for allowance of claims for services rendered by such registrars before the passage of that act.

Appeal from Carroll Circuit Court, Eastern District; *W. A. Dickson,* Judge; reversed.

STATEMENT OF FACTS.

Appellee, as local registrar of District No. 69, in Carroll County, Arkansas, filed in the county court on April 7, 1919, his claim against Carroll County for $40.50 for services rendered in regard to registering the births

and deaths for said district during the year 1916. The claim was disallowed by the county court, and appellee appealed to the circuit court, where the claim was allowed and ordered paid.

The judgment of the circuit court recites that Dr. I. M. Poynor was duly appointed and acted as registrar of the Bureau of Vital Statistics for Prairie Township in Carroll County, during the year 1916; that he performed the services as such registrar, and that his fees therefor amounted to $40.50 for services during the year 1916; that the levying court in October, 1918, appropriated $150 for the expense of the local registrars and $175 for the expense of the local registrars for the year 1916; and that that sum was collected and was in the county treasury for that purpose.

The circuit court was of the opinion that, while the county was not originally liable for said claim, it is now liable because the levying court had made an appropriation therefor and the collector has collected the taxes so levied.

Judgment was rendered in accordance with the finding of the court, and Carroll County has duly prosecuted an appeal to this court.

F. O. Butt, for appellant.

The question is one of law solely, and the court erred in allowing the claim. The error appears on the face of the record and no motion for a new trial was necessary. 100 Ark. 515. The fact that a levying court levied a tax for a specific tax, and such tax was collected, does not render the county liable if the claims are *per se* illegal and not a proper charge against the county. The Legislature had no power to validate an appropriation by a levying court for other than county purposes. 125 Ark. 350; 114 *Id.* 278. The powers of the levying court are fixed by Constitution 1874, art. 7, § 30, and no act outside the functions prescribed have any vitality. The county court acted legally in disallowing the

claim, and the judgment of the circuit court was erroneous.

Johnson & Simpson, for appellee.

The error here does not appear on the face of the record, and no motion for new trial was made. Appellant can not raise the question here for the first time. The circuit court found that the levying court made a specific levy and appropriation to pay the claims of registrars for the year 1916. The matter was submitted to the court sitting as a jury and the judgment is conclusive. 46 Ark. 17; 93 *Id.* 382; 13 *Id.* 344.

HART, J. (after stating the facts). It is sought to uphold the judgment on the ground that no motion for a new trial has been filed. The Supreme Court can review for errors manifest from the face of the judgment where the judgment contains a recital of the facts upon which it is based. *Baucum* v. *Waters,* 125 Ark. 305, and *Davies & Davies* v. *Patterson,* 132 Ark. 484. The facts upon which the judgment of the circuit court is based are recited in the judgment, and we can, therefore, review for errors apparent from the face of the record.

Doctor Poynor was appointed registrar pursuant to an act creating the State Board of Health and Bureau of Vital Statistics. See Acts of 1913, page 352. The services performed by him were pursuant to the provisions of that act during the year 1916. That act came up for construction in the case of *Fort Smith Dist. of Sebastian County* v. *Eberle,* 125 Ark. 350. The court held that the local registrar was a State officer, and that his services could not be regarded a county purpose within the meaning of the Constitution, and that the act was invalid so far as it authorized the payment for the services of the local registrar out of the county treasury. That decision is conclusive of the case at bar. If the levying court, by subsequently making an appropriation therefor, and the collector by collecting the taxes for general county purposes pursuant to the appropriation could bind the county to make the payment for services which this

court has held the county was not liable for, the practical effect would be to oust the county court of the original jurisdiction which is granted it by the Constitution. By virtue of our Constitution and laws, the county court is invested with the exclusive original jurisdiction to audit, settle and direct the payment of all demands against the county. Constitution of 1874, art. 7, § 28, and *Chicot County* v. *Kruse*, 47 Ark. 80.

As we have just seen, the claim of Doctor Poynor was not a debt against the county because at the time the services were performed he was a State officer, and the county was not liable for the payment of his services as a State officer. To hold otherwise would be to divest the county court of the jurisdiction granted it under art. 7, § 28, which provides that the county courts shall have "exclusive original jurisdiction in all matters relating to county taxes, * * * disbursements 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." As we have seen the claim of appellee is not a debt against Carroll County, and, under the provision of the Constitution just referred to, the county court would not be authorized to audit and allow a claim which was not authorized under the law.

It is true the Legislature of 1917 amended the general act above referred to so as to provide for the payment by the respective counties for the services of the local registrars. See Acts of 1917, Vol. 1, p. 799. That act, however, does not purport to be retroactive in its operation, and therefore has no application whatever to the present case.

It follows that the circuit court erred in holding that the county was liable for the services performed by Doctor Poynor as local registrar during the year 1916, and for that error the judgment must be reversed and the cause will be remanded for further proceedings according to law and not inconsistent with this opinion.

TENNISON v. HANSON.

Opinion delivered March 8, 1920.

1. SALES—ABANDONMENT OF CONTRACT—JURY QUESTION.—In an action against a seller for breach of a contract to deliver cotton, the testimony being in conflict, the question whether defendant abandoned the contract before the buyer's insolvency was for the jury.
2. SALES—DUTY OF SELLER TO MAKE TENDER.—In an action by the trustee of a bankrupt firm against one who had contracted to deliver the cotton to the firm, alleging a breach of the contract, *held* where there was evidence that the firm's agent had notified the seller that the firm was insolvent, and would be unable to carry out the contract, it was not error to refuse to instruct that the defendant was liable unless he had tendered performance; as the law does not require the doing of a vain thing.
3. SALES—TIME OF DELIVERY—INSTRUCTION.—Where a contract obligated the seller to deliver 200 bales of cotton during the month of September, an instruction to find against the seller if he did not have that number on hand to make delivery on September 23 was error.
4. APPEAL AND ERROR—INSTRUCTIONS NOT EXCEPTED TO.—Where no exceptions to the giving of an instruction was saved, the propriety of the instruction will not be considered on appeal.

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

STATEMENT OF FACTS.

T. L. Tennison, trustee of the estate of Scott Bros., bankrupts, brought this suit against J. D. Hanson to recover damages for an alleged breach of two contracts for the sale of cotton. This is the second appeal in the case. On the former appeal the judgment of the circuit court was reversed because the court erred in directing a verdict for the defendant. *Tennison* v. *Hanson,* 136 Ark. 266.

On the 4th day of August, 1916, J. D. Hanson, a merchant of Buckner, Arkansas, made a contract with Scott Bros., cotton factors of Paris, Texas, to sell them 200 bales of cotton to be delivered in September, 1916, at a stipulated price per pound. On the 16th day of August, 1916, Hanson made a contract with Scott Bros. to sell

them one hundred bales of cotton to be delivered in October, 1916, for a stipulated price per pound. On the 23d day of September, 1916, Hanson wrote to Scott Bros. that he thought he would have great difficulty in complying with his contract for the delivery of the cotton and asked to be released from the contract. This letter was written at the suggestion of a representative of Scott Bros. In a day or two thereafter Hanson was informed by the Arkansas representative of Scott Bros. that that firm had become insolvent and would go into bankruptcy.

The Arkansas representative of the firm testified that between the 20th and 25th days of September, 1916, he received a letter from the firm stating that it was insolvent and unable to carry out its contracts and directing him to close up the Arkansas office. He communicated these facts to Hanson.

Hanson testified that at this time he had in his possession 142 bales of cotton to be delivered on his contract with Scott Bros., and that he could have purchased the balance in time to have delivered the same during the month of September, and that he did not do so because he was informed that Scott Bros. had become insolvent and could not carry out their contracts.

A member of the firm of Scott Bros. testified that they were not insolvent at this time, and that they could have carried out their contract up to about the 10th of October, when they went into bankruptcy.

The jury returned a verdict for the defendant, and the case is here on appeal.

King & Whatley, for appellant.

The record is clear and convincing that plaintiff is entitled to a judgment, and the court erred in refusing instruction No. 2 for plaintiff. The errors here were not passed on by this court on the former appeal. The court erred in refusing No. 5 for plaintiff and violated the mandate of this court. It was also error to refuse No. 6 and in giving No. 1 for defendant. 136 Ark. 266. Appellant was entitled to judgment, as Hanson aban-

doned the performance of the contract before the insolvency of Scott Brothers, and he did not intend to deliver the cotton. Under the contract Hanson must deliver the cotton, or offer to do so, and appellant is entitled to judgment on the compromise for $1,500.

Searcy & Parks, for appellee.

There are no errors in the instructions, and the verdict is sustained by all the legal evidence and the former opinion of this court on first appeal.

HART, J. (after stating the facts). The plaintiff sought to recover in the action on the theory that Hanson abandoned the performance of the contract before the insolvency of Scott Bros., and that he did not intend to deliver the cotton under the contract. The facts are in conflict on this point, and this question was properly submitted to the jury under appropriate instructions.

Counsel for the plaintiff assign as error the refusal of the court to instruct the jury that it was the duty of Hanson to tender to plaintiff the cotton embraced in the contract, and that, if he failed to do so, he would be liable in damages to the plaintiff.

The court was right in refusing to give this instruction. It made the defendant guilty of a breach of the contract if he failed to tender the cotton to the plaintiff, regardless of the fact of whether or not plaintiff was able to carry out the contract.

According to the testimony of Hanson, he had been informed by the Arkansas representative of Scott Bros. that that firm had become insolvent, had ceased to do business, and would be unable to carry out its contract. This being true, it would have been a vain and idle thing for Hanson to have tendered the cotton to Scott Bros. under the contract. If Scott Bros. were unable to carry out the contract, no useful purpose could have been served by Hanson tendering to Scott Bros. or the plaintiff the cotton under the contract.

It is next insisted that the court erred in refusing to instruct the jury that if it should find from the evi-

dence that Hanson on the 23d day of September, 1916, did not have the September cotton and did not intend to deliver the same, it should find for the plaintiff. There was no error in refusing to give this instruction. Hanson had all of September in which to buy the cotton under the first contract. He had 142 bales on hand on the 23d of September, 1916, and said that he could have gotten the balance by the end of the month. The court had no right to limit his time of procuring the cotton to the 23d day of September, 1916, when his contract gave him the whole of that month. Hence the instruction would have been confusing and misleading to the jury and the court properly refused to give it. All of the instructions refused by the court contained this same vice, and there was no error in refusing them.

Counsel also complain that the court erred in giving an instruction asked by the defendant. We need not consider this assignment of error; for no exceptions were saved at the trial to the giving of it, and under our familiar rules of practice any objection to it will be deemed to have been waived.

The judgment will be affirmed.

FLEMING v. HARRIS.

Opinion delivered March 8, 1920.

1. VENDOR AND PURCHASER—RESCISSION FOR FRAUD.—One who desires to rescind a contract for the purchase of land on the ground of fraud must act promptly after discovering the facts.
2. VENDOR AND PURCHASER—REASONABLE TIME TO RESCIND.—Where plaintiff took possession of a farm purchased by him and remained thereon from January to November, he could not thereafter rescind the contract upon the ground that the vendor falsely represented that a certain tract of timber land was part of the farm; for he could not speculate for a whole crop season upon whether or not his purchase might turn out well and then, when he believed that it did not, come into a court of equity and claim a rescission of the contract.

3. VENDOR AND PURCHASER—MISREPRESENTATION—EVIDENCE.—In an action by the purchaser of a farm to rescind the contract of sale upon the ground that it was procured by false representations that a certain tract was a part of the farm, evidence *held* to show that the vendor's representations as to the boundary line were mere expressions of opinion and made without intent to deceive.

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

STATEMENT OF FACTS.

The plaintiff, J. E. Harris, purchased a farm consisting of eighty acres of land from the defendant, W. A. Fleming, received a deed, and paid the whole amount of the purchase money. This suit is brought to rescind the contract of sale on the ground that it was procured by false representations.

The facts are that J. E. Harris, being about to purchase a farm from the defendant, W. A. Fleming, made an examination of the farm with Fleming and J. Q. Rogers, a real estate agent, who had the property for sale. The parties went over the land together and Harris was shown the improvements. There were houses and barns on the land of the value of $1,100. There were about thirty or more acres of land in cultivation. The price was $1,600. About one hundred yards from the northeast corner of the fence on the east boundary line of the land there is a crooked creek running in a southerly direction. There are about twenty acres of timber land between the east fence and the creek. It is the contention of the plaintiff that the defendant represented to him that his line ran near the creek and that the farm contained this twenty acres of timber land. The plaintiff is corroborated in his testimony by the testimony of his son. The plaintiff also states that this twenty acres was the most valuable part of the farm, but he does not state anything about the quantity or value of the timber situated on the twenty acres.

On the other hand, according to the testimony of the defendant he only pointed out in a general way the east-

ern boundary line of the tract and told the plaintiff that according to a survey he had had made, the line went beyond the fence. His testimony is corroborated by that of the surveyor who had made a survey of the land. At the suggestion of the chancellor, the parties had the line surveyed again, and it was ascertained by that survey that the twenty acres in question were not included within the limits of the eighty-acre tract described in the deed. There is no question but that the farm embraced eighty acres of land as described in the deed.

Other witnesses for the defendant testified that the twenty acres of land in question contained no valuable timber and was itself of but little value. They said that it was wet and boggy, and that very little of it could be cleared and cultivated. They said that the land on the west side of the farm was twice as valuable as the land in question.

The chancellor found the issues in favor of the plaintiff, and it was decreed that the contract of sale between the parties should be set aside and that the deed from Fleming to Harris should be canceled and set aside, and that a deed from Harris to Fleming to a tract of land which was a part of the consideration for the contract of sale should be canceled and the title to that land be again vested in Harris.

W. A. Fleming has appealed.

D. D. Glover, for appellant.

There were no false representations by Fleming or his agent, and no fraud was practiced on defendant to induce him to purchase the land. No case for rescission was made. 46 Ark. 354. The place is well worth the price paid for it, and under the evidence the cause should be reversed.

The findings of the chancellor are not against the preponderance of the evidence and should be sustained. No false representations were made. 71 Ark. 91; 112 *Id.* 502. Elliott on Contracts, § 2417 and note; 26 Ark. 34. Fraud avoids a contract *ab initio.* 22 Ark. 517; 30 *Id.*

374. The facts of this case bring it squarely within the rule of 11 Ark. 58; 47 *Id.* 148; 129 *Id.* 498. It was a fraud on Harris for Fleming to make the positive statement that the east line of the lands he was offering to sell Harris was near the creek, 100 yards or more east of the fence, when as a matter of fact the line was 33 links west of the fence. Fleming was not injured. The dispute here has been settled by three surveyors, and Fleming stated that he was satisfied, and the findings and decree should be affirmed.

HART, J. (after stating the facts). The decree was wrong for two reasons. In the first place, where a party desires to rescind his contract for the purchase of land on the ground of fraud, he must act promptly after discovering the facts. The plaintiff, Harris, received a deed from Fleming in the early part of January, 1918, and immediately moved on the farm. A part of the consideration for the purchase was a house and lot in Malvern, Arkansas, which Harris conveyed to Fleming. Fleming went into possession of the house and lot. Harris did not bring this suit until the 3d day of November, 1918. This, under the circumstances just recounted, was an unreasonable time. During all this time, Harris treated the land as his own and made no complaint to Fleming on the ground that there was a misrepresentation as to the twenty acres of timber land. Harris could not wait to experiment and see whether the transaction might not after all turn out well. Acquiescence, under the circumstances of this case, is fatal to his right of recovery, if any before subsisted. It was his duty to have moved in a reasonable time, and, not having done so, he could not speculate for a whole crop season upon whether or not his purchase might turn out well, and then, when he believed that it did not, come into a court of equity and claim a rescission of the contract. *Fitzhugh* v. *Davis, Admx.*, 46 Ark. 337.

In the next place, a careful consideration of the whole record leads us to the conclusion that Fleming did

not intend to deceive Harris as to the boundary line of the farm. It is true Harris testified that the principal inducement to buy the farm was the fact that he got the twenty acres of timber land in question, but he is contradicted in this respect by Fleming and by all the circumstances in the case. We think a preponderance of the evidence shows that he was buying the eighty-acre farm for $1,600. There were a house and barn on the premises in a good state of repair worth $1,100. According to Harris' testimony there were thirty acres of land in cultivation. According to the testimony of other witnesses there were nearly fifty acres in cultivation. Harris does not attempt to place any value on the timber. The testimony of the other witnesses is that the twenty acres were wet and boggy and that but little of the twenty acres was susceptible of cultivation. Hence it will be seen that the main object of Harris was to buy the eighty-acre farm. He got all the land which his deed called for, and we are of the opinion that under the circumstances the representations made by Fleming as to the boundary line were but a mere expression of an opinion by him as to where his boundary line extended and that they were not representations that the boundary line as a matter of fact did extend to the creek.

It follows that the decree will be reversed, and the cause remanded with directions to dismiss the complaint of the plaintiff for want of equity.

SCHOOL DISTRICT NO. 36 OF HOT SPRING COUNTY v. GARDNER.

Opinion delivered March 8, 1920.

1. SCHOOLS AND SCHOOL DISTRICTS—EMPLOYMENT OF TEACHER—RATIFICATION.—Where two only of the three directors of a school district employed a teacher, and the third director subsequently signed the contract, and insisted that the teacher perform her contract, the contract was ratified and became binding on the district.

2. APPEAL AND ERROR—PRESUMPTION WHERE INSTRUCTIONS ARE NOT ABSTRACTED.—Where the instructions are not abstracted, it will will be presumed on appeal that the case was submitted to the jury under proper instructions.
3. APPEAL AND ERROR—CROSS-APPEAL.—Where plaintiff, who secured judgment below, filed no motion for new trial, she can not claim on her cross-appeal that the verdict should have been for a larger amount if she was entitled to recover at all.

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

D. D. Glover, for appellant.

The plaintiff alleged she had a legal contract to teach a four months' school in district No. 36. Defendants denied this. This made an issue to be tried by a jury. The court erred in taking the issue from the jury. 91 Ark. 335; 105 *Id.* 106.

The court erred in its instructions and in its modifications of defendant's prayers.

Andrew I. Roland, for appellee.

A contract with a teacher signed by only two of three directors may be ratified, even though never signed by the third director as here. 110 Ark. 262; 126 *Id.* 622; 129 *Id.* 211. But here the third director signed the contract to make it valid. Act 96, Acts 1913, § 6. While a school district may be relieved from liability for compensation to a teacher when the school is closed by an act of God, or the public enemy, a mere contagious disease is not such an act; and where a teacher is ready and offers to continue her duties under the contract, no deduction can be made from the salary for the time the school is closed. 35 Cyc. 1099 and cases cited.

The court should have given instruction No. 1, also Nos. 2 and 3, and no deduction should have been made for the time the school was closed on account of influenza. Courts take judicial knowledge of who are public officers of the State. 66 Ark. 183. Also of the records of the Secretary of State and journals of the Senate and House (106 Ark. 511), and also of administrative regu-

lations of considerable notoriety established by important State boards. 16 Cyc., p. 903. The court should have taken judicial notice of the notorious order of the State Board of Health closing the schools and given plaintiff's instruction No. 1.

SMITH, J. Appellee recovered judgment on a contract to teach a school for and in the appellant school district. It is said her contract was not valid because only two of the directors had signed it at the time of its execution. The contract called for a four-months school at $60 per month. The school opened October 14, and was closed by the directors on October 16 on account of the influenza epidemic. Thirty days thereafter the third director, who had not signed the contract originally, did sign it, and on December 9 the school was reopened and appellee taught the remainder of the four months. The testimony is conflicting as to why the school was not resumed earlier; but appellee testified, and was corroborated by her father and other witnesses, that during the period of time covered by the contract when the school was not being taught she was offering to teach it and had asked permission of the directors to resume it. This was denied by the directors, who alleged in their answer, and testified at the trial, that appellee refused to finish the school, and that the directors requested her to begin the school earlier after its suspension and insisted that she do so.

The court gave an instruction numbered 4, reading as follows:

"The court instructs the jury that, although you may believe from the evidence that there was no meeting of the board of directors prior to making the contract sued on herein, still, under the undisputed evidence, the directors ratified said contract, and after the ratification it became a binding contract between the parties thereto."

It is insisted that error was committed in giving this instruction, in that the jury should have been allowed to say whether the contract had been ratified or not. No

error was committed in giving this instruction. The signature of the third director made a valid contract, and the teacher was paid $126 of her salary. Moreover, the directors not only assented to the fact that appellee had a valid contract, but insisted that she perform it, and now defend against this suit upon the ground that she refused to comply with it. In their brief they say: "The three directors swear positively that they did not stop the school. That they did not prevent her from beginning at her will, and that they urgently tried to get her to teach out her term of school and she would not do it. That they had the money to pay her and urgently requested that she teach it out." *School District* v. *Jackson,* 110 Ark. 262; *School District* v. *Hundley,* 126 Ark. 622; *School District* v. *Johnson,* 129 Ark. 211.

The instructions are not abstracted, and we must, therefore, assume that the case was submitted to the jury under proper instructions; and as the testimony of appellee and her father was legally sufficient to support a finding that appellee was ready and willing to perform the contract, we can not consider any question of the preponderance of the testimony on that subject.

The jury returned a verdict in appellee's favor for $75, and on her cross-appeal it is insisted that the verdict should have been for $111; that if she is entitled to recover at all—and the jury has found in her favor—she is entitled to $111, if entitled to anything. This insistence is answered, however, by saying that appellee filed no motion for a new trial in the court below.

No error appearing, the judgment is affirmed.

McELWEE v. McELWEE.

Opinion delivered March 8, 1920.

1. DESCENT AND DISTRIBUTION—ANCESTRAL ESTATE.—In order to constitute a gift from a parent to a child an ancestral estate, the conveyance must be entirely in consideration of blood without any consideration deemed valuable in law.

2. DESCENT AND DISTRIBUTION—ANCESTRAL ESTATE.—Where a parent who took a life estate in lands under his father's will with remainder to his children induced a child to convey his interest in consideration of a conveyance of other land, such a child's interest in the land so conveyed is a new acquisition, and not an ancestral estate.

3. HOMESTEAD—ABANDONMENT.—Where a married man moved from his rural homestead to a town house belonging to his wife, and rented his farm, but retained the house, so that they could return at any time, intending to return to it when his health should be restored, there was no abandonment.

4. HOMESTEAD — ABANDONMENT.—Where a widow within a month after her husband's death asserted a claim to a homestead in her husband's land, it can not be said that she elected not to claim such homestead, though she resided in a town house belonging to her for more than a year after her husband's death.

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

U. L. Meade, for appellants.

1. The land was ancestral and not a new acquisition and the intestate had never abandoned it as a homestead. 71 Ark. 594; 54 *Id.* 11; Thompson on Homesteads, § 2251; 33 Ark. 399; 31 *Id.* 145; 29 *Id.* 280; 41 *Id.* 94. If John C. McElwee abandoned his homestead in 1911 his widow could not re-establish after his death by moving back on it after his death. Cases *supra;* 101 Ark. 296; 107 *Id.* 535; 73 *Id.* 266; 104 *Id.* 637.

2. Under the testimony the 80-acre tract, the east half southwest quarter, section 11, was ancestral and the widow is only entitled to be endowed in a life estate of one-half of said tract, and the fee to the whole 80 should be decreed to appellants. 15 Ark. 275; *Ib.* 555; 98 *Id.* 93; Kirby's Digest, § 2645; 70 Ark. 371.

Appellants and their ancestor, James McElwee, are tenants in common to all of said land. And, if so, the fact that John C. McElwee executed a deed of release to his reversionary interest in the South Carolina land to his father, James, did not amount to a purchase by John C. from his father and would not make it a new acquisition, but on the contrary it was ancestral. 19

Ark. 404; 98 *Id.* 118; 104 *Id.* 23; 107 *Id.* 594; 39 L. R. A. (N. S.) 1912, p. 957, and note; 94 Atl. Rep. 145.

Hays & Ward, for appellee.

1. If the estate is ancestral and not a homestead, it is subject to partition, and appellee is entitled to one-half for life only, the fee being in appellants. Kirby's Digest, § 2709.

2. If ancestral, and the homestead of appellee, then it is not subject to partition, as the widow is entitled to all of said lands so long as her homestead continues. Const. 1874, art. 9, § 6; 92 Ark. 260.

The case in 98 Ark. 93 does not determine that these lands are ancestral, and they were a new acquisition. 98 Ark. 100; 18 C. J. 819; 4 Elliott on Contracts, p. 1060, § 3849.

3. This court will not disturb the findings upon conflicting evidence unless they are clearly against the weight of the evidence. 84 Ark. 429; 100 *Id.* 370.

4. Appellants further contend that John C. McElwee obtained these lands in a "family settlement," but the evidence is against them.

John C. McElwee did not abandon the homestead. The chancellor found there was no abandonment, and the evidence sustains the finding. 55 Ark. 55; 101 *Id.* 103; 65 *Id.* 373; 81 *Id.* 154. Forfeitures are not favored, and homestead laws are liberally construed. 13 R. C. L., p. 656, § 647; 64 Ark. 7; 100 *Id.* 399; 78 *Id.* 479. As there was no abandonment by John C. McElwee in his lifetime, the court's finding will not be disturbed.

The widow was not required to make her election as to homestead until after her husband's death. 71 Ark. 594; 45 *Id.* 303. See, also, 42 *Id.* 503; 48 *Id.* 230; 104 *Id.* 313.

SMITH, J. Appellee is the widow of John C. McElwee, who died intestate and without issue, and appellants are his collateral heirs; and the litigation involves the division of his estate. The points at issue have narrowed until only two remain to be decided.

The first question is whether east half southwest quarter, section 11, township 7 north, range 20 west, owned by the intestate at the time of his death, was ancestral or a new acquisition. The point is, of course, that if the land was a new acquisition the widow takes a half interest in fee, while if ancestral she takes a half interest for life.

The second question is whether the intestate had abandoned the land above described as a homestead.

Upon the first proposition it is shown that the grandfather of decedent, whose name was William McElwee, Sr., owned 700 acres of land in South Carolina, which he willed to the father of John C. McElwee, whose name was James McElwee, for and during the life of the same James McElwee, and at his death to any children born to the said James McElwee. There were five of these children. James McElwee removed to this State, and became the owner by purchase of 320 acres of land, the eighty above described being a part thereof. He conveyed an eighty-acre tract to each of four of his children in consideration of their conveyance to him of their interest in the South Carolina lands. A conveyance from the fifth child was also secured by James McElwee, and the consideration for this deed was the sum of $1,000 cash paid. It is now insisted that these conveyances constituted nothing more than a family settlement and resulted in giving decedent, John C. McElwee, title in severalty to the eighty acres herein described, and that his title is therefore ancestral in its character.

The distinction between an ancestral estate and a new acquisition is pointed out in the case of *Martin* v. *Martin,* 98 Ark. 93, the facts of which case are somewhat similar to those of the instant case. It was there said: "The purpose of the statute creating ancestral estates was to keep such estates in the line of the blood from whence they came, and blood must be the only consideration by which they are acquired, whether by devise or gift. * * * We conclude that, in order to constitute a gift from a parent to a child an ancestral estate within the

meaning of our statute, the conveyance must be entirely in consideration of blood and without any consideration deemed valuable in law; and if such deed is executed partly for a valuable consideration, the estate acquired is a new acquisition."

Under this test we think the estate was not ancestral. What happened here was that James McElwee undertook to secure from his children the fee to 700 acres of land in which he had only a life estate, and he did this by trading lands and paying money. This was not a family settlement, and it can not be said that ancestral blood was the only consideration, if, indeed, it was any part of it.

John C. McElwee resided on the land above-described from the time of his marriage in 1880 until 1911, a period of thirty-one years, and the proof of abandonment consisted in the testimony of J. N. McElwee, a brother, who stated: "Brother J. C. wrote me that his wife had sold her place, which was adjoining his, and had bought in Russellville. That he was not able to farm and would rent out his place and make Russellville his home." As appears from this answer the Russellville home was the property of the widow, and she and her husband resided there from 1911 until his death on August 18, 1918.

Mrs. McElwee testified that her husband's health failed, and she thought it best for him to move to town to be nearer a doctor, but that while they rented their lands they never at any time rented their home on it, but kept the house so they could go back to it at any time, and that it was always their intention to return to it when the husband's health was restored, but that he never recovered his health. In writing his brother that he would make Russellville his home J. C. McElwee may have intended only that he had changed his residence for a time; and the explanation made by his wife shows that was what he did intend to say.

It is finally insisted that Mrs. McElwee made an election to select the town property as her homestead by

residing on it for about a year after the death of her husband. But this suit was brought within about a month after the death of her husband, and in her answer, which she soon thereafter filed, she claimed the farm home as her homestead. It can not, therefore, be said that she has elected not to claim the homestead of her husband as her own.

Decree affirmed.

ARKADELPHIA MILLING COMPANY v. GREEN.

Opinion delivered March 8, 1920.

1. PRINCIPAL AND AGENT—SPECIAL AGENT.—A person dealing with a special agent must do so at his peril; and if the agent is without authority, the principal can not be held.
2. PRINCIPAL AND AGENT—GENERAL AGENT.—A person dealing with a general agent can hold the principal if the acts of the agent are within the general scope of the particular business intrusted to him.
3. PRINCIPAL AND AGENT—PRESUMPTION AS TO AGENCY.—One dealing with an admitted agent had a right, without notice to the contrary, to treat with him as a general agent and within the general scope of his authority.
4. PRINCIPAL AND AGENT—GENERAL AGENT.—One under a general employment to transact a particular kind of business for another is a general, and not a special, agent.
5. PRINCIPAL AND AGENT—IMPLIED AUTHORITY OF AGENT.—Where the agent of defendant having a contract for the entire output of a stave mill had authority to pay for labor in producing bolts and staves and to settle with the mill operator, and defendant honored checks drawn on it by such agent in the payment of goods furnished by plaintiff to the mill operator to facilitate the manufacture of staves and also a check drawn by another agent for goods similarly furnished, the former agent had implied authority to pledge defendant's credit to pay for goods so furnished.
6. FRAUDS, STATUTE OF—ORIGINAL OR COLLATERAL PROMISE.—In an action for the price of goods furnished to the operator of a stave mill for whose entire output defendant had a contract, evidence *held* to make it a jury question whether the promise of defendant's agent to pay for a bill of goods furnished to such operator was a collateral or an original undertaking.

7 FRAUDS, STATUTE OF—COLLAERAL PROMISE.—The fact that goods furnished to a stave mill operator on a promise of defendant's agent that defendant would pay for them were carried in the operator's account, instead of against defendant, was not conclusive that defendant's undertaking was collateral.

8. FRAUDS, STATUTE OF—INSTRUCTION.—An instruction presenting plaintiff's theory that defendant's undertaking was original and not collateral *held* not objectionable as ignoring the question whether defendant's undertaking was collateral.

9. FRAUDS, STATUTE OF—INSTRUCTION.—Where there was evidence tending to prove a direct promise on defendant's part to pay for goods furnished to a third person, an instruction that if defendant made the promise to pay for the goods it became an original undertaking and not within the statute of frauds was correct as presenting plaintiff's theory that the undertaking was original.

10. TRIAL—INSTRUCTION—PROVINCE OF JURY.—In an action for the price of goods furnished to a third person, an instruction that the complaint was based upon the allegation of an original and express promise to pay and that if the jury found by a preponderance of the evidence that such a promise was made they should find for plaintiff, and setting forth the gravamen of the action and the necessity for plaintiff to sustain it by a preponderance, did not invade the province of the jury.

11. SALES—ACCOUNT—INTEREST.—In an action for goods sold, interest was recoverable from the date of accrual of the right of action for balance due on account.

Appeal from Clark Circuit Court; *C. W. Smith*, Judge on exchange; reversed on cross-appeal.

McMillan & McMillan, for appellant.

1. There is no evidence that it was within the scope of J. A. Carr's authority to pledge the credit of the Arkadelphia Milling Company for goods furnished to defendant, W. W. Brown, by Green. 105 Ark. 111; 132 Ark. 155; 31 *Id.* 212.

2. The evidence establishes conclusively that plaintiff Green did not look solely to Arkadelphia Milling Company in the first instance for payment but rather as surety. 102 Ark. 435.

3. A parol promise actually made by a fully authorized agent, if it is a collateral promise, is void un-

der the statute of frauds. It was error to give the fifth instruction for plaintiff. 102 Ark. 435. The third instruction given was also error. *Supra.*

Isaac L. Awtrey, John H. Crawford and *Dwight H. Crawford,* for appellee.

1. Carr had authority to bind the milling company as agent therefor. The cases cited by appellant do not apply, as they are not in point. 130 Ark. 86-89.

2. Carr was a general agent. 132 Ark. 371-3; 90 *Id.* 301; 48 *Id.* 138; 55 *Id.* 627-9; 25 *Id.* 219; 40 *Id.* 430. There was no error in the instructions complained of. 42 Ark. 285; 76 *Id.* 1; 103 *Id.* 219; 32 Neb. 269; 49 N. W. 240.

3. If appellee's evidence is true, it was an original undertaking and not collateral, and the verdict is conclusive against appellant. There is no error in instructions. On the cross-appeal the judgment should be reversed and judgment entered here for $213.58 and interest.

HUMPHREYS, J. Appellee instituted suit against appellant and W. W. Brown in the Clark Circuit Court, to recover $269.83, with interest at six per cent. per annum from August 23, 1917, on account of goods and merchandise sold and delivered to them.

W. W. Brown filed a separate answer, admitting appellee delivered the goods and merchandise to him, but alleging the sale and delivery was under an agreement with appellant to pay for them.

Appellant filed a separate answer, denying the sale and delivery of any goods or merchandise to it or to W. W. Brown for it on the dates alleged, and, by way of further defense, pleaded the statute of frauds as exempting it from liability on the debt of W. W. Brown for goods and merchandise delivered to him by appellee. Included in the answer was a cross-bill, alleging that appellant sold and delivered to appellee on August 1, 1917, four barrels of flour for $56.25, for which he prayed judgment, with six per cent. per annum from said date.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, upon which a verdict was returned and judgment rendered for $213.58. Under proper proceedings, appellant has prosecuted an appeal from the judgment, and appellee a cross-appeal from the refusal of the court to allow interest on the amount of the judgment from the date of the last item of merchandise furnished.

A summary of the facts is as follows: Appellee, a merchant at Womble, had for many years prior to May, 1917, sold W. W. Brown, a stave mill operator, fifteen miles out from Womble, supplies on credit. Under contract with Brown, appellant was entitled to the output of the mill. Brown was allowed a checking account, and paid his labor and other mill expenses by drafts on appellant. On April 16, 1917, appellee wrote to appellant that Brown was behind with him, and, unless he could be assured of his money, he could not let Brown have any more goods. Shortly thereafter, appellant changed his system of doing business with Brown. It agreed to pay $2.50 per thousand for producing the bolts in the woods, the cost of hauling them to the mill, and to advance $5 a thousand on manufactured staves stacked on the mill yard. J. A. Carr, as agent of appellant, was sent to Brown's mill semi-monthly for the purpose of checking up the bolts, staves and labor incurred in making them, and for the purpose of paying them in the following manner: After ascertaining the status of Brown's account in the production of the staves, he issued checks against appellant to settle the labor accounts, and to Brown, or to others by Brown's direction, for any balance that might be due on the estimate of $2.50 per thousand for bolts, and $5 per thousand for staves. At the same time, Carr visited Golden's mill, some fifteen or twenty miles distant in an adjoining county, for the same purpose. Appellant had a contract for the output of that mill also.

Appellee testified that when J. A. Carr first came to Womble, he assured him that Brown's account was good;

that on the second trip he accompanied Brown to the store, checked over the account and paid it himself by check or draft on appellant; that Brown then asked if he could continue to get goods. He answered "not" unless he could be assured of his money every thirty days; that Brown said, "What about that, Mr. Carr?" That Carr replied, "You (referring to appellee) let him have the goods, and I will be here once a month and pay you;" that Carr also said he was representing appellant; that Carr made two settlements with him subsequent to that time; that on the first settlement, he received a check of date June 12, 1917, for $300, drawn on the Citizens National Bank of Womble, payable to W. W. Brown, signed "W. W. Brown, by J. A. Carr," and on the second settlement received a check, of date July 17th, for $200, payable to appellee at the same bank, and signed in the same manner as the first. The checks were filled out on blanks used by appellant in payment of bolts and staves, bearing appellant's business and place of business, and containing a direction to the bank to charge the amount to the stave department of appellant. Appellee testified further that the goods were charged to W. W. Brown on the books, being carried on the old account as a matter of convenience; that he sued Brown jointly with appellant because he was mixed up with the matter, and not because he looked to Brown for the account; that the goods were sold to Brown on appellant's credit; that on August 13, 1917, he wrote to appellant that it would inconvenience him to carry the account longer, and urged that he send Carr over by the 15th to check up Brown, but received no reply to the letter; that Carr enlisted in the army, and Patterson, appellant's representative, came in August and refused to pay the account, but bought goods from appellee to the amount of $118 to be delivered to Brown's mill, and paid for them by check drawn on appellant.

J. A. Carr testified that he did not promise to pay for goods furnished Brown nor pledge appellant's credit therefor, but that he told Green if Brown had anything

coming, after the labor was paid out of the $5 per thousand to be advanced, he would be glad to give Green a check for it, if requested to do so by Brown.

E. Nowlin, manager of the stave department of appellant, testified that J. A. Carr had no authority to pledge appellant's credit for goods to be delivered to Brown.

Appellant insists that the court erred in refusing to give its requested peremptory instruction, for the reason that the undisputed evidence showed, first, that J. A. Carr had no authority to pledge appellant's credit for the delivery of goods to Brown; and, second, that the undisputed evidence showed that the agreement, if any, between Carr and appellee, was a collateral and not an original undertaking, and, therefore, void, if made, by virtue of the statute of frauds, which was specially pleaded.

(1) A person dealing with a special agent must do so at his peril, and, if the special agent was without authority, the principal cannot be held. Not so, however, in dealing with a general agent. A person dealing with a general agent can hold the principal if the acts of the agent are within the general scope of the particular kind of business intrusted to him. *Liddell* v. *Sahline,* 55 Ark. 627. J. A. Carr's employment was not a special one and confined to a single transaction, but was a general employment to transact a particular kind of business for appellant. He was, therefore, a general agent under the rule announced in the case last cited. Again, he must be held as a general agent of appellant in his dealings with Green for the reason that he was appellant's admitted agent, and, being an admitted agent, Green had a right, without notice to the contrary, to treat with him as a general agent and within the apparent scope of his authority. It was said in the case of *Three States Lumber Co.* v. *Moore,* 132 Ark. 371, that: "One dealing with an admitted agent has the right to presume, in the absence of notice to the contrary, that he is a general agent

clothed with authority coextensive with its apparent scope."

The evidence revealed the fact that J. A. Carr was clothed with authority to pay for the labor which entered into the production of the bolts and manufactured staves, as well as to check up the bolts and staves and settle with Brown on the basis of the cost of the actual haul of the bolts, $2.50 per thousand for the production thereof, and $5 per thousand for manufactured staves. It also disclosed that appellant received the entire output of Brown's stave factory; that the goods sent by Green to the mill were for the purpose of facilitating the manufacture of the staves; that appellant knew that the goods were being used for that purpose, and, for two months prior thereto, had honored checks drawn on it in the name of Brown, by Carr, its agent, in settlement of the goods and merchandise thus furnished; that in August, its representative, J. C. Patterson, purchased from Green a bill of goods for the use of Brown at the mill, to the amount of $118 and paid for them by check drawn on appellant. Under these facts, it was clearly implied, and, therefore, within the scope of Carr's authority to pledge the credit of appellant to pay for goods which entered into the manufacture of the staves. The first reason, therefore, assigned by appellant in support of its contention that the court erred in refusing its peremptory instruction is not sound.

(2) The evidence was conflicting as to whether the undertaking was collateral or original. It is true the goods were charged on the books of appellee to Brown, and not to appellant, and also true that appellee included W. W. Brown as defendant in this suit. It is explained, however, that he carried the account in the name of W. W. Brown, after the alleged agreement, because it was a matter of convenience, growing out of the fact that W. W. Brown had been dealing with appellee for a number of years. The fact of bringing suit against appellee was explained by saying that it was brought simply because Brown was mixed up in the matter. These explanations

differentiate the instant case from the case of *Millsaps* v. *Nixon,* 102 Ark. 435, relied upon by appellant; so, it cannot be said in this case, as was said in that, that the manner of charging the account on the books rendered it a collateral, and not an original, undertaking. With the explanation, it became a disputed fact for determination by the jury. So, the second reason assigned by appellant, in support of its contention that the court erred in refusing its peremptory instruction, is not sound.

It is insisted that the court erred in giving appellee's fifth instruction, for the reason that it is not qualified by the bearing of the statute of frauds upon collateral undertakings. The instruction is as follows: "The defendant, Arkadelphia Milling Company, is bound to the plaintiff, W. C. Green, for the result of the apparent authority of its agent, J. A. Carr; and if the jury find that it was within the apparent scope of J. A. Carr's authority to arrange for supplies to enable W. W. Brown to operate his mill, they should find for the plaintiff, if they find that said Carr did in fact promise to pay the account sued on in this case."

This instruction was intended to present the theory of appellee that the acts were within the apparent scope of Carr's authority and that the agreement or promise was an original undertaking. The statute of frauds has no application to an original undertaking. In presenting this theory of the case, the instruction contains no error.

It is also insisted that the third instruction, given by the court, was erroneous for the same reason urged against instruction No. 5. It carried the declaration of law that, if the jury found from the evidence that the milling company made the promise to pay for the goods, it became an original undertaking, and, for that reason, not prohibited by the statute of frauds. This was a correct instruction on appellee's theory of the case, and there was evidence to support a direct promise on the part of appellant, through its agent, to pay for the goods. There was no error in giving it.

It is urged that the first instruction given by the court invades the province of the jury. The instruction outlined the issue by stating that the complaint was based upon an allegation of an original and express promise to pay the debt; that, if the jury found by a preponderance of the evidence that such a promise was made, they should find for the appellee. It set forth the gravamen of the action and the necessity for appellee to sustain it by a preponderance of the evidence in order to prevail. We do not think this in any way invaded the prerogative of the jury.

A great many objections were made to instructions given and to the refusal of instructions requested. It would unnecessarily extend the opinion to discuss all the objections made and exceptions saved by appellant. Upon the whole, we think the case was submitted upon correct declarations of law, as applied to every phase or theory of the case.

Appellee's right of action accrued on August 23, 1917, and he should have been allowed six per cent. interest per annum on the balance due him on account after that date. The court committed error in refusing to allow him interest on the amount of the recovery from the date his cause of action accrued, towit: on August 23, 1917.

The judgment is therefore affirmed on the direct appeal, and reversed on appellee's cross-appeal, with judgment here for $213.58, with interest thereon at the rate of six per cent. per annum from August 23, 1917.

JOHNSON v. STATE.

Opinion delivered March 8, 1920.

1. LARCENY—CORPUS DELICTI—SUFFICIENCY OF EVIDENCE.—In a prosecution for the larceny of a yearling animal which it was asserted that defendant killed and transported to his shop, evidence *held* sufficient to sustain a finding that a carcass found in defendant's shop was that of a yearling belonging to the prosecuting witness.

2. CRIMINAL LAW—FELONIOUS INTENT.—In a prosecution for larceny of a yearling where the defense was that accused bought the animal from another, an instruction purporting to cover all elements of the case was erroneous in omitting the element of criminal or felonious intent.

Appeal from Prairie Circuit Court, Southern District; *George W. Clark,* Judge; reversed.

Cooper Thweatt, for appellant.

1. The verdict is against the law and the evidence, as the beef was not identified as the one lost or stolen. 25 Cyc. 123; 8 Enc. of Ev., p. 136; 171 S. W. 89.

2. The court erred in its instruction to the jury. It was inherently erroneous and highly prejudicial. 110 Ark. 117; 101 *Id.* 586.

3. The court erred in its instruction as to larceny. It assumes that there was evidence before the jury tending to prove material facts. Hughes, Inst. to Juries, p. 175.

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

1. The brief of appellant shows that the motion for new trial was filed too late—more than thirty days after judgment. Kirby's Digest, § 2421; 94 Ark. 240. The appeal was granted in vacation. 94 Ark. 240. The bill of exceptions was not filed in time.

2. The evidence is sufficient to sustain the conviction.

3. There is no reversible error in the instructions. 114 Ark. 398.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Prairie Circuit Court, Southern District, for the crime of larceny, and his punishment fixed at one year in the penitentiary. An appeal from that judgment has been properly prosecuted to this court.

The facts not in dispute disclose that appellant was engaged in the butcher business in September, 1917, at the town of Biscoe. Frank Gill, the prosecuting witness,

lived out from Biscoe, about three-quarters of a mile from the bridge across Jackson's Bayou. He owned a two-year-old white and red spotted heifer, marked with "clip off right and under-bit under left ear." The yearling had always ranged on both sides of the bayou and came up every evening until a certain Friday evening in September, 1917. Gill made a search Saturday following but failed to find it. He found where an animal had been butchered about 75 yards south of the bayou, and, on Monday morning following, found blood on the banister and floor on the east side of the bridge spanning the bayou. The heifer had been raised in that range and was never seen after that time. On the evening the yearling failed to come up, appellant and Louis Davie killed and dressed a yearling at the place where Gill, the prosecuting witness, had found evidences of an animal being butchered. The animal butchered at that place was hauled to the butcher shop of appellant that night.

The other facts disclosed by the record are in sharp conflict. The evidence on the part of the State tended to show that appellant employed Louis Davie to assist him early in the evening in killing a yearling at the place in question; that appellant placed it, after night, in one-horse wagon and hauled it to his butcher shop at Biscoe, reaching there about midnight; that, *en route,* while on the bridge crossing the bayou, appellant threw the head of the yearling into very deep water.

The evidence on the part of appellant tended to show that he went to the bayou to fish, and, while there, bought the yearling from Louis Davie for $25, and paid him $1.25 for helping him dress it; that, at Davie's request, he gave him the head and does not know what disposition was made of it; that he left the bayou early in the evening and reached Biscoe about eight or eight-thirty p. m.; that he fed his mules and went to bed.

The first insistence for reversal is that the evidence is insufficient to identify the carcass found on Saturday in appellant's shop as being the yearling owned by Frank Gill, the prosecuting witness. We think the identity be-

tween the carcass and Gill's yearling sufficiently shown by the following facts: Gill's yearling had been raised in the particular range where appellant and Louis Davie killed and dressed the yearling. The place where the animal was killed was a short distance from the home of the prosecuting witness, Frank Gill. Frank Gill's yearling was gentle and accustomed to coming home every evening late, but was never seen in that range or elsewhere after the time appellant and Davie killed and dressed the yearling found in appellant's butcher shop the next day.

It is insisted that the court erred in instructing the jury as follows: "To the indictment in this case the defendant pleads not guilty; that casts the burden upon the State to prove his guilt beyond a reasonable doubt. Before you can convict the defendant, you must be convinced beyond a reasonable doubt, that the State has established his guilt; and the State is required to establish each and every material allegation in this indictment, which are, that the defendant did, either by himself, or with aid or assistance of others, in the Southern District of Prairie County, within three years prior to the finding of this indictment, commit this crime by converting to his own use this cow, the personal property of Frank Gill."

The inherent error contended for in the instruction is that it omitted a criminal or felonious intent as an essential in enumerating the necessary elements constituting larceny. The State justifies the instruction on the ground that the court read the statute to the jury which provides that the crime of larceny must be a taking with the intent to steal, and in emphasizing, in other parts of the charge that the conversion of property must be with a felonious or criminal intent in order to constitute larceny. It will be noticed, in giving the instruction challenged, the court purported to set forth every material allegation necessary to support a charge of larceny, and felonious intent is the very gist of the charge. A conversion without such criminal intent is not larceny. The

omission of this essential, in attempting to define every element of larceny, brings that portion of the instruction challenged in direct conflict with the other parts of the charge, to the effect that a criminal or felonious intent is a necessary essential in a charge of larceny.

Because of the inherent error carried in that portion of the charge challenged, the judgment is reversed and the cause remanded for a new trial.

FARMERS' MUTUAL FIRE INSURANCE ASSOCIATION *v.* HODGES.

Opinion delivered March 8, 1920.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—An issue upon which there was a conflict in the evidence will be treated on appeal as finally settled by the verdict.
2. INSURANCE—OWNERSHIP OF PROPERTY—EVIDENCE.—Evidence *held* sufficient to sustain finding that plaintiff owned the property insured in fee simple at the time he applied for insurance.
3. INSURANCE—CHANGE OF POSSESSION AS AFFECTING.—Kirby's Digest, sections 4358-4361, relating to farmers' mutual aid associations, do not contemplate that a removal or change in possession of the property insured against fire should automatically work a forfeiture of membership or insurance, in the absence of such a clause in the contract, articles, by-laws, or constitution governing the order.
4. APPEAL AND ERROR—REQUEST BY BOTH PARTIES FOR DIRECTED VERDICT.—Where, upon an issue raised by cross-bill, both parties requested the court to direct a verdict, the court's finding thereon was as conclusive on appeal as the verdict of a jury.
5. INSURANCE—INSURABLE INTEREST—VENDOR'S LIEN.—One holding a vendor's lien on property owns an insurable interest therein unless the contract provides that the insurer shall have exclusive or unconditional title to the property.

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

Seth C. Reynolds, for appellant.

1. The appellee forfeited his right to recover by failing to pay his last assessment and by including the

Redding property in his application and policy, as it was not owned by him on January 1, 1917, when the policy became effective. The court erred in admitting evidence. 94 Ark. 594; 67 *Id.* 553; 94 *Id.* 594; 71 *Id.* 292; 71 *Id.* 294; 63 *Id.* 201-2.

2. The instructions are erroneous. Kirby's Digest, § 4358; 14 Ark. 286; 61 *Id.* 104; 71 *Id.* 292; 38 Mich. 548; 25 Ark. 257; 63 *Id.* 187; 94 *Id.* 594; 69 *Id.* 295. The policy was null and void when the fire occurred, as he had moved. The preponderance of the evidence shows that he did not pay the premiums on his policy. The instructions do not state the law. 14 Ark. 286; 61 *Id.* 104. Instruction No. 8 refused should have been given. McDonald had no authority to accept pay on the policy after Hodges had moved to town.

Dulaney & Steel, A. P. Steel and *John J. Dulaney,* for appellee.

1. Appellee was entitled to recover because his policy was valid at the time it was issued and he had paid all assessments up to the date of the loss. The jury evidently believed that appellee had paid his last assessment as evidenced by his check, and they are the sole judges of the credibility of witnesses and the weight of the testimony on questions of fact. 121 Ark. 599; 88 *Id.* 200; 123 *Id.* 240; 124 *Id.* 480; 113 *Id.* 417; 107 *Id.* 158; 316 S. W. 1. See, also, 97 Ark. 486; 99 *Id.* 69; 90 *Id.* 131. Where there is substantial evidence to sustain it, the verdict will not be set aside. 105 Ark. 331; 112 *Id.* 507; 117 *Id.* 223.

2. The policy had not lapsed nor been forfeited at the time of the loss. 105 N. W. 1031; 22 Cyc. 1412; 65 N. E. 323; 139 U. S. 297. Nor had he withdrawn from the association. He still held the policy. 49 N. E. 279; 49 N. W. 536.

3. His policy was never canceled. 108 Ark. 135.

4. Appellee had not been properly suspended or expelled from the association. 77 N. Y. S. 194; 67 Pac. 485; 16 N. W. 392.

5. The policy was not forfeited nor canceled and he did not cease to be a member in good standing simply because he had removed from the house burned. The application nor policy contained no prohibition of removal to town. 65 Ark. 295; 92 *Id.* 283; 81 N. W. 220.

6. The association may waive compliance with its by-laws. 86 S. W. 501; 67 Ark. 585; 53 *Id.* 494; 99 *Id.* 54; 65 *Id.* 54; 94 *Id.* 227.

7. The lower court did not err in directing a verdict. 77 Ark. 27.

8. There was no error in excluding the evidence offered by appellant. It was incompetent and immaterial. 120 Ark. 233.

9. There is no error in the instructions. 101 Ark. 376; 89 *Id.* 368; 96 *Id.* 451; 118 *Id.* 389.

HUMPHREYS, J. This suit was instituted by appellee against appellant in the Little River Circuit Court to recover the amount of $300 on policy No. 31, issued to indemnify him against loss to his dwelling on the Arden farm, near Arden, Arkansas, and the contents thereof, by fire. The policy was executed by appellant to appellee on June 11, 1917, but, under agreement, related back and took effect on January 1, 1917, in order to conform to the application for the insurance made and paid for on the latter date. The policy was not issued on January 1, because appellant had no blank forms of policies at that time. Appellant company was organized under sections 4358 to 4361, inclusive, of Kirby's Digest of the Laws of Arkansas, and is a farmers' mutual aid association. Appellee alleged in the complaint that the Arden house, valued at $500 in the policy, and $100 of the household goods, valued at $700 in the policy, had been destroyed by fire; that, under the terms of the policy, he was entitled to recover from appellant one-half of the value of the house and one-half of the value of the household goods destroyed, or a total of $300; that he had fully complied with the requirements of the by-laws and constitution of

appellant and the policy issued by appellant to him, as a prerequisite for a recovery.

Appellant filed answer, denying that appellee had complied with the terms of the policy, and alleging a breach thereof, first, by failing to pay his assessments; second, by failing to actually reside in the house, and, third, by moving to and becoming a resident of the incorporated town of Ashdown and living there at the time the house and its contents burned. As an additional defense, appellant alleged that appellee included in his application for the insurance, property which he did not own, and permitted same to be included in the policy issued as effective of date January 1, 1917. By way of cross-bill, appellant alleged that it paid appellee $150 on the Redding house, destroyed by fire on February 6, 1917, which was not owned by appellee on January 1, 1917, but was fraudulently included in his application for the policy of insurance; that, at the time the Redding house was burned, appellee had no insurable interest therein, but had transferred all his right and title therein to J. L. Shafer, prior to his application for the insurance. Based upon the facts set up in the cross-bill, appellant prayed for judgment against appellee in the sum of $150 paid by it as aforesaid to appellee.

Appellee filed an answer to the cross-bill, denying the material allegations therein and reaffirming that he was the owner of all the property included in his application for insurance at the time he made same, and that he had an insurable interest in the Redding farm house at the time it burned, for which he rightfully collected the sum of $150 from appellant under the terms of his policy.

The cause was submitted to the jury upon the pleadings, evidence and instructions of the court, upon which a verdict was returned and judgment rendered in favor of appellee for $300, from which an appeal has been duly prosecuted to this court.

It is insisted that appellee forfeited his right to recover on the policy by failing to pay his last assessment. This assessment was ordered on January 14, 1919, and, under the constitution of appellant, was due and payable in thirty days after notice. No notice of the assessment was given to appellee. There was evidence tending to show that he paid it without notice, March 3, 1919, or thirty-six days before the fire. There was substantial evidence pro and con on the issue of whether appellee paid the assessment. There being a conflict in the evidence on this issue, it must be treated on appeal as finally settled in appellee's favor by the verdict of the jury. *Shearer* v. *Bank,* 121 Ark. 599.

It is also insisted that appellant forfeited his right to recover on the policy by including the Redding property in his application and policy, for the alleged reason that it was not owned by him on January 1, 1917, when the policy became effective. Appellee testified that he permitted J. L. Shafer to move on the Redding farm the latter part of December, 1916, with a view to either leasing or selling it to him; that, on the morning of January 9, 1917, he sold it to him for a small cash payment and the balance on time, secured by a vendor's lien retained in the deed; that, on that date, the deed was acknowledged but dated back to January 1, 1917, to correspond with the notes evidencing the purchase money, which, by agreement, were to bear interest from the first day of January; that the deed was delivered a day or so afterward and recorded on January 13. Appellee's evidence was corroborated by that of the purchaser, J. L. Shafer. The evidence was ample to support a finding by the jury that appellee owned a fee simple title to the Redding farm when the application for insurance was signed and the policy became effective.

It is also insisted that appellee forfeited his right to recover on the policy because he did not reside in the house at the time it was destroyed by fire, on April 7, 1919, but had removed to, and was a resident of, an in-

corporated city. On inspection, we have been unable to discover any inhibition in the application, policy or by-laws, articles of incorporation or constitution of appellant, against moving out of the house, or moving to, or becoming a resident of, an incorporated town. In the absence of such a clause in the contract, articles, by-laws or constitution governing the order, a mere change in the possession of the property will not void the contract. The statute under which appellant was organized never contemplated that a removal or change in possession of the property would work a forfeiture of the contract. The purpose and intent of the statute was to designate the character of property insurable and to fix the qualifications for admission into the order. It provided that farm property, as distinguished from town or city property, was subject to insurance in the order; and a farmer, actually residing on and managing his farm, eligible to admission in the order. It was not necessarily inferable from the law that a removal from a farm to a town or city home of a member should work an automatic forfeiture of such member's membership or insurance.

The objections and exceptions of appellant to instructions given and refused were suggested by the interpretation it placed upon the statute under which the order was organized, its by-laws and constitution, and the contract of insurance, consisting of the application and the policy. We think the construction placed upon the law and these instruments by the learned attorney for appellant is incorrect, and, for that reason, we deem it unnecessary to discuss appellant's assignments of error to giving and refusing instructions further than to say, after a careful consideration thereof, we are of opinion that the cause was submitted to the jury under proper instructions.

A great many objections were made by appellant to evidence adduced by appellee, and to the exclusion of evidence offered by it. We have carefully examined the rulings of the court on the admission and exclusion of the

evidence, and find that no prejudicial error was committed in this regard. To discuss each piece of evidence excluded or omitted over the objection of appellant, in relation to its bearings to the issue in the case, could serve no useful purpose and would extend this opinion to an unusual length.

This brings us to a consideration of the last insistence of appellant to the effect that the court committed reversible error in refusing to instruct peremptorily in its favor on the cross-bill. The determination of the issue presented by the cross-bill involved the solution of whether appellee owned the Redding farm on January 1, 1917, or whether he owned an insurable interest in the Redding house when destroyed by fire. Each party asked a peremptory instruction.

Whether or not appellee was the owner of the Redding place on January 1, 1917, is largely a question of fact. The finding of the court in that particular is as conclusive on appeal as the verdict of a jury. The court's verdict is supported by substantial evidence. Appellee testified positively that he did not sell the Redding property to J. L. Shafer until January 9, 1917. In the main, his evidence is corroborated by that of the purchaser.

Whether appellee owned an insurable interest in the Redding house when destroyed is one of law, because the undisputed evidence is he sold and conveyed it to Shafer before the fire. In making the sale, however, appellee reserved a vendor's lien to secure the unpaid notes evidencing the purchase money. The owner of a lien on property necessarily owns an insurable interest therein, where there is no provision in the contract providing that the insurer shall own the exclusive or unconditional title in the property. There is no such provision in the instant contract.

No error appearing, the judgment is affirmed.

CASEY v. WISCONSIN & ARKANSAS LUMBER COMPANY.

Opinion delivered March 8, 1920.

1. APPEAL AND ERROR—PHOTOGRAPH AS EVIDENCE—HARMLESS ERROR. —In an action by a servant for injuries from a small saw on a planer alleged to have been concealed under sawdust and shavings, admission in evidence of a photograph of the machine after the injury, without the sawdust and shavings on it, was harmless to plaintiff where the trial court stated that the jury should not consider the photograph to show whether or not the saw was covered at the time of the injury.
2. MASTER AND SERVANT—CONDITION OF MACHINERY AFTER ACCIDENT. —In such action the testimony of a clean-up man that, at a time subsequent to the injury complained of, the saw was covered with sawdust and shavings, so that it could not be seen, was incompetent where the witness did not show that he was put to work at the saw immediately after plaintiff was injured.
3. TRIAL—REBUTTING EVIDENCE.—It was not error to reject evidence first offered in rebuttal which should have been offered in chief where no excuse is offered for failure to offer it at the proper time.

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

D. D. Glover, for appellant.

The photograph taken two months after the injury was not admissible in evidence. 48 Ark. 460; 118 *Id.* 50.

The court erred in excluding the evidence of Keyton and Davis in rebuttal and the verdict is against the law and the testimony.

T. D. Wynne and *W. R. Donham,* for appellee.

1. The photograph was properly admitted in evidence. 73 Ark. 183; 80 *Id.* 528.

2. The testimony in rebuttal was properly excluded, as it was not competent. 116 Ark. 125; 121 *Id.* 233. The evidence was cumulative merely.

3. The appellant failed to abstract the record and the judgment should be affirmed.

HUMPHREYS, J. Appellant instituted suit against appellee in the Hot Spring Circuit Court to recover dam-

ages on account of an injury received to his hand while cleaning up shavings and sawdust in the rear of a planing machine in appellee's mill. The charge of negligence consisted in appellee allowing a small saw, attached on the back side of the planer, to become covered with sawdust and shavings, while being operated, so that it could not be seen by appellant, and in operating it without a sufficient shield or hood, or notification to appellant of its presence in the pile of sawdust and shavings.

Appellee filed an answer, denying the material allegations of negligence in appellant's complaint.

The proof offered by both appellant and appellee was directed to the issue of whether or not the small saw attached to the planer was concealed by sawdust and shavings piled around and upon it at the time appellant received his injury.

Appellee, over the objection and exception of appellant was permitted to introduce a photograph of the machine made subsequent to appellant's injury. This is assigned and insisted upon as reversible error. It is suggested that the photograph, made subsequent to the injury, was not a true representation of the machinery as it existed at the time the injury was inflicted. Tom E. McHenry, a witness, gave testimony to the effect that the photograph was a correct representation of the machinery as it existed at the time of the injury. It is said, however, that the photograph was prejudicial to appellant's cause of action, because made at a time when there was no sawdust or shavings around or upon it. The court guarded this point by stating to the jury that they should not consider the photograph other than to show the location, height and position of the saw, and should not regard it as evidence tending to show whether or not the saw was covered with shavings and sawdust at the time of the injury. Guarded in this way, we do not see how appellant's cause of action could have been prejudiced by the introduction of the photograph.

Appellant insists that the court erred in refusing the proffered testimony of Hosey Keyton and W. H. Davis in rebuttal, which offer is as follows: "The plaintiff (appellant) offers the testimony of Hosey Keyton, who is present and who has been under the rule and subpoenaed in this case, who would testify that he worked at the same machine at which Mr. Casey was hurt, as cleanup man, immediately after Mr. Casey was hurt and that the saw was covered entirely up and that the planing machine would not be running thirty minutes until it would be so covered that it was hidden from the view of anyone.

"That W. H. Davis is in attendance on court, subpoenaed and under rule and was employed as cleanup man after Mr. Casey was hurt, working with Cecil Davis. He was put with him to assist and instruct him as to his duties; and that Mr. Davis would testify that this machine on which Mr. Casey was hurt and the floor was covered in places to a depth of four or five feet and the saw at which Mr. Casey was hurt was completely covered up in sawdust and shavings so it could not be seen; that the blowpipe was in a defective condition, and the shavings and sawdust were flying thick and fast as testified by the plaintiff (appellant)."

The condition of the small saw upon which the injury was received, with reference to being covered or uncovered by the sawdust and shavings produced in the operation thereof, could not be determined by proof of whether covered or uncovered with sawdust and shavings at a subsequent time, for this condition depended entirely upon the operation thereof and how often or whether the shavings and sawdust produced by it had been cleaned up. For this reason, the offered testimony of W. H. Davis was not admissible. He did not pretend to say that he was put to work at that place immediately after appellant was injured. At the time his testimony relating to the same issue was offered in chief, he admitted that he went to work after the injury happened, but would not

say whether it was one or two days thereafter. Seemingly, for this reason, appellant's counsel withdrew the testimony of W. H. Davis in this respect offered as testimony in chief. It was not competent in the development of appellant's case in chief, and, for the same reason, not competent as evidence in rebuttal.

The proffered evidence of Hosey Keyton in rebuttal was clearly admissible, had it been offered in the development of appellant's case in chief, because he testified that he went to work as clean-up man around this particular machine immediately after appellant was hurt. While admissible in the development of appellant's case in chief, it was not necessarily admissible in rebuttal. The offered evidence was responsive in the main issue joined in the pleadings as to whether or not the saw was covered with sawdust and shavings at the time the injury occurred. It was appellant's privilege to introduce Keyton's testimony in the development of his case in chief, and, having failed to do so without offering some good excuse for the failure, he could not insist upon the introduction of the testimony in rebuttal as a matter of right. This holding is in keeping with the rule announced in the case of *Bain* v. *Fort Smith Light & Traction Co.*, 116 Ark. 125.

No error appearing, the judgment is affirmed.

HAYES v. STATE.

Opinion delivered March 15, 1920.

1. CONTINUANCE—APPLICATION.—Where an application for continuance on account of the absence of a witness failed to state where the absent witness was, and that his attendance could be procured at the next term of court, the motion was properly denied.

2. CRIMINAL LAW—EXCLUSION OF TESTIMONY.—Where the record does not show what the answer of a witness would have been if the court had not refused to allow a question to be asked, alleged error in refusing to permit the question to be asked will not be held prejudicial.

3. WITNESSES—QUESTIONS ASKED BY COURT.—The mere fact that the court propounded questions to accused or to other witnesses in the case for the purpose of eliciting all the facts of the case did not constitute error where it does not appear from the record that the questions had any tendency to convey to the jury any impression of the court's views as to accused's guilt or innocence.

4. CRIMINAL LAW—INSTRUCTION—PREJUDICE.—An instruction in a prosecution for selling whiskey which submitted the question whether accused sold whiskey within three years was not prejudicial, though the statute was passed less than three years previously, if all the testimony related to a date subsequent to its passage.

5. CRIMINAL LAW — INSTRUCTION — FAILURE TO OBJECT.—Where defendant and his counsel were in court when the jury returned and asked if they could consider as a circumstance of guilt defendant's prior conviction, and the court's charge correctly told them that they could do so, and no objection was raised that there was no testimony to show a prior conviction, and no request made that the court answer in the negative, the objection will be overruled on appeal.

6. CRIMINAL LAW — INSTRUCTION — CREDIBILITY OF WITNESSES.—An instruction that the jury might consider all the facts and circumstances admitted in evidence, that they were the sole judges of the weight thereof, and that it was permissible to show accused's occupation and history and his conviction as affecting his credibility as a witness, was not erroneous.

7. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—Newly discovered evidence which is merely cumulative and impeaching does not authorize a new trial.

Appeal from Washington Circuit Court; *W. A. Dickson,* Judge; affirmed.

W. A. Ratterree and *John P. Roberts*, for appellant.

1. The court erred in overruling the motion for continuance on account of the absence of a material witness. Defendant had used due diligence to procure the attendance of the witness. 100 Ark. 301; 110 *Id.* 251; 129 *Id.* 299; 140 S. W. 8.

2. The court erred in manifesting an interest in the trial by taking charge of and examining defendant while on the stand.

3. The court erred in instructing the jury after they had retired and came back into court and the questions asked by the judge were prejudicial.

4. The court erred in overruling defendant's motion for new trial for newly disovered evidence and surprise. 26 Ark. 496; 92 *Id.* 519; 103 *Id.* 589; 148 *Id.* 371; 30 *Id.* 723; 60 *Id.* 643; 40 S. W. 126; 37 L. R. A. 659.

5. The court erred in refusing to let J. H. Smith, witness, answer the question contradicting John Barnett.

6. The court erred in giving instruction No. 1 on its own motion. Kirby & Castle's Digest, § 6021 *et seq.*

John D. Arbuckle, Attorney General, and *J. B. Webster,* Assistant, for appellee.

1. There was no error in overruling the motion for continuance. Due diligence was not alleged nor shown. 71 Ark. 62; 94 *Id.* 169. It is an abuse of discretion to deny a continuance on account of a nonresident witness. 103 Ark. 509; 90 *Id.* 384; 110 *Id.* 402. No proper foundation was laid, and there was no abuse of discretion by the court. 57 Ark. 168; 41 *Id.* 153; 79 *Id.* 594.

2. The court did not manifest an undue interest in the trial by examining defendant on the stand nor in instructing the jury after they retired and came back. 84 Ark. 95; 86 *Id.* 360.

3. The motion for new trial was properly overruled. The grounds were not sufficient. 66 Ark. 620; 55 *Id.* 567; 57 *Id.* 60; 69 *Id.* 546.

4. There was error in refusing John Smith to answer question asked. 7 Enc. of Ev., p. 17; Kirby's Dig., § 3138, as amended by act of 1905; Enc. of Ev., vol. 7, p. 173; 53 Ark. 390.

5. No error in giving instruction No. 1 on the court's own motion. 84 Ark. 95; 86 *Id.* 360.

McCULLOCH, C. J. Appellant was indicted by the grand jury of Washington County for the offense of selling whiskey, alleged to have been committed in that county on July 17, 1918, and the proof adduced by the

State tended to show that appellant sold twenty-four pints of whiskey to John Barnett at the town of Winslow, in Washington County, in the evening of the day mentioned in the indictment.

The State relied on the testimony of Barnett and his son, Joe, who both testified that they were present when appellant sold and delivered the whiskey. Appellant was, according to the testimony, driving through the country in an automobile and stopped on the street at Winslow and took the whiskey out of his automobile and sold and delivered it to Barnett.

Appellant filed a motion for continuance for the purpose of procuring the attendance of a witness named Budd, who it was alleged in the motion would testify, if present, that Joe Barnett told him that appellant was not the man that sold the liquor to his father at Winslow. There was no statement in the motion as to where the absent witness was at that time, nor that the attendance of the witness could be procured at the next term of the court.

The court was correct in refusing to postpone the trial under those circumstances.

The next ground urged for reversal of the judgment is that the court erred in refusing to permit appellant to prove by witness, J. H. Smith, a justice of the peace, that Barnett had signed and sworn to a statement admitting that he had testified falsely with respect to the sale of whiskey by appellant. The proper foundation was laid for the contradiction, but the record does not show what the answer of the witness would have been if the court had not refused to allow the question to be asked. The record merely shows that appellant's counsel propounded to Smith the question whether or not Barnett had come before him and signed the written statement as aforesaid. In order to show that the error was prejudicial, it is essential to disclose in the record what the testimony of the witness on that subject would have been if permitted to answer.

The court, over the objection of appellant, asked appellant several questions during the progress of the latter's cross-examination by the prosecuting attorney, and this is assigned as error. It does not appear from the record that the conduct of the court in propounding questions had any tendency to carry to the minds of the jury the court's view as to appellant's guilt or innocence, and there was no error merely in the fact that the court propounded the questions to the accused, or other witness in the case, for the purpose of eliciting all of the facts of the case.

In the first instruction given by the court the question was submitted of appellant's guilt or innocence of the charge embraced in the indictment of selling whiskey "within three years before the indictment was filed." The contention is that, as the trial of the case was less than three years after the enactment of the statute making the sale of intoxicants a felony, it was error to allow the jury to consider sales made at any time within three years. The answer to this is that there could not have possibly been any prejudice resulting from this statement of the court for the reason that the testimony was directed to a particular sale made on a certain date within three years before the finding of the indictment, and after the enactment of the statute.

The record recites that the jury, after considering the case for a time, returned into court and asked "if the jury might consider, as a circumstance of defendant's guilt, his conviction for transporting liquor through Benton County;" that appellant was present in court in person and by attorney, and expressly waived a reply by the court in writing and consented that the court might answer the question orally; that "thereupon the court read to the jury the written instructions and added that they might consider all of the facts and circumstances admitted in evidence by the court, they being the sole judges of the weight to be attached thereto; that it was permissible to show what defendant's occupation and history had been, and his conviction, if any was shown by the

proof, as affecting his credibility as a witness." The record further recites that the defendant excepted on the ground that the court's statement constituted an erroneous statement of the law.

It is argued now that there was no testimony tending to show a conviction for the transportation of liquor through Benton County, and that the court ought to have answered the inquiry of the jury in the negative without further comment. The difficulty about this position, assumed now by appellant, is that his counsel failed to ask the court at that time to answer the question in the negative and thereby exclude that question from the consideration of the jury. The charge given by the court at that time was unobjectionable as a statement of the law, and there was no error in making it, and if it was not responsive to the inquiry made by the jury and a concise and correct answer to the question was desired by appellant, such a request ought to have been made to the court at that time.

The last contention is that the court ought to have granted a new trial on appellant's showing in his motion of newly discovered evidence. In the progress of the trial appellant adduced testimony tending to impeach the character of Barnett, and also to prove contradictory statements of Barnett with respect to the alleged sale of liquor by appellant to him. In the motion for new trial appellant set forth the affidavit of three persons who resided in Fort Smith, and who stated that they had heard Barnett say in the presence of several persons that appellant was not the man, named Lee Hayes, who sold him the liquor. This testimony was merely cumulative, and was also for the sole purpose of impeaching the credibility of Barnett, and it is a settled practice, approved by this court, not to grant new trials for the purpose of introducing testimony of that kind.

Judgment affirmed.

HUGHEY v. LENNOX.

Opinion delivered March 15, 1920.

1. HIGHWAYS—NEGLIGENCE OF AUTOMOBILE DRIVER.—In an action for death of a child struck by an automobile, evidence *held* to warrant finding that driver was negligent.
2. MASTER AND SERVANT—LIABILITY FOR SERVANT'S NEGLIGENCE.—An automobile owner is liable, under the doctrine of *respondeat superior*, for negligence of his servant in operating an automobile.
3. HIGHWAYS—NEGLIGENCE—PERMITTING CHILD TO WALK ALONG FOOTPATH.—Parents of a child three years old killed when defendant's automobile left the road and ran upon the footpath *held* not guilty of contributory negligence in permitting the child to walk along the footpath accompanied by an intelligent twelve-year old girl, though the public road alongside thereof was in use by many automobiles.
4. HIGHWAYS—NEGLIGENCE.—An automobile driver is not to be excused from liability for injuries caused while driving on a public highway because of his inexperience and unskillfulness, for he should not frequent places where inexperience or unskillfulness in handling an automobile is liable to cause injury.
5. HIGHWAYS—SPEED OF CAR—TESTIMONY.—Where there was evidence that the automobile which struck deceased was driven 58 feet after it struck deceased, and there was some testimony that the car was being driven only five miles an hour, expert testimony that a car driven at five miles an hour could have been stopped in six or eight feet was competent.
6. DEATH — CONSCIOUS SUFFERING — EVIDENCE.—Evidence *held* sufficient to show that deceased, a child struck by an automobile, suffered conscious pain for a short time after the injury.
7. DEATH—CONSCIOUS SUFFERING—EXCESSIVE DAMAGES.—Where the time during which a child consciously suffered pain was very short, an allowance of damages of $1,000 for pain and suffering will be reduced to $250.
8. DEATH — DEATH OF CHILD — EXCESSIVE DAMAGES.—A verdict of $2,000 to parents for the death of a three-year old girl who was healthy and intelligent *held* not excessive.
9. DEATH—DEATH OF CHILD—MEASURE OF DAMAGES.—There is no exact standard by which damages for a child's death can be measured, much being left to the fair and intelligent judgment of the trial jury.

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

Sam R. Chew for appellants; *T. P. Winchester,* of counsel.

1. The verdict on the first count is wholly without legal testimony to sustain it and the burden was on appellee. The verdict was the result of passion or prejudice. Conscious suffering for any length of time was not proven. 68 Ark. 1.

2. If the proof shows conscious pain and suffering the verdict is excessive.

3. The court erred in giving instruction No. 4 and in refusing appellant's instruction No. 5. 69 Ark. 134; 82 *Id.* 499; 96 *Id.* 206.

4. The verdict on the second count is also excessive. 39 Ark. 491; 33 *Id.* 350; 80 *Id.* 454; *Ib.* 74; 90 *Id.* 274.

5. The father of the child was guilty of contributory negligence in letting the child go on the highway unattended by some discreet person. 68 Ark. 1; 77 *Id.* 398; 72 *Id.* 1; 36 *Id.* 41; 5 Thompson on Negl., § 6310, p. 769. The negligence of the father was not properly submitted to the jury.

6. The testimony of L. H. Kibler was not competent. 87 Ark. 243; 98 *Id.* 352; 100 *Id.* 518.

7. The evidence of Hughey before the coroner's jury was incompetent.

8. The verdict is contrary to and against the weight of the evidence and contrary to the law. 56 Ark. 465.

9. Instruction 3 given by the court was error.

Starbird & Starbird, for appellee.

1. The verdict is supported by the evidence as to conscious pain and suffering. 96 Ark. 105; 88 *Id.* 164. The weight and credibility of the testimony was for the jury. 88 Ark. 200; 112 *Id.* 269; 92 *Id.* 569.

2. The verdict is not excessive. 84 Ark. 241; 103 *Id.* 361; 165 S. W. 627.

3. There was no error in the instructions given or refused. 125 Ark. 519.

4. Larger verdicts than this have been often sustained. 99 Ark. 422; 105 *Id.* 347; 102 *Id.* 422; 135 *Id.* 56; 33 *Id.* 350.

5. The objections to the admission of the testimony by appellants are not sustained by the law.

McCULLOCH, C. J. J. M. Hughey, one of the appellants in this case, ran down and killed Tressa Lennox, a little girl between three and four years of age, while driving an automobile along a public road in Crawford County. The car belonged to J. W. Hansel, the other appellant in the case, and Hughey was driving the car as Hansel's agent. This is an action instituted by appellee as administrator of the estate of Tressa Lennox to recover on two causes of action; one for the benefit of the estate of the decedent, and the other for the benefit of the parents of said decedent.

It is alleged in the complaint that at the time of the injury the child was traveling a footpath along the side of the road in company with another child about her own age and another girl about twelve years of age, and that Hughey negligently ran the car against this child and caused her death. The answer contained appropriate denials of the allegations of the complaint. There was a trial of the issues before a jury, which resulted in a verdict in favor of the plaintiff, assessing damages on the first count for the benefit of the estate of the decedent in the sum of $1,000, and on the other count in the sum of $2,000.

The following state of facts is deducible from the testimony, viewing it in the light most favorable to appellee:

The child, Tressa Lennox, lived with her parents near the railroad station of Shibley, in Crawford County. There was a store at or near the station operated by a Mr. Brewer. Soon after the noon hour Tressa Lennox was sent to Brewer's store, a short distance from her home, to make a small purchase for her father. She was accompanied by Margaret Conn, a very intelligent girl,

twelve years of age, and her little brother, who was about the age of Tressa. The three, returning from the store, after having made the purchase, were walking along a footpath on the north side of the public road, Margaret holding one of the hands of each of the children. They were going westward along this footpath, and Hughey came along behind them driving the automobile and when he came within a distance of about 58 feet of the children the machine suddenly left the road and went over to the footpath and ran against Tressa Lennox and killed her. The other two children escaped uninjured. Margaret Conn testified that she had both of the children by the hand and that she succeeded in rescuing her little brother from the danger, but that the car struck Tressa and knocked her loose from her grasp before she could get her out of the way of the machine. The car struck the child violently and knocked her a considerable distance. Margaret Conn ran to the child after the car had passed over her and picked her up but appellant Hughey stopped the car and got out and took the child from Margaret's arms and carried her back up to Brewer's store.

The testimony with respect to probable suffering experienced by the child as the result of the blow came from Margaret Conn, so far as appellee's side of the controversy is concerned, who testified that when she picked the child up she was crying and that she continued crying until after Mr. Hughey came and took her out of the witness' arms. The child died about the time that Hughey reached the store and laid her down on the floor. It was proved by several witnesses that the car left the roadway and moved along the footpath and that the child was struck while she was walking along or standing in the footpath. Mr. Brewer was standing on the porch at his store when the injury occurred, and he testified that he was looking at the car and the children at the time, and that he saw the car dart out suddenly from the road over to the path and that the car was running at a high rate of speed.

There was testimony adduced tending to show that Hughey was an inexperienced driver. At any rate we think that the testimony was sufficient to warrant the jury in finding that Hughey was guilty of negligence in operating the car, and that he is responsible for the injury inflicted.

Hansel is liable under the doctrine of *respondeat superior,* Hughey being his servant and agent in operating the car.

It is contended in the first place that the court erred in refusing to submit to the jury the question of contributory negligence on the part of the parents in permitting the child to travel along the public highway where the proof shows automobiles frequently move. Learned counsel for appellants rely on the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Dawson,* 68 Ark. 1, where it was held that parents suing for injuries to a child of tender age were barred by their own negligence in permitting the child to travel unaccompanied along a dangerous way and receive injuries as the proximate result of such negligence.

We do not think, however, that there was, in the present case, any evidence of contributory negligence sufficient to warrant a submission of that issue to the jury. There was testimony to the effect that a great many automobiles moved along this highway. Some of the witnesses expressed the opinion that they averaged more than fifty a day, but this little girl was not traveling alone. She was accompanied by another girl twelve years of age, who shows by her testimony that she is very intelligent and is capable of looking after the safety of her little companions. There was nothing especially dangerous about the situation which would have warranted the jury in finding that under those circumstances the parents were guilty of negligence in allowing the child to pursue such a short journey to the store. There was no occasion to cross the road, and the proof shows that there was a well defined footpath along the fence on the north side of the road, and that there was a space of

about twelve feet between this footpath and the driveway. Certainly it is not negligence for an intelligent girl of twelve years to pursue a journey of that kind alone, and since this child, Tressa, was in care of the older girl, there is nothing to justify a finding that it constituted negligence to permit her to go on the journey thus accompanied. The court was therefore correct in refusing to submit the question of contributory negligence to the jury.

Error of the court is assigned in refusing other instructions requested by appellants, but we think that the law of the case as stated in those instructions was fully covered by instruction No. 3, given at the request of appellee, which reads as follows:

"The defendants had the right to run their car upon the highways, but in so doing they must use due care and diligence not to injure other persons using the highway at the same time. It is the duty of a person operating an automobile upon the highways to use due care to keep his automobile upon the highways; to use due care to keep his automobile under control, and he must possess reasonable skill in operating an automobile before he undertakes to operate said automobile upon the public thoroughfares or highways, if he fails to possess reasonable skill in operating the car or fails to exercise due care in operation of the car, that constitutes negligence. Due care is such care as an ordinary person would use in operating an automobile upon the highway and lack of this due care is negligence. Negligence is the failure to exercise that degree of care which an ordinarily careful person would use under the same or similar circumstances."

Objection was made to that part of the instruction quoted above which states the law to be that a person operating an automobile along a public highway "must possess reasonable skill in operating an automobile before he undertakes" to do so upon the public highway. We are of the opinion that that part of the instruction is correct. An unskillful or inexperienced driver is not to

be excused from liability for injuries inflicted because of his inexperience and unskillfulness. On the contrary, he should not frequent places where injury is liable to result from inexperience or unskillfulness in handling a car. When a person operates an automobile along a public highway frequented by other travelers, he assumes the responsibility for injuries resulting from his own unskillfulness in the operation of the car.

L. H. Kibler, a witness introduced by appellee, qualified as an expert in the operation of automobiles, and testified that a car running five miles an hour, with the machinery in fairly good working order, could be stopped in a distance of six or eight feet, and we think that the witness showed sufficient familiarity with the subject to qualify as an expert, and it was competent to show within what distance a car could have been stopped, since other proof shows that the car was driven 58 feet after it left the road, and some of the testimony tended to show that Hughey was driving about five miles per hour.

It is next insisted that there was no evidence of conscious suffering on the part of the child after she was struck by the automobile, and that for this reason the verdict was without evidence to sustain it, so far as relates to the recovery on the first count of the complaint.

We do not agree with counsel that there is entire absence of testimony tending to show that Tressa Lennox consciously suffered pain. Margaret Conn testified that as soon as the automobile passed over the body of the child she ran to the child and took her up in her arms, and that she was crying and continued to cry until Mr. Hughey got out of the car and took the child out of her arms. There was other testimony tending very strongly to contradict this statement. Hughey testified that he did not himself take the child from the arms of Margaret Conn, but that he took the child up from the ground just as Margaret was about to take her up from the ground, and that she was not crying, nor did she give any other indication of conscious suffering. He testified that the child died just as he laid the body down on the floor at

Mr. Brewer's store. There was a physician who examined the body several hours after the death of the child, and he testified that from the wounds as he found them there could not have been any conscious suffering after the infliction of the injury. He testified, in other words, that there was total unconsciousness immediately resulting from the infliction of the injury, and that there could have been no pain endured by the child. The jury might have found, from the fact that the child was crying that she suffered pain for several minutes. It is not a case of entire absence of indications of suffering, as was the case in *St. Louis, Iron Mountain & Southern Railway Company* v. *Dawson, supra,* relied on by counsel for appellants. In that case the court said in the opinion that there was no testimony of any cries or moans on the part of the injured child. The very fact that the child was crying might have been, and doubtless was, accepted by the members of the jury as sure indication that there was conscious pain.

The time during which the child endured pain was, according to the undisputed evidence very short, and we are of the opinion that the recovery on that branch of the case is excessive. Of course, each case must to a certain extent stand upon its own peculiar facts, and we have reached the conclusion that the testimony in this case is not sufficient to warrant a recovery exceeding $250.

The contention is also made with respect to the recovery on the other branch of the case that the verdict was excessive, but after careful consideration we have reached the conclusion that the verdict on this branch of the case was not excessive. The child was healthy and intelligent, and even at the tender age of three years she was able to go on errands for her parents. The jury might have found that it was reasonably inferable that the child, during her minority, would be of substantial benefit to her parents, and that her services would be of sufficient value when reduced to present value to amount to the sum awarded. Much is left to the fair and intelligent judgment of the trial jury, as there is no exact

standard by which damages in this sort of case can be measured.

The judgment of the court will, therefore, be modified by reducing the judgment on the first count to the sum of $250, with interest from the date of the rendition of the judgment below, and, as modified, the judgment will be affirmed.

ABBOTT v. VANMETER.

Opinion delivered March 15, 1920.

1. ANIMALS—KILLING BY POISON.—In an action for killing cows by means of tree poison left by defendant in an enclosure into which the animals had broken, the jury had the right to infer, from the fact that their carcasses were found in close proximity to the pot containing the poison, that the cows were killed by drinking it.
2. ANIMALS—LEAVING TREE POISON—NEGLIGENCE.—In an action for killing cows by means of tree poison left by defendant on his land, the question whether defendant exercised reasonable care by merely covering the pot with a box *held* for the jury.
3. ANIMALS — KILLING BY POISON — INSTRUCTIONS.—An instruction which declared the owner of inclosed land liable if his fence was defective, and he left exposed a vessel containing poison from which cattle drank and were killed was erroneous, as it was necessary to show that the poison solution was a substance calculated to allure trespassing animals so that the land owner was called upon to anticipate the danger and provide protection against it.

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

John H. Crawford and *Dwight H. Crawford,* for appellant.

1. Appellant owed no duty to make and keep his premises safe from plaintiff's trespassing cattle and the court erred in giving the first instruction on its own motion. It is misleading and prejudicial.

2. The court erred in giving plaintiff's seventh instruction.

3. The court erred in refusing defendant's first request for a peremptory instruction, and in striking from his second request the last blackfaced clause. 93 Ark. 141-151; 93 *Id.* 564, 573; 76 *Id.* 69; 94 *Id.* 282, 293. The law is correctly stated in appellant's second request. 11 R. C. L. 872. Appellant was not liable if his fences were bad and he did not properly protect and conceal the poison. 1 R. C. L. 1132; 6 Pa. St. 472; 57 Ark. 16; 52 L. R. A. (N. S.) 133; *Ib.* 140; 85 S. W. 401; 140 *Id.* 638; 59 L. R. A. 771.

4. The court erred in refusing appellant's third instruction. 46 Ark. 207; 52 *Id.* 402; 94 *Id.* 458; 117 *Id.* 1; 1 R. C. L. 1134; 41 L. R. A. 677; 59 *Id.* 771.

McMillan & McMillan, for appellee.

1. There was actionable negligence in the case, and appellant was liable. 98 Ark. 72; 117 *Id.* 1; 46 *Id.* 207; 116 *Id.* 163; 117 *Id.* 1; 119 *Id.* 139; 38 *Id.* 366; 27 Mont. 79; 59 L. R. A. 771, is not on all-fours with this case. See 94 Ark. 458; 46 *Id.* 207.

2. The instructions as a whole cover all the requirements of the law. 117 Ark. 1; 94 *Id.* 458.

McCULLOCH, C. J. Appellant is a farmer in Clark County, and in the spring of the year 1919 planted corn in a new-ground formerly used as an enclosed pasture. There was standing timber which interfered with the growth of the crop of corn, and in April appellant was engaged in deadening this timber by using a chemical solution commonly called "tree-killer." It is not shown by evidence what particular chemicals were embraced in the compound, further than that it contained substances which were destructive to live trees.

There is a conflict in the testimony as to whether or not the fence enclosing this particular field was such as is prescribed by statute as a lawful fence. The solution was kept in a large pot and appellant used it on a certain day in April and left the pot over night to continue the use of the tree-killer the next day. The top of the pot was covered by a wooden box. Appellee lived in the neighborhood, and was the owner of four cows which

were permitted to run at large, and they broke into appellant's inclosure during the night and drank of the chemical solution left there and were found dead the next morning.

Appellee instituted this suit against appellant to recover the value of the cows on the ground that appellant was guilty of negligence in failing to properly fence his premises and to protect the cattle which broke in on account of the insufficient fence from the exposed pot of chemical solution. Appellant denied the allegations of negligence, and on the trial of the issues before a jury appellee was awarded damages for the value of the cows which died from drinking of the solution.

The testimony as to the cause of death of the cows was inferentially established by the carcasses being found in close proximity to the pot of chemical solution. The jury had a right to infer from the circumstances that the cows drank of this solution and that it produced death. The testimony adduced by appellant shows beyond controversy that appellant took certain precautions by covering the pot, but it was a question for the jury to determine whether those steps were sufficient to constitute reasonable care so as to acquit appellant of the charge of negligence in failing to securely cover up the dangerous substance.

The only contentions made here as grounds for reversal relate to the rulings of the court in giving and refusing instructions. The court gave the following instructions at the request of appellee, and over appellant's objections:

"No. 1. You are told that it was the duty of the defendant to exercise ordinary care to place and keep the poison complained of in an inclosure such as it would not be reasonably expected that cattle running on the range would become exposed to and drink of the poison; and if you find from a preponderance of the evidence in this case that defendant's fence, inclosing the ground where the poison was, was not reasonably sufficient to keep cattle out of the field, and you further find that de-

fendant failed to cover and conceal in a reasonably good condition the pot or vessel containing the poison, and that the plaintiff's cattle became exposed to the poison and drank thereof and died from the effects thereof, you will find for the plaintiffs."

"No. 7. If you find through and on account of negligence on the part of defendant, plaintiff's cattle came upon defendant's premises, and further find that defendant left exposed a pot or vessel containing poison and that plaintiff's cattle drank some of it and died from the effects thereof, then you will find for the plaintiffs."

The court gave the following instruction at appellant's request after modifying the same by striking out the concluding sentence:

"No. 2. One who suffers his stock to go at large, takes upon himself the ordinary risks incident to it. He takes the permissive pasturage with its accompanying perils. The land owner owes no duty to cattle owners, prior to the entry of the stock upon his premises, unless it be to refrain from unnecessarily attracting or drawing them into a place of danger. And, after cattle are upon the land owner's premises, the land owner owes only the negative duty of avoiding any injury to them, which the exercise of ordinary care at that time would prevent."

The court refused to give the following instruction requested by appellant:

"3. An owner of uninclosed, or insufficiently inclosed, lands is not liable for injuries to animals straying upon the land, unless he maintains or permits to remain thereon something in itself calculated to attract such animals to their injury; and in this case if you find from a preponderance of the evidence that the pots of poison were mixed by defendant for a lawful purpose, that is, to destroy useless timber upon his lands, and that he did not and had no reason to anticipate that plaintiff's cattle would drink the poison, the defendant will not be liable in damages, and your verdict should be for the defendant."

The contention is that the instructions given by the court at appellee's request are in conflict with part of instruction No. 2, which the court gave at appellant's request, and that the court erred in refusing to give instruction No. 3. We think that this contention is sound, and that the court erred in its instructions. Instructions No. 2 and No. 7, given at the instance of appellee submitted the question of appellant's liability solely on the ground of negligence in failing to maintain a sufficient fence around the premises and in failing to protect and conceal the pot containing the dangerous substance, and entirely omitted the other question necessarily involved in the case whether or not there was negligence in exposing a substance which was attractive to animals. The law on this subject is well settled and is, we think, correctly stated as follows:

"The owner of uninclosed land is not in general bound to keep his premises safe for the trespassing animals of others, and if, in the ordinary use of the property, harm befalls them, their owner, by permitting them to roam at large, is held to have assumed the risk of such injury, and so is denied any right of action on that account." * * * "While the owner of land is not ordinarily responsible for injuries occurring to trespassing cattle, he is not permitted negligently to leave on his premises poisonous substances which will attract passing animals, nor can he place thereon dangerous instrumentalities, as traps baited with strong scented meats, set so near the highway on the grounds of another that the animals of others will be lured onto his lands from the place where they rightfully are to their injury or destruction. This results from the principle that where there is invitation, enticement, allurement or attraction, a person is bound, at his peril, to use reasonable care and diligence in keeping his property in safe condition." 1 R. C. L., §§ 74, 75.

That is the doctrine which was announced by this court in its first decision bearing on the question. *Jones* v. *Nichols,* 46 Ark. 207. In that case the proof estab-

lished the fact that the defendants operated a gin and maintained a pit near the highway about which was scattered cotton seed and corn, and a cow owned by the plaintiff being attracted by the food thus exposed fell into the pit and was killed. It was said that those facts made out a case of liability. That doctrine has been followed in subsequent cases and the distinction has been made in each of the cases that while the owner of premises is not ordinarily liable for injuries to trespassing animals, yet where he exposes any substance which is calculated to allure animals, he must exercise ordinary care to protect from danger the animals thus enticed upon the premises. The duty which a land owner owes to the owner of trespassing animals is merely the negative one of refraining from committing an act of negligence which would entice animals upon the premises and injure them. The rule was stated by this court in *St. Louis, Iron Mountain & Southern Railway Company* v. *Newman,* 94 Ark. 458, as follows:

"His (the land owner's) liability arises in the use of his premises when he fails to observe for the protection of the property of another that degree of care and precaution which the circumstances demand, whereby an injury results to such other person's property. He does owe, therefore, to the owner of straying stock the duty to refrain from attracting or drawing to a dangerous object or substance which he has placed upon his land such stock. Such act becomes one of negligence whereby, if injury result to another, a liability is incurred. The land owner has no right to thus actively draw into peril straying stock. He may not be under any duty to guard the stock from the dangers to which they ordinarily might be exposed, but if he places on his land a dangerous substance which would attract passing animals, and thereby the animals are injured, if the injury is the natural and probable result of the act which a prudent man would have foreseen, then the land owner is liable for the injury resulting therefrom."

To the same effect is *St. L., I. M. & S. Ry. Co.* v. *Wilson,* 116 Ark. 163; *Buckeye Cotton Oil Co.* v. *Horton,* 117 Ark. 1. The same doctrine is announced in the case of *St. L. & S. F. Rd. Co.* v. *Williams,* 98 Ark. 72, with respect to the liability of a railway company for putting out a torpedo on its own premises. And such is the doctrine of this court announced in *Brinkley Car Co.* v. *Cooper,* 70 Ark. 331, in regard to liability for injuries inflicted upon children by reason of negligence in exposing them to dangerous substances or situations which are attractive to children. That is the basis of the doctrine of the so-called "Turntable Cases." *Railroad Co.* v. *Stout,* 17 Wall. 657.

This rule is well supported by the text writers on the subject and by adjudicated cases in other jurisdictions. Prof. Thompson states the rule as follows:

"Where domestic animals are allowed to run at large, and they stray upon uninclosed lands and are injured, the owner of the lands cannot be held liable therefor. A land owner is no more obliged to prepare his land in any particular way for the protection of his neighbor's cattle, not invited or tempted to come upon it, than for the protection of his neighbor himself. For example, land owner is under no obligation to fence his land bordering on the highway, or to keep up such fences or the gates in them, so as to prevent the animals of another, which are allowed to run at large upon the highway, from getting through his land upon a railway track and there being killed." Thompson on Negligence, § 959.

The same author, at another place (§ 955), states the law on this subject as follows:

"The same rule, subject to qualifications, applies in the case of injuries to domestic animals through pitfalls or other dangers upon uninclosed grounds. That rule is that the owner or occupier of land is under no legal obligation to take special care or pains to the end of keeping it safe for the protection of the animals of others which may be allowed to run at large—and this without reference to the question whether the rule of the 'English

common law' prevails, which required the owners of domestic animals to restrain them at their peril, or whether the rule of most of the American States prevails, which allows domestic animals to run at large, and required the owners of cultivated fields to fence them."

This subject is elaborately treated in the note to the case of *Gillespie* v. *Wheatland Industrial Co.* (Wyo.), 52 L. R. A. (N. S.) 133. The following cases are also instructive: *Strong* v. *Brown* (Idaho), 52 L. R. A. (N. S.) 140; *Beinhorn* v. *Griswold* (Mont.), 59 L. R. A. 771; *Muir* v. *Thixton, Millett & Co.,* 119 Ky. 753; *Morrison* v. *Cornelius,* 63 N. C. 346; *Tennessee Chemical Co.* v. *Henry,* 114 Tenn. 152, 85 S. W. 401; *Turner* v. *Thomas,* 71 Mo. 569; *Sweeney* v. *Old Colony & Newport Rd. Co.,* 10 Allen, 368.

The case of *Beinhorn* v. *Griswold,* cited above, is especially in point in view of the fact that the injury was caused by exposed chemical substance on the premises of the defendant which caused the death of plaintiff's cow. The case of *Tennessee Chemical Co.* v. *Henry* is also in point for the same reason.

Applying those principles to the facts of the case at bar, the error of the court in its instructions is emphasized. It cannot be assumed as a matter of law that the chemical substance was of itself alluring to cattle so that appellant was bound to anticipate the danger. The evidence in the case does not even disclose the contents of the solution except that it was designed to kill trees. The only evidence that it was dangerous to animals was that these cattle were killed by drinking it. It was an essential part of appellee's case to show that the solution was a substance was calculated to allure trespassing animals so that the land owner was called on to anticipate the danger and provide protection against it. The two instructions given at the instance of appellee entirely ignored this element of liability on the part of appellant and permitted the jury to award damages merely upon the finding that an insufficient fence was maintained around the premises and that proper care

was not observed in protecting the solution from trespassing animals.

Instruction No. 2, requested by appellant, as modified and given by the court, correctly embraced the principle of law applicable and was in conflict with the instructions given by the court at the request of appellee. Instruction No. 3, requested by appellant and refused by the court, more concisely stated the law as applicable to the case and should have been given. It constituted prejudicial error to refuse this instruction.

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

HART and HUMPHREYS, JJ., dissent.

GRAY v. MALONE.

Opinion delivered March 15, 1920.

1. INJUNCTION—TRESPASSES—REMEDY AT LAW.—A suit in equity will not lie to restrain a party from removing timber from the plaintiff's land, in the absence of an allegation that defendant was insolvent.
2. EQUITY—DEFECTIVE COMPLAINT—WHEN CURED BY ANSWER.—In a suit to restrain defendant from trespassing on plaintiff's timber lands failure of the complaint to allege that the defendant was insolvent was cured when the answer denied defendant's insolvency.
3. TRIAL—MOTION TO TRANSFER—WHEN TOO LATE.—After defendant had waived objection to the jurisdiction of the chancery court, and submitted the cause and it had gone to final hearing, it was too late for defendant to move to transfer the cause to the law court.
4. CONTINUANCE—DILIGENCE.—In a suit to enjoin trespasses on plaintiff's land, defendant's motion for continuance in order that he might have an additional survey of the land by a competent surveyor was properly denied where there was no showing of diligence in not procuring such survey.
5. INJUNCTION—TRESPASSES—BURDEN TO PROVE TITLE.—In a suit to enjoin trespasses on land, the burden of proof was on plaintiff to show that he was the owner and entitled to possession thereof.

6. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS. —Where the Supreme Court can not determine from the testimony where the preponderance of the evidence lies, it will treat the chancellor's finding of facts as conclusive.

7. NAVIGABLE WATERS—ACCRETIONS.—Kirby's Digest, section 4918, relating to title to land formed in navigable waters within the original boundaries of a former owner of land on the stream, has no application to land not formed on an island in a river but built up as an accretion to plaintiff's original tracts.

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

Frauenthal & Johnson, for appellant.

1. Under the allegations of the complaint the court had no jurisdiction. It should have been brought at law in the circuit court. Injunction will not lie to prevent even a trespasser from cutting timber where the complaint does not state facts sufficient to show an irreparable injury to the freehold itself and defendant's insolvency. 67 Ark. 413; 75 *Id.* 286; 77 *Id.* 527; 81 *Id.* 115; 92 *Id.* 118. Chancery had no jurisdiction and appellant was entitled to a jury trial. Defendant was in possession, and a suit at law was necessary. Kirby's Digest, § 6518; 30 Ark. 579; 56 *Id.* 391; 65 *Id.* 503; 74 *Id.* 81. It was error to refuse to transfer the case to the law court.

2. It was error to refuse the continuance. 21 Ark. 460; 85 *Id.* 334; 99 *Id.* 394.

3. Under the testimony appellee was not entitled to recover. Appellant was in possession of the land as a home, and appellee must recover on the strength of his own title, and if an absolutely good title in himself is not shown, then possession by defendant is sufficient to defeat recovery. 104 Ark. 154; 135 *Id.* 353.

4. The testimony shows that the land is the property of appellant, and that both title and possession are in him. The land formed and involved here is located within the original boundaries of the Jesse Gray tract and became vested in appellant and his sisters. Kirby's Digest, § 4918; 6 L. R. A. (N. S.) 162 and note.

5. The great preponderance of the evidence shows that an island was formed in the Arkansas River opposite the land and that accretions have formed to the island extending to the shore and that John Gray was in possession of the land, that it was washed away and in time made back within the original boundaries. Authorities *supra.* The washing away was by avulsion, and the channel of the river was changed so as to run through the Jesse Gray land. It was incumbent on appellee to show by clear testimony that the accretions began from his land and not from other point so as to reach his land. 76 Ark. 538.

The chancellor erred in finding that the lands involved were accretions to the Malone land and that there was no island formed in the river, and these findings are contrary to the great preponderance of the evidence. Lands submerged by overflow and afterward reappearing belong to the original owner. 53 Am. Rep 206; 3 Farnham on Waters, § 448; 6 L. R. A. (N. S.) 162.

Reid, Burrow & McDonnell and *Calvin Sellers,* for appellee.

1. The chancery court had jurisdiction. 78 Ark. 408; 84 *Id.* 140; 92 *Id.* 15; 99 *Id.* 438; 105 *Id.* 558; 114 *Id.* 206; 15 *Id.* 307; 14 *Id.* 55, 354. Grounds of equitable relief were alleged in the complaint. The motion to transfer was properly overruled. Kirby & Castle's Digest, § 7432; 74 Ark. 81.

2. The continuance was properly refused. Kirby & Castle's Digest, § 7613.

3. The evidence sustains the findings of the chancellor. 66 Ark. 367; 99 *Id.* 128; 112 *Id.* 607; 113 *Id.* 19. The testimony shows that the accretion was not within the original boundaries of Gray or his father.

WOOD, J. This is an appeal from the chancery court of Perry County. The action was instituted by the appellee against the appellant.

The appellee alleges that he is the owner of certain lands in sections 13 and 18 in Perry County, Arkansas; that the appellant without right had entered upon the lands and is removing valuable timber therefrom, and unless restrained would cause damage to the appellee for which he had no adequate remedy. Appellee prayed for a temporary restraining order and upon the final hearing for perpetual injunction restraining appellant from cutting and removing timber from the lands.

Appellant answered and alleged that he was without knowledge as to whether the appellee was the owner and in possession of the lands specifically described in the appellee's complaint. Appellant denied that he was in possession, and that he was cutting and removing the timber without right, and denied that appellee had no adequate remedy at law, and that he (appellant) was insolvent. He alleged that his father, Jesse Gray, was the owner of certain lands which he described situated in section 7, township 5 north, range 15 west; that at the death of their father, appellant and four other children inherited the lands. He alleged that the lands were situated on the Arkansas River; that during the lifetime of his father all of the lands were washed away; that an island was formed within the original boundaries of the lands and thereafter continued to enlarge by accretion until it covered all and beyond the lands of the original survey of the lands owned by his father; that, by reason of the avulsion of the original lands and the subsequent formation of the island and the accretions thereto, the appellant and the other heirs at law of Jesse Gray became the owners of the lands described in his answer and which appellant was then in possession of for himself and as the agent of the other heirs. The answer was signed by G. F. Clerget, Edward Gordon, Strait & Strait, "attorneys for defendant."

After the issue thus joined, the attorneys for appellee and W. P. Strait, one of the attorneys for the appellant, entered into a stipulation whereby they agreed that "all questions as to the jurisdiction of the court in this

case are waived." This stipulation was filed in 1917. After the depositions were taken the cause proceeded to a hearing and final decree was rendered on May 15, 1919. The decree recites that the cause was submitted upon the complaint, answer, demurrer and deposition of witnesses and also upon the stipulation of counsel that this cause might be tried in chancery.

The decree, however, as it appears from the recitals thereof, was not finally entered of record until June 24, 1919, when on that day the same was entered *nunc pro tunc* as of May 15, 1919.

The record shows that on May 30, 1919, W. P. Strait withdrew as counsel for the defendant. On May 20, 1919, it appears that the appellant through his counsel filed a motion to transfer the cause. That motion was responded to, and the affidavit of appellant was taken in support thereof in which he denied that he ever gave any authority to any of his attorneys, and particularly W. P. Strait, to enter into or make any agreement or stipulation that all questions as to the jurisdiction of the court were waived.

The order of the court overruling the motion to transfer recites, among other things, that "the court doth find that W. P. Strait being the duly authorized leading counsel in this cause for the defendant, together with attorney for plaintiff, heretofore executed and filed a stipulation herein that this cause might be tried in this court, and that in case a finding was made for the defendant that jurisdiction might be retained for the purpose of settling the boundaries of the respective parties; that, in pursuance of said agreement, at great expense, depositions were taken and this cause by consent of all parties submitted to this court December 17, 1918, and at the request of all parties by the court taken under advisement, decree to be rendered in vacation at Morrilton; that, thereafter, towit, on May 15, 1919, the court rendered a final decree for plaintiff without objection having previously been made by defendant to the jurisdiction of the court."

While the cause was pending, the appellee filed a petition in which he alleged that since the institution of the suit and up to the time of filing the petition appellant had been and was at the time endeavoring to cause discontent among the tenants of appellee for the purpose of having the tenants quit possession of certain lands in order that appellant might secure possession thereof; that he was attempting to collect rent from appellee's tenants, although such tenants were cultivating lands which at the commencement of the suit were entirely in the possession of the appellee and under his control. This petition alleged the insolvency of the appellant, and further alleged irreparable injury unless the restraining order should be issued.

The court granted the prayer of the petition for the restraining order.

First. The first contention of appellant is that the chancery court was without jurisdiction. This contention cannot be sustained for several reasons. True, the original complaint was defective and did not state facts sufficient to give the chancery court jurisdiction, because it failed to allege that the appellant was insolvent, and therefore failed to allege facts showing that the appellee had no adequate remedy at law for the trespasses of appellant of which the appellee complained. *Burnside* v. *Union Saw Mill Co.*, 42 Ark. 118, and cases there cited. But the chancery court had jurisdiction of the parties, and it had jurisdiction of the subject-matter of restraining trespasses on the lands of appellee if the pleadings raised the issue that the trespasser was insolvent. The pleadings did raise that issue.

The defect in the complaint was cured or removed by the allegations of the answer in which the appellant denied that he was insolvent. In *Choctaw, Okla. & Gulf Ry. Co.* v. *Doughty,* 77 Ark. 1-7, we said: "A defect in pleading is aided if the adverse party plead over to or answer the defective pleading in such a manner that an omission or informality therein is expressly or impliedly supplied, or rendered formal or intelligible."

Again the omission of the complaint to allege that appellant was insolvent was supplied by the allegation to this effect in the petition which the appellee filed asking that the appellant be restrained from "interfering with the possession of appellee or his tenants in any of the lands described in the original complaint or any accretions thereto except such lands as were actually in the possession of the defendant (appellant) at the institution of this suit. This petition was but supplementary to the original complaint which contained a prayer for a restraining order.

Furthermore, the court correctly ruled that the motion to transfer to the law court was too late, coming as it did after appellant, through his counsel, had waived objections to the jurisdiction of the chancery court, and had by consent submitted the cause for hearing before that court, and after a final rendition of the decree in that cause. *Collins* v. *Paepke-Leicht Lbr. Co.*, 74 Ark. 81. The court having jurisdiction of the parties and the subject-matter, it was within the power of the appellant through his counsel to waive omission of the complaint to allege the insolvency of the appellant.

Second. After the court refused to transfer the cause to the circuit court, the appellant filed a motion to continue on the ground that the testimony and maps of the two surveyors, one of whom was a witness for the appellant and the other for the appellee, differed as to the exact location of the land of which appellant was in possession.

Appellant set up in his motion that he desired to have a further survey made by a competent surveyor, and that he had been unable to do so because the land had been covered with water; that he desired to have this survey in order to show more clearly if possible that the land in controversy was situated in section 7, and that he also desired to more fully develop the testimony by showing the value and amount of improvements which he had made upon the land and the amount of taxes which he had paid.

It appears that appellant took the deposition of witness H. L. Wright, a surveyor, November 10, 1916, who previously had made a survey of the land at the instance of appellant. The deposition of E. A. Woolverton was taken on September 19, 1917. He had previously made a survey of the lands at the instance of the appellee. Plats which these witnesses had made respectively were filed with their depositions. These plats, therefore, were of record in the cause more than a year before its submission, and were, therefore, subject to the inspection of appellant and his counsel. Appellant fails to show any diligence whatever to procure the survey which he claims might more clearly elucidate the situation of the lands and throw additional light on the subject-matter of the controversy.

Appellant did not in his motion set up or show that the previous surveys were made by persons unskilled in the art of surveying and therefore incompetent. He did not allege that the additional survey would be made by one more competent and skilled than the surveyors who had already testified. The court might have concluded, for aught that appears in the record to the contrary, that a new survey, instead of throwing light upon the issue, would render confusion more confounded.

The only excuse appellant gives for not having made the desired survey earlier was that the lands during the winter and spring months were inundated, rendering the survey impossible. But the summer and fall seasons had intervened at the time of the taking of the depositions concerning the previous surveys and the time when appellant asked for the continuance.

Third. Learned counsel for appellant contends in the last place that the testimony is not sufficient to entitle the appellee to recover. The issue was narrowed in the pleadings and proof to the question of whether or not appellant or appellee was the owner of the particular lands which were occupied by the appellant.

The burden of proof is upon the appellee to show that he is the owner and entitled to the possession of the lands

in controversy. He must recover, if at all, upon the strength of his own title, and not upon the weakness of the title of the appellant. *Glasscock* v. *Nat. Box Co.,* 104 Ark. 154; *Wallace* v. *Hill,* 135 Ark. 353.

The testimony shows that appellee and one Jones obtained a deed to the land in controversy from L. E. Hill, November 9, 1901, and that Jones executed a deed to the appellee for his interest in March, 1909. Appellee testified that at the time he and Jones purchased the lands from Hill the lands including the accretions were inclosed by a fence. He says: "The farm part of it was fenced in separate from the other but the whole tract was under fence." Later he acquired the entire interest from Jones, and since 1901 no one had owned any interest in it except himself and Jones. In 1905 he cleared about seven acres of the land that appellant claims. It was cultivated by tenants. He was asked if he had exercised any acts of ownership on any other portion except the part that was cleared, and he answered that he had by keeping it inclosed and using it as a pasture for stock. He was asked if he rented it out at various times and he answered in the affirmative. He was further asked if he and Jones together, since their purchase in 1901, claimed to own all the accretions, and if they had held it openly and adversely since the purchase of the land from Hill. He answered in the affirmative.

Appellee testified that prior to the time that appellant entered upon it he had a suit with one Mobbs in regard to it, which was disposed of in the Supreme Court some time in 1911. The controversy between himself and Mobbs arose over the division of the accretion in front of the two tracts of land, but his right to a portion of the accretion was not in controversy. Beyond that suit with Mobbs, his title to the accretion or right to the possession had never been questioned by any one up to the time that appellant moved on the same. The entire accretions had been under fence since 1901. He had fences constructed in the bend to divide the land in cultivation from his pasture lands, and he continued to control and rent out the

land between the fence and the river and to exercise the same authority over it as he did over the lands in cultivation.

It could serve no useful purpose to set out further the testimony in detail. The testimony of the appellee is corroborated by the testimony of other witnesses to the effect that the land in controversy had been occupied by appellee under color of title for a sufficient length of time to give him title by adverse possession. Nor would it be worth while to set out and discuss in detail the testimony upon which appellant relies to sustain his contention that the land in controversy was within the original boundaries of the land owned by his father, and that, after having been washed away, they were gradually rebuilt and formed within the boundaries originally described in the deed to his father, Jesse Gray, that is to say in section 7, township 5 north, range 15 west. Suffice it to say, after considering the testimony of the appellant himself and the testimony of the witnesses adduced by him including the testimony of the surveyor and the plat exhibited with his deposition together with the testimony of the appellee and the witnesses adduced by him, the testimony of the surveyor and the plat also exhibited with his testimony, we have been unable to reach a satisfactory conclusion as to whether or not the lands in controversy are accretions within the boundaries of the original tract of land conveyed to the appellant's father. There was considerable testimony tending to show that no island was formed within the boundaries of the land originally owned by appellant's father. If the island was formed as claimed by the appellant, the testimony is such as to leave our minds in grave doubt as to whether it was within the boundaries of the land originally owned by the appellant's father.

We are unable to determine from the testimony in the whole record where the preponderance of the evidence lies on this issue. Therefore, we treat the finding of the chancellor as persuasive and adopt it as our own. *Leach* v. *Smith*, 130 Ark. 465.

The chancellor found that no part of the land in controversy was formed as an island, but that the same was an accretion to original tracts of land owned by the appellee in sections 13 and 18. See *Bush* v. *Alexander,* 134 Ark. 307. Under this finding of fact by the chancellor, the act of April 26, 1901, section 4918 of Kirby's Digest, upon which appellant relies to give him title by accretion, has no application.

The decree is correct, and it is, therefore, affirmed.

HOMEWOOD RICE LAND SYNDICATE *v.* SUHS.

Opinion delivered March 15, 1920.

1. MASTER AND SERVANT—INDEPENDENT CONTRACTOR.—Under a contract whereby plaintiff was to do all the work and labor and defendant to furnish the land, equipment and supplies to raise a crop of rice on 300 acres, for which defendant was to pay plaintiff $5,000, plaintiff was an employee, and not an independent contractor.
2. MASTER AND SERVANT—"INDEPENDENT CONTRACTOR" DEFINED.—An independent contractor is one who, in the course of independent occupation, prosecutes and directs the work himself, using his own methods to accomplish it, and represents the will of the company only as the the result of the work.
3. EVIDENCE—CIRCUMSTANCES EXPLANATORY OF CONTRACT.—Courts may acquaint themselves with the persons and circumstances that are the subject of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract so as to view the circumstances as they viewed them, so as to judge of the meaning of the words and of the correct application of the language to the things described.
4. MASTER AND SERVANT — COMPENSATION FOR SERVICES.—Where plaintiff was employed to raise about 300 acres of rice on defendant's land, and defendant agreed to pay him $5,000 "for labor to raise and properly irrigate, mature and harvest" the rice, plaintiff was entitled to the entire consideration, though he raised only 260 acres and harvested only 200 acres, if he exercised reasonable diligence in performing the services required of him under the contract.

Appeal from Prairie Circuit Court, Southern District; *George W. Clark,* Judge; affirmed.

John L. Ingram and *Harry E. Meek,* for appellant.

1. Appellee was an independent contractor and not a servant. 26 Cyc. 970.

2. The court erred in its oral charge to the jury. The excuses urged by appellee do not legally justify his admitted partial failure to comply with his contract. 13 C. J. 639-640; 112 S. W. 134; 158 Ill. App. 468; 21 L. R. A. 645. Under appellee's own testimony appellant was entitled to judgment on the counterclaim.

Cooper Thweatt and *Chas. B. Thweatt,* for appellee.

Under the contract appellee was not an independent contractor but an employee or servant. 124 Ark. 90. His excuse for failure to raise a full crop of rice was a valid one. 128 Ark. 24; 124 *Id.* 90; 105 *Id.* 421; 113 *Id.* 181. There is no error in the instructions, and the judgment is right on the whole case.

WOOD, J. The appellee brought this action against the appellant to recover a balance which he alleged was due him on a contract entered into with appellant by the terms of which appellee was to raise about 300 acres of rice on the lands of appellant, being the same number of acres cultivated by the appellant in 1911. Appellant was to pay appellee the sum of $5,000 "for labor to raise and properly irrigate, mature, and harvest" the rice. The appellee was to do all necessary hauling, to do the plowing in the fall and winter for the next year's crop. In case of too bad weather in the fall and winter, he was to be allowed to plow as late as April 15th. If appellant was going to make a change in the employment or in case the appellee was going to make a change and stop raising rice after the termination of the contract, either party was to give the opposite party a notice of his intention in writing three months previous to the termination of the contract. Appellee was also to make all necessary

levees, canals, flumes, and open up all drains and outlets pertaining to the crop; to keep all fences in good repair; to do the cutting and proper shocking of the rice; to take care of all the farming tools, wagons and machinery, putting same in the tool shed when not in use and to take good care of everything belonging to the party of the first part. There was also a further provision that all seed rice must be cleaned on fanning mill and the land must be well prepared, well ditched and harrowed. For raising the crops appellant was to pay appellee partly in monthly installments. The appellant during the time of threshing the rice was to furnish the appellee a man to tend to the separator and also to furnish an engineer and a man and team for the water wagon. The appellant was also to furnish seed rice, binding twine, rice sacks, coal and wood, oil and grease, and all necessary tools and machinery.

The appellee alleged that he had complied with all the terms of the contract, and that appellant had paid him the sum of $3,500, leaving a balance due him of $1,500, for which he prayed judgment.

The appellant answered denying that appellee had complied with the terms of his contract in this, that instead of seeding 300 acres of land to rice, as he was bound to do under the contract, he only seeded 260 acres, to appellant's damage in the sum of $2,250; that the appellee had also failed to harvest 60 acres of the 260 acres, which he seeded, to appellant's damages in the sum of $3,375, making the total damage to appellant, by reason of appellee's failure to comply with his contract, in the sum of $5,625. This sum the appellant asked to be allowed as a counter-claim against appellee.

The appellant also alleged that the appellee wrongfully appropriated to his own use 363 bushels of rice which were worth $163.35, which appellant claims as a set-off.

Appellant prayed that it have judgment against the appellee for said sums.

The appellee answered the cross-complaint, admitting that he only harvested about 200 acres of rice, but alleged that of the 300 seeded to rice 100 acres were lost on account of the failure of the appellant to supply enough water to irrigate the same. He denied that appellant was damaged in any sum on account of appellee's failure to comply with the terms of the contract. He also denied that he was indebted to the appellant for 363 bushels of cracked rice.

It will be observed that the execution of the contract was admitted by the appellant but it denied that the appellee had performed the contract on his part. On the contrary, it alleged that the appellee had failed to perform his part of the contract in the particulars set forth in its answer and cross-complaint and prayed for damages on account of such failure.

The first question, therefore, to be determined is whether or not the appellee complied with the contract. A proper solution of this involves a construction of the contract to determine what were the obligations of the appellant. Appellant contends that under the contract the appellee was an independent contractor and bound under the terms of the contract to produce and deliver to appellant about 300 acres of rice for which appellant was to pay him the sum of $5,000. Undoubtedly, if the contract read that "Edward Suhs hereby agrees and makes contract to raise about 300 acres of rice for which party of the first part agrees to pay the party of the second part the sum of $5,000," the appellant would be correct in its contention, for if these were the terms of the contract they would denote an unqualified undertaking upon the part of the appellee to produce and deliver to the appellant the rice from 300 acres of land according to his own methods and using his own means to accomplish the result without being subject to the control or direction of the appellant in any particular. But, when all the provisions of this contract are construed together, as they must be, the relation of the appellee to the appellant was not that of an independent contractor.

The contract itself does not undertake in words to define or characterize the relation of the parties to each other. Yet, when all of its provisions are considered, we are convinced that it should be construed as creating the relation of employer and employee or master and servant, rather than that of independent contractor employed for no other purpose than to produce through his own resources a crop of rice on appellant's land.

In *J. W. Wheeler & Co.* v. *Fitzpatrick,* 135 Ark. 117-24, this court, in the language of Judge Elliott, defines an independent contractor as follows: "An independent contractor may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own methods to accomplish it, and represents the will of the company only as to the result of his work." From Words and Phrases as follows: "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of the work."

Now, applying the above definitions to the contract under review, it is manifest that the relation of the appellee to the appellant was not that of an independent contractor.

If the parties had intended that appellee's duty under the contract were at an end when he had cultivated, harvested and delivered the rice raised on 300 acres of appellant's land, the contract would have doubtless been couched in language similar to that above set forth and would have ended there. But, instead of this, the parties proceeded to specify things that are to be done by the appellee and appellant, which are wholly incongruous with the theory that the appellee was to produce and deliver to the appellant the rice grown on the 300 acres of land as a condition precedent to his receiving any consideration for his services. It will be observed that the contract does not stop with merely obligating the appellee to "raise about 300 acres of rice," but it proceeds to

specify the methods to be used, and enumerates the things which the appellee is required to do in order to produce such results, and also specifies certain obligations on the part of the appellant which must be done to contribute to such result, which necessarily imports that the appellee could not use his own means and methods but that he must adopt and use those furnished and specified by the appellant. Furthermore, the appellee had other duties under the contract to perform than those of simply raising 300 acres of rice. Among these was the duty to notify the appellant if he were going to quit raising rice after the termination of the contract. He was to clean all seed rice on a fanning mill and take care of all farming machinery.

Without further enumeration, it suffices to say that the reciprocal duties and obligations imposed by the words of this contract are entirely inconsistent with the relation of employer and independent contractor. If the parties had intended to create such relation the words used were wholly unnecessary and inappropriate. But if we are mistaken in this conclusion when the words of the contract alone are considered, then certainly there can be no doubt of the correctness of our conclusion when the contract is considered in the light of the testimony.

The president of the appellant, among other things, testified that he was to a certain extent in active charge and control of the affairs of appellant with reference to raising rice. He would go over there to see what was going on and then go home and report to the directors of appellant. The appellee "practically looked to all of us for his directions."

The testimony shows that the appellee had occupied virtually the same relation to appellant for four years previous to 1913 except that he received a smaller salary. His relations up to the year 1913 had always been satisfactory, and he had always been paid for his work. Appellee was paid for his services, notwithstanding he failed to produce rice on all the land of appellant under

his contract. In 1912 appellee was operating under the identical contract that he had in 1913 except as to the amount of compensation for his services, and he fell short some forty to forty-five acres that year from the amount he cultivated the year previous. Notwithstanding this fact, the appellant renewed his contract and increased his pay from $4,500 to $5,000.

One of the directors visited appellant's farm in August, 1913. He and the appellee in looking over the farm agreed that seventy acres of the rice had not been irrigated. This director was asked if on that occasion he told appellee that if he (appellee) harvested the crop as it then stood he would get a bonus of $100, and he replied that he might have done so.

The appellee testified that this director had promised him on this occasion, after seeing that seventy acres of the land was not watered, that if he (appellee) raised and harvested the crop like it then stood that he would pay appellee $100.

Another witness testified that he heard the president of appellant say, after the crop was harvested in November, that he was pleased with the results. Witness heard a conversation at that time between the president and the appellee concerning appellee's continuing to work for the appellant during the year 1914.

The appellee testified that in January, 1914, that the appellant tried to make a contract with him for the year 1914.

The president of appellant testified that he was the man who looked after making the payments to the appellee under the contract. On February 7, a short time before the differences between the appellant and the appellee arose, he was down at the rice farm and gave the appellee a check for $800 on account and a due bill for the balance:

"Stuttgart, Ark., Feb. 7, 1914. Paid to Edward Suhs up to date for salary on 1913 contract thirty-five hundred dollars ($3,500), balance fifteen hundred dollars ($1,500). Henry Moecker."

Witness was asked the following question:

"Q. Didn't you tell him that if you had the money in the bank you would pay it all to him then, but as you did not have it he would have to wait until you got back to Homewood?"

"A. I might have said that, yes. But when I came back to Homewood, it was all different. The directors refused, and cautioned me for even paying that $800."

In *Wood* v. *Kelsey,* 90 Ark. 272-7, we said: "Courts may acquaint themselves with the persons and circumstances that are the subject of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described." *Alf Bennett Lbr. Co.* v. *Walnut Lake Cypress Co.,* 105 Ark. 421; *Maloney* v. *Maryland Casualty Co.,* 113 Ark. 178-81; *Arlington Hotel Co.* v. *Rector,* 124 Ark. 90.

Therefore, if it can be said that the language of the above contract is ambiguous, then the above testimony clearly shows that it was not the intention of the appellant to make the appellee an independent contractor and treat with him as such. Having concluded that appellee under the contract was not an independent contractor and that his relation to the appellant was rather that of a servant, it follows that the appellee was not absolutely bound under his contract to produce and deliver to appellant 300 acres of rice before he was entitled to recover under the contract.

The next question, therefore, is, did the appellee exercise reasonable diligence in performing the services required of him under the contract? The appellee admitted that he did not produce and deliver to the appellant rice raised on 300 acres of land, but he alleged that his failure to produce and deliver the rice on that number of acres was caused by the insufficiency of the pumping plants to irrigate the farm and to the inability of the appellee to harvest all of the crop produced because

of the muddy condition of the field due to the extraordinary rainfall.

As to whether or not appellee had exercised ordinary care to comply with the terms of the contract on his part to raise 300 acres of rice and whether or not the failure to do so was caused by his negligence or through failure of the appellant to supply him sufficient pumps and machinery to irrigate the land or through excessive rainfall which precluded appellee from harvesting all the rice that was produced on the land of appellant, were all purely issues of fact. It could serve no useful purpose to set out in detail and discuss the testimony bearing upon these issues. We have carefully examined the instructions in which these issues were sent to the jury, and we find no reversible error in any of them. There was evidence to sustain the verdict.

Affirmed.

CASTLEBERRY v. WEIL.

Opinion delivered March 15, 1920.

1. BILLS AND NOTES—PAYMENT BY INSTALLMENTS.—A note payable "ten months after date" with interest at the rate of 10 per cent., providing for "payments to be made $50 per month until paid" *held* to provide for such installment payments from date of execution, and not to give maker option of paying note in installments after expiration of the ten months.
2. USURY—DEDUCTION OF INTEREST.—Where a note calling for ten per cent. interest was payable ten months from date, but provided for payment of note in installments during the ten-months period, the withholding of interest for the full ten months constituted usury.
3. USURY—DEDUCTION OF INTEREST IN ADVANCE.—Deduction of interest at the highest rate on note payable in 20 months at time of execution renders the note usurious, under Kirby's Digest, section 5382.
4. USURY—INTENTION.—Where the lender's agent, acting within the scope of his authority and with the lender's knowledge, deducted in advance 10 per cent. interest on a $500 note payable in ten months in ten installments of $50 each, it was no defense that

at the time of making the contract nothing was said except that the lender was to receive interest at 10 per cent. and so instructed his agent.

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

Frank Strangways and *Asa C. Gracie,* for appellants.

1. The note was an installment note payable for ten months from date and the withholding of 10 per cent. per annum for the full time was usurious.

2. The note was not commercial paper and not within the exception allowing 10 per cent. interest to be taken in advance; and,

3. Regardless of the fact that the note was apparently legal on its face, the original agreement to pay the loan back at the rate of $50 per month with 10 per cent. interest per annum deducted as interest in advance for the full ten months, makes the note void for usury. 86 Me. 517; 30 Atl. 110; 1 Cush. (Mass.) 16; 59 S. W. 467; 56 *Id.* 693; 107 Ga. 606; 60 Ark. 288; 62 *Id.* 92; 201 S. W. 286.

Ben F. Reinberger and *Mehaffy, Donham & Mehaffy,* for appellee.

There was no usury, as it was not the intention to charge or receive more than the lawful rate of interest. *Thomas* v. *Page,* Fed. Cases No. 13906; 51 Cal. 166; 66 Ga. 286; 11 Ill. 327; 13 Ind. 494; 5 Kan. 541; 129 Mass. 361.

WOOD, J. The appellee instituted this action against the appellant on a promissory note, which reads as follows:

"Little Rock, Ark., Oct. 15, 1915.

"Ten months after date, I, we, or either of us, promise to pay to the order of

Ben B. Weil

Five hundred.....no/100 Dollars,

For value received, negotiable and payable, without de-

falcation or discount, at the.....of .....with interest from maturity at the rate of ten per cent. per annum to *maturity*, and at the rate of ten per cent. per annum from maturity until paid. The makers and indorsers of this note hereby severally waive presentment for payment, notice of nonpayment and protest.

"*Payments to be made* $50.00 *per month until paid. Secured by a real estate mortgage in Pulaski County, Arkansas.*

"C. E. Castleberry.
"Mrs. W. H. Trimm."

The defense was usury. The appellee introduced the note.

Appellant, Castleberry, testified that he borrowed the $500, evidenced by the note, through appellee's agent, Reinberger; that he borrowed the sum of $700 at the time represented by two notes; that one of the notes was made payable in four months and the note in controversy in ten months; that the understanding was that witness was to pay ten per cent.; that he did not know at the time that appellee was going to take out the interest in advance; that he expected to get $700 in cash; that he thought that he was to pay the interest from maturity. Witness was asked if he did not request the privilege of paying it at $50 per month and answered the note was made payable that way.

A mortgage was given to secure the note, which, among other things, recites with reference to the notes as follows: "Until paid at the rate of ten per cent. per annum. Said note being signed by C. E. Castleberry and Mrs. W. H. Trimm, and one note for the sum of two hundred ($200) dollars of even date, herewith payable to the order of the said Ben B. Weil, and to be due and payable four months after date, and bearing interest from maturity until paid at the rate of 10 per cent. per annum. That the said C. E. Castleberry shall have the right to pay fifty ($50) dollars per month upon said notes until the same are fully paid, both principal and interest."

Castleberry further testified that, "The original agreement was that I was to pay $50 per month until paid on the note." Witness could have begun the payments of the $50 per month after maturity and paid it out long before he was sued. Witness had not paid the note.

The appellee in rebuttal testified that he purchased the note through his agent, Mr. Reinberger; that his only instructions to his agent were that the note should be good and bear ten per cent. per annum. Witness did not demand that the interest should be paid in advance. He instructed his agent that he was to receive ten per cent. per annum on the note, as shown by the notes. Witness had not made an alteration on the note nor had he authorized any one else to do so. Witness instructed his agent to be careful so that no claim could be made that compound interest was intended and to make all settlements so that witness was to receive ten per cent. per annum.

Another witness testified that he represented the appellants in negotiating the loan from Weil; that the interest charged on the note was ten per cent. per annum; that there was never anything said by any one either directly or indirectly agreeing to pay any more than ten per cent. Witness, acting for Castleberry, did not agree that more than ten per cent. per annum should be charged on the loan. Witness did not remember who wrote the note, but believed that it was C. E. Castleberry. The regular bank words were used in writing the note. "Ten months after date," and the amount "$500" were written in and signed by Castleberry and Mrs. Trimm. At a later time witness remembered the words "may, at his option, pay the note in installments of $50 per month." Witness did not remember whether this was written in before Castleberry got his money, but it was not on the note when witness first saw it. The note was signed by Castleberry in witness' office and was delivered by Castleberry to appellee's agent, Castleberry collecting the proceeds.

The cause was tried by the court sitting as a jury.

The appellant asked the court to make eight separate specific findings of fact, among them a finding to the effect (7) that the parties to the note intended the words "payments to be made $50 per month until paid" be a part of the note; (8) that the note in suit was discounted in advance at the rate of ten per cent. per annum for a period of ten months. Appellant also asked that the court make certain declarations of law to the effect that the note in suit is not commercial paper, but is a note payable ten months after date in installments of $50 per month, and that the collection of the interest in advance on the full amount of the note was therefore usurious.

The court refused the declarations of law and found generally the facts and the law in favor of the appellee.

The court, therefore, rendered a judgment in favor of the appellee for the amount of the note with interest at the rate of ten per cent. thereon from date. From which judgment is this appeal.

In the left hand corner of the note, which is the foundation of the action, written with ink, are the words "payments to be made $50 per month until paid. Secured by a real estate mortgage in Pulaski County, Arkansas."

The plaintiff (appellee) does not allege that these words were added to the note after the same was signed and he does not allege that the same were no part of the note nor does the testimony of the witness Braham show or tend to show that these words were not written on the note before the same was delivered to the appellee.

We conclude, therefore, that the note in controversy was a plain, negotiable promissory note payable ten months from date with interest at ten per cent. per annum from date, with payments to be made in installments of $50 per month. The withholding or deducting from the face of such note the highest legal rate of interest for the full ten months constituted usury. Because interest at the rate of ten per cent. on $500 payable in monthly installments of $50 per month would amount, for the full period of ten months, to the sum of $23.02, whereas, the

appellee, through his agent, charged and received the sum of $41.67. This was a fraction over 18 per cent. per annum on $500 payable in monthly installments of $50 each for a period of ten months.

The contention by the appellee that the words "payments to be made $50 per month until paid" was a notation written after the note and mortgage were executed and that same were only for the purpose of giving Castleberry the option or privilege of paying off the note in installments after maturity, has no evidence to support it. In the absence of evidence to that effect or evidence showing that these words were a forgery, it must be held that these words were a part of the instrument. The note on its face shows that they are a part of it, and Castleberry testified that they were part of the note, and the testimony of appellee's agent who was instrumental in obtaining the note, shows that Castleberry prepared the note. Therefore, the testimony is undisputed and the conclusion irresistible that these words were a part of the note and expressed the manner in which the principal was to be paid.

But, if counsel for appellee were correct in his contention that these words were intended to give the appellant the option or privilege of paying the note in monthly installments after the same became due, still this could not rescue the appellee from the charge of usury, for if the appellant had the option of paying the note in installments of $50 each after the date named for the maturity of the note, this would in reality make the note payable in twenty months instead of ten months. If the note was payable in twenty months instead of ten, then the same would not be commercial paper and there would be no authority in the law for appellee to receive or discount interest upon such paper in advance. "A contract is usurious whereby interest is deducted at the time of making the loan if the loan is for a period of over twelve months." *Ellis* v. *Terrell,* 108 Ark. 69; section 5382, Kirby's Digest.

The appellee contends that the note was not usurious, because at no time during the making of the contract of sale was there anything said except that the appellee was to receive interest at the rate of 10 per cent. per annum and so instructed his agent Reinberger. But the appellee's contention is not tenable for the reason as we have shown that the note upon its face shows that it was payable in installments of $50 per month, and appellee's agent, before delivering the note to appellee, deducted in advance the full amount of the interest for the entire ten months and gave to the appellants the balance. He does not set up in his complaint or show in his testimony that there was any inadvertence or mistake on the part of his agent in taking the note in the form in which it was executed or in receiving the $41.67 interest in advance.

In *Galveston & H. Inv. Co.* v. *Grymes,* 50 S. W. 467-70, it is said, "Both parties intended the notes to be for the amounts named in them and knew how these amounts were obtained. In the sense that they believed the interest charge to be lawful they did not intend to violate the law, but they did intend to do just what they did, and that was a violation. Their mistake was simply as to legal effect." See, also, *Habach* v. *Johnson,* 132 Ark. 374, and cases there cited.

Reinberger in deducting the interest in advance from the $500 and paying the balance to the appellant was acting within the scope of his authority and appellee was bound by his act and intention. The undisputed circumstances show that the appellee knew what Castleberry had done. See *Jones* v. *Phillippe,* 135 Ark. 578-81.

The court erred in its findings and judgment. The judgment is, therefore, reversed and the cause will be dismissed.

McCULLOCH, C. J. (dissenting). The proper interpretation of the contract is that the makers of the note could not be compelled to pay until ten months after date, and that they should then have the privilege of paying in ten monthly installments. If there is any ambiguity,

the doubt should be resolved in favor of the legality of the contract. The contention of counsel for appellants is that the contract is usurious because the principal sum is payable in monthly installments from date, and interest on the whole sum was deducted in advance. This is not sound for the reason already stated, that according to the proper interpretation the monthly payments were not to begin until after the maturity date of the note. But the majority now hold that the reservation of interest for the period of ten months vitiated the contract for the reason that the privilege of payment in installments after the maturity date takes it out of the operation of the statute which authorizes the reservation in advance of the highest rate of interest for a period of not exceeding twelve months on "any commercial paper, mortgages or other securities." Kirby's Digest, § 5382.

This statute does not confine the authority to commercial paper, but extends it to "mortgages or other securities." In other words, it is lawful to reserve interest at the highest legal rate for twelve months on all obligations to pay money. It is not the character of the paper which determines the right to reserve interest, but it is the length of time for which interest is reserved, and it is expressly declared to be lawful to reserve interest in advance on all such obligations for a period not exceeding twelve months.

But, aside from this particular construction of the statute, the reservation of interest at the highest rate for a period not exceeding twelve months is not rendered unlawful by a further stipulation in the contract for an extension of time of payment beyond that limit. The thing sought to be prohibited by the statute is the reservation of interest for a period exceeding twelve months, and regardless of the time the obligation is to run before maturity, the contract is not rendered unlawful by the taking of interest in advance for a period not exceeding twelve months.

HUMPHREYS, J., joins in this dissent.

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