ARKANSAS REPORTS
VOL. 146

CASES DETERMINED

IN THE

Supreme Court of Arkansas

FROM

NOVEMBER, 1920, TO JANUARY, 1921

T. D. CRAWFORD
REPORTER

PUBLISHED
BY THE
STATE OF ARKANSAS
1921

COPYRIGHT 1921
BY IRA C. HOPPER
SECRETARY OF STATE OF ARKANSAS

AUG 10 1921

LITTLE ROCK
DEMOCRAT PRINTING & LITHOGRAPHING COMPANY
1921

JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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

TABLE

OF CASES REPORTED

A

Aetna Life Ins. Co. v. Little 70
Alexander (Wells Fargo & Co. Express *v.*) 104
Alix Coal Co. *v.* Nelson 574
Ancrum (Troupe *v.*) 36
Anderson *v.* Powell 87
Archillion (Conley *v.*) 64
Arkansas Children's Home Society *v.* Walker 356
Arkansas Light & Power Co. *v.* Paragould 1
Arkansas Nat. Bank (Star Lime & Zinc Mining Co. *v.*) 246
Armour & Co. *v.* Drury 310
Auto Fedan Hay Press Co. (Cheney *v.*) 517
Avery (Moore *v.*) 193

B

Bailey (Moir *v.*) 347
Bailey (Sandlin *v.*) 23
Bain-Adams Co. (Wooten & Co. *v.*) 462
Bank of Brinkley (Stoops *v.*) 127
Barlow *v.* Cain 160
Beattie *v.* Smith 532
Becker Provision Co. *v.* Parker Hardware Co. 539
Betts (Hines *v.*) 555
Board of Directors of Long Prairie Levee District (Dickson *v.*) 14
Boatmen's Bank (Felker *v.*) 186
Bolinger (Oliver *v.*) 242
Bonham *v.* Brotherhood of Railroad Trainmen 117
Brinkley Township Road District *v.* Dixon Township Road District 167
Brotherhood of Railroad Trainmen (Bonham *v.*) . . 117
Brotherhood of Railroad Trainmen *v.* Merideth . . . 140
Burns (Hall *v.*) 157

C

Cain (Barlow *v.*) 160
Cain *v.* Stacy 55
Calaway (Holt *v.*) 526
Campbell *v.* Lux 397
Carter *v.* Randolph County 221
Central Coal & Coke Co. *v.* Fitzgerald 109
Cheney *v.* Auto Fedan Hay Press Co. 517
Cole (Jackson *v.*) 565
Common School District No. 52 *v.* Rural Special School District No. 11 32
Comstock *v.* Comstock 266
Conley *v.* Archillion 64
Courtesy Flour Co. *v.* Westbrook 17
Cox *v.* Fisher 223
Cruce (Hill *v.*) 61

D

Davis (Evans *v.*) 595
Davis *v.* Straus 282
Deason & Keith (Rock *v.*) 124
De Queen & Eastern Rd. Co. *v.* Park 350
Dewberry *v.* Furst & Thomas 26
Dickson *v.* Board of Directors of Long Prairie Levee District 14
Dixon Township Road District (Brinkley Township Road District *v.*) 167
Dozier *v.* Union Bank & Trust Co. 386
Drainage District No. 5 of Lonoke County *v.* Kochtitzky 495
Drury (Armour & Co. *v.*) 310

E

Elliott (White River Lumber Co. *v.*) 551
Ellis & Co. *v.* Farrell 274
Emerson-Brantingham Imp. Co. (Weaver *v.*) 379
Evans *v.* Davis 595

F.

Farrell (Ellis & Co. *v.*) 274
Farrell *v.* Oliver 599
Felder *v.* Hall Brothers Co. 94
Felker *v.* Boatmen's Bank 186
Fisher (Cox *v.*) 223
Fitzgerald (Central Coal & Coke Co. *v.*) 109
Ford (Ramey-Milburn Co. *v.*) 563
Ford (Wm. R. Moore Dry Goods Co. *v.*) 227
Fort Smith Rim & Bow Co. *v.* Qualls 475
Fowler & Hill (Manley Carriage Co. *v.*) 295
Fraser *v.* Keck 255
Frost (Missouri Pac. Rd. Co. *v.*) 472
Furst & Thomas (Dewberry *v.*) 26

G

Gaikens (Spurlock *v.*) 50
Grand Lodge F. & A. M. *v.* Taylor 316
Griffin (Morris *v.*) 439
Groschner *v.* Winton 520

H

Hale *v.* State 579
Hall *v.* Burns 157
Hall Brothers Co. (Felder *v.*) 94
Harris *v.* Irby 403
Hawkeye Tire & Rubber Co. *v.* McFarlin 491
Hawkins *v.* State 298
Henderson (School Districts Nos. 14 & 15 *v.*) 338
Hill *v.* Cruce 61
Hill *v.* Imboden 99
Hines *v.* Betts 555
Hines *v.* Mauldin 170
Hines *v.* Patterson 367
Hinkle (Vaughan *v.*) 149
Hodges (Southwestern Bell Telephone Co. *v.*) 585
Hogue *v.* Sparks 174
Holt *v.* Calaway 526

I

Imboden (Hill *v.*) 99
Ingram (Security Life Ins. Co. *v.*) 393
Irby (Harris *v.*) 403

J

Jacobs *v.* Jacobs 45
Jackson *v.* Cole 565
Jones (Murray Transfer Co. *v.*) 153

K

Kansas City So. Ry. Co. *v.* Rogers 232
Keck (Fraser *v.*) 255
Kelley *v.* State 509
Kelly Handle Co. *v.* Shanks 208
King *v.* Stevens 443
Knuckles *v.* Pressley 216
Kochtitzky (Drainage District No. 5 of Lonoke County *v.*) 494

L

Lee *v.* Straughan 504
Lewis *v.* Owen 469
Little (Aetna Life Ins. Co. *v.*) 70
Lux (Campbell *v.*) 397

M

McCracken *v.* State 300
McCuen (O'Kane *v.*) 236
McFarlin (Hawkeye Tire & Rubber Co. *v.*) 491
Manley Carriage Co. *v.* Fowler & Hill 295
Marsh *v.* State 77
Mauldin (Hines *v.*) 170
Maxwell (Mosby-Dennison Co. *v.*) 482
Merideth (Brotherhood of Railroad Trainmen *v.* . . . 140
Missouri Pac. Rd. Co. *v.* Frost 472
Moir *v.* Bailey 347

Moore *v.* Avery 193
Morris *v.* Griffin 439
Mosby-Dennison Co. *v.* Maxwell 482
Murray Transfer Co. *v.* Jones 153

N

Nalley (Terry Dairy Co. *v.*) 448
Nelson (Alix Coal Co. *v.*) 574
Nelson *v.* Nelson 362

O

O'Kane *v.* McCuen 236
Oliver *v.* Bolinger 242
Oliver (Farrell *v.*) 599
Owen (Lewis *v.*) 469

P

Paragould (Arkansas Light & Power Co. *v.*) 1
Park (De Queen & Eastern Rd. Co. *v.*) 350
Parker Hardware Co. (Becker Provision Co. *v.*) ... 539
Patterson (Hines *v.*) 367
Payne *v.* Wood 286
Pearrow *v.* State 182, 201
Pressley (Knuckles *v.*) 216

Q

Qualls (Fort Smith Rim & Bow Co. *v.*) 475

R

Rainwater (Standard Sewing Machine Co. *v.*) 81
Ramey-Milburn Co. *v.* Ford 563
Randolph County (Carter *v.*) 221
Reinman (Simpson *v.*) 417
Reves (Ruddell *v.*) 259
Robertson (Western Union Telegraph Co. *v.*) 406
Robinson (Stover *v.*) 262
Rock *v.* Deason & Keith 124

Rogers (Kansas City So. Ry. Co. *v.*) 232
Ruddell *v.* Reves 259
Rural Special School District No. 11 (Common School District No. 52 *v.*) 32

S

Sandlin *v.* Bailey 23
School Districts Nos. 14 and 58 *v.* Henderson 338
Security L. Ins. Co. *v.* Ingram 393
Shanks (Kelly Handle Co. *v.*) 208
Simpson *v.* Reinman 417
Sims (W. P. Brown & Sons Lbr. Co. *v.*) 253
Smith (Beattie *v.*) 532
Southwestern Bell Telephone Co. *v.* Hodges 585
Sparks (Hogue *v.*) 174
Spurlock *v.* Gaikens 50
Stacy (Cain *v.*) 55
Standard Sewing Mach. Co. *v.* Rainwater 81
Star Lime & Zinc Mining Co. *v.* Arkansas Nat. Bank 246
State (Hale *v.*) 579
State (Hawkins *v.*) 298
State (Kelly *v.*) 509
State (McCracken *v.*) 300
State (Marsh *v.*) 77
State (Pearrow *v.*) 182, 201
State (Thrash *v.*) 547
State (Ware *v.*) 321
Stevens (King *v.*) 443
Stoops *v.* Bank of Brinkley 127
Stover *v.* Robinson 262
Straughan (Lee *v.*) 504
Straus (Davis *v.*) 282
Sudbury (Superior Oil & Gas Co. *v.*) 319
Superior Oil & Gas Co. *v.* Sudbury 319

T

Tatum *v.* Wallis 287
Taylor (Grand Lodge F. & A. M. *v.*) 316
Terry Dairy Co. *v.* Nalley 448

Thrash *v.* State..... 547
Troupe *v.* Ancrum..... 36

U

Union Bank & Trust Co. (Dozier *v.*)..... 386

V

Vaughan *v.* Hinkle..... 149

W

Walker (Arkansas Children's Home Society *v.*)... 357
Wallis (Tatum *v.*)..... 236
Ware *v.* State..... 321
Weaver *v.* Emerson-Brantingham Imp. Co..... 379
Wells Fargo & Company Express *v.* Alexander.... 104
Westbrook (Courtesy Flour Co. *v.*)..... 17
Western Union Telegraph Co. *v.* Robertson..... 406
White River Lumber Co. *v.* Elliott..... 551
William R. Moore Dry Goods Co. *v.* Ford..... 227
Winton (Groschner *v.*)..... 520
Wood (Payne *v.*)..... 236
Wooten & Co. *v.* Bain-Adams Co..... 462
W. P. Brown & Sons Lbr. Co. *v.* Sims..... 253

TABLE OF CASES

CITED BY THE COURT

A

Ackerman *v.* Santa Rosa-Vallejo Tanning Co., 237 Fed. 369 21
Adams' Estate, *In re*, 140 N. W. 832 274
Aetna Life Ins. Co. *v.* Taylor, 128 Ark. 155 75
A. L. Clark Lumber Co. *v.* Northcutt, 95 Ark. 291 116
A. L. Clark Lumber Co. *v.* St. Coner, 97 Ark. 358 377
Alexander *v.* Gordon, 101 Fed. 91 193
Alleghany Improvement Co. *v.* Weir, 96 Ark. 500 116
Allen *v.* Morris, 29 A. & E. Ann. Cas. 1310 571
Allen *v.* Roper, 75 Ark. 104 261
American Bldg. & L. Assoc. *v.* Warren, 101 Ark. 163 349
American Car & Foundry Co. *v.* Armentraut, 214 Ill. 509 459
Angle *v.* Chicago, St. Paul, etc., Ry. Co., 151 U. S. 1 181
Appleby's Estate, *In re*, 111 N. W. 305 272
Arkansas Natural Gas Co. *v.* Lee, 115 Ark. 288 107
Arkansas Southwestern Ry. Co. *v.* Wingfield, 94 Ark. 75 516
Armstrong *v.* Norris, 247 Fed. 253 231
Augusta *v.* Smith, 117 Ark. 93 9
Awbrey *v.* Hoopes, 145 Ark. 502 266
Ayres *v.* Anderson-Tully Co., 89 Ark. 160 494

B

Bailey *v.* Rockafellow, 57 Ark. 219 252
Ballard *v.* Hunter, 74 Ark. 174 ..... 430, 436
Bank *v.* Magness, 11 Ark. 344 193
Bank of Newport *v.* Cook, 60 Ark. 288 59
Bank of United States *v.* Owens, 2 Pet. 527 63
Banks *v.* State, 143 Ark. 154 324
Banker *v.* Campbell-Ratcliff Land Co., 167 Pac. 468 508
Barton-Parker Mfg. Co. *v.* Taylor, 78 Ark. 586 87
Bayou Meto Drainage Dist. *v.* Chapline, 143 Ark. 446 500
Beckett *v.* Whittington, 92 Ark. 230 285
Beckwith *v.* Talbot, 95 Ark. 289 11
Bell *v.* State, 120 Ark. 530 514
Beneaux *v.* Sparks, 144 Ark. 23 ..... 43, 44
Berbridge *v.* Gotch, 107 Ark. 136 265
Berdos *v.* Tremont & Suffolk Mills, Ann. Cas. 1912 B. 797
Birmingham *v.* Rogers, 46 Ark. 254 300
Briscoe *v.* Madden, 17 Ark. 533 193

Black *v.* Brinkley, 54 Ark. 375 169
Bloomer *v.* State, 75 Ark. 297 513
Bob *v.* Powers, 19 Ark. 442 231
Bonham *v.* Brotherhood of Railway Trainmen, 146 Ark. 117 146
Booe *v.* Vinson, 104 Ark. 439 165
Bowers *v.* Hutchinson, 67 Ark. 15 273
Boyd *v.* Nebraska, 143 U. S. 135 331
Boyd *v.* Roane, 49 Ark. 397 599
Brake *v.* Sides, 95 Ark. 74 573
Brashear *v.* Taylor, 109 Ark. 281 570
Brewer *v.* Keeler, 42 Ark. 289 570
Brickey *v.* Continental Gin Co. 113 Ark. 15 31
Brodie *v.* Fitzgerald, 57 Ark. 445 318
Brotherhood of American Yeomen *v.* Fordham, 120 Ark. 605 148
Brown *v.* Bocquin, 57 Ark. 97 570
Brown *v.* Lemay, 101 Ark. 95 227
Brown *v.* State, 108 Ark. 339 186
Brown & Hackney *v.* Daubs, 139 Ark. 53 135
Browne *v.* Bentonville, 94 Ark. 80 9
Brownfield *v.* So. Car., 189 U. S. 427 331
Brunson *v.* Board of Directors, 107 Ark. 24 554
Bryan *v.* Bryan, 62 Ark. 79 271
Buford *v.* Briggs, 96 Ark. 150 599
Bullock *v.* State, 47 Atl. 62 332
Burbridge *v.* Arkansas Lbr. Co., 118 Ark. 94 539
Burel *v.* East Arkansas Lbr. Co., 129 Ark. 58 102
Burke *v.* South Pac. Rd. Co., 234 U. S. 669 508
Bush *v.* Kentucky, 107 U. S. 110 332
Business Men's Acc. Assn. *v.* Cowden, 131 Ark. 419 75

C

Cabell *v.* Board of Imp., 124 Ark. 278 424
Cache Valley Lbr. Co. *v.* Culver Co., 93 Ark. 383 69
Cain *v.* Collier, 135 Ark. 291 44
Caldwell *v.* Cunningham, 162 Ky. 275 21
Capitol Food Co. *v.* Mode & Clayton, 112 Ark. 165 386
Carr *v.* State, 43 Ark. 99 550
Carroll *v.* Bell, 237 Ill. 332 508
Carroll *v.* Jacks, 43 Ark. 462 227
Carter *v.* Texas, 177 U. S. 442 ..... 329, 330, 331, 332, 337
Cassady *v.* Norris, 118 Ark. 449 ..... 424, 429, 434, 438
Castleberry *v.* State, 69 Ark. 346 ..... 327, 331
Central Coal & Coke Co. *v.* Graham, 129 Ark. 550 578
Central Lbr. Co. *v.* Braddock Land & Lbr. Co., 84 Ark. 560 103
Cherokee Construction Co. *v.* Harris, 92 Ark. 260 507
Chicago Mill & Lbr. Co. *v.* Bryeans, 132 Ark. 282 107
Chicago, R. I. & P. Ry. Co. *v.* Batsel, 100 Ark. 526 560
——— *v.* McIlroy, 92 Ark. 600 36

Childers *v.* Commonwealth, 171 S. W. 149 513
Citizens Bank *v.* Commercial Nat. Bank, 107 Ark. 142 230
Clark *v.* New England Tel. & Tel. Co., 118 N. E. 348 417
Clay County *v.* Bank of Knobel, 105 Ark. 450 255
Clay County *v.* Brown Lumber Co., 90 Ark. 417 255
Clements *v.* Knight & Co., 125 Ark. 488 18
Cocks *v.* Simmons, 55 Ark. 104 570
Colliers *v.* State, 60 S. W. 42 332
Colorado Fuel & Iron Co. *v.* Adams, 60 Pac. 1125 258
Commonwealth *v.* Hollis, 49 N. E. 632 461
Continental Gin Co. *v.* Benton, 104 Ark. 367 520
Cribbs *v.* Walker, 74 Ark. 104 102
Crittenden Lumber Co. *v.* McDougal, 101 Ark. 390 ..... 430, 437
Cumbie *v.* St. Louis, I. M. & S. Ry. Co., 105 Ark. 415 356
Curtis v. Haynes Sp. School Dist. H., 128 Ark. 129 346

D

Dale *v.* Hall, 64 Ark. 221 182
Dana *v.* Boyd, 2 J. J. Marsh 588 21
Daniels *v.* Brodie, 54 Ark. 216 ..... 405, 406
Daniels *v.* Gordy, 84 Ark. 218 251
Darnell *v.* Bibb, 143 Ark. 580 44
Davis *v.* Gaines, 28 Ark. 440 520
Davis *v.* Houghteller, 33 Neb. 582 107
De Queen *v.* Fenton, 100 Ark. 504 36
Dewein *v.* State, 114 Ark. 472 ..... 206, 207, 328
Dickerson *v.* Tri-County Levee District, 138 Ark. 471 16
Dickinson *v.* Clibourn, 125 Ark. 101 245
Dickinson *v.* Housley, 130 Ark. 259 554
Dodson *v.* Butler, 101 Ark. 416 599
Donald *v.* Smith, 95 Ark. 523 273
Douglass *v.* Sharp, 52 Ark. 113 199
Drake *v.* Eubanks, 61 Ark. 120 227
Dugan *v.* Kelly, 75 Ark. 55 136
Dunlap *v.* Moose, 98 Ark. 235 443

E

Earl *v.* Harris, 99 Ark. 112 539
Edgar *v.* State, 37 Ark. 219 480
Elk Cotton Mills *v.* Grant, 48 L. R. A. 656 454
Ellis *v.* Terrell, 109 Ark. 69 59
Emerson *v.* Stevens Grocer Co., 95 Ark. 421 126
Emerson *v.* Stevens Grocer Co., 105 Ark. 575 126
Eubanks *v.* Futrell, 112 Ark. 437 ..... 34, 36
Evans *v.* Robberson, 1 Am. St. Rep. 701 429
Evans *v.* St. Louis, I. M. & S. Ry. Co., 87 Ark. 628 562
Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556 393

F

Farmers' & Merchants' Bank *v.* Layson Lbr. Co., 87 Ark 607 ..... 426, 430, 438
Fergus *v.* Russell, 277 Ill. 20 603
Files *v.* Reynolds, 66 Ark. 314 97
Fitzpatrick *v.* Owens, 124 Ark. 167 272
Fleener *v.* State, 58 Ark. 98 186
Fletcher *v.* Lyon, 93 Ark. 10 539
Ford *v.* Ford, 100 Ark. 518 516
Forschler *v.* Cash, 128 Ark. 492 97
Forsythe *v.* Russell Co., 148 Ky. 429 21
Fortenberry *v.* Gaunt, 69 Ark. 433 221
Foster *v.* Bradney, 143 Ark. 319 468
Francis *v.* McNeal, 228 U. S. 695 231
Franklin *v.* State, 85 Ark. 534 ..... 331, 334
Fullerton *v.* Henry Wrape Co., 105 Ark. 434 215

G

Gaines *v.* Hennen, 24 How 553 48
Gainus *v.* Cannon, 42 Ark. 503 278
Ganns *v.* State, 132 Ark. 481 310
Garland Power Co. *v.* State Board, 94 Ark. 423 472
Gates *v.* McPeace, 106 Ark. 583 93
Gibson *v.* Mississippi, 162 U. S. 566 ..... 328, 329
Gibson *v.* People, 99 Pac. 333 480
Gilbreath *v.* Teufel, 15 N. Dak. 153 428
Glenn *v.* Liggett, 135 U. S. 533 193
Glenwood Cemetery Land Co. *v.* Routt, 17 Col. 156 258
Green *v.* State, 64 Ark. 532 516
Greer *v.* Laws, 56 Ark. 35 69
Greer *v.* Turner, 36 Ark. 17 475
Griffin *v.* Long, 96 Ark. 269 251
Griffin *v.* Rhoton, 85 Ark. 89 602
Griggs *v.* Dodge, 2 Day 28 447
Grooms *v.* Bartlett, 123 Ark. 255 602
Guernsey v. West Coast Lbr. Co., 25 Pac. 414 468

H

Habach *v.* Johnson, 132 Ark. 374 59
Hamby *v.* Brooks, 86 Ark. 428 520
Hawkins *v.* State, 133 Ark. 38 514
Hannaford *v.* Dowdle, 75 Ark. 127 273
Hanover Nat. Bank *v.* First Nat. Bank, 109 Fed. 421 192
Hardie *v.* Bissell, 80 Ark. 74 102
Harold *v.* Hill, 19 Ark. 103 ..... 226, 227
Harper *v.* State, 91 Ark. 422 460

Harrington *v.* State, 90 Ark. 596 335
Harris *v.* Beasley, 32 A. & E. Am. Cas. 949 231
Harrison *v.* Abington, 140 Ark. 115 293
Harrison *v.* State, 140 Ark. 46 335
Harrison *v.* Business Men's Acc. Ass'n, 133 Ark. 163 75
Haskins *v.* Royster, 70 N. C. 601 181
Haynes *v.* Harper, 25 Ark. 541 227
Hazen *v.* Wilhelmie, 93 N. W. 920 21
H. D. Williams Cooperage Co. *v.* Kittrell, 107 Ark. 341 116
Headrick *v.* H. D. Williams Cooperage Co., 97 Ark. 553 212
Henry *v.* Butler, 123 Pa. 742 272
Hickey *v.* State, 114 Ark. 526 36
Hill *v.* Echols, 140 Ark. 474 ..... 292, 294
Hines *v.* Johnson, 145 Ark. 592 563
Hines *v.* Mauldin, 146 Ark. 170 ..... 235, 378
Hobson *v.* State, 121 Ark. 79 328
Hollingsworth *v.* State, 53 Ark. 387 206
Home Ins. Co. *v.* N. Little Rock Ice & Electric Co., 66 Ark. 538 280
Honnett *v.* Honnett, 33 Ark. 156 50
Horn *v.* Baker, 140 Ark. 173 222
Horner *v.* Hamner, 49 Ark. 134 231
Hot Springs School Dist *v.* Sisters of Mercy, 84 Ark. 497 319
Howard *v.* State, 47 Ark. 431 306
Huddleston *v.* Coffman, 90 Ark. 219 222
Hudson *v.* McGuire, 223 S. W. 1101 508
Hunton *v.* Luce, 60 Ark. 146 221

I

Independent Order etc. *v.* Wilkes, 98 Miss. 179 121
Ingham Lumber Co. *v.* Ingersoll, 93 Ark. 447 539
Isom *v.* Oil Co., 147 Cal. 659 508

J

Jackson *v* Rotax Motor Co., 20 Am. & Eng. Ann. Cas. 528 468
James *v.* Gibson, 73 Ark. 440 265
J. C. Lysle Milling Co. *v.* Sharp, 207 S. W. 72 126
J. D. Kilgore Lumber Co. *v.* Halley, 140 Ark. 448 546
Jensen *v.* Lehigh Valley Rd., 255 Fed. 795 173
Jobe *v.* Urquhart, 102 Ark. 470 258
Johnson *v.* Missouri Pac. Rd. Co., 139 Ark. 507 135
Johnson *v.* West, 89 Ark. 604 169
Jones *v.* Malvern Lbr. Co., 58 Ark. 125 215
Jones *v.* McEwan, 91 Ky. 377 21
Jones *v.* Phillips, 59 Ark. 35 310
Jones *v.* Stanley, 76 N. C. 355 181
Jonesboro Hardware Co. *v.* Western Tie & Timber Co., 134 Ark. 543 546
Jordan *v.* State, 141 Ark. 504 206
Joseph *v.* Baker, 95 Ark. 150 227

K

Kansas City So. Ry. Co. *v.* Cobb, 118 Ark. 569
——— *v.* Rogers, 146 Ark. 232 378
Kelly *v.* State, 102 Ark. 657 335
Kelly's Heirs *v.* McGuire, 15 Ark. 555 402
Kennedy *v.* State, 117 Ark. 113 48
——— *v.* State, 37 Sou. 90 513
Kerr *v.* Smith, 5 B. Mon. 533 21
King, *Ex parte*, 141 Ark. 213 360
Kizer Lbr. Co. *v.* Mosely, 56 Ark. 544 102
Klondike Lbr. Co. *v.* Williams, 71 Ark. 334 261
Knickerbocker Ice Co. *v.* Gardner Dairy Co., 16 L. R. A. (N. S.) 746 181
Knights of Maccabees *v.* Shields, 49 L. R. A. (N. S.) 853 147
Koester *v.* Rochester Candy Works, 19 L. R. A. (N. S.) 783 461
Krause *v.* Thompson, 138 Ark. 571 344

L

Lanigan *v.* North, 69 Ark. 62 321
Lavelle *v.* Northern Pac. Rd. Co., 172 N. W. 918 235
Lee County *v.* Robertson, 66 Ark. 82 602
Lee Line Steamers *v.* Craig, 111 Ark. 550 280
Lanahan *v.* Pittston Coal Mining Co., 12 L. R. A. (N. S.) 461 458-460
Leonard *v.* State Exchange Bank, 236 Fed. 316 192
Lincoln Reserve Life Ins. Co. *v.* Smith, 134 Ark. 245 146
Liston *v.* Chapman & Dewey Land Co., 77 Ark. 116 539
Little Rock & F. S. Rd. Co. *v.* Miles, 40 Ark. 323 107
Little Rock, M. R. & T. Ry. *v.* Manees, 49 Ark. 248 193
Littlejohn *v.* State, 76 Ark. 481 551
Lloyd *v.* Mills, 32 L. R. A. (N. S.) 702 571
Long *v.* State, 76 Ark. 493 513
Louisville, H. & St. L. R. Co. v. Lyons, 48 L. R. A. (N. S.) 666 457, 459
Luck *v.* Adkins, 53 Ark. 303 598

M

McCall *v.* Lee, 11 N. E. 522 447
McCormick Harvesting Machine Co. *v.* Chesson, 33 Minn. 32 21
McCormick Lumber Co. *v.* Winam, 105 Wis. 945 21, 22
McCowan *v.* State, 125 Ark. 597 328
McCoy *v.* State, 46 Ark. 141 551
McCray *v.* Cox, 105 Ark. 47 343
McEvoy *v.* Tucker, 115 Ark. 430 402
McFadden *v.* Wetherbee, 29 N. W. 881 468
McLemore *v.* Western Union Tel. Co., 171 Pac. 390 415
McKneeley *v.* Terry, 61 Ark. 527 570
McGraw *v.* State, 113 Ark. 301 582
McLeod *v.* Griffis, 51 Ark. 1 285

McMahan *v.* Ruble, 135 Ark. 85 222
Mahoney *v.* Roberts, 86 Ark. 130 182
Mallory *v.* State, 141 Ark. 496 551
Mahoney *v.* Maryland Casualty Co., 113 Ark. 174 75
Malvern *v.* Cooper, 108 Ark. 24 10
Mammoth Vein Coal Co. *v.* Bubliss, 83 Ark. 567 459
Manley Carriage Co. *v.* Fowler, 128 Ark. 299 296
Martin *v.* Gwinn, 90 Ark. 44 599
Marvin *v.* Marvin, 52 Ark. 425 50
Marx *v.* Hanthorn, 148 U. S. 172 431
Mears *v.* State, 84 Ark. 136 186
Mell *v.* State, 133 Ark. 197 549
Merritt *v.* School Dist., 54 Ark. 468 334
Metropolitan Casualty Co. *v.* Chambers, 136 Ark. 84 75
Midgett *v.* Kerby, 129 Ark. 301 493
Miller *v.* Moore, 10 S. E. 360 468
Milwee *v.* Tribble, 139 Ark. 574 292
Missouri Pac. Rd. Co. *v.* Ault, 140 Ark. 572 ..... 172, 173, 234, 235, 378
Mitchell *v.* Clarks, 110 U. S. 633 331
Monk *v.* Little, 122 Ark. 7 441
Morgan *v.* McCuin, 96 Ark. 512 349
Murray *v.* Miller, 112 Ark. 227 385

N

National Americans *v.* Ritch, 121 Ark. 185 148
Neal *v.* Delaware, 103 U. S. 370 ..... 329, 330
Neely *v.* Rembert, 71 Ark. 91 227
Nesmith *v.* Platt, 114 N. W. 1053 272
Newmarket *v.* Pendergrast, 24 N. H. 54 572
Nophsker *v.* Supreme Council, 7 A. & E. Ann. Cas. 646 147
Norman *v.* Fife, 61 Ark. 333 221
Northern Supply Co. *v.* Wangard, 117 Wis. 624 21
Norton *v.* Lakeside Sp. School Dist., 97 Ark. 71 344
Nye *v.* Dalton, 177 Mass. 549 116

O

O'Bannon *v.* Riff, 7 Dana 320 21
Oliver *v.* Morton, 36 Ark. 134 604
O'Neal *v.* Lyric Amusement Co., 119 Ark. 454 102
Ouachita Power Co. *v.* Donaghey, 106 Ark. 48 472
Ozark & Cherokee Central Ry. Co. *v.* Ferguson, 92 Ark. 254 385

P

Parker *v.* Commonwealth, 96 Ark. 212 516
Pass School Dist *v.* Hollywood City School Dist., 26 L. R. A. (N. S.) 485 343

Patterson *v.* Collison, 135 Ark. 108 472
Patterson *v.* Gaines, 6 How. 550 408
Patterson Coal Co. *v.* Poe, 81 Ark. 343 459
Pattison *v.* Smith, 94 Ark. 588 ..... 430, 437
Patty *v.* Goolsby, 51 Ark. 61 ..... 199, 446
Pekin Stave & Mfg. Co. *v.* Ramey, 104 Ark. 1 212
Pembroke *v.* Logan, 71 Ark. 364 102
People *v.* Foley, 64 Mich. 148 516
Peter Anderson & Co. *v.* Diaz, 77 Ark. 606 107
Pewett *v.* Richardson, 79 Ark. 66 23
Phillips *v.* State, 99 S. E. 874 513
Pillow *v.* Sentelle, 49 Ark. 430 598
Plunkett *v.* State, 72 Ark. 409 551
Pollock *v.* Steinke, 100 Ark. 228 227
Pounders *v.* State, 37 Ark. 399 461

Q

Quinn *v.* Higgins, 63 Wis. 664 516

R

Radford *v.* Samstag, 113 Ark. 185 265
Railway *v.* Shinn, 52 Ark. 93 136
Randolph *v.* Nichol, 74 Ark. 93 334
Real Estate Bank *v.* Rawdon, 5 Ark. 558 69
Rice *v.* Felker, 110 Ark. 70 167
Richeson & National Bank of Mena, 96 Ark. 594 546
Rieger *v.* Schaible, 81 Neb. 33 271
Rinehart & Gore *v.* Rowland, 139 Ark. 90 334
Robertson *v.* Derrick, 113 Ark. 41 258
Robinson *v.* Indiana & Ark. Lbr. Co., 128 Ark. 550 319
Robinson *v.* St. Louis, I. M. & S. Ry. Co., 111 Ark. 208 107
Rogers *v.* Alabama, 192 U. S. 226 ..... 331, 332
Rolin *v.* R. J. Reynolds, 7 L. R. A. (N. S.) 335 459
Rosenfield *v.* Swenson, 45 Minn. 190 21
Rowland *v.* Taylor, 134 Ark. 183 50
Ruddell *v.* Rutherford, 145 Ark. 49 ..... 290, 294
Rural Special School Dist. *v.* Special School Dist., 123 Ark. 570 346
Ryan *v.* Batchelor, 95 Ark. 375 227
——— *v.* Fielder, 99 Ark. 374 334

S

St. Louis & S. F. Rd. Co. *v.* Wyatt, 84 Ark. 193 107
St. Louis, I. M. & S. Ry. Co. *v.* Baker, 110 Ark. 241 578
——— *v.* Beidler, 45 Ark. 17 11
——— *v.* Cumbie, 101 Ark. 172 354
——— *v.* Evans, 96 Ark. 547 562
——— *v.* Grant, 75 Ark. 589 106
——— *v.* Roddy, 110 Ark. 161 560
——— *v.* Rogers, 93 Ark. 564 215

St. Louis S. W. Ry. Co. *v.* Lewis, 91 Ark. 343 212
——— *v.* Thompson, 102 Tex. 89 121
Sanders *v.* Miller, 79 Ky. 520 272
Scales *v.* Wren, 127 S. W. 164 429
School Dist. *v.* Howe, 62 Ark. 481 319
——— *v.* Parker, 123 Ark. 317 345
——— *v.* Rural Sp. School Dist., 128 Ark. 383 343
Scogin *v.* Stacy, 20 Ark. 265 273
Scott, White & Co. *v.* Henry & Cunningham, 13 Ark. 112 93
Scroggin *v.* Hammett Grocer Co., 66 Ark. 183 266
Sexton *v.* Crebbins, 80 Ark. 519 598
Shane *v.* Dickson, 111 Ark. 353 446
Shapard *v.* Mixon, 122 Ark. 530 573
Singer *v.* Naron, 79 Ark. 446 574
Sloan *v.* Lawrence County, 134 Ark. 125 ..... 222, 223
Smead *v.* Chancellor, 71 Ark. 507 262
Smith *v.* McNeal, 109 U. S. 426 193
Smith *v.* Mississippi, 162 U. S. 592 329
Smith *v.* Missouri Pac. Rd. Co., 138 Ark. 589 560
Smith *v.* Packard, 98 Fed. 793 98
Snider *v.* Martin, 55 Ark. 139 53
Solmson *v.* Deese, 142 Ark. 189 ..... 226, 227
Southern Anthracite Coal Co. *v.* Bowen, 93 Ark. 140 578
Southwestern Telephone Co. *v.* King, 103 Ark. 160 594
Speer *v.* State, 130 Ark. 457 335
Spencer, *Re*, 117 Am. St. 137 454
Standard Life & Acc. Ins. Co. *v.* Schmaltz, 66 Ark. 595 75
Starnes *v.* Albion Mfg. Co., 17 L. R. A. (N. S.) 602 454
State *v.* Dickson, 190 S. W. 290 513
——— *v.* Johnson, 172 Pa. 189 513
Stilley *v.* Vogler, 14 Ohio 610 271
Stone *v.* Suckle, 145 Ark. 137 160
Strauder *v.* West Va., 100 U. S. 303 329
Stubbs *v.* Pitts, 84 Ark. 160 474
Supreme Lodge K. of P. *v.* Robbins, 70 Ark. 364 281
Sweeden *v.* Atkinson Imp. Co., 93 Ark. 397 107
Swinney *v.* Klippert, 50 S. W. 841 50

T

Taber *v.* Packwood, 2 Day 52 447
Tallman *v.* Lewis, 124 Ark. 6 62
Taylor *v.* Grand Lodge, 11 A. & E. Ann. Cas. 260 147
——— *v.* Grand Lodge, 11 L. R. A. (N. S.) 92 147
——— *v.* McClintock, 87 Ark. 243 516
Terry Dairy Co. *v.* Nalley, 146 Ark. 448 ..... 479, 481
Thomas *v.* Gray, 94 Ark. 9 468
Thompson *v.* Crenshaw, 113 Ark. 169 23

Thormon's Estate, *In re*, 144 N. W. 5 272
Tillman *v.* State, 121 Ark. 322 ..... 328, 334, 338
Triplett *v.* Mansur, 68 Ark. 230 251
Turnbull *v.* Richardson, 69 Mich. 400 516

U

Union & Mercantile Trust Co. *v.* Hudson, 143 Ark. 519 199
United States *v.* Gale, 109 U. S. 65 333
Upham *v.* Dodd, 24 Ark. 545 300

V

Van Etten *v.* Daugherty, 83 Ark. 534 432
Vanness *v.* Vanness, 128 Ark. 543 265
Vaughan *v.* Hinkle, 131 Ark. 197 151
Virginia, *Ex parte*, 100 U. S. 339 332
Virginia *v.* Reaves, 100 U. S. 313 329
Von Berg *v.* Goodman, 85 Ark. 605 13

W

Wakin *v.* Wakin, 119 Ark. 509 182
Waldo *v.* Thweatt, 64 Ark. 126 266
Waldron *v.* Taenzer, 79 Ark. 16 599
Walker *v.* Mathis, 128 Ark. 317 167
——— *v.* Peay, 22 Ark. 103 193
Ward *v.* Blythe, 92 Ark. 208 102
Ward Furniture Mfg. Co. *v.* Isbell, 81 Ark. 549 467
Warden *v.* Middleton, 110 Ark. 215 23
Washington *v.* Moore, 84 Ark. 220 443
Watkins *v.* Greer, 52 Ark. 65 136
——— *v.* Martin, 69 Ark. 311 193
Weatherton *v.* Taylor, 124 Ark. 579
Webber *v.* Rodgers, 128 Ark. 25 393
Weis *v.* Meyer, 55 Ark. 18 136
Welch *v.* Welch, 132 Ark. 227 44
Wells Fargo & Co. *v.* Baker Lumber Co., 107 Ark. 415 493
Wescott *v.* Cady, 5 Johns Ch. 334 447
Western Union Telegraph Co. *v.* Ivey, 102 Ark. 246 ..... 592, 595
Whitehead *v.* State, 121 Ark. 390 582
Whitney *v.* State, 59 S. W. 895 ..... 332, 336
Whitted *v.* Fairchild Cotton Mills, 128 C. C. A. 219 11
Wilcox *v.* Hebert, 90 Ark. 145 212
Wilhelm *v.* Collison, 133 Ark. 167 14
William Brooks Med. Co. *v.* Jeffries, 94 Ark. 575
Williams *v.* Carden's Bottom Levee Dist., 100 Ark. 166 503
——— *v.* Fulkes, 103 Ark. 196 516
——— *v.* Mississippi, 170 U. S. 213 329
——— *v.* State, 100 Ark. 218, 103 Ark. 70 328

Williams *v.* State, 50 Ark. 511 516
——— *v.* State, 103 Ark. 70 328
Wilson *v.* Storthz, 117 Ark. 14 570
Wolfe *v.* State, 107 Ark. 29 328

Y

Yick Wo *v.* Hopkins, 118 U. S. 356 332
Young *v.* Berman, 96 Ark. 78 592
Younger *v.* State, 100 Ark. 321 206
Youngson *v.* Bond, 5 Ann. Cas. 191 446

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

ARKANSAS LIGHT & POWER COMPANY *v.* PARAGOULD.

Opinion delivered November 8, 1920.

1. MUNICIPAL CORPORATIONS—AUTHORITY TO "MAINTAIN" WATERWORKS.—Under Kirby's Dig., § 5675, authorizing a city to operate and maintain waterworks constructed by improvement districts, the power to maintain involves the repair of the plant and the renewal of parts which have become worn out and in disrepair, and the repairs are not restricted to a reconstruction in the identical form in which the waterworks were originally constructed.
2. MUNICIPAL CORPORATIONS—MAINTENANCE OF WATERWORKS.—The statute authorizing the city council to maintain waterworks constructed by an improvement district empowers it to contract for an electric pump and for the current to operate it, the original steam pumping plant being retained as an emergency plant.
3. MUNICIPAL CORPORATIONS—ORDINANCE—EVIDENCE OF PASSAGE.—Under Kirby's Dig., § 3066, where the record containing city ordinances is produced containing a record of a certain ordinance, in the passage of which it is required that a majority of the members elected to the council shall concur, such record is *prima facie* evidence that the ordinance was duly passed, so that the burden of attacking it is on the party contending that it was not passed.
4. MUNICIPAL CORPORATIONS—ACCEPTANCE OF CONTRACT.—Where a contract for the installation of an electric pumping plant between a city and an electric power company was to become effective after publication of the municipal ordinance and its acceptance by the power company, a written notice by the manager of the power company that the installation of the pumping plant had been completed as per contract was an acceptance of the ordinance.
5. FRAUDS, STATUTE OF—DIFFERENT WRITINGS.—Different writings may be considered together to meet the requirements of the statute of frauds, where they on their faces are connected together.

6. CORPORATION—RATIFICATION OF AGENT'S CONTRACT.—If the manager of a corporation was not authorized to accept a contract with a city for furnishing electric power, it will be held to have ratified such acceptance where it furnished power thereunder for more than a year.

7. FRAUDS, STATUTE OF—RATIFICATION OF CONTRACT.—It is not essential that the ratification of an agent's act in accepting a contract within the statute of frauds should be in writing, though the acceptance must have been in writing, to comply with the statute of frauds.

8. WATERS AND WATERCOURSES—RIGHT OF CITY TO CHANGE WATER RATES.—A contract for the furnishing of power for a city waterworks plant which fixed the maximum monthly compensation to the power company on the basis of the rates then in force was not void as restricting the power of the city to change the rates, as such change would not reduce the compensation of the power company under the contract.

9. WATERS AND WATERCOURSES—RIGHT TO CHANGE WATER RATES.—Even if a contract for furnishing power to a city waterworks plant contemplated that the monthly compensation to the power company should be scaled down when the water rates then in force should be reduced, this did not invalidate the contract as restricting the city's right to change its rates, since the contract was made in contemplation of that right, and the power company could not complain unless it was deprived of reasonable compensation.

10. APPEAL AND ERROR—ORDER GRANTING NEW TRIAL.—Where the evidence was sufficient to show that the contract set forth in the complaint was entered into, and that defendant broke the contract, and there was conflicting evidence as to the damages resulting from the breach, a decision of the trial court setting aside the verdict and granting a new trial will not be reversed.

Appeal from Greene Circuit Court, First Division; *R. H. Dudley,* Judge; affirmed.

Huddleston, Fuhr & Futrell, for appellant.

1. The city was without power to make the contract alleged and sued upon. The city was not acting in its proprietary capacity, but as trustee for the water districts 1 and 2. Kirby's Digest, § 5675; 117 Ark. 93. It was beyond the power of the city to make the contract. The statute only authorizes the city to operate and maintain the works, and not to reconstruct the system or change the plan of operation, but only to repair. 48 L.

R. A. 285. For definition of "maintain" see Anderson's Dict., p. 646; Universal Dict., vol. 3, p. 3008; Webster, Enc. Dict. and Worcester, Dict. *verbo.* To "maintain" means only to support what is already in existence. To "repair" means to restore to good order after decay, injury, dilapidation or partial destruction (2 Exch. 21); to "maintain" is to preserve or keep up in good order. 60 Barb. 417-21; 72 Atl. 461-4; 110 Md. 47; 121 Pac. 801-3; 61 Ore. 174; 98 S. W. 465; 200 Mo. 97. See, also, Acts 1893, p. 252; 60 Atl. 436; 73 N. H. 233; 79 Atl. 177; 84 Conn. 202; Ann. Cas. 1912 B, 1212. "Maintain" is practically the same as "repair" or keep in good order after decay or injury, etc. 107 S. W. 572-6; 27 *Id.* 447. "Maintain" is synonymous with repair, to keep up in good order.

2. The power to the council to adjust and regulate water rates for the purpose of operating and maintaining the water plant is governmental, and can not be surrendered. The contract provides and establishes a fixed charge for water rates for ten years, and, if valid, defeats the right of future councils to readjust water rates for ten years. Such a power is legislative, and can not be delegated. If the council can do this for 10 years, why not for 100? 45 U. S. (Law. Ed.), 679; 53 *Id.* 177; 7 So. 409; McQuillin on Mun. Corp., vol. 4, § 1738; 1 Elliott on Cont., § 603.

3. The contract is clearly outside the powers of plaintiff and void, and the city is estopped by a void contract. 6 R. C. L. 501; 18 A. L. R. 575, note 20; 139 U. S. 24, 59-60. It is *ultra vires.* 35 U. S. (Law. Ed.), 55; 3 McQuillin on Mun. Corp. 2586; 1 Dillon, Mun. Corp. 516. There is no estoppel in the present case. 36 Ark. 577; 47 *Id.* 269; 89 *Id.* 95; 96 U. S. 341; 98 *Id.* 621; 9 U. S. 45.

Plaintiff seeks to recover damages for breach of a void executory contract and there can be no recovery. 6 R. C. L. 501.

4. No contract was ever made; there must be a proposal on one side and an acceptance by the other.

This is elementary law. The acceptance must be upon the exact terms of the offer, and if the offer prescribes the manner, terms and time of acceptance, it can not be modified or changed, but must be accepted just as prescribed in the offer. A modified or conditional acceptance is a rejection of the original. 1 Page on Contracts, 48; 9 Cyc., p. 266 (d); Lawson on Contracts, §§ 18, 76-7; 4 Wheaton, 225; 10 Ark. 393; 97 *Id.* 618; 112 *Id.* 384.

5. The city failed to prove that the alleged ordinance was passed by the council as required by law. Kirby's Digest, § 5473; 211 S. W. 664; 40 Ark. 105; 105 *Id.* 506. The record fails to show that the yeas and nays were called as required by law. The verdict is contrary to the law and the evidence and the instructions are erroneous. Part performance is not available to take this case out of the statute of frauds. 103 Ark. 79; 46 *Id.* 80; 48 *Id.* 485.

H. R. Partlow and *Block & Kirsch,* for appellee.

1. The contract was not *ultra vires.* Municipal corporations have not only the powers expressly conferred by the Legislature, but those necessarily or fairly implied as incident to or essential for the purposes expressly declared. 130 Ark. 334; 116 *Id.* 125; 71 *Id.* 4.

While acting within the scope of its authority to contract, the council is vested with legislative discretion, with which the courts will not interfere unless the action is arbitrary or unreasonable or oppressive. 80 Ark. 125; 127 *Id.* 30; 101 *Id.* 223. The contract made by the council with appellant was authorized, and the power was not arbitrarily or unreasonably exercised. When a water plant is being operated by the city under section 5675, Kirby's Digest, the city is responsible for purchases made for its maintenance and operation. 86 Ark. 61; 94 *Id.* 80; 117 *Id.* 214.

2. The city in making the contract did not surrender any of its powers.

3. Since the contract was not void, there is no necessity for arguing estoppel under a void contract.

4. A binding contract was made and effected, even if there had been no writing. A proposal was made and the offer accepted. 139 U. S. 19; 42 N. E. 386.

5. The ordinance was properly passed by the council. Kirby's Digest, § 5473; 108 Ark. 24. The burden was not on the city, as the presumption is that the ordinance was properly passed when the book of city ordinances was produced. 108 Ark. 30. If any formalities necessary to be observed were omitted, appellant should have produced the records to show any invalidity, and on a failure to do so the presumption is that it was valid. 56 Ark. 370; 90 *Id.* 292; 108 *Id.* 4.

6. The statute of frauds was complied with. Kirby's Dig., § 3654; 25 R. C. L. 639; 95 U. S. 289; 45 Ark. 17; 128 C. C. A. 219. The statute does not apply to written contracts but oral ones. Browne, Stat. Frauds, § 354 A; 83 Atl. 212.

7. There was no error in granting a new trial. Kirby's Digest, § 1238; 120 Ark. 99; 33 *Id.* 166; 98 *Id.* 334; 133 *Id.* 167; 126 *Id.* 427; 129 *Id.* 448; 132 *Id.* 45. Under the law as above, the court properly set the verdict aside.

McCULLOCH, C. J. This is an appeal from an order of the circuit court granting a new trial in an action in which appellee sued appellant for alleged breach of contract. In the trial of the case before a jury the court submitted the issues, and the verdict was in favor of appellant. The court sustained appellee's motion for a new trial, whereupon appellant filed the statutory stipulation making the order granting a new trial a final judgment (Kirby's Digest, section 1187, subdivision 2), and prosecuted an appeal.

A system of waterworks was constructed in the city of Paragould through the agency of two separate improvement districts, and when completed was taken over by the city pursuant to the statute (Kirby's Digest, section 5675) which provides that a city or town council, after the construction of waterworks or gas or electric

lights by any improvement district, "shall have full power and authority to operate and maintain the same, instead of the improvement district commissioners, and said city or town council may supply water and light to private consumers and make and collect uniform charges for such service, and apply the income therefrom to the payment of operating expenses and maintenance of such works."

Appellant, a domestic corporation, was operating an electric light plant under franchise from the city of Paragould and furnished electric current for domestic and industrial purposes in that city. The city council passed an ordinance on February 12, 1916, establishing, when accepted, a contract between the city and appellant, whereby appellant was to furnish and install a motor pumping plant at the water works for the purpose of pumping water for the city in the operation of the water works and to furnish the necessary electric current for operating the pump for a period of ten years and that the city would pay to appellant out of the revenues derived from sale of water to consumers the sum of $4,400 for installing the pump and would pay for the electric current furnished as aforesaid at certain stipulated rates.

Under this contract, if accepted, appellant was to furnish the services of an engineer to assist in keeping the pumping plant in proper condition and to keep a supply of coal to be used in operating the plant in case of an emergency. The city was to keep its own boilers at the plant in proper condition for use in any emergency when the pumping plant furnished by appellant might be temporarily out of commission. The ordinance provided that the contract should extend "for a period of ten years from and after the passage, approval and publication of the ordinance by the city and its acceptance in writing by the company," and that the city should pay for the power furnished under the contract subsequent to the "filing of notice with the city clerk by the

company that its equipment had been installed, and it is prepared to render said service of pumping water."

Appellant's plant in the city of Paragould was operated and the business there conducted by a local manager, a Mr. Reynolds, and on February 5, 1917, after the pumps and machinery had been installed, the following writing was delivered to the city authorities by Mr. Reynolds in the name of appellant:

"Paragould, Arkansas February 5, 1917.

"Honorable Mayor and City Council,

"Paragould, Arkansas.

"Gentlemen:

"We have this day completed the installation of the pumps and machinery as per contract with the city of Paragould. Yours very truly,

"Arkansas Light & Power Company,

"W. T. Reynolds, Manager."

It appears from the testimony that prior to that time the Actuarial Bureau had required certain changes in the construction of the plant, which requirements were complied with, but delayed the final installation of the pumping plant and machinery. Immediately upon the giving of the above notice, appellant began operations pursuant to the terms of the contract by furnishing current and pumping water for the city, and that was continued from then until the month of August, 1918. A short time after appellant began pumping operations a controversy arose with the city as to whether the plant and machinery had been installed in accordance with the stipulations of the contract, and the city for a time refused to make payments for the current furnished, but finally consented to do so and made the payments under protest from month to month until appellant ceased to continue operations, as before stated, in August, 1918. At that time, appellant, through its president, repudiated the contract or rather raised the question that there never had been a written acceptance thereof and declined to proceed any further. This suit was then insti-

tuted to recover damages for refusal on the part of appellant to perform the contract.

It is contended that, according to the undisputed evidence in the case, the judgment should have been in favor of appellant, and that the court erred in granting a new trial. If appellant is correct in the statement that there is no liability according to the undisputed evidence in the case, then the court should not originally have submitted the issues to the jury, but should have given a peremptory instruction in appellant's favor, and should not have granted a new trial.

The first ground urged why appellant is not liable is that the contract was one beyond the power of the city. The argument is that the statute hereinbefore quoted merely authorized the city council "to operate and maintain" the water works, and not to reconstruct the system or to change in anywise the plan of operation. Counsel urge that the word "maintain" is synonymous with the word "repair," and that the city council had no authority to abandon the operation of the steam pumping plant and substitute an electric pumping plant to be operated by electric current furnished by someone else. We think that the argument of counsel puts too narrow a construction upon the term "operate and maintain." It must be admitted that, under this statutory authority, the city did not have the right to discard the plant turned over to it and to construct another in its place, but the words used in the statute, when construed in the light of the purposes to be accomplished, must be given more elasticity and breadth than the argument of counsel justifies. The purpose of the statute was to authorize the city council, after the water works had been constructed and turned over, to perpetuate the same by having the city maintain it up to a standard of efficiency. This would necessarily involve the repair of the plant and the renewal of parts which became worn out and in disrepair. There is nothing in the language which compels restriction of the repairs to a reconstruction in identical form in which the

water works were originally constructed. Looking at it from a practical standpoint, what the statute requires is that the water works shall be kept up to the established standard, and that the city shall have control over it to determine in what way that standard of efficiency shall be maintained.

Under the contract involved in the present case, the city was not to reconstruct the plant in its entirety, nor was it even to discard wholly the pumping plant. That was to be held for emergency purposes, and appellant was to furnish an electric pumping plant, so that current could be supplied in the operation of the plant. This was not in any sense an abandonment of the plant or an attempt to reconstruct it. We are of the opinion that it falls within the wording of the statute.

Learned counsel for appellant insists that this case is controlled by the decision in *Augusta* v. *Smith*, 117 Ark. 93, but they are mistaken in their estimate of the effect of that decision. All that we held in that case was that the city council, after taking over a system of water works constructed by an improvement district, had no authority under the statute to sell the plant. The views that we have expressed are in accord with what was said in the opinion of this court in *Browne* v. *Bentonville,* 94 Ark. 80. Our conclusion on this branch of the case is that the contract was within the power of the city.

The next contention is that the passage of the ordinance was not shown to have been in accordance with the statute, which requires that the yeas and nays shall be called and recorded on the passage of an ordinance to enter into a contract and that a concurrence of a majority of the whole number of members elected to the council shall be required. Kirby's Digest, section 5473. Appellee introduced the ordinance book containing a record of the ordinance, which made a *prima facie* case of the due passage of the ordinance and cast upon the opposing party the burden of showing that the ordinance was not passed in accordance with the requirements of

the statute. Under section 3066 of Kirby's Digest printed copies of the ordinances and by-laws of any city or incorporated town, published by authority, and manuscript copies of the same certified under the hand of the proper officer, are made the evidence of passage of such ordinances, by-laws, etc. See case of *Malvern* v. *Cooper,* 108 Ark. 24, which is identical to the case now presented, and was decided adversely to appellant's contention.

It is next contended that there was no acceptance of the terms of the ordinance by appellant, and that the contract was one not to be performed within a year, and therefore within the statute of frauds. We are of the opinion that the written notice signed by Mr. Reynolds as manager constituted sufficient acceptance in writing to bind appellant to the terms of the contract. The ordinance required appellant to install the pumping plant and machinery and to give notice to the city "that its equipment has been installed and it is prepared to render said service of pumping water." The written acceptance did not literally follow the language of the ordinance, but it necessarily implied the acceptance of its terms, and was not susceptible to any other interpretation. It contained distinct notice that appellant had completed the installation of the pump and machinery "as per contract with the city of Paragould." The contract could only be accepted in its entirety, and written notice of the acceptance of any part of it would necessarily constitute an acceptance of the whole. The effect of this was not to alter the contract or to hold out a counter-proposal, but it was an unqualified acceptance of the contract, if it amounted to anything at all. It contained no counter-proposal, and no indications that any portion of the contract was unacceptable. The initial feature of the performance of the contract was the installation of the pumping plant and machinery, and the notice of such installation, in writing, was necessarily an acceptance of the terms of the contract, and an expression of readiness to proceed with its performance.

The rule is that where a contract is within the statute of frauds, different writings essential to an expression of the terms of the contract, in order to be considered together, must connect themselves with each other on their faces. *St. L., I. M. & S. Ry. Co.* v. *Beidler,* 45 Ark. 17; *Beckwith* v. *Talbot,* 95 U. S. 289; *Whitted* v. *Fairchild Cotton Mills,* 128 C. C. A. 219. The essential features of the contract evidenced by the two writings are present in this instance, for the notice of acceptance referred to the contract between appellant and the city, and there appears to have been no other contract between those parties to which the language of the notice was referable. It seems clear to us therefore that the writing constituted sufficient acceptance. The ordinance expressed all of the terms of a complete contract, and the letter which referred to that contract and impliedly accepted its terms was sufficient to bind the other party. 25 Ruling Case Law, page 639.

It is contended further on this subject that there is no evidence of authority on the part of Reynolds to bind appellant. The evidence shows that he was the manager of the electric plant that was being operated there, but there was no testimony adduced to show that he had authority to enter into new contracts. Conceding this to be true, there was evidence sufficient to justify a finding that appellant ratified the action of its agent, Reynolds, in entering into the contract by proceeding with and continuing in performance of the contract for a period of more than a year. Appellant was bound to have known that the contract was being performed, and that the performance was referable to the terms of the ordinance. Therefore the performance by the company constituted a ratification of the previously unauthorized action of its agent in writing this letter. It was not essential that the act of ratification should have been of equal dignity with the original form of the contract which the statute of fraud required to be in writing. The writing itself was sufficient, when ratified by the party to be

bound, to satisfy the statute of frauds. When appellant proceeded with the performance of the contract, its act in so doing was referable only to the written acceptance made by its agent, of which it was bound to take notice.

It is contended that the contract was void for the further reason that its performance would restrict the power of the city to alter rates for water furnished to consumers. The argument is that, because in the contract the compensation payable to appellant was based on a maximum percentage of the gross receipts collected from the consumers, this constituted an abdication by the city of its power to change the water rates to the consumers and rendered the contract void. In other words, it is insisted that the city could not contract away its legal power, and that the contract is void on that account. The first answer to this contention is that it is a mistake to say that in this contract the city has restricted its power to change the water rate. Under the contract the compensation to appellant for furnishing the current is based on the scale of water rates then in force, and the monthly compensation should not exceed 40 per cent. of the gross revenue collected; but it is further provided that "said 40 per cent. shall be determined by calculation based on the water rates now in force for sale of water and rental of hydrants." This language of the contract fixed the maximum rate of compensation on the schedule of rates then in force, and any change thereafter made by the city would not reduce the monthly compensation payable to appellant. Therefore this clause of the contract placed no restriction whatever on the right and power of the city to change the schedule of rates. But, even if the monthly maximum compensation was under the contract regulated by a new schedule of rates fixed from time to time, the result would be the same, because the contract must be construed in the light of the law in force at the time and with reference to the powers of the city to regulate water rates. The parties are presumed to have contracted with reference to the

power of the city to change the rates which entered into and became a part of the contract. It would have to be assumed that the city would not reduce the rates so as to deprive appellant of a reasonable compensation for its service to be performed under the contract. The contract fixed definitely the maximum amount of compensation, and any change which the city might make in the price of water furnished to the consumers could not alter the specified contract price to be paid to appellant as compensation for its services in furnishing power. This contract must be treated the same as any other made by the city in the operation of the water works, and, regardless of the schedule of rates to consumers, the city was bound by contracts made and obligations incurred in the operation of the plant. There is therefore no foundation for the contention that the city has contracted away its power to change the rates.

It is thus seen that the evidence in the case was sufficient to show that the contract set forth in the complaint was entered into and that appellant broke the contract by refusing after a time to perform it, and to make out a case in favor of the city for the recovery of damages. There was evidence which tended to establish damages resulting from appellant's breach of the contract. There was a conflict in the testimony as to the amount of damages, and under those circumstances this court will not reverse the decision of the trial court in setting aside the verdict and granting a new trial. *Clements* v. *Knight & Co.,* 125 Ark. 488; *Wilhelm* v. *Collison,* 133 Ark. 167.

The judgment of the circuit court in granting a new trial is affirmed, and judgment absolute will be entered to the effect that appellee is entitled to recover in accordance with the prayer of the complaint and the cause will be remanded for the assessment of damages.

DICKSON v. BOARD OF DIRECTORS OF LONG PRAIRIE LEVEE DISTRICT.

Opinion delivered November 8, 1920.

1. CONSTITUTIONAL LAW—CONDEMNATION FOR LEVEE PURPOSES.—Acts 1917, p. 1683, which provides for the relocation of a levee built by a district organized under a previous act, and for assessment of damages to owners whose property is taken on relocation of the levee, *held* to comply with the constitutional requirements as to due process and compensation, though condemnation is made only by adoption of relocation plans, instead of by the method provided by the general law.
2. EVIDENCE—RECORD OF PLANS OF LEVEE DISTRICT—ORAL EVIDENCE.—In an action by a levee district to restrain a landowner from preventing access to his land sought to be taken for relocation, oral evidence as to the filing and record of the relocation plans was inadmissible, the record being the best evidence.

Appeal from Lafayette Chancery Court; *J. M. Barker,* Chancellor; reversed.

J. M. Carter, for appellant.

1. The demurrer to the complaint should have been sustained, as it shows no right in plaintiff to go upon and construct a levee across appellant's lands. Act 106, Acts 1905, p. 267. Act 339, Acts 1917, p. 1863, does not authorize the district to exercise the right of eminent domain, and the demurrer should have been sustained.

2. It was error to admit oral proof of the filing of the plans and specifications. 80 Ark. 80. See, also, 15 N. E. 601; 37 *Id.* 91; 3 Tex. Civ. App. 436; 48 Atl. 218; 10 N. E. 657; 19 So. 239; 63 N. E. 118.

McCULLOCH, C. J. Appellee is a levee district in Lafayette County, organized by special statute enacted by the General Assembly of 1905. Acts 1905, page 267. A levee was constructed to protect the lands in the district from inundation from the waters of Red River. The General Assembly of 1917 (Acts 1917, page 1683) enacted another special statute reciting the fact that a considerable portion of the levee built by said district had been washed away, and that it had become necessary

to raise and strengthen the levee for the protection of the property in the district. The new statute provided, in substance, that the board of directors of said district should "raise and strengthen the levees of said district" and "change the location thereof where necessary so as to protect the lands of said district, or as much of said lands as practicable, from overflow by the waters of Red River," and that the board should employ an engineer to make plans for the relocation of the levees, and that "said plans with the accompanying specifications and a plat showing the location of all levees in the district together with an estimate of the probable cost" should be filed in the office of the county clerk. The statute further provided that the board of directors should appoint a board of assessors to assess the benefits to accrue from the additional improvement "and also all damages which may be sustained by any person or corporation by reason of the construction of the improvement;" that the assessment of benefits and damages so made should be filed with the president of the board of directors; that notice should be published and a hearing given to landowners who desired to make complaint, and that any person or corporation "aggrieved by the action of the board of assessors fixing the assessment list, as herein provided, shall have the right for twenty days from the date of adjournment of said board of assessors sitting as a board of equalization to apply to any court of competent jurisdiction to set aside said assessment list," etc.

Appellant owned certain lands in the district, and when the work of the improvement began, he refused to permit the work to be done on his land and interfered with the contractor. This action was instituted by the board of directors of said district to restrain appellant from interfering with the construction of the levee. On final hearing injunctive relief was granted as prayed for, and an appeal has been prosecuted to this court.

The first contention of appellant is that there was no condemnation of his land for the relocation of the

levee; and that he was therefore within his rights in preventing the taking of his land without a legal condemnation thereof. It is contended that the original act fixed the method of condemnation by reference to the general statute, which was not complied with. Counsel is not correct in the position thus taken, for the act of 1917, *supra,* is complete and provides authority for taking the land to be used in relocating and constructing the levee and in assessing damages therefor. An adequate remedy was provided for an aggrieved landowner, which answered in all respects the constitutional requirements of due process of law and of awarding compensation for private property taken for public use.

The case comes squarely within the decision of this court in *Dickerson* v. *Tri-County Levee District,* 138 Ark. 471. The governing statute in that case was similar to the one involved here, the only difference being that that case was one where the landowner disregarded the statutory proceedings and brought suit for damages to his property, whereas in the present suit the property owner is attempting, by resort to force, to prevent the taking of the property. The statute itself, in providing that the engineer should make and file plans and that the board should relocate the new levee and proceed to construct it, constituted in itself an exercise of the right of eminent domain, and another section of the statute provided for the assessment of damages. This method was approved in the case just cited and was held to be valid.

It is next contended that the court erred in admitting oral testimony as to the plans and specifications. The attorney for the district, Mr. Searcy, testified that the plans and specifications showing the relocation of the levee were filed in the office of the county clerk in accordance with the provisions of the statute. This proof was objected to by appellant, but was admitted over his objection. There was no other proof of the filing of the plans and specifications. The filing of the plans and specifications in the office of the county clerk made a rec-

ord which constituted the sole evidence of what was done in that regard, and no other proof could be introduced in the absence of proof of loss or destruction of the record. The adoption of the plans and specifications showing the new route of the levee and the filing of the same in compliance with the statute constituted a condemnation of the property to be taken in the construction of the improvement. The record thus made also formed the basis of the assessment of benefits and damages, and the filing of these plans was therefore jurisdictional. Without such proceedings, there was no condemnation of the land, and appellant was not bound to submit to the taking of his property. He should not be restrained from interfering with the proceedings which constituted an unlawful invasion of his rights.

We are of the opinion therefore that the court erred in admitting oral proof of the filing of the plans and specifications and the condition of said record. For this error the judgment is reversed, but the cause will be remanded with directions to permit record evidence to be introduced to show that there was a valid condemnation in accordance with the statute, and for further proceedings not inconsistent with this opinion.

COURTESY FLOUR COMPANY v. WESTBROOK.

Opinion delivered November 8, 1920.

1. SALES—IMPLIED WARRANTY.—In a sale of a carload of meal without express warranty of quality there is an implied warranty that it is of the kind and quality specified, and is wholesome and reasonably fit for use.

2. SALES—EXPRESS AND IMPLIED WARRANTIES—DAMAGES.—Where goods are purchased under express warranty as to quality, the purchaser may rescind on discovering the inferior quality of the articles sold, but he is not bound to do so, and may retain the articles and sue on the warranty or recoup the damages when sued for the price; but where the contract is to deliver goods of a particular description or quality without express warranty, and the purchaser accepts them after discovery of the inferior

quality or after having had a fair opportunity to make such inspection, he waives the right to claim damages.

3. SALES—WAIVER OF DAMAGES.—Where several carloads of meal were sold without express warranty as to quality, but with privilege of inspection, and the purchaser on inspection found that the meal was hot and musty and caked, and advised the seller, who wired, "unload car, advise extent, nature damage, give plenty of air," and the purchaser, instead of obeying instructions, sold the meal and waited five weeks before reporting the condition of the meal, he waived the right to damages.

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

Reinberger & Reinberger, for appellant.

1. The question presented is, did appellant waive its right to the warranty of soundness of two cars of meal by trying to dispose of same, or was it compelled to elect whether it would rescind the sale, or keep the meal and sue for damages for the meal purchased for resale and human consumption, and upon inspection found to be unsound for the purpose intended? The court's instructions were erroneous. Appellant, having paid for the two cars of meal, had the right to retain it after ascertaining the bad condition thereof and sue for the difference in the purchase price of said cars and the amount he received from the damaged meal, including the expense of handling same. 76 Ark. 66. He had the right after he had paid for the meal to rescind the contract or keep the property and sue for damages. 110 Ark. 215. The sixteenth instruction given was error. 79 *Id.* 68; Benjamin on Sales (7 ed.), 893; 104 Ark. 573; 110 *Id.* 215.

2. The court erred in refusing to give instruction No. 5, asked by appellant, that if there was no express warranty there was an implied one that the meal was fit for the use intended. 76 Ark. 352; 113 *Id.* 169; 53 *Id.* 155. Also in giving the instruction on its own motion. 79 Ark. 66.

Harry T. Wooldridge, for appellee.

The acceptance of goods after an opportunity of inspection precludes the buyer from making any claim as to defects in quality. 104 N. W. 179; 63 N. E. 57; 105 N. W. 945; 66 Atl. 366; 175 Pac. 18; 257 Fed. 369; 172 N. W. 500; 221 S. W. 519. There is no error in the instructions.

McCULLOCH, C. J. This is an action to recover damages resulting from the breach of an alleged contract for the sale of two car loads of meal. Appellee was engaged in the grain and milling business in Pine Bluff and sold two car loads of meal to appellant, a dealer in Vicksburg, the two car loads being sold separately f. o. b. Pine Bluff and shipped under bills of lading to the shipper's order and attached to drafts drawn by appellee on appellant. The sales were made through a broker in Vicksburg, and the drafts to which the bills of lading were attached permitted inspection by the purchaser before acceptance. The shipments were about a week apart, and when they reached destination appellant paid the drafts and proceeded to unload the cars and found, according to the testimony which he adduced at the trial, that the meal was hot and musty and was caked, to the extent that a considerable part of it was unsalable and unwholesome. When the condition of the meal in the first car was discovered by appellant, he advised the broker through whom he had made the purchase and the latter communicated the information to appellee, who immediately sent to appellant a telegram of instructions in the following words: "Unload car, advise extent, nature damage, give plenty of air."

This occurred on March 20, 1918, and appellant finished unloading the first car, and when the second car arrived, finding it in the same condition, he unloaded that, too. He caused the meal to be taken care of by separating the good from the bad and giving it plenty of air in accordance with the instructions, and proceeded to sell it to local merchants in Vicksburg. Much of it was

found to be unfit for human consumption and was returned. The damaged portion of the two cars aggregated the price of $2,949.28, according to the invoices, and of this enough was sold to realize the sum of $1,322.52, leaving a balance claimed by way of damages, including interest, commission and handling charges of $1,823.93, the amount sought to be recovered. According to the undisputed evidence appellant made no report to appellee until May 4, 1918, when a statement of the amount of damages was furnished. A trial of the issues before a jury resulted in a verdict in favor of appellee.

Several errors of the court are assigned in giving certain instructions, but as the material facts in the case are undisputed it is unnecessary to discuss the instructions of the court.

There was no express warranty of the quality of the meal sold, but there was an implied warranty that the commodity sold was of the kind and quality specified and was wholesome and reasonably fit for use. Under the terms of the shipment appellant had the opportunity to inspect the meal before he accepted it, and he did in fact inspect it immediately after the payment of the draft, and he then discovered that it was not in accordance with the specifications and was unfit for use.

The law on the subject is that where chattels are purchased under express warranty as to quality, the purchaser may rescind on discovering the inferior quality of the article sold, but is not bound to do so, and, on the contrary, may retain the articles purchased and sue on the warranty or recoup the damages when sued for the price. In case, however, the contract is to deliver goods of a particular description or quality without express warranty, and the purchaser accepts them after inspection and discovery of the inferior quality, or after having had a fair opportunity to make such inspection, he waives the right to claim damages for defects or inferiority of the goods sold.

The case of *Dana* v. *Boyd,* 2 J. J. Marsh. (Ky.), 588, one of the early cases on the subject in this country, after stating the rule that a purchaser who receives goods under those circumstances waives the defects, states the following exceptions to that rule: "To this there may be exceptions, as, when the defects are discovered afterward; in which case he must, on the discovery thereof, offer to restore, or where there has been fraud, in concealing or misrepresenting the bad qualities of the articles, or an express warranty. But, where the defects are palpable and are perceived at the time, he must reject the goods and set aside the contract *in toto,* and go for their full value, and can not be allowed to accept and then bring his action for the bad quality."

The rule announced in that case has been followed by a long line of cases in the Kentucky Court of Appeals. *O'Bannon* v. *Reff,* 7 Dana 320; *Kerr* v. *Smith,* 5 B. Mon. 533; *Jones* v. *McEwan,* 91 Ky. 377, 12 L. R. A. 399; *Forsythe* v. *Russell Co.,* 148 Ky. 492; *Caldwell* v. *Cunningham,* 162 Ky. 275. There are many other authorities sustaining that rule, and the overwhelming weight seems to be in its favor. *McCormick Harvesting Machine Co.* v. *Chesron,* 33 Minn. 32; *Rosenfield* v. *Swenson,* 45 Minn. 190; *McCormick Lumber Co.* v. *Winans* (Wis.), 105 N. W. 945; *Hazen* v. *Wilhelmie* (Neb.), 93 N. W. 920; *Ackerman* v. *Santa Rosa-Vallejo Tanning Co.,* 237 Fed. 369; *Northern Supply Co.* v. *Wangard,* 117 Wis. 624.

In the present case the purchaser, before making any use of the commodity purchased, notified the seller of the inferiority of the commodity, which was tantamount to a refusal to accept, and if that position had been maintained throughout the subsequent dealings with regard to the commodity purchased there would not have been any waiver of the right either to rescind the sale or to sue for the damage. Such, however, was not the effect of appellant's conduct in his subsequent dealings. He was instructed by appellee to "unload car, advise ex-

tent, nature damage, give plenty of air." This meant that appellant was authorized to unload the car and separate the meal so as to give it plenty of air and then to advise appellee of the extent and nature of the damage. This was the extent of the authority conferred, and appellant had no right to do anything more, and the implication which necessarily arises is that the instructions were to be obeyed within a reasonable time. Instead of obeying those instructions, appellant sold the meal and waited about five weeks before he made any report to appellee as to the extent and nature of the damaged condition of the meal. This can only be construed as a waiver of the right to complain of the inferior condition of the meal. The case of *Rosenfield* v. *Swenson, supra,* is directly in point. There was a delay of six weeks before complaint was made of the inferiority of the commodity sold, and the court in disposing of the case announced the applicable rule as follows: "Where goods are sold and delivered upon condition as to kind and quality, it is the duty of the vendee to promptly examine them, and, if the conditions are not complied with, to notify the vendor within a reasonable time of his refusal to accept. If he unreasonably delays such notification, he must be held to have accepted in fact." The court held that the delay of six weeks was unreasonable.

In the case of *McCormick Lumber Co.* v. *Winans, supra,* the court held that a delay of eight months was unreasonable.

We are of the opinion that appellant's conduct in proceeding to sell the meal without authority from appellee and his delay in making a report to appellee of the condition in which he found the meal after unloading it constituted a waiver of the defective condition and an acceptance of it in fulfillment of the contract which precluded him from claiming damages.

There is nothing in our own decisions cited by counsel for appellant in conflict with the views here expressed. In fact, those cases are in accord with what we now hold.

Pewett v. *Richardson,* 79 Ark. 66; *Warden* v. *Middleton,* 110 Ark. 215; *Thompson* v. *Crenshaw,* 113 Ark. 169.

The judgment is therefore correct from the undisputed facts of the case and should be affirmed. It is so ordered.

SANDLIN *v.* BAILEY.

Opinion delivered November 8, 1920.

1. APPEAL AND ERROR—OBJECTION TO AMBIGUOUS INSTRUCTION.—To an instruction that is ambiguous, and that might have been understood as assuming a certain fact, a general objection is insufficient, as objections to ambiguous instructions must be specific, so as to give the trial court an opportunity to correct the instructions by eliminating the ambiguity.
2. LANDLORD AND TENANT—WRONGFUL TAKING—EVIDENCE.—In an action for damages for the wrongful taking and cultivation of land, a finding that the land had been taken and cultivated by defendant by authority, and that he had tendered to plaintiff the proper share of the crop, *held* sustained by evidence.

Appeal from Yell Circuit Court, Dardanelle District; *A. B. Priddy,* Judge; affirmed.

R. F. Sandlin, for appellant.

The maxim, "As one binds himself so shall he be bound," should be upheld in this case. Appellee read the contract, and he is bound by it—hardship or inconvenience does not excuse performance of a contract. 61 Ark. 315; 93 *Id.* 452; 9 Cyc. 627; 162 S. W. 946; Cent. Dict. "Contract," § 152. The court erred in instruction No. 4. It is in conflict with No. 2. Appellee says he could have performed the contract, and the facts are not disputed; the court should have directed a verdict. 104 Ark. 267. It is error to instruct a jury on an issue where there is no evidence to support it. 86 Ark. 127; 79 *Id.* 109; 153 S. W. 928; Cent. Dig., "Trial," §§ 505, 596, 612; Dec. Dig., § 352. Our first instruction was correct, and was tantamount to a specific objection. 118 Ark. 262. The verdict is contrary to the law and the evidence. The

case is fully developed, and this court should direct judgment for appellant for $162.

McCULLOCH, C. J. Appellant, Mrs. Ella Sandlin, owns a farm in Yell County, and entered into a written contract with appellee whereby the latter agreed to clear up ten acres of the land ready for the plow for the sum and price of $55 to be paid by appellant and to cultivate the same in corn and to deliver appellant one-third of the crop for the use of the premises. The contract also specified that appellee should have the use of the house on an adjoining tract owned by appellant in another section.

This is an action instituted by appellant against appellee to recover damages for breach of said contract, it being alleged that appellee failed to clear up the land in accordance with the terms of the contract or to cultivate it as agreed upon. It is also alleged that appellant, without authority, cultivated one and one-half acres of land near the house in another section, not covered by the contract, and this action is to recover the rental value of the land so taken and cultivated. The case was tried before a jury, and the verdict was in favor of appellee.

Appellee introduced proof tending to show that he was prevented, on account of high water, from clearing the land according to the contract, and that the high water prevented the cultivation of the crop on the land. The court submitted the issues to the jury on instructions which told the jury, in substance, that if appellee failed to clear the land in accordance with the terms of the contract he would be liable to appellant for the difference between the price agreed upon for doing the work and what it would cost appellant to have it done by some one else; and that appellant would be also entitled as damages for a reasonable rental value of the land for that year as if it had been cleared and put in cultivation in accordance with the terms of the contract.

Objection was made to the following instruction given at the instance of appellee:

"If you find from the testimony in this case, gentlemen, that the plaintiff is entitled to recover, that is, if you find they entered into a contract whereby he agreed to do this work, and failed to do it, then the measure of plaintiff's damages would be what would have been the reasonable rental value of that land for the year 1919, if he had been permitted to have put it in; not what it might have been some other year, but, under all the conditions last year, what it would have reasonably been worth. In addition to that she would be entitled to recover whatever additional amount more than the $55 which she agreed to pay him. In other words, gentlemen, if he agreed to clear it up for $55, then if it would take more than that to clear it up now, she would be entitled to that much in addition as her measure of damage."

It is argued that the language of this instruction constituted an assumption by the court of the fact that appellee was prevented by high water or other causes from putting the land in cultivation. The part of the instruction which constituted such an assumption, according to the contention of counsel for appellant, is as follows: "If he had been permitted to have put it in." This language does not constitute a direct assumption of the fact that the land could not have been cultivated on account of the high water or any other cause. The most that can be said in criticism of the use of this language is that it is ambiguous and might have been understood as an assumption of the fact mentioned. There was, however, only a general objection to the instruction, and that was not sufficient to raise the point now argued. It has become a well-settled rule of this court that objections to ambiguous instructions must be specific, so as to give the trial court an opportunity to correct the instruction by eliminating the ambiguity.

There was a sharp conflict in the testimony with reference to the cultivation of the small patch of ground near the house occupied by appellee and which was not embraced in the contract. The testimony adduced by appellant tended to show that appellee took this small patch of ground and cultivated it without her consent or without authority and that the reasonable rental value was $15. Appellee testified that he obtained this small patch from Rushing, another tenant, who had rented it from appellant on the share and that he had planted it mostly in peanuts and had a few hills of watermelons and three or four rows of popcorn and a small garden. He testified also that when he gathered the peanuts he left the landlord's share on the ground for delivery.

The court submitted the question to the jury whether or not appellee had taken and cultivated the land by authority or whether his occupancy of the land was wrongful and also submitted the question whether or not appellee had tendered to appellant the proper share of the crop. There was enough evidence to sustain the finding of the jury on this as well as the other issues in the case. The testimony does not show that the watermelons raised on the few hills and popcorn were of any appreciable value, therefore the jury had the right to find from the testimony that the tender of the third of the peanut crop was a substantial performance of the contract.

Upon the whole we do not find any prejudicial error in the record, and the judgment is therefore affirmed.

DEWBERRY v. FURST & THOMAS.

Opinion delivered November 8, 1920.

1. EVIDENCE—WRITTEN AGREEMENT—PAROL MODIFICATION.—A written agreement may, in the absence of statutory provision requiring a writing, be modified by a subsequent oral agreement.

2. APPEAL AND ERROR—EXCLUSION OF EVIDENCE HARMLESS ERROR.—In a suit against the guarantors of payment for a stock of merchandise, the exclusion of evidence of an agreement to release the guarantors was harmless where it was shown that the release never became effective.

3. TRIAL—SUFFICIENCY OF VERDICT.—Where undisputed evidence established that, if plaintiff was entitled to recover, he was entitled to judgment for the amount sued for, a verdict finding simply for the plaintiff was sufficient in form, especially where the court inquired of the jury the amount, and they replied, "For the amount he sues for."

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

Brundidge & Neelly, for appellants.

1. There are three reasons for reversal, because (1) the court erred in refusing to permit defendants to testify as to the rescission of the original contract between plaintiffs and defendants, (2) the court erred in its instruction on that question, and (3) the verdict was contrary to the law in that it found for no specified amount. The contract had been rescinded by another contract between the same parties after Dewberry became in ill health and unable to continue the work and plaintiffs agreed to secure a new man who would give a new bond, and appellants could turn over the stuff to him and be released from the bond. This was a complete defense. 6 R. C. L., p. 922, par. 306; 13 C. J. 593-5, § 614. In this case a new agreement was made and a new party furnished who made a satisfactory bond.

2. The jury failed in their verdict to find any sum whatever and is void. 29 Ark. 597.

Avery M. Blount, for appellees.

The court had all the facts before it, the jury were properly instructed and the verdict is supported by the evidence. None of the contentions of appellant are tenable. 163 S. W. 662; 115 Ark. 166; 124 *Id.* 597, and *Lange Med. Co.* v. *Johnson,* 131 Ark. 15. The latter case is almost identical with this. The letters attempted to be introduced were secondary evidence and not admis-

sible. 6 R. C. L. 306 is correct but does not apply, nor is 29 Ark. 595 applicable.

WOOD, J. The appellees, a partnership doing business at Freeport, Illinois, entered into a contract with W. A. Dewberry of Searcy, Arkansas, by which the appellees sold to Dewberry certain merchandise on credit. Dewberry entered into a contract of guaranty with the appellees for the performance of the contract on his part, which contract of guaranty was signed by W. C. Sneed, J. A. Verner, and Theo. Phillips, the other appellants. Dewberry's health failed, and he terminated the contract in July, 1915. He had on hand at that time merchandise of the value of $169.19. The appellees credited him with the amount of the stock on hand and instituted this action against the appellants for the balance of the account due. The appellants defended on the ground that the contract between them and the appellees had been rescinded by another contract entered into between the appellants and the appellees. The testimony on this issue is substantially as follows:

Clyde Calhoun testified that he lived in Searcy; that he made a contract with the appellees for the sale of merchandise. He had an understanding with Sneed, Phillips and Verner that he was to go to Hempstead County to take the place of Mr. W. A. Dewberry. He wrote the appellees, and they replied that witness could have Dewberry's place when witness made a bond, which witness did. Witness did not take Dewberry's place in Hempstead County, however, for appellees told witness that he could have White County, and he dropped the work down in Hempstead. He never entered into the business or sold any goods for the appellees down there; never took over Dewberry's accounts or attempted to collect the same; he did not take over the stock of merchandise or become liable for it. He made a bond and went to Hempstead County for the purpose of taking over Dewberry's business, but learned that White, his home county, was vacant, and he preferred to work

there. The appellees never refused to give witness Hempstead County. The court, over the objection of appellants, excluded the above testimony.

Witness Sneed testified that, after Dewberry became ill, appellants took up by correspondence with the appellees the matter in regard to getting another man to take Dewberry's place in Hempstead County, who would assume the indebtedness of Dewberry and relieve Dewberry's guarantors. Witness received a letter from the appellees, dated August 9, 1915, in which, among other things, they said: "We are glad to know that you think you will be able to get a man to take his (Dewberry's) territory." Appellees in this letter stated that it would be all right as far as appellees were concerned for the guarantors to hold the goods in order to give them a chance to secure some one for the territory; that, if the guarantors did not get any one to take Dewberry's place, they had better arrange to have the goods shipped back to appellees on Dewberry's account, and concluded the letter as follows: "We hope everything will work out all right, so that there won't be any financial loss to you and any other of the guarantors." In another letter from the appellees, dated September 28, 1915, they say: "We have been unable to get any information concerning the financial responsibility of the guarantors on Mr. Calhoun's contract. We have written to the recorder of deeds and are hoping to get a favorable reply soon. Mr. Calhoun has been highly recommended to us, and we are indeed anxious to start him in the business. Just as soon as we get a report, we will let you know whether or not we can accept the contract, and then you can act accordingly."

Witness stated that the guarantors after this turned over Dewberry's stock to Calhoun and considered that they had nothing further to do with it and wrote the appellees to that effect, and on September 23d had a letter from appellees, as follows: "We are pleased to advise you that we have accepted the contract from C. P.

Calhoun, and the Dewberry stock can now be transferred to him. We have sent Mr. Calhoun a blank on which to furnish us a list of the goods to be transferred." Witness continuing said that, after receiving the above letter, he considered the matter closed, so far as the guarantors were concerned. Witness went with Calhoun to Hope and helped him pack up his stuff and ship it back to appellees. This was after the appellees had written that they had made a mistake in assigning Calhoun that county. Witness wrote to appellees that, if they would release the guarantors from the bond, they would get appellees another salesman, and the appellees accepted the proposition.

The court ruled that the correspondence and the oral testimony in regard to the appellees accepting Calhoun in the place of Dewberry and releasing the appellants' guarantors from the contract of guaranty was incompetent because it tended to vary the terms of a written contract. The court, among other things, instructed the jury that the action was brought by the appellees against Dewberry and the other appellants as sureties or guarantors on his bond for goods furnished by the appellees to Dewberry; that if they found from the evidence that appellees furnished Dewberry with certain goods, and that Dewberry refused to pay for same after demand was made, the verdict would be in favor of the appellees in such amount as the jury found was due them. The jury returned the following verdict: "We, the jury, find for the plaintiff." The court thereupon asked the following question: "Do you mean to say, gentlemen, $228.93?" A juror responded: "For the amount he sues for." The appellants objected to the verdict. Thereupon judgment was rendered in favor of the appellees for $228.93, from which is this appeal.

The appellants challenged the ruling of the court in excluding the oral testimony and the correspondence. The court erred in holding that the letters and oral testimony offered by the appellants were incompetent. The

law is well settled that "a written contract may, in the absence of statutory provision requiring a writing, be modified by a subsequent oral agreement." 13 Corpus Juris, 593; 6 Rul. Case Law, section 306, p. 922, and cases cited in note to the above; 1 Black on Rescission and Cancellation of Contracts, section 13; *Von Berg* v. *Goodman*, 85 Ark. 605; *Brickey* v. *Continental Gin Co.*, 113 Ark. 15.

The error of the court, however, in excluding this testimony from the jury was not prejudicial to the rights of appellants; for, when the oral testimony and the written correspondence is considered, it is not sufficient to show a completed contract on the part of the appellees and the appellants, whereby the latter were released from the obligations of their contract. The oral testimony and the correspondence show that Calhoun was to be substituted for Dewberry to take over his stock of merchandise and to carry out his contract. The appellees accepted the contract to substitute Calhoun for Dewberry, but the undisputed testimony shows that Calhoun, after making bond, which was accepted by the appellees, upon being informed by the appellees that he could have White County, dropped the work in Hempstead County; that he did not assume the business, did not take over the stock of merchandise that Dewberry had or his accounts, and did not become responsible for them or attempt to collect them. Thus the undisputed testimony shows that the consideration for the contract of rescission on the part of the appellants failed. The contract was never completed because Calhoun failed to comply with the conditions upon which the contract, which is the basis of this action, was to be rescinded. The contract, being in full force, the undisputed evidence shows that the amount due the appellees on the contract, and for which they sued, was the amount for which the jury returned a verdict. The sum was definitely ascertained, and the inquiry of the court to the jury and the answer thereto showed that the verdict was returned for this

specified amount. There was no error in the form of the verdict.

The judgment is correct, and it is affirmed.

COMMON SCHOOL DISTRICT NO. 52 v. RURAL SPECIAL SCHOOL DISTRICT NO. 11.

Opinion delivered November 8, 1920.

1. SCHOOLS AND SCHOOL DISTRICTS—REPEAL OF STATUTE.—Act No. 15 of 1919 covers the entire subject-matter of act No. 321 of 1909, relating to the establishment of rural special school districts, and was intended as a substitute for it, and therefore repeals it.
2. SCHOOLS AND SCHOOL DISTRICTS—RURAL SPECIAL DISTRICTS.—Under act No. 15 of 1919, rural special school districts can not be formed by dismembering one or more common school districts, but must be formed by embracing such common school districts in their entirety.
3. STATUTES—CONFLICT.—Where there is irreconcilable conflict between two acts, the latest act controls.

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

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

1. Act 15, Acts 1919, is in conflict with and repugnant to act 321, Acts 1909, and repeals it. 112 Ark. 437 does not sustain appellees in their contention. Where the Legislature takes up an old subject anew and covers the entire ground of the subject-matter of a former statute, it is evidently intended as a substitute for and repeals the prior act. 80 Ark. 411; 82 *Id.* 302; 112 *Id.* 440; 92 *Id.* 600; 100 *Id.* 504; 41 *Id.* 149; 92 *Id.* 266. See, also, 47 Ark. 489; 73 *Id.* 536; 72 *Id.* 8; 76 *Id.* 32; 93 U. S. 266; 170 S. W. 563.

Dwight L. Savage, for appellee.

Act 15, Acts 1919, is neither in conflict with nor repugnant to act 321, Acts 1909. 112 Ark. 437 is directly in point. Repeals by implication are not favored. 112 Ark. 441; 92 *Id.* 600. The acts are cumulative, and it was

the intention of the Legislature to preserve the act of 1909 and not to repeal it. 170 S. W. 563. 114 Ark. 526 is clearly distinguishable from this. 112 Ark. 441.

WOOD, J. Rural Special School Districts Nos. 11 and 13 were established under act No. 321 of the Acts of 1909, which in part is as follows:

"Section 1. That when the people of any given territory in any county in this State, other than incorporated cities and towns, desire to avail themselves of the benefits of all laws of this State for the regulation of public schools in incorporated cities or towns, they may be organized into and established as a single school district in the manner and with powers therein provided, with such modifications of said laws as are herein provided.

"Section 2. That the petitions provided for in section 7669 of Kirby's Digest of the laws of Arkansas shall be accompanied by a map showing the territory asked to be made into the special district and shall be presented to the county judge of the county containing such territory, who shall perform the duties imposed upon the mayor of cities and towns in said original act, and with like force and effect, and said county judge shall designate the time and place for holding the election provided for therein, and shall appoint three qualified electors of the proposed territory to hold said election."

Act No. 15 of the Acts of 1919 is in part as follows:

"Section 1. When the people of any given territory comprising one or more common school districts in any county in the State, other than incorporated cities and towns, desire to avail themselves of the benefits of all the laws of this State for the regulation of public schools in incorporated cities or towns, they may be organized into and established as a rural special school district in the manner and with the power in said laws provided, with such modifications of said laws as are herein provided.

"Section 2. The petition provided for in section 7669 of Kirby's Digest of the laws of Arkansas shall be ac-

companied by a map or plat showing the territory embraced in the common school district or districts to be included in the proposed rural special school district, and said petition and map shall be presented to the county judge of the county in which such territory is situated, who shall perform the duties imposed upon the mayor of cities and towns in said original act, and with like force and effect, except as otherwise herein provided, and said county judge shall designate the time and place for holding the election provided for therein, and shall appoint three qualified electors residing on said territory to hold said election. Said call shall also provide for the election of six qualified voters residing on said territory to serve as directors of the proposed rural special school district, if same should be created, until the first regular annual school election thereafter."

Section 3 provides for the election returns to be filed with the county clerk.

Section 4 provides for a canvass of these returns by the county court and an appropriate order by the court declaring the result, describing the boundaries of the district and designating the same as Rural Special School District No. .....

Section 8 provides: "This act shall not have the effect of repealing any other laws not in conflict herewith, but shall be cumulative."

There are other sections not necessary to set forth.

Districts Nos. 11 and 13 were established under act No. 321 of the Acts of 1909 out of territory composing parts of a number of common school districts, after the enactment act No. 15 of the Acts of 1919. The requirements of act No. 15 of the Acts of 1919 were not complied with in the establishment of the districts involved. The only issue presented by this appeal is whether or not act No. 15 of the Acts of 1919 repeals the provisions of act No. 321 of the Acts of 1909.

In *Eubanks* v. *Futrell,* 112 Ark. 437-440, we said: "The law is well established that where the Legislature

takes up an old subject anew and covers the entire ground of the subject-matter of the former statute, and evidently intends a substitute for it, the prior act will be repealed thereby, although there are no express words to that effect, and although there may be in the old act provisions not embraced in the new."

Act No. 15 of the Acts of 1919 covers the entire subject-matter of act No. 321 of the Acts of 1909 and contains other provisions. It is manifest that act No. 15 of the Acts of 1919 was intended as a substitute for the provisions of act No. 321 of the Acts of 1909. The words, "comprising one or more common school districts," in section 1 of act No. 15 of the Acts of 1919, and the words, "embraced in the common school district or districts," in section 2 of that act are intended as words of restriction or limitation. They prescribe the territory comprising one common school district in its entirety as the least *quantum* of territory that can be embraced in a rural special school district. There is no limitation as to the number of common school districts that may be embraced in a rural special school district under act No. 15 of the Acts of 1919, but there must be at least one. Act No. 321 of the Acts of 1909 contained no such limitation, but under that act common school districts may be consolidated in whole or in part. In other words, common school districts, under act No. 321 of the Acts of 1909, might be dismembered and rural special school districts might be established out of such portions; but under act No. 15 of the Acts of 1919, rural special school districts can not be established out of territory less than that comprising one common school district; and if it is desired to establish a rural special school district embracing more territory than is contained in one common school district, then such rural special district must be established by embracing other common school districts in their entirety. Act No. 15 of the Acts of 1919 provides a different procedure for the establishment of rural special school districts than that contained in act No.

321 of the Acts of 1909. There is an irreconcilable conflict between the two acts, and the last enactment controls. See *Eubanks* v. *Futrell, supra; C., R. I. & P. Ry. Co.* v. *McIlroy,* 92 Ark. 600; *DeQueen* v. *Fenton,* 100 Ark. 504. This necessarily results, although section 8 of the last enactment, act No. 15 of the Acts of 1919, provides that "this act shall not have the effect of repealing any other law not in conflict herewith, but shall be cumulative." *Hickey* v. *State,* 114 Ark. 526.

Since act No. 15 of the Acts of 1919 covers the entire subject-matter embraced in act No. 321 of the Acts of 1909 and was intended as a substitute for that act, it follows that the trial court erred in holding that the districts involved herein were valid districts. The decree is therefore reversed with directions to overrule the demurrer to the complaints.

TROUPE *v.* ANCRUM.

Opinion delivered November 8, 1920.

1. REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE—EVIDENCE.—While, to justify reformation of an instrument for mutual mistake, there must be something more than a mere preponderance of the evidence, the rule does not require that the proof be undisputed; it is sufficient if the testimony is unequivocal and clear, that is, such as to satisfy the court that the mistake was made and that the instrument does not express the intention of the parties.
2. REFORMATION OF INSTRUMENTS—EVIDENCE.—Evidence *held* to entitle defendant to a reformation of his deed.
3. REFORMATION OF INSTRUMENTS—SUFFICIENCY OF PRAYER.—Where defendant pleaded a mutual mistake in the description contained in his deed, and prayed that plaintiffs be required to execute a deed covering the property sold to him, the prayer was sufficient to authorize a decree for the reformation of the deed.

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; reversed.

Toney & Craig, for appellants.

It is clear from the evidence that Jordan sold Troupe the land on which he (Troupe) now resides, and the law is well settled. The proof is clear, unequivocal and convincing that a mistake was made and a reformation should have been decreed and the chancellor erred. Renfrow was not an innocent purchaser.

A. R. Cooper, for appellees.

1. The law regarding actions for damages for deceit or misrepresentation is well settled. Not every misrepresentation of the vendor in regard to property sold is a fraud. If the means of information are alike accessible to both parties, so that with ordinary prudence or vigilance the parties might rely on their own judgment they must be presumed to have done so, or if they have not so informed themselves they must abide the consequences of their own inattention and carelessness. 47 Ark. 148; 11 *Id.* 58; 71 *Id.* 91; 62 *Id.* 20; 112 *Id.* 489; 101 *Id.* 603; 95 *Id.* 375; 11 Ark. 58; 30 *Id.* 373; 26 *Id.* 28; 2 Pom. Eq. Jur., § 893. A preponderance of the evidence is not sufficient. 62 Ark. 20. To justify a court of equity in rescinding or cancelling or reforming a contract for the sale of land a clear case should be made and the proof clear and satisfactory that a misrepresentation was made and that the plaintiff *relied* upon it and was induced thereby to make the contract. 62 Ark. 20; 95 *Id.* 375.

2. There was no misrepresentation here. Appellant got the land he knew he was to get. Equity will not decree specific performance or reformation unless the terms of the contract are clearly and unequivocally proved. The burden was on appellant. 82 Ark. 33. Slight and trivial improvements or outlays do not raise an equity in favor of a donee to have a gift enforced. 63 Ark. 101; 109 *Id.* 310; 109 *Id.* 617. Specific performance of an oral contract for sale of land will not be enforced unless it is proved by a decided preponderance of the evidence that the contract was made and what its precise terms were. 78 Ark. 158; 82 *Id.* 33; 15 *Id.* 322;

23 *Id.* 421. The testimony is not sufficient as to the description of the land. Troupe is estopped; he had possession of the deed for a reasonable length of time. 81 Ark. 269. It was his duty to read the deed and make its contents known to himself. 87 Fed. 63; 178 S. W. 399; 84 *Id.* 349; 71 *Id.* 185.

3. Equity looks to the substance of a contract or transaction rather than the form. The transaction in substance though not in form was the same as though the real estate had been deeded to Jordan, who had given his notes and then he in turn had conveyed to Troupe. Equity looks to the substance, the intent, not to form. 105 Ark. 592; 44 *Id.* 251; 92 *Id.* 63. The vendee in an executory contract for sale of land is the equitable owner, while the vendor has merely a lien for the purchase money, and the vendee must suffer any loss which may happen and is entitled to any benefits which may accrue in the interim between the agreement and the contract. The vendor holds the legal estate in trust for the purchaser. Eaton on Equity, p. 70, § 21; 63 N. Y. 301; 1 N. J. Eq. 460; 21 *Id.* 599. If any one was guilty of misrepresentation it was Jordan. Troupe, Ancrum and the realty company were *bona fide* purchasers and holders.

4. Renfrow was a *bona fide* holder to the extent of one-half of four of the notes, and the decree as to him should be affirmed. The representations, if really made, were insufficient to constitute the basis of a cross-complaint, as they were mere expressions of opinion, and appellants had equal opportunity to ascertain the conditions, and, if they failed to do so, they assumed all risks, and they did not rely upon the representations of Jordan but used their own judgment. The testimony is clear and unequivocal. As to specific performance, there is no evidence of any precise agreement. It was the duty of defendant to examine the deed in a reasonable time after receiving it, and, failing to do so, he is estopped. See cases *supra.* If Jordan was guilty of fraud and de-

ceit, he is certainly responsible in damages. Renfrow is the owner of half interest in the notes originally made to the realty company and never had any notice of appellant's contentions or equities, and the lower court so properly found and is an innocent purchaser and the decree should be affirmed.

WOOD, J. This suit was instituted by J. H. Ancrum and F. E. Renfrow, who were holders of eight promissory notes executed by the appellants to Ancrum and the Union Realty Company, amounting in the aggregate to $499.96. The complaint alleged that the notes evidenced the balance due on the purchase price of the southwest quarter of the northeast quarter of section 33, township 5 south, range 10 west, containing forty acres, more or less; that a vendor's lien was retained on the above land to secure the payment of the purchase money; that four of the notes made payable to the Union Realty Company were transferred for value to F. E. Renfrow. The prayer was for the amount of the notes with interest and that a lien be declared on the lands described.

Appellants answered admitting the execution of the notes, but they set up that the notes were executed for the northwest quarter of the northeast quarter of section 33, township 5 south, range 10 west, instead of the lands described in the complaint; that the appellants were placed in possession of the lands described in their answer by the agent of the vendors, who represented that the same was the land which appellants had purchased; that appellant, G. G. Troupe, was an old, ignorant negro, not familiar with the survey and description of the land in question, and he accepted the deed executed by the vendors, believing that the same was a deed to the land which the vendors put him in possession of. Appellants tendered the balance due on the purchase money notes and prayed that the complaint be dismissed or that the vendors be required to execute to them a deed to the lands described in their answer.

The allegations of the answer and cross-complaint were denied. After the institution of the action Ancrum died, and the cause was revived in the name of his administratrix.

Ancrum testified that he and the Union Realty Company owned the land in controversy. They had an agreement with one Dr. H. L. Jordan, a colored man, to sell him four hundred acres of land, including the tract in controversy. They were to deliver a warranty deed to Jordan, or to whomsoever he might direct, in tracts of forty or eighty acres. Jordan would give a description of the land sold by him to various parties, and the vendors would convey to these parties and the deeds would be delivered by Jordan. Jordan had the right to sell the land and put the purchasers in possession. Witness executed the deed describing the land as Jordan directed and delivered the same to Jordan. At the time witness sold the land to Jordan, Evans, a white man, was witness' agent and had possession of the improved land upon which Troupe is now living. Witness wrote him to turn the property over to whom Jordan directed.

Jordan testified that he entered into a contract to sell Troupe the land described in the complaint. He was not sure of the description. The forty was in the southwest corner of the 400-acre tract. When he went to show Troupe the property, he went just one-half mile this side of where a little field is and showed him the improved land. Troupe said: "I would like to have this field." Witness said: "The line goes through this field. If you will buy eighty acres, you will get it all. I do not know where the lines are;" and that he would have to take his chances on getting the field. Witness further testified: "At the time I sold Troupe the land I knew the number of each tract. I would take a little plat and pick out the forty and say: 'About here is your forty.' I knew when I sold Troupe the land I was selling him the southwest forty, but I did not know where the lines were. I never described the land properly to Troupe until I de-

livered him the deed which was recorded before delivery. Troupe paid me $40 extra for the improvements on the land. I have since tendered Troupe the $40."

Troupe testified substantially as follows: He lives on the forty acres bought from Jordan. When he bought the land Jordan pointed out the little house, the fencing and the cleared land and said: "Now, practically all of this land is fresh land, and, Brother Troupe, it is a bargain." Witness told Jordan that he was too old to clear the land, and that he would not buy land from anybody that was not cleared. He told Jordan this while he was standing on the land where he now lives. Jordan said to witness: "Now, Brother Troupe, here is this forty. It is practically fresh land, and Mr. Ancrum says that whoever gets this forty acres of land must pay extra for this improvement." A day or two after that he asked Jordan the price of the improvement and Jordan replied: "$40 for the improvement." Witness paid Jordan a total of $250. Jordan told witness he would get Ancrum to write Travis Evans to give witness possession. Ancrum wrote Evans, who had the place in charge, and told him to turn over the keys to witness. Witness went to Evans, secured the keys, and moved upon the place which he now occupies. Witness had paid between $250 and $300 in improving the place. Neither Jordan nor Ancrum had ever objected to witness' occupancy of the place. Witness was an old negro, and knew nothing about the description or survey of land by metes and bounds. The deed, when given witness, was recorded, and witness thought it was the deed to the property upon which he was then living.

Evans testified that he had in charge the house and improved land where Troupe now lives before Troupe moved on it. Ancrum wrote witness a note saying that he had sold the place to Troupe and directed witness to turn the keys over to Troupe, which witness did. Witness saw Doctor Jordan after that, and he told witness that he had sold the place which witness had in charge

to Troupe. After witness had turned the place over to Troupe, he was in Ancrum's office lots of times, and he told Ancrum that he had turned the place over to Troupe, and Ancrum said that it was all right.

Frank B. Anthony testified that he was a surveyor. Doctor Jordan employed him to survey the land in controversy. Troupe was present and helped him do the work. When Troupe's property was reached, Troupe objected to the survey. He said something was wrong.

Another witness testified that he bought from Doctor Jordan the forty just north of that owned by Troupe; that the land he bought included the little field and property occupied by Troupe; that Troupe told witness after the lines were run off that he bought the south forty; that Doctor Jordan told him the south forty would get most of the improvements.

Jordan, in rebuttal, testified that he told Troupe that he was preparing to have the ground surveyed, and that the matter of where the lines ran would be determined when it was surveyed; that in the meantime Troupe could move in. When it was found that Troupe was on the wrong land, he offered him the $40 back.

Another witness (Jenkins) testified to the effect that, while he was negotiating for the purchase of a tract of land with Jordan, Jordan pointed out to witness the forty where Troupe lived and said: "Here is a forty; some of it is improved, and it has a house on it. I have just sold that to a fellow, and he is going right along," and told witness that if he had been earlier he would have had a chance to get it. Troupe told witness the next week that he had bought the place.

The testimony shows that the deed to the land described in the complaint was executed and recorded and delivered to Troupe, and he accepted the same.

The above are substantially the facts upon which the court entered a decree in favor of the appellees, from which is this appeal.

In *Beneaux* v. *Sparks,* 144 Ark. 23, we said: "Equity will not reform a deed on account of mistake in description, unless the proof of such mistake be clear, unequivocal, and convincing, nor unless the mistake is clearly shown to be common to both parties. While there must be something more than a mere preponderance of the evidence to show mutual mistake, the rule does not require that the proof be undisputed. The requirements of law are fully met when the testimony tending to show a mutual mistake is unequivocal and clear; that is such as to satisfy and convince the court that the mistake was made and that the instrument was so drawn as not to express what the parties to the contract intended."

The outstanding fact, which the testimony proves, is that Troupe intended to buy and Jordan intended to sell the forty acres of land on which the house was situated into which Troupe moved after he purchased the land. At the time the land was sold, Evans was occupying the same. Jordan told Evans that he had sold the land to Troupe. We do not find anywhere in the testimony that Jordan denies that he intended to sell Troupe the forty acres on which the house into which Troupe moved was situated. The testimony of Troupe, Evans and Jenkins is clear and unequivocal to the effect that Jordan said he had sold to Troupe the land on which the house was situated into which Troupe moved. While Jordan stated that he knew when he sold Troupe the land that he was selling him the southwest forty, he also states that he did not know where the lines were. The testimony of Evans and Jenkins to the effect that Jordan told them that he had sold to Troupe the land on which the house into which Troupe moved was situated is not anywhere expressly denied by Jordan; nor does Jordan deny the testimony of Troupe that he told Jordan that he (Troupe) was too old to clear land, and that he would not buy land from anybody that was not cleared, and that Jordan in response to this pointed him out the forty on which the house was situated. True, Jordan testified

that he told Troupe that he didn't know where the lines were, and that, unless he bought the entire eighty, he would have to take his chances on getting the field. But this, as we view the testimony, does not dispute the positive and unequivocal testimony of Troupe and the other witnesses to the effect that Jordan had sold Troupe the land on which the house was situated. The proof is clear, satisfactory, and convincing that, although neither Jordan nor Troupe knew at the time of the sale and purchase what the correct description of the land was on which were the improvements, nevertheless Jordan intended to sell and Troupe intended to buy that forty. Such being the case, the court erred in not reforming the deed to Troupe so as to effectuate the intention of the parties. While there is no specific prayer in appellants' answer for reformation of the deed, yet there is a prayer that "plaintiff be required to execute to him a deed to the northwest quarter of northeast quarter of section 33, township 5 south, range 10 west, upon which he now resides and which was sold to him by the plaintiff," etc.

This prayer was but tantamount to asking for a reformation of the deed. Equity ignores mere form and looks to the substance. Under the doctrine of *Beneaux* v. *Sparks, supra,* the appellants were entitled to have the deed reformed. See, also, *Darnell* v. *Bibb,* 143 Ark. 580; *Cain* v. *Collier,* 135 Ark. 291; *Welch* v. *Welch,* 132 Ark. 227.

The decree is therefore reversed, and the cause will be remanded with directions to the chancery court to enter a decree in favor of appellants reforming the deed so as to convey to appellants the lands as described in their answer, and in favor of appellees for the unpaid purchase money, and for such other proceedings as may be necessary not inconsistent with this opinion.

JACOBS v. JACOBS.

Opinion delivered November 8, 1920.

1. BASTARDS—PRESUMPTION OF LEGITIMACY.—Where a child is born in wedlock, it is presumed to be legitimate, but this presumption may be rebutted by evidence that the husband was impotent or entirely absent at the period in which the child in the course of nature was begotten.
2. BASTARDS—PRESUMPTION OF LEGITIMACY.—The presumption of legitimacy of a child born in wedlock applies to a child conceived before the marriage, though in such case it may not be as strong as in other cases.
3. BASTARDS—PRESUMPTION OF LEGITIMACY—EVIDENCE.—In a suit under Kirby's Dig., § 8020, to recover the share of a child pretermitted by will, evidence that plaintiff was born two months after her mother's marriage, and that she resembled a man who had kept company with her mother, was not sufficient to overcome the presumption that she was legitimate.
4. BASTARDS—FORCED MARRIAGE—LEGITIMACY OF CHILD.—Where a man seduces a woman and marries her through fear of the consequences of his crime, the marriage is valid, and a subsequently born child will be legitimate.
5. BASTARDS—RECOGNITION OF CHILD.—Kirby's Dig., § 2639, requiring recognition of an illegitimate child born before marriage, has no application where the marriage occurred before the child was born.

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

STATEMENT OF FACTS.

J. F. Jacobs died testate in Izard County, Arkansas, leaving surviving him his widow and several children. Dee E. Jacobs was one of his children, and he died intestate, leaving surviving him Lola Jacobs, his daughter, as his sole heir at law. She commenced this suit in the probate court against the appellants, who are the children and devisees under the will of J. F. Jacobs, deceased, to recover her interest in the estate under section 8020 of Kirby's Digest, which provides, in effect, that when any person shall make his last will and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of

the execution of such will, every such person, so far as regards such child, shall be deemed to have died intestate.

Judgment was rendered in favor of appellee in the probate court, and the case was appealed from the probate to the circuit court. The case was tried in the circuit court before the court sitting as a jury upon substantially the following facts:

On the 29th day of June, 1916, J. F. Jacobs made a will in which he bequeathed and devised the property in question to his widow and children named in the will. He omitted to mention the name of his son, Dee E. Jacobs, in the will and did not leave him anything. J. F. Jacobs died on the 13th day of August, 1919, and his will was offered for probate in common form on the 16th day of August, 1919. Dee E. Jacobs died in May, 1899, leaving surviving him his widow and her child, Lola Jacobs, who claims to be the daughter and heir at law of said Dee E. Jacobs, deceased. Dee E. Jacobs married the mother of Lola Jacobs two months before Lola Jacobs was born. Dee E. Jacobs visited Lola Jacobs' mother frequently and constantly for seven or eight months before they were married. They went to church together nearly every Sunday or Sunday night. Before their marriage it became known that the mother of Lola Jacobs was pregnant, and Dee E. Jacobs was arrested, charged with being the father of her child. He only stayed with her one night after their marriage and then left her.

On the part of appellants, it was shown by eight or nine witnesses that other young men kept company with the mother of Lola Jacobs before her marriage to Dee E. Jacobs, and had as good opportunities as Jacobs to have had intercourse with her. All these witnesses testified that Lola Jacobs resembled very much one of the young men, named Davidson, who so visited her mother before her marriage.

The circuit court found the issues in favor of appellee, and judgment was rendered accordingly. The case is here on appeal.

P. C. Sherrill, for appellants.

The will here speaks for itself and shows that J. F. Jacobs recognized seven heirs at law, giving each of the six a one-sixth part of the residue of his estate and cutting off one, Ada Jacobs, with one dollar. Hence, if appellee should receive at all, it should be for only one-eighth instead of one-seventh. The proof here overcomes the presumption of the legitimacy of Lola Jacobs, the appellee, and, under the provisions of Kirby's Digest, § 2639, the judgment should be reversed. The testimony clearly refutes the presumption that appellee was an heir. There is nothing in the facts or the law that will justify the giving of a portion of the estate to one not proved to be of the blood and contrary to the will of J. F. Jacobs.

Elbert Godwin and *John C. Ashley,* for appellee.

1. Appellee in her complaint alleges that she is the only child and heir at law of Dee E. Jacobs, deceased, a son of J. F. Jacobs, and the testimony shows that she was. She was admitted to have been born in lawful wedlock, and the trial court was correct in holding that the burden of proving illegitimacy of plaintiff was on defendants. 5 Cyc. 6267; 7 C. J. 940; 173 S. W. 842; Am. & Eng. Enc. Law 136-7; 6 Jones, Eq. (N. C.), 335; 10 Iredell (N. C.) 131; Brok. (U. S.) 256; 58 Iowa 46; 61 Ind. 334; 2 Munf. (Va.) 442; 117 Ark. 113. See, also, 3 R. C. L., § 7, p. 727; 6 How. 550; 34 *Id.* 563-609.

2. The court did not err in refusing to allow W. J. Taylor to answer the question as to the general consensus of opinion of people in the neighborhood as to whose daughter plaintiff was. The question was incompetent, immaterial and irrelevant, as would have been the answer. It was purely hearsay testimony, and could not outweigh the undisputed evidence that Dee F. Jacobs was constantly in the company of the mother of plain-

tiff for more than a year previous to the conception of plaintiff's mother, and in her company after the conception, on up until he married the mother to escape disgrace.

3. The court was correct in refusing to allow Walter Meers to answer the question asked him. It was also incompetent, irrelevant and immaterial. If a man seduces a woman and marries her through fear of the consequences of his crime, the marriage is valid and the children legitimate. 33 Ark. 156; 52 *Id.* 425.

4. Kirby's Digest, § 2639, has no application whatever to this suit.

HART, J. (after stating the facts). In the case of *Kennedy* v. *State,* 117 Ark. 113, which was a bastardy proceeding, the court held that where a child is born in wedlock it is presumed to be legitimate, but that this presumption may be rebutted by sufficient evidence showing that the husband was impotent or entirely absent at the period in which the child in the course of nature has been begotten so that he could not have had access to the child's mother. The rule is about the same on the subject of descent and distribution. The question of the legitimacy or illegitimacy of the child of a married woman is one of fact, resting upon decided proof as to the nonaccess of the husband. 2 Kent, Comm. (14 ed.) *211.

In *Patterson* v. *Gaines* (U. S.), 6 How. 550, and *Gaines* v. *Hennen,* 24 How. (U. S.) 553, the court held that access between man and wife is always presumed until otherwise plainly proved, and nothing is allowed to impugn the legitimacy of a child short of proof by fact showing it to be impossible that the husband could have been its father. This is the general rule on the subject. 3 R. C. L., pp. 728-29.

Conception during wedlock is not essential to the presumption of legitimacy which arises from birth in wedlock. There is a division as to the amount of proof necessary in such cases. Some of the authorities hold that antenuptial conception does not even weaken the

presumption of legitimacy arising from postnuptial birth. This is in recognition of the frailties of human nature. 3 R. C. L., § 10, p. 730.

Another line of authorities recognizes that the presumption is weaker in cases of antenuptial conception, and the reason given is that it is the marriage only, and not the presumed intercourse resulting from marriage, which creates the presumption. It does not make any difference which of these rules is correct, so far as his case is concerned, for the finding of the court is correct under either rule. The decided weight of authority is that every child born during wedlock is rightly presumed to be the offspring of the husband. The presumption must be adhered to for the protection of the rights of those who are attempted to be bastardized without any fault on their part, to preserve the peace of families and to promote the interest of society.

In the present case it is claimed that the proof overcomes the presumption of the legitimacy of Lola Jacobs. We think the proof falls short of doing this, and that the court rightly held that Lola Jacobs was the legitimate child of Dee E. Jacobs, deceased. The only testimony tending to show that she was not his child was the testimony of witnesses to the effect that Lola Jacobs resembled another young man who kept company with her mother and that he had equal opportunity with Dee E. Jacobs to have been the father of the child. No attempt was made to show any undue intimacy on the part of this young man with Lola Jacob's mother or that they had even been engaged to marry. The law will not balance probabilities in this way.

Counsel for appellant also point to the fact that the father of Lola Jacobs' mother swore out a warrant against Jacobs, before the latter's marriage to the former's daughter, charging Dee E. Jacobs with being the father of the unborn child. They insist that because of the arrest the rule should be changed. This court has held that, if a man seduces a woman and marries her through fear of the consequences of his crime, the mar-

riage nevertheless will be valid and the child will be legitimate. *Honnett* v. *Honnett,* 33 Ark. 156; and *Marvin* v. *Marvin,* 52 Ark. 425.

Counsel for appellants contend for a reversal of the judgment under the provisions of section 2639 of Kirby's Digest, which reads as follows:

"If a man have by a woman a child or children, and afterward shall intermarry with her, and shall recognize such children to be his, they shall be deemed and considered as legitimate."

This section has no application to the present suit. It refers to cases where the children are born before the marriage. In such cases there must be a recognition of the children after the marriage in order to make them legitimate. *Rowland* v. *Taylor,* 134 Ark. 183, and *Swinney* v. *Klippert* (Ky.), 50 S. W. 841.

The case turned upon the testimony of Lola Jacobs, and the circuit court properly held in her favor on this point.

It follows that the judgment will be affirmed.

SPURLOCK *v.* GAIKENS.

Opinion delivered November 8, 1920.

1. HOMESTEAD—FAILURE TO CLAIM BEFORE EXECUTION SALE.—Under Kirby's Digest, § 3902, a debtor's right of homestead is not lost or forfeited by his omission to claim it as exempt before a sale under execution, and he may occupy the homestead until he is sought to be evicted before he is required to act.
2. EJECTMENT—PLAINTIFF'S TITLE.—In ejectment by a purchaser of a debtor's homestead at an execution sale, the mere fact that the judgment debtor attempted to sell the homestead after the execution sale, and that the deed to the debtor's grantee was void because his wife did not join in the execution, was no ground for recovery by the plaintiff, there being no abandonment of the homestead by the debtor, and the plaintiff being required to recover on the strength of his own title.

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

STATEMENT OF FACTS.

Appellant brought this suit in ejectment against appellees in the circuit court to recover possession of certain tracts of land.

The case was tried before the court sitting as a jury upon an agreed statement of facts, which is substantially as follows:

Tony Gaikens was the owner of eighty acres of land which he occupied with his wife, Josephine Gaikens, as his homestead. While he resided on his homestead, a judgment was obtained against him and an execution issued and levied on the land. Appellant became the purchaser at the execution sale, and the sheriff executed to him a deed therefor. No claim of exemption was filed by Tony Gaikens. After the sale under execution, and while occupying the land as his homestead, he made a deed to John Gaikens, and his wife did not join with him in the execution of the deed. John Gaikens was the nephew of Tony Gaikens. He is now in possession of the land. After Tony Gaikens died, his widow, Josephine Gaikens, executed a deed to the land to John Gaikens.

The circuit court found that the sheriff's execution deed to appellant was based upon the sale of the homestead of the execution debtor and was therefore void.

Judgment was accordingly rendered in favor of appellees, and the case is here on appeal.

E. E. Hopson and *Coleman, Robinson & House,* for appellant.

Both appellant and appellees trace their title from Tony Gaikens. Appellant must prevail upon the strength of his own title. We accept that rule and submit that the record shows title sufficient to sustain ejectment and shows absolutely no title in appellee, John Gaikens. It was not necessary for the owner of the homestead to claim it as exempt before sale on execution. The purchaser of a homestead at execution sale acquires a defeasible title. 55 Ark. 139. Spurlock had a defeasible title at the outset, but since then the title has vested in him. *Ib.*

The deed from Tony Gaikens to John Gaikens conveyed no title, as the wife did not join nor acknowledge it. A conveyance of a homestead without the wife joining in the deed is void. 108 Ark. 297; 94. *Id.* 107. After the death of Tony Gaikens his widow attempted to convey the property to John Gaikens. It was a homestead, and there were no minor children. So far as the record shows, the homestead was exempt during the widow's lifetime unless she abandons it. If she does, she waives her right to claim it as exempt, and it becomes liable to the debts of her deceased husband. 65 Ark. 70; 126 *Id.* 5. It follows that the deed from Josephine Gaikens to appellee conveyed no title whatever. Regardless of what may be said of appellant's title, it is clear that appellee has no title whatever. Upon the death of Tony Gaikens, after failure during his lifetime to claim the homestead exempt, and with the subsequent abandonment of the homestead by his widow, the defeasible title of appellant by purchase of the homestead at a sale under execution, he became indefeasible, and good against the world. 72 Ark. 446. It is therefore clear that Spurlock is the owner of the eighty acres involved here, and that appellees have no title whatever, and that appellant upon the strength of his own title, is entitled to recover in this suit.

J. T. Cheairs, Jr., and *F. M. Rogers,* for appellees.

1. The sheriff's deed, upon which appellant bases his title, is void (67 Ark. 60), and appellant's title fails, as he must recover on the strength of his own title, which is conceded. It is established that at the time of the levy of the execution and the sale the property was the homestead of Tony Gaikens. If Kirby's Digest, § 3902, bore out plaintiff's contention, his plight would not be benefited, for the act of 1887 (Kirby's Digest, § 3902) would contravene. Art. 9, § 3, Const. 1874; 28 Ark. 486; 43 *Id.* 430; 45 *Id.* 384; 47 *Id.* 400; 53 *Id.* 182; 55 *Id.* 139; 56 *Id.* 150; 70 *Id.* 69; 75 *Id.* 116. If a debtor wishes to *prevent* a sale, he may do so by following the provisions of

the act; if he so elects, he assumes the burden of proving that the property claimed is really exempt; if he fails or neglects to schedule prior to the sale, he does not lose his rights, but may enforce same by suit to remove cloud from title, or may successfully resist an action of ejectment by pleading his homestead rights. Cases cited *supra.* The question of waiver or nonwaiver is determined from the facts presented by the record. Gaikens had the perfect right to convey although there had been a sale under execution. 43 Ark. 429; 52 *Id.* 101, 493; 56 *Id.* 156; 57 *Id.* 242.

2. The deed to John Gaikens was not void because the wife of Tony Gaikens did not join in it, under Kirby's Digest, § 3901, but she afterward did execute a deed with covenants of warranty conveying the lands and others to appellee and delivered it. The deed relates back to the date of the execution of the deed by Tony Gaikens and vitalizes it. The act does not mean that the wife must sign the identical paper her husband signed, but only that she consents to the sale, and establish her consent by record evidence. Kirby's Dig., § 3901. No exception was filed to the deed.

3. Tony Gaikens died without issue, and the widow acquired an undivided one-half interest in the land, and her deed conveyed this interest to John Gaikens. Kirby's Digest, § 2709.

HART, J. (afaer stating the facts). Art. 9, sec. 3, of the Constitution of 1874 provides that the homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment or decree of any court, or to sale under execution, or other process thereon, except such as may be rendered for the purchase money, or in certain other specified instances.

Counsel for appellant admit that the homestead in this case was not subject to execution under the judgment against Gaikens, but they insist that the judgment be reversed under the authority of *Snider* v. *Martin,* 55 Ark. 139. In that case judgment was rendered and an

execution issued and levied upon the homestead, and the purchaser at the execution sale executed his note to the sheriff for the purchase money. Upon being sued by the execution-creditor on the note, he defended on the ground that the homestead was not subject to sale under the execution and that the note executed by him was on that account without consideration.

This court said that the sale was valid against every one except the debtor and his wife, and that the purchaser acquired an interest sufficient to constitute a valuable consideration. The court also said that the execution debtor might choose to waive his claim to a homestead, and that, until the purchase had been defeated by an ascertainment of the homestead rights, it was too soon to consider what relief the purchaser might be entitled to, if any.

Under section 3902 of Kirby's Digest, a debtor's right of homestead is not lost or forfeited by his omission to select and claim it as exempt before the sale on execution. The section further provides that the debtor may set up his right of homestead when suit is brought against him for possession. Our Constitution exempts the homestead from sale under execution except in certain specified cases, which it is admitted does not apply here. The debtor is not required to perform any act, to discharge any duty in the premises, or to manifest an intention to avail himself of its benefits. The deed by the sheriff to the purchaser at the execution sale has no effect on the title to the homestead beyond that of casting a cloud over it. The debtor need not claim his homestead as exempt. No affirmative action is required by him. He may occupy the homestead until he is sought to be evicted before he is required to act.

There is nothing in the record to show that the debtor in the instant case intended to abandon his homestead or to waive his claim of exemption thereto. It is claimed that his deed to the homestead is void because his wife did not join in the execution of it. In our view of the case, it does not make any difference whether his

attempted sale of the homestead after execution was under a void deed or not. The mere fact that he attempted to sell his homestead shows that he did not intend to abandon it, or to waive his claim of exemption.

As above stated, the execution debtor need not claim the homestead until he is sought to be evicted from it and the purchaser at the execution sale seeks to obtain possession of the property. Hence his right to the homestead has never been made an issue, and there is nothing in the record to indicate that he abandoned his claim of the homestead. It is conceded that the appellant must recover, if at all, on the strength of his own title. This is true.

It follows that the judgment must be affirmed.

CAIN v. STACY.

Opinion delivered November 8, 1920.

1. USURY—TAKING INTEREST IN ADVANCE.—The taking of the highest rate of interest in advance on a loan having not more than twelve months to run is not usury.
2. USURY—EMPLOYMENT OF LENDER.—Where a lender, in addition to charging the highest legal rate of interest, exacts of the borrower, as part of the consideration, that the borrower employ him for a consideration when his services are not needed and are not in fact rendered, the contract is usurious; but such an agreement would be valid if the contract was made in good faith, and the additional amount to be received was a fair compensation for services to be rendered, and was not a device to hide usury.
3. USURY—EVIDENCE.—A finding that a transaction was not tainted with usury held not against the weight of the evidence.

Appeal from Woodruff Chancery Court, Northern District; *A. L. Hutchins,* Chancellor; affirmed.

STATEMENT OF FACTS.

I. J. Stacy brought this suit in equity against W. R. Cain to obtain judgment upon a promissory note and to foreclose a mortgage given to secure the same.

The answer sets up the defense of usury. On the 15th day of May, 1919, W. R. Cain executed to I. J. Stacy a mortgage on certain chattels to secure an indebtedness of $4,000 evidenced by a promissory note bearing interest at the rate of 10 per cent. per annum from date until paid. The mortgage was given by Cain to Stacy to obtain a loan of $4,000 to be used in raising a rice crop. The parties also entered into a written agreement reciting the execution of the mortgage and agreeing that the money should be deposited with the Bank of Augusta & Trust Co., to the credit of Cain-Stacy rice account, and that no checks drawn thereon should be valid until signed by said Stacy.

It was further agreed that Stacy, if he saw fit, might take charge of the rice crop and manage the same, and that the cost thereof should be charged against the rice crop and paid out of the proceeds arising from the sale thereof. It was further agreed that in any event the said Stacy should receive a reasonable compensation for his services and that he might have the rice crop shipped in his name and ship and sell it when he so desired. During the season of growing the crop, Stacy was paid $50 per month for his services for a period of five months. Thus far the facts are undisputed.

According to the testimony of W. R. Cain, Stacy drew a check in advance in his own favor for the first six months' interest at the time the money was deposited in the bank to the credit of the Cain-Stacy rice account. The parties also agreed at that time that Stacy should receive a salary of $50 a month for five months. It was the understanding that in this way Cain would pay to Stacy 25 per cent. interest per annum for the loan. In other words, the employment of Stacy and the payment of the $200 interest in advance were for the purpose of enabling Stacy to avoid the usury laws, it being the understanding between the parties that in this way Stacy should receive 25 per cent. per annum interest on the loan. Cain did not agree to pay $50 per month to Stacy for any assistance and advice in cultivating the rice

crop. Stacy did nothing to assist Cain in cultivating the rice crop except to lend him the $4,000. Cain never saw Stacy on the farm while the rice was being grown. Cain made arrangements with a certain coal company to furnish him with coal, and when he needed coal he asked Mr. Stacy, who was one of the stockholders of the company, to call the company over the telephone and order a car of coal for him. Cain admitted that he sometimes drank to excess, but said that he drank very little during the year 1919. None of the checks drawn on the rice account were countersigned by Stacy.

According to the testimony of Stacey, he was president of the bank in Augusta in which the Cain-Stacy rice account was placed. Stacy loaned Cain $4,000 which he had borrowed for Cain from a friend in St. Louis and took a chattel mortgage from Cain to secure the debt. He required the account to be placed in the bank of which he was president and to be designated as the Cain-Stacy rice account, because he wanted to have control of checking out the same so that he might see that it was used to make the rice crop and for no other purpose. He did not sign the checks himself because he was in the bank and knew what each check was drawn for. He at all times during the season advised with Cain about the expenditure of the money and knew that each check was applied to the cost of making the rice crop. Cain had been in the habit of drinking very heavily, and Stacy thought that he would have to give him a good deal of help and advice about cultivating and gathering the rice crop. For this service he was to be paid at the rate of $50 a month for five months. It was on account of the hazard and the services Stacy was to render that Cain agreed to pay him this $50 per month.

Stacy was asked what he meant by using the word "hazard" in this connection and answered that Cain was accustomed to get drunk and was not able to supervise or work the rice crop while in this condition. Cain did get drunk a number of times during the crop season, and Stacy earned his compensation of $50 per month.

Stacy was a stockholder in a coal company and saved Cain at least $25 per car by supplying him the coal through the company of which he was a stockholder. Stacy purchased four cars of coal for Cain in this way.

The cashier of the coal company corroborated the testimony of Stacy about the purchase of the coal. Cain rented the land on which the rice crop was grown from R. B. McKnight. McKnight testified that Stacy approached him to take over Cain's rice crop if it became necessary. McKnight had seen Cain in a drunken condition frequently, but very little during the year 1919.

The chancellor found the issues for the plaintiff, Stacy, and gave judgment in his favor against the defendant, Cain. It was also decreed that the mortgage should be foreclosed. The case is here on appeal.

E. M. CarlLee, for appellant.

The decree, in so far as it gave judgment for the $4,000 note, is void for usury, and the finding of the chancellor that the transaction was not usurious is contrary to the clear preponderance of the evidence. The loan was for six months, and the taking of $200, the full ten per cent. allowed by law, in advance, was usury. The burden was on appellee to show that there was no usury. 55 Ark. 146. The evidence proves usury. *Ib.* The alleged services were a mere subterfuge to cover an usurious loan. 39 Cyc. 931. Testimony by parol is admissible to show that a written agreement to pay an usurious rate of interest is always admissible. 62 Ark. 98.

J. F. Summers, for appellee.

The allegation of usury is not only not sustained by the proof but is not tenable. Here the contract provides for valuable services which were performed, and there was no usury. The finding of the chancellor who heard all the testimony is supported by a clear preponderance of the testimony that there was no usury; and the decree should be affirmed.

HART, J. (after stating the facts). The first ground of usury relied upon by the defendant is that the notes

bore 10 per cent. interest per annum from date until paid and that the plaintiff took out $200, the first six months' interest, in advance.

In *Ellis* v. *Terrell,* 109 Ark. 69, and in *Bank of Newport* v. *Cook,* 60 Ark. 288, the court held that the taking of the highest rate of interest in advance on negotiations having not more than twelve months to run is not usury.

Another ground for the alleged usury is that by the written agreement of the parties the payment to Stacy for his services in connection with the rice crop was a contrivance between the parties by which more than the legal rate of interest was to be secured to Stacy. If Stacy exacted of Cain as part of the consideration of the loan that Cain should employ him at an exorbitant price when his services were not needed, and were not in fact to be rendered, the contract would be usurious. The form of the contract is immaterial if the intent exists at the time the contract is made to take and receive usurious interest. *Habach* v. *Johnson,* 132 Ark. 374.

In the present case, the chancellor found that the defense of usury had not been established by the evidence, and we can not say that the finding of the chancellor is against the weight of the evidence. At the time of the loan Cain was in straitened circumstances. He had rented a rice farm, and was not able to grow a rice crop without pecuniary assistance. He had the habit of getting drunk frequently, which habit was known to Stacy.

According to the testimony of Stacy, the written agreement of the parties was given as a consideration for the services of Stacy in the matter of superintending the rice crop because Cain was in the habit of frequently getting drunk. It is true that Cain did not get drunk as frequently as usual during the rice season of the year 1919, but he did get drunk several times and needed the services of Stacy in assisting him about managing the crop. Stacy said that Cain was incapable of managing the crop when he was drunk. It is true the owner of the land on which the crop was grown said that he did not

see Stacy drunk often during the year 1919, but the reasonableness of the charge must be tested by the conditions existing at the time the contract was made. The question is whether the agreement between the parties was a contrivance by which more than the highest legal rate of interest was to be secured to the lender. The evidence shows that at the time the agreement was made Cain was in the habit of frequently getting drunk and Stacy had this in mind when he made the agreement. He knew that Cain was incapable of looking after the crop when he was drunk. Stacy felt like the hazard of lending money to a man of this character was so great that he must protect himself by knowing that every bit of the money loaned should be applied to the expense of raising the rice crop. To accomplish this purpose, he had the money deposited and the account named in the bank as the Cain-Stacy rice account. It is true he did not sign the checks, but he was president of the bank carrying the account and knew what each check was for before it was paid. Stacy also assisted Cain in other ways about the rice crop. He looked after the purchase of coal for him and in this way saved him at least $100.

According to Stacy's testimony he superintended the growing of the rice crop and rendered valuable services in that behalf to Cain. Of course, according to the testimony of Cain, the transaction was intended as a cover for the advance of money with usurious intention. According to the testimony of Stacy, however, the amount to be received by him was a fair allowance for the trouble and inconvenience he was likely to be put to in assisting and superintending the growing of the rice crop. If agreements of this kind are made in good faith and not as a device to hide usury, they are valid, even though the compensation may be greater than usually paid for like services. 39 Cyc. 931 and cases cited in notes 8 and 9.

As above stated, the chancellor found that the defense of usury should not prevail, and under the settled rules of this court his finding will not be disturbed

on appeal unless it is against the preponderance of the evidence.

Tested by this rule, we are of the opinion that the decree must be affirmed.

HILL v. CRUCE.

Opinion delivered November 8, 1920.

1. HIGHWAYS—EMPLOYMENT OF COMMISSIONER BY BOARD.—Acts 1915, No. 338, § 5, requiring each commissioner of a road improvement district to take an oath "that he will not, directly or indirectly, be interested in any contract made by the board of commissioners," prohibits a commissioner from being so interested, and renders invalid the employment of a commissioner by the board to supervise road construction, whether such employment is advantageous to the district or not.
2. HIGHWAYS—UNLAWFUL CONTRACT—CURATIVE ACT.—An unlawful employment by the board of commissioners of a road improvement district of one of the members thereof to superintend road construction was not cured by Road Laws 1919, vol. 1, p. 6, the expressed purpose of which being to validate acts of the board done in connection with the formation of the district and the assessment of benefits.

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

J. Allen Eades, for appellant.

1. Appellee was one of the board of commissioners of district 1 and could not employ or hire himself at a stated price per month. Act 338, § 5, Acts 1915, prohibits him from so doing. The hiring was unlawful and the contract void, and he should have been restrained as prayed, and it was error to refuse the relief prayed. Act. 338, § 5, Acts 1915, p. 1407. The law is clear and plain, and this case is ruled by 98 Ark. 38. The hiring is against public policy and void. 25 Wis. 551; 81 Ark. 599; 54 N. Y. 314; 95 Pac. 349.

2. Cruce did not file any claim with the county court for his services in a fiduciary character, and he is not entitled to recover on the *quantam meruit,* and he should

be required to refund all over his *per diem,* $5. Cases *supra,* and 125 Cal. 119. The cause should be reversed and the restraining order granted, with an order to refund to the district treasurer the amount collected and the price of the car.

Strait & Strait, for appellee.

The services were rendered under a valid contract, not prohibited by law as against public policy. The services were honestly rendered and very valuable and no court should, after they were rendered and accepted and the benefits enjoyed, require Cruce to refund. The contract was not prohibited by the Alexander Road Law or any other act. Acts 1915, 1408. The contract was validated by act 36, Acts 1919, vol. 1, p. 6. The principle is stated clearly by 2 Story, Esq., Jur., and 4 Hen. & Munf., 419, and is sustained in this State. 98 Ark. 38; 58 *Id.* 348; 61 *Id.* 397. Under the circumstances, and in view of the valuable services rendered by Cruce and the small compensation agreed upon, the chancellor did not err.

Sellers, Gordon & Sellers, of counsel for appellee, join in the brief for appellee.

SMITH, J. The instant case is not distinguishable on the material facts from the case of *Tallman* v. *Lewis,* 124 Ark. 6. Tallman was a commissioner of a drainage district, and had been employed by the board of commissioners to supervise the construction of the ditch. Appellee Cruce is a commissioner of a road improvement district organized under the Alexander road law (act 338, Acts 1915), and was employed by the board of commissioners to supervise the construction of the road.

The oath required of the commissioner in each case was "that he will not, directly or indirectly, be interested in any contract made by the board of commissioners."

Of this oath in the case of *Tallman* v. *Lewis, supra,* we said: "While the statute under consideration does not in express terms declare that the contract shall be null and void, it does require the commissioner to make

oath that he will not directly or indirectly be interested in any contract made by the board. So, under the statute, a commissioner would violate his oath of office by becoming interested in a contract made by the board of which he was a member. This amounted to an express prohibition to him, and to permit a recovery upon rights growing out of such a contract would in effect abrogate the statute. The principle is well expressed by the Supreme Court of the United States in *Bank of United States* v. *Owens,* 2 Pet. 527, as follows: 'No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country. How can they then become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal.' " In the case from which we have quoted a taxpayer was permitted to recover judgment against a commissioner so employed, for the benefit of the district, for the sum illegally paid. The plaintiff in the instant case is a taxpayer, who prays the same relief, and, in addition, asks that the commissioners be restrained from further employing their associate. The court below denied the relief prayed, because of the showing made that the contract with appellee was an advantageous one to the district. In this the court erred. If the contract is illegal, it is unimportant to determine whether it is advantageous or not, as its validity or invalidity is not determined by balancing its advantages against its disadvantages.

It has been suggested that the contract was validated by act No. 36 of the Acts of 1919 (Vol. 1, of Special Road Acts, p. 6). We do not think so. In the first place, it is not shown that appellee performed the services under a contract entered into prior to the passage of that act, and, secondly, we do not think the contract in question was within the purview of the act. The purpose of the act, as reflected by its title, was "to establish Road Improvement District No. 1 of Conway County,

Arkansas; to validate all acts of the county court, the board of commissioners and the board of assessors heretofore had and done in connection with the matter of the formation of Road Improvement District No. 1 of Conway County; to validate the assessment of benefits to the property within the district as heretofore made and filed by the board of assessors of said district under appointment by the county court of Conway County; and to provide a method whereby the plans and specifications and the character of the surface of the road to be constructed and improved, as shown by the plans and specifications on file in the office of the county clerk of Conway County, may be changed."

It follows, from what we have said, that the court should have granted the relief prayed, and the decree will therefore be reversed and the cause remanded with directions to ascertain the sum paid appellee (not including the per diem allowed him as a commissioner), and to render judgment against appellee for its recovery, and to enter an order restraining the commissioners from further employing appellee in any capacity, so long as he continues in office as a commissioner of the district.

CONLEY v. ARCHILLION.

Opinion delivered November 8, 1920.

1. VENDOR AND PURCHASER—PURCHASER'S ASSUMPTION OF VENDOR'S DEBT.—In an action on notes secured by a vendor's lien apparently satisfied of record, finding of the court that defendants as subvendees of the purchaser assumed payment of the note *held* not against the preponderance of the evidence.
2. LIMITATION OF ACTIONS—PAYMENT OF INTEREST.—Payment of interest on a note within the statutory period *held* to stop the running of the statute of limitations.
3. LIMITATION OF ACTIONS—ASSUMPTION OF PAYMENT.—Suit on land purchase notes was not barred where, within the statutory period, the land was conveyed by the purchaser and payment of the notes was assumed by the grantee.

4. VENDOR AND PURCHASER—LACHES.—A suit on land purchase notes, the payment of which was assumed by two brothers as grantees of the purchaser, was not barred by laches because it was not commenced until after the death of one of such grantees, where the other brother was alive and presented his theory of the transaction, especially where suit was brought within the statutory period.

5. VENDOR AND PURCHASER—LIABILITY OF PURCHASER'S WIDOW AND HEIR.—The widow and heirs of a purchaser of land, who assumed payment of his grantor's purchase money notes secured by a vendor's lien on the land, are proper parties to a suit to enforce such lien, though they are not personally liable.

6. VENDOR AND PURCHASER—REFORMATION OF DEED.—In a suit to subject land to the payment of notes secured by a vendor's lien apparently satisfied of record, a deed by the purchaser to the defendants need not be reformed, so as to show that they assumed payment of the notes, since, if that was the agreement, it could be enforced without reforming their deed.

7. EVIDENCE—PAROL EVIDENCE TO EXPLAIN RECORD.—Cancellation of a vendor's lien on the margin of record was a mere receipt, and parol evidence was admissible to show that it had been entered because the purchase notes had been lost and might fall into the hands of persons who might attempt to collect them.

Appeal from Mississippi Chancery Court, Chickasawba District; *Archer Wheatley,* Chancellor; affirmed.

J. T. Coston, for appellants.

1. The note was barred by the statute of limitations.

2. It was error to render a personal decree against heirs. The claim should have been presented for allowance to the administrator of Robert Conley and it was error to sue the widow and heirs. 35 Ark. 292; 40 *Id.* 544; 39 *Id.* 79-80; 45 *Id.* 303.

3. The decree is against the great preponderance of the testimony and the claim is barred by laches. 123 S. W. 1046-7; 145 *Id.* 886; 142 *Id.* 158. It was not fair and it is unconscionable for the old lady to present her claim after the death of Robert Conley. 21 Ark. 202; 25 *Id.* 515.

4. It was error to decree a reformation of the deed from Mrs. Conley to Robert and Pete Conley. No fraud

or mistake were alleged, nor does the complaint ask reformation of said deed. Nor is the proof clear, unequivocal and decisive. 219 S. W. 328; 77 *Id.* 53; 131 *Id.* 701; 101 *Id.* 724; 131 *Id.* 452. The note is barred by limitation and laches and the decree is against the clear, preponderance of the testimony.

W. D. Gravette, for appellee.

The great weight of the evidence supports the findings of the chancellor and none of the notes were barred by limitation or laches. The decree really is too lenient to appellants. Appellee was not unreasonable nor unconscionable, as the evidence shows.

SMITH, J. This suit was brought by appellee to collect two notes, for $500 each, dated September 14, 1910, and due in one and two years after date. The notes were originally executed by J. W. Conley to appellee, and were given in part payment of the purchase price of a certain eighty-acre tract of land, and were secured by a vendor's lien reserved in the deed. Appellee lost the notes, and they remained lost for several years. After discovering the loss of the notes appellee endorsed upon the margin of the deed record concellation and satisfaction of the notes there mentioned and secured. The testimony is in irreconcilable conflict as to the purpose for which this was done. Appellee testified that she thought the notes had been stolen, or that they might be found, and, if so, that Conley would be compelled to pay them. Conley is appellee's son. Conley testified that he had applied for a loan to the Southern Loan & Abstract Co., and to procure this loan it was required that he have the vendor's lien in his mother's favor canceled, and that it was done for that purpose. He testified that it was understood that the debt was not thereby extinguished. He further testified that his crop failed, and he was unable to meet his obligations, and on that account sold the land to his sons, Robert and Pete Conley, on December 29, 1915, for the consideration of $4,000, and that he had never made any payment to his mother of principal, but

had paid the interest on three or four occasions. That this consideration was represented by a cash payment of $500, the assumption of the mortgage indebtedness in favor of the loan company, and the agreement to pay appellee the thousand dollars purchase money due her. Robert Conley died February 17, 1916, and left surviving him a widow and several minor children, who were made parties to this suit.

Pete Conley testified that before buying the land he was assured by appellee that the land was clear—that she had satisfied the debt against it—and that he would not have bought the land but for this assurance. Jim Phillips, a tenant living on the land, substantially corroborated this testimony, as did also Eldorado Phillips, a granddaughter. Mrs. Maggie Ledbetter, the divorced wife of J. W. Conley, and the mother of Robert and Pete Conley, testified that she had repeatedly heard appellee say that the debt to her on the land was settled.

On the other hand, the testimony was to the effect that the land was worth more than $4,000 at the time J. W. Conley executed the deed to his sons, and the deed recites a consideration of $4,000 of which $1,500 was cash in hand paid. It is admitted that only $500 was paid in cash, but the explanation was offered that one Taylor had attempted to buy the land and had offered $3,000 for it, and it was desired to have it appear that $4,000 had been paid for the land.

The deed from Conley to his sons was prepared by J. A. Mott, the cashier of the People's Bank of Blytheville, who testified that in the preparation of the deed he heard the parties discuss the fact that J. W. Conley owed his mother a thousand dollars, and that the consideration of the deed was to be $4,000, and that in writing it he recited the consideration to be $4,000. The witness recognized the deed as the one prepared by him. Fay Mott, a brother of J. A. Mott, remembered the occasion when his brother prepared the deed, and, in response to a question as to what was said about the thousand dollars in the presence of the boys at that time, an-

swered: "Yes, sir, the old man here (J. W. Conley) owed one thousand dollars to the old lady (appellee), or some one, and they could pay it off if they wanted to," and, in response to the question, "Did you understand from their conversation that these boys understood he owed a thousand dollars to Mrs. Archillion?" answered, "They couldn't keep from knowing it. He said he owed a thousand dollars, I am sure he said a thousand dollars, against the land, but they knew he owed it. It seemed like the thousand dollars was for taking care of the children, or something like that." It thus appears that, while the witness was mistaken about the details, he was positive that a demand of a thousand dollars in favor of appellee was then asserted and conceded.

It was shown that appellee was eighty years old, and probably in her dotage, and certainly very litigious, and that she had several lawsuits with her children and with her grandchildren, all of which she had lost.

Without further reviewing the testimony, or attempting to reconcile it, it may be said that it does not appear that the finding of the court below is clearly against the preponderance of the evidence. The court found the fact to be that the deed from J. W. Conley to his sons was upon the consideration that they would assume and pay the thousand dollars which he owed appellee for purchase money, and it was ordered that the deed be reformed to recite that fact.

There was a judgment for the thousand dollars and interest from December 29, 1915, and time fixed for its payment, with directions to the commissioner there appointed to sell the land if payment was not made within the time limited, subject, however, to the lien of the loan company; and this appeal is from that decree.

It is insisted that one of the notes sued on was barred by the statute of limitations. But this is not true if the payments of interest were made as testified by Conley. Moreover, before the bar of the statute had fallen, the deed from J. W. Conley was executed, and, as found by the court, the assumption at that time of the

payment of the two notes furnished in part the consideration for the deed, and this suit was commenced July 1, 1917.

It is said the suit was barred by laches, inasmuch as it was not commenced until after the death of Robert Conley. But we do not agree with counsel in this contention. The other brother was still alive, and presented his theory of the transaction. Moreover, the suit was commenced before the bar of the statute of limitations had fallen.

It is insisted that the court erred in rendering personal judgment against the heirs of Robert Conley. But we do not understand this to be the effect of the decree. The widow and heirs of Robert Conley were proper parties in a proceeding to subject the land to the payment of the notes, and they are bound by the decree insofar as it directs the sale of their interest in the land for that purpose, but they are not otherwise liable for the debt.

It is unnecessary to determine whether the court should have decreed the reformation of the deed to make it recite an agreement on the part of Robert and Pete Conley to pay the thousand dollars. If there was such an agreement, it was proper to enforce it, and it was not necessary to actually reform the deed to award that relief. Cancellation of the lien from appellee to Conley on the margin of the record was, at most, a mere receipt, and no rule of evidence is offended against in permitting an explanation of that receipt. *Greer* v. *Laws*, 56 Ark. 35; *Real Estate Bank* v. *Rawdon*, 5 Ark. 558; *Cache Valley Lbr. Co.* v. *Culver Co.*, 93 Ark. 383.

Of course, if Robert and Pete Conley had been led to believe that the debt to appellee had been paid, or canceled, because of the satisfaction of record of the lien reserved in the deed, they would be protected on that account. But that is the point in the case, and the court found against their contention. The decree of the court is therefore affirmed.

AETNA LIFE INSURANCE COMPANY v. LITTLE.

Opinion delivered November 8, 1920.

1. INSURANCE—ACCIDENT POLICY—INTENTIONAL KILLING.—Evidence in an action on an accident policy *held* not to support inference that the person who shot insured knew when he fired that he was shooting at the insured.
2. INSURANCE—"ACCIDENTAL" DEFINED.—The term "accidental" in an accident policy is used in its ordinary, popular sense, as meaning happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected; if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it can not be called a result effected by accidental means; but if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means.
3. INSURANCE — PRESUMPTION THAT DEATH WAS ACCIDENTAL.—The death of insured being shown to have resulted from violent and external means, the presumption is that it was accidental.
4. INSURANCE—PRESUMPTION OF ACCIDENTAL DEATH.—The presumption that a death from violent means was accidental may be overcome by proof of circumstances from which the inference might reasonably be drawn that deceased was guilty of conduct which would likely subject him to the injury which he sustained; but the testimony from which the inference is to be drawn that the death was not accidental must be such as to make it reasonable and probable, and not merely speculative or conjectural.
5. INSURANCE — ACCIDENTAL DEATH — NEGLIGENCE OF INSURED.—Recovery on an accident policy is not defeated by the fact that the insured's negligence contributed to his death.

Appeal from Sebastian Circuit Court, Fort Smith District; *John Brizzolara,* Judge; affirmed.

James B. McDonough, for appellant.

1. The facts proved do not show that the death of Judge Little was caused by the means provided for or covered by the policy, and the court erred in directing a verdict, as a case for a jury was made by the testimony. 92 Ark. 378; 76 *Id.* 520; 105 *Id.* 213; 112 *Id.* 507; 102 *Id.* 460; 71 *Id.* 445; 119 *Id.* 589; 210 S. W. 350; 120 Ark. 43; 98 *Id.* 370.

2. Under all the facts of this case, a jury had a right to find that deceased was violating the law of the State in attempting to make an entry into his house, and the evidence is sufficient to sustain such a finding, and the court erred in its instructions given and refused. 214 S. W. 456; 174 N. W. 577; 101 S. E. 134; 179 Pac. 913; 187 *Id.* 1070. See, also, 185 Pac. 1085; 257 Fed. 225; 177 N. Y. S. 68; 60 Ark. 588.

3. A directed verdict should have been given for defendant. 108 N. E. 296; 80 Fed. 368; 68 *Id.* 825; 104 Ind. 133; 60 S. W. 570; 81 Atl. 207; 143 Fed. 271.

The court erred in refusing the instructions asked by defendant. If deceased went to Williams' house for an unlawful purpose, he was not covered by the accident policy. 257 Fed. 225; 108 N. E. 296; 73 Ark. 274; 1 Cyc. 248; 143 Fed. 271. See, also, 65 So. 852; 177 N. Y. S. 68; 101 S. E. 134; 174 N. W. 577; 120 Mass. 550; 169 U. S. 139; 76 N. W. 683.

4. Instruction No. 3 for defendant should have been given, as well as No. 4. Cases *supra.*

5. It was error to allow the penalty and attorney's fee under the facts of this case.

6. A case for a jury was made. 113 Ark. 174; 81 *Id.* 87; 99 *Id.* 490; 102 *Id.* 460; 127 *Id.* 286; 107 *Id.* 158; 118 *Id.* 432; 128 *Id.* 347; 222 S. W. 1067; 221 *Id.* 858; 222 *Id.* 51.

7. If the death was due to an agency of the deceased, it did not result from accidental means. The cases cited for appellee do not apply. See cases *supra* and 34 S. E. 113; 143 Fed. 271; 107 Iowa 538; 46 Fed. 446; 80 Fed. 368; 169 Cal. 800; 158 Pac. 1022.

Pryor & Miles, for appellee.

If true that Judge Little went to the window of the house and it was a negligent act, yet the insurance company can not plead his negligence in this case. 102 Penn. St. 230. The cases cited by appellant have no application here, and many of them support the contention of appellee. 1 Am. Rep. 157; 161 Mass. 149; 23 Q. B. Div.

453; 127 U. S. 661; 54 Am. Rep. 298. There is nothing to show that Judge Little voluntarily assumed the risk of death. The court properly directed a verdict. 92 Wis. 83; 89 Cal. 101; 93 N. W. 361. If his act was involuntary and unintentional it was an accident. 62 N. W. 807; 28 L. R. A. 78; 38 Am. St. 408; 110 Iowa 224; 81 N. W. 484; 39 Fed. 321; 57 S. W. 614; 85 Fed. 401; 131 Ark. 419. There was no issue to submit to a jury (*supra*), and no error in the instructions.

SMITH, J. This is a suit brought by the appellee, the widow of Judge Paul Little, to recover on an accident policy insuring the deceased "against loss from bodily injuries effected solely through external, violent and accidental means, suicide (sane or insane) not included." Judge Little was shot and killed, and it is the insistence of the appellant that the killing resulted from conduct on the part of Judge Little which, if not wrongful in fact, appeared to be unlawful to the party who killed him, and that the death was not, therefore, due to accidental means.

The facts in connection with the killing, as shown by the testimony in the case, are substantially as follows: The killing occurred at the residence of Guy Williams on Alabama Avenue in the city of Fort Smith, Arkansas, on the night of October 29, 1919. The witnesses vary slightly in their statements as to the hour, but all place it around 9:30 p. m. Williams and his wife had retired for the night, and had extinguished the lights only a few minutes before the killing occurred. About ten minutes after the lights were turned out Judge Little went to the Williams home and, seeing it dark, walked around to the bedroom window and knocked at the window or rattled it, when Williams fired a shotgun through the window and killed Judge Little.

The argument is made that, if Judge Little had wanted to speak to Williams, he could have called him over the telephone, as there were 'phones in both homes, and that if he desired a personal conversation he should have approached the Williams home in the usual way and should

have announced his presence by ringing the doorbell, and that, failing in this, he caused Williams to believe that some one was attempting to enter the home with an unlawful or wrongful purpose, and that Williams knew that person to be Judge Little. There was no testimony to show, however, that Judge Little made any effort to enter the home. His acts there were directed to attracting the attention of the occupants of the house, and in this he succeeded, as is evidenced by the consequence of having his presence discovered.

If Judge Little had any improper motive in visiting the Williams home, only two theories can be advanced in explanation. One is that he was about to commit burglary; the other that he sought an assignation. That he entertained either purpose appears to be without any substantial testimony to support it. Judge Little had served the judicial district in which he resided for two terms as its prosecuting attorney, and, at the time of his death, was in the middle of his second term as the judge of that circuit. That he sought an assignation with Mrs. Williams appears as improbable as that he intended to commit burglary. The undisputed testimony is to the effect that he and Williams were brothers-in-law; that Williams was the official stenographer of that district, and, that, as Mrs. Little expressed it, they were "like one big family." The relationship was close and intimate. It does appear that a few days before the killing Williams bought the gun with which he killed Judge Little, but there is no intimation that there had ever been the slightest ill-will or friction between them. There is no intimation that the name of Judge Little had ever been coupled with that of Mrs. Williams in any improper way.

The testimony does show that when Williams first came to the door, and while he still had his gun in his hand, he called out, "What are you doing here?" or words to that effect, and that he did not go to the man who had been shot. But it will be remembered that the killing occurred at night, and late in October. The in-

jured man was lying outside of the house, and on the ground, and Williams was in his pajamas. It appears that an ambulance was promptly called by the neighbors who heard the shooting and came at once to the scene of the killing, and Judge Little was carried to the hospital. There is no intimation that any scene occurred between Williams and his wife, and both were at the hospital within half an hour after Judge Little arrived there.

It is strongly insisted that the testimony of one Frank Hines shows that the killing was not accidental, but was intentional. This witness testified that he lived about a block and a half from the Williams home, and that he was sitting on his front porch when the shot was fired; that he called Williams on the 'phone and asked what the trouble was, and that Williams said he had shot Judge Little. Asked how long that was after the shot he answered, "It must have been five minutes." The witness further testified that he went over to the Williams home, and got there just as the ambulance was leaving, and that Williams and his wife left for the hospital in four or five minutes after he got there.

We do not think this testimony, considered in the light of all the other testimony, would legally support the inference that Williams knew, when he fired the fatal shot, that he was shooting at Judge Little. It is undisputed that several neighbors reached the scene of the killing before Hines did, and that these first arrivals advised Williams whom he had shot, and that Williams thereafter dressed to leave home, and that he was dressed when Hines arrived there, and that these first arrivals, after discovering what had happened, telephoned for the ambulance, and that an interval of from five to fifteen minutes elapsed before the ambulance came. Williams was not called as a witness at the trial, it being shown that he was in Texas at that time.

We have stated the salient facts and circumstances which might be said to support the view that Williams killed Judge Little purposely. Other circumstances are

mentioned in the briefs, but we do not think they are of sufficient evidentiary value to warrant discussion.

The court directed a verdict in favor of appellee, and that action is assigned as error, the insistence being that a case was made for the jury.

This court has had frequent occasion to define the words "accidental injury" and "accidental death." In the case of *Standard Life & Accident Ins. Co.* v. *Schmaltz,* 66 Ark. 595, the court approved an instruction given by the trial court, in a suit on an accident policy, "that the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;' that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it can not be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means." See, also, *Maloney* v. *Maryland Casualty Co.,* 113 Ark. 174; *Harrison* v. *Business Men's Accident Assn.,* 133 Ark. 163; *Metropolitan Casualty Co.* v. *Chambers,* 136 Ark. 84; *Aetna Life Ins. Co.* v. *Taylor,* 128 Ark. 155.

The insistence of counsel is that the death of Judge Little was brought about by his own agency, that is, that his death was the probable, and not the unexpected, result of his conduct. But the presumption is otherwise. It having been shown that Judge Little died as a result of violent and external means, the presumption is that it was accidental, and the burden is on the insurance company of showing otherwise. *Metropolitan Casualty Co.* v. *Chambers, supra.* Of course, this burden could be discharged (or, at least, a question be made for the jury) by the proof of circumstances from which the inference might reasonably be drawn that the deceased was guilty of conduct which would likely or probably subject him to the injury which he sustained. But, as was said in the case of *Business Men's Accident Assn.*

v. *Cowden,* 131 Ark. 419, the testimony from which the inference is to be drawn must be such as to make it reasonable and probable, and not merely speculative or conjectural. That case was a suit on an accident policy, and the verdict was directed against the insurance company. The policy provided against liability, if the insured met his death from intentional injuries inflicted by himself or others except in an assault committed for burglary or robbery. The insured in that case was found dead in the Missouri River, with a wound on the head and face that penetrated the brain and caused his death. The wound was a sharp and incised wound that did not fracture the bone or tear the flesh. It was there insisted by the insurance company that the jury should have been permitted to say how the insured came to his death. But we said the insurance company had failed to maintain the burden cast upon it to make out a defense, and that the court was correct in directing a verdict in favor of the plaintiff, instead of submitting the case to the conjecture of the jury.

Judge Little may have been guilty of a careless act in going to the window under the circumstances stated; but negligence would not defeat a recovery. See 14 R. C. L., p. 1256, and authorities cited in the note to section 435. It is probably true that the element of carelessness or negligence enters into most accidents, and such policies would be of little value, if the policyholder was insured against the consequences of those accidents only in which his own negligence played no part.

We think that only by conjecture or speculation could the jury have found that Judge Little was guilty of wrongful or unlawful conduct, and if this be true there was no question for the jury, although Williams intended to hit the man at whom he shot.

No error appearing, the judgment is affirmed.

MARSH v. STATE.

Opinion delivered November 8, 1920.

1. INTOXICATING LIQUORS—EVIDENCE OF SALE.—In a prosecution for the illegal sale of whiskey, evidence of the discovery of mash, moonshine liquors, etc., in and about defendant's premises is admissible as tending to show that he was engaged in the whiskey business.
2. CRIMINAL LAW—REMARK OF COURT—ABSENCE OF OBJECTION.—In a prosecution for a criminal offense, a remark of the court made during the trial will not be considered where no objection or exception was saved thereto.
3. INTOXICATING LIQUORS—QUESTION FOR JURY.—In a prosecution for the illegal sale of whiskey, evidence *held* sufficient to carry to the jury the question of identification of defendant.

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

J. N. Rachels, for appellant.

The court erred in admitting Sheriff Plant's testimony and in addressing the remarks to the prosecuting attorney in the presence of the jury during the cross-examination of R. M. Clayton; also in admitting the evidence of H. B. Rogers. This was extremely prejudicial to appellant. Without this evidence a verdict of "not guilty" would certainly have been the result. There was no competent testimony to support a verdict of guilty, and the court really should have instructed a verdict for defendant in both cases. There was no testimony that Marsh was the man who sold the whiskey to Harve Hall. Marsh was proved to be an honored citizen, without blemish or spot, until Castleberry, a lifelong bootlegger, falsely attempted to put the blame on appellant, and a new trial should be granted.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

There was no error in the admission of evidence, and the instructions were correct. No proper exceptions were saved at the trial to the admission of evidence and the evidence warrants a conviction in both cases.

HUMPHREYS, J. These appeals are from judgments of conviction of appellant in the White Circuit Court for the illegal sale of whiskey. The cases being against the same party and of the same general character, one opinion will suffice in both cases. The first conviction was obtained in case No. 2463 upon an indictment charging appellant with a sale of whiskey to Riley L. Castleberry, and the second upon an indictment charging him with a sale to Harve Hall. As a punishment in each case, appellant was sentenced to serve one year in the penitentiary. In the first case, or case numbered 2463, attorney for appellant admits that the testimony for and against the sale of four gallons of whiskey by appellant to Riley L. Castleberry, in December, 1919, in Pangburn, White County, Arkansas, presented an issue of fact to be determined by the jury; but contends that the court erred in permitting the sheriff, Tatum C. Plant, to testify in substance that he visited appellant's farm, across the line in Cleburne County, about ten miles from Pangburn, and found a one-gallon demijohn and a two-gallon wooden keg of moonshine whiskey buried in his garden; also a lot of mash in his smokehouse; also, five barrels of mash about one-quarter of a mile outside of his field where a still had been located; also eight or nine half-gallon fruit jars of sugar and molasses in a tow-sack in the barn. This evidence tended to show that appellant was in the whiskey business and was a circumstance tending to establish the sale of whiskey to Riley L. Castleberry. It was therefore proper to admit it for that purpose.

It is insisted that the court erred in addressing the following remark to the prosecuting attorney in the presence of the jury during the cross-examination of R. M. Clayton, one of appellant's witnesses:

"*Court:* That is one of the ingredients, isn't it?

"*Prosecuting Attorney:* Yes, sir."

The connection in which the remark of the court, and answer of the prosecuting attorney was made is as follows: R. M. Clayton was asked the following ques-

tion in reference to the molasses and sugar found in the barn:

"Q. It was molasses and sugar, wasn't it?"

"*Mr. Rachels,* for defendant: We object.

"*Court:* That is one of the ingredients, isn't it?

"*Mr. Miller* (prosecuting attorney): Yes, sir.

"Objection overruled; note our exceptions.

"A. It looked to me like it was molasses and sugar, or molasses that went to sugar."

No objection was made or exception saved at the time to the remark of the court and the answer of the prosecuting attorney. The objection and ruling related to the question propounded by the prosecuting attorney to the witness in reference to the molasses and sugar and was proper and competent.

Two questions are presented for determination on appeal in case No. 2464. The first challenged the admissibility of the evidence of H. B. Rogers, in substance similar to that of Tatum Plant adduced by the State in case No. 2463; and to the evidence of Harve Hall, Ralph M. Jones and Ezra Marsh, concerning the purchase of whiskey at a later date by them from appellant near his farm in Cleburne County. The competency of this evidence was discussed in case No. 2463. For the same reason there assigned, the evidence was admissible in this case.

The second question challenges the sufficiency of the evidence to identify appellant as the party who made the sale of whiskey in Pangburn to Harve Hall. Harve Hall testified that he bought a gallon and a half of whiskey from a man they called S. A. Marsh, in Pangburn, on or about the first of May, 1920; that he paid him $30 for it in a check made payable to S. A. Marsh; that the man from whom he purchased the whiskey looked like appellant except that appellant's beard at the time of the trial was a whole lot longer and some whiter than the beard worn by the man from whom he bought it; that he afterwards went in a car to Cleburne County with Ralph Jones, Charley Marsh and Asa Marsh, and met the man

from whom he bought the whiskey at Pangburn on the roadside near Wilburn, in Cleburne County; that, at that time, the man's beard was shorter and not so gray as appellant's beard; that he bought and paid for the whiskey at R. M. Jones' store in Pangburn.

R. M. Jones testified that he went to Cleburne County with Harve Hall, Charley and Ezra Marsh, in a car, and bought some whiskey from S. A. Marsh, the appellant; that is, from a man that resembled appellant, with whiskers probably not as heavy as appellant's; that, at the time, he was not familiar with appellant, but, since that time, had met him and is of opinion that appellant is the same man as the man from whom he bought the liquor in Cleburne County; that appellant had never been in his house at Pangburn but one time.

Ezra Marsh testified that appellant favored the man the four of them met in Cleburne County, but looked a little older; that, at the time they met him in Cleburne County, he had whiter and shorter beard.

Stewart Coffey testified that he was acquainted with appellant, S. A. Marsh, and had seen him several times in Pangburn; that about the first of May, he saw him at the store of R. M. Jones with a small vial, or bottle, of whiskey, representing it to be a sample of whiskey he had for sale; that he priced the whiskey to him at $20 a gallon.

H. B. Rogers testified that appellant was the same man whose farm they searched in Cleburne County at the time they found the demijohn and keg of moonshine whiskey buried in his garden; that, at the time of the trial, appellant's whiskers were a little longer than they were then; that, at that time, they were all crumpled up, but that at the time of the trial he had combed them out a little.

It developed that Harve Hall had been engaged in the unlawful sale of whiskey himself, and it was apparent from a reading of his testimony, as well as that of R. M. Jones and Ezra Marsh, that they were unwilling witnesses for the State as to the identity of appellant.

Appellant denied selling Harve Hall any whiskey in Pangburn or that he had a vial about the time representing it to be a sample of whiskey he had for sale, or that he offered to sell any whiskey to Stewart Coffey. He also testified that he had worn his beard just as it appeared at the trial for two years and for that length of time it had been about the color and length it then was, and that it was his custom to comb his whiskers out every morning. His testimony in reference to the length and color of his whiskers was corroborated by that of other witnesses.

We can not say, as a matter of law, that the evidence did not sufficiently identify appellant as the S. A. Marsh who sold the whiskey to Harve Hall. Under the evidence the question of identification was clearly one for the jury to determine.

In view of our conclusions, the judgment in each case is affirmed.

STANDARD SEWING MACHINE COMPANY v. RAINWATER.

Opinion delivered November 8, 1920.

1. SALES—MEETING OF MINDS.—Though a sewing machine company furnished its salesman a blank which stated that the seller would not be bound by any agreement outside of such blank, yet if the salesman entered into an additional written agreement with a purchaser, obligating the seller to retake all machines not sold within sixty days, but sent to the purchaser the filled-in order blank without the additional agreement, the minds of the parties never met, and the purchaser could return the articles sold by the agent under his agreement.
2. EVIDENCE—PAROL EVIDENCE TO PROVE WRITTEN CONTRACT.—Where a purchaser of sewing machines refused to sign an order for machines until a written agreement was made that the agent of the seller was to sell the machines for the purchaser on commission, and that unsold machines could be returned to the seller, and this additional agreement was attached to the order when signed by the purchaser, but was detached by the agent before forwarding the order to the seller, parol evidence was admissible to show that the proposed order signed by the purchaser was not to become his contract without the additional agreement attached thereto.

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

C. A. Holland and *Rogers, Barber & Henry,* for appellant.

1. The demurrers should have been sustained and it was error to overrule them. In the original answer of defendant his case and defense are based upon the memorandum of Cachere attached to his copy of the order, but this memorandum was not a component part of the contract because (1) the printed order expressly states that "no claims or demands on account of any promise, either verbal or written, or any agreement whatever, outside of this order, will or can be made."

2. The court erred in admitting certain testimony set out in the motion for new trial. There is no testimony to show that appellant ever ratified the supplementary agreement or acquiesced in it, but the testimony is positive that he never in any way ratified it.

The agreement of appellant to sell goods to appellee and to no other person in Jonesboro was no part of the written contract and could not be pleaded or proved as a defense. The evidence to prove it was incompetent, and the instruction based upon it was erroneous. 75 Ark. 206; 41 Miss. 541. The supplementary agreement was incompetent and not admissible in evidence. It is the court's duty to determine the meaning of an unambiguous contract. 101 Ark. 353. There was no ambiguity in the order contract nor in the supplementary agreement, and the supplementary agreement should have been excluded and a peremptory instruction given for appellant on the contract. The contract was in writing and could not be varied by parol proof, and no fraud was shown, and appellee was not misled, as the testimony shows. There is a limit on the admission of testimony under the plea of fraud. 71 Ark. 185; 35 *Id.* 559. The testimony as to fraud was not competent and should have been ruled out.

3. The court erred in its instructions and in refusal to give a peremptory instruction for appellant. 55 Ark. 627; 92 *Id.* 315; 94 *Id.* 301.

Strait & Strait, for appellee.

1. If the original order was the only formal contract and the additional agreement executed contemporaneously is in reality no part of the contract, then the representations made by the agent and evidenced in part by this additional agreement were certainly the inducement which prompted appellee to enter into the formal contract and, being absolutely false and untrue, were a fraud upon him, and the contract was void. Both instruments executed contemporaneously and fastened together constitute one contract, and appellant has no standing in court in a suit to recover the value of the unsold machines which were returned to it by appellee just as agreed to and provided by the contract.

2. If that part of the written contract favorable to appellee is to be executed as part thereof and the order blank alone is the contract, then the false and fraudulent misrepresentations made by the agent was a fraud on appellee, avoiding the contract. The two instruments executed on the same day evidenced a single contract. 18 Ark. 65; 26 *Id.* 240; 89 Ark. 239; 77 *Id.* 261; 125 *Id.* 199. The entire contract composed of all instruments will be construed together as disclosing the full intention of the parties, and the various clauses and provisions will be given that construction that will make them consistent with each other. 97 Ark. 322; 84 *Id.* 434; 116 *Id.* 212. Both instruments should be construed together—establish appellee's contention that the signed order was never intended to constitute a sale but was a mere memorandum which the company required to have signed showing that when the goods were shipped they would be received and the sale put on in good faith. In the absence of notice to the contrary, one dealing with an agent has the right to presume that he is a general agent and acting within the scope of his au-

thority. 103 Ark. 86; 96 *Id.* 456; 93 *Id.* 521. The company is bound whether the agent signed his personal name or that of the company. 108 Ark. 69. Appellee has paid for the machines sold and returned the rest of them, and this should end the matter. If the contract consists only of the order blank signed, then the rider or reciprocal obligation signed by Cachere and the representations constitute a fraud on appellee, and testimony showing this is admissible. 75 Ark. 95; 101 *Id.* 603; 106 *Id.* 346. Misrepresentations as to goods sold by a vendor relied on by a purchaser constitute fraud avoiding a contract. 38 Ark. 334; 60 *Id.* 387; 74 *Id.* 46; 30 *Id.* 362. Parol testimony is always admissible to impeach a written contract for fraud. 101 Ark. 95; *Ib.* 603. The demurrer was properly overruled and appellant's peremptory instruction properly refused. All the facts and circumstances made this a case for a jury, and its verdict is conclusive. No complaint is made as to instructions.

HUMPHREYS, J. Appellant instituted suit against appellee in the circuit court of Conway County for $712.50, the purchase price of twenty-five sewing machines, alleged to have been shipped by appellant to appellee under written contract, or order, signed by both parties. The contract on its face was an unconditional order for twenty-five rotary sewing machines of certain style and kind, at a stipulated price under specified terms. The contract contained the following clause limiting the authority of its traveling salesman:

"The above is an exact statement of the terms agreed upon as per order above; and it is fully understood and agreed that no claims or demands on account of any promise, either verbal or written, or any agreement of any kind whatever, outside of this order, will or can be made; the undersigned agreeing to be bound strictly by the terms and conditions above named, and not to countermand this order. Purchaser is requested to read this order carefully."

The contract also contained a blank line for approval of appellant.

Appellee pleaded as one of his defenses that the order was signed upon the following written condition attached to the contract as a part thereof: "I will put on a sewing machine sale for you, furnish all cloth and odd matter, and charge you nothing for the sales, but for each sale I make and you accept in writing I will charge you 20 per cent. of the net sale after deducting allowance for old machines. I will start this sale on or about October 2nd of the week you select, if you advise me ten days in advance. I agree to remain here or have my help remain here until all machines are sold satisfactory to you. If I do not sell all in sixty days, I will refund your freight charges and remove all unsold machines."

Under our view of the case, it is unnecessary to set out the other defenses or additional pleadings. The cause was submitted to the jury upon the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment for appellee, from which judgment an appeal has been duly prosecuted to this court.

The facts are that appellant, an Ohio corporation, through its salesman, attempted to sell a business concern in Conway County, controlled by appellee, a lot of sewing machines unconditionally. Appellee refused to enter into the contract as drawn, unless modified by writing, either in the body of the order or by written guaranty attached to the effect that the salesman would put on a sale and either sell all the machines within sixty days from October 2, 1915, or such week as appellee might select, for 20 per cent. of the net profit, providing that, in case of a failure to sell any part of the machines, to refund the freight paid by appellee and to remove all unsold machines. The agent thereupon attached an additional writing to that effect to the order, and the order and additional writing were signed by both parties. The order was signed by W. A. Cachere, as salesman, and the additional writing by W. A. Cachere. As finally

drafted and thus signed, it consisted of three pages and was copied, in 1916, by Miss Clara Schneider, a stenographer in the office of appellee's attorneys. Her copy was introduced in evidence. Contrary to the agreement that the additional writing should become a part of and be attached to the original order, the salesman sent appellant the order without the additional writing attached as a part thereof, and it shipped the machines without knowing that the guaranty was attached, or agreement of its agent that it should be attached. The saleman's duty was to secure orders and submit them to the home office of appellant for execution or acceptance. The contract, as finally drawn and signed by appellee and the salesman, was never sent to the home office of appellant for acceptance or ratfication. Only a part of it was sent in and approved. In accordance with the guaranty, the agent put on the sale. Four or five machines were sold, and the remainder returned to appellant, who refused to receive them.

Based upon the facts, as detailed above, appellant requested a peremptory instruction, which was refused, and it now insists upon a reversal because the court refused to instruct a verdict for it. The insistence is that the filled-in printed order blank, signed by the parties, is the entire contract and made so by the restrictive clause preventing appellant's salesman from making any written or verbal changes therein. The evidence is that appellee refused to sign the written order unless modified by written guaranty that the agent would put on a sale of the machines, remove such as were not sold, and refund the freight thereon; that, in order to procure the order, the agent appended a written undertaking to that effect, at which time the parties signed the order and additional undertaking. The agent sent the original order to appellant for acceptance without the written guarantee which he attached, or agreed to attach. Appellee gave an order for the machines which contained an agreement on the part of the agent to put on a sale, to remove all unsold machines, and to return the freight advanced

thereon. Appellant accepted an order without such an agreement in it, and consequently the minds of the parties never met upon the same contract. The proposed contract and the one accepted materially differed in terms.

But it is contended that it was error to admit oral evidence to vary the terms of the written order or contract. Under the issue tendered by the answer in this case, the purpose of the oral evidence was to establish the terms of the order proposed by appellee, and not to contradict the terms thereof. The proposed order, signed by appellee, was not to become his contract without the undertaking attached thereto, when approved or accepted by appellant, and it was proper to prove that fact by parol evidence. In cases quite similar to the instant one, the principles thus announced were accurately stated and applied by this court. *Barton-Parker Mfg. Co.* v. *Taylor,* 78 Ark. 586; *William Brooks Medicine Co.* v. *Jeffries,* 94 Ark. 575.

No error appearing, the judgment is affirmed.

ANDERSON v. POWELL.

Opinion delivered November 8, 1920.

1. MORTGAGES — ABSOLUTE DEED AS MORTGAGE.—In determining whether an instrument, absolute on its face, was intended by the parties as a mortgage, the court will consider all the circumstances connected with it, such as the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances, verbal or written, as well as the acts and declarations of the parties.
2. MORTGAGES—ABSOLUTE DEED—PRESUMPTION.—The presumption is that a deed absolute is what it purports to be, and, to overcome this presumption and establish its character as a mortgage, the evidence must be clear, unequivocal and convincing.
3. MORTGAGES—EVIDENCE AS TO CHARACTER OF INSTRUMENT.—In an action to have a deed absolute on its face declared a mortgage, evidence *held* to establish that the deed was intended as a mortgage.

Appeal from Chicot Chancery Court; *Joe S. Harris,* Special Chancellor; reversed.

Williamson & Williamson, for appellant.

1. Chancery cases on appeal are tried *de novo.* 125 Ark. 364; 93 *Id.* 394; 79 *Id.* 577; 99 *Id.* 218. The finding of the chancellor is persuasive only. 197 S. W. 1160; 75 Ark. 72.

2. B. A. Kimple could not pass any better title than she had, and the deed to her was only a mortgage. She was only a mortgagee, and Mary Powell took nothing better, and no better title than her grantor had, and her deed is subject to all the rights of Sarah Anderson, including, of course, the right to redeem. 70 Ark. 253. This case is squarely in point and entitles appellants to a reversal. See, also, 13 Cyc. 657 (d); 127 Ark. 204; 219 S. W. 15-18.

3. The Mary Powell deed is only a mortgage; it was made to secure a debt. 221 S. W. 465; 13 Ark. 126; 7 *Id.* 508; 5 *Id.* 321; 13 *Id.* 112; 31 *Id.* 62; 103 *Id.* 484; 88 *Id.* 299; 128 *Id.* 74; 234 *Id.* 79; 70 *Id.* 253; 40 *Id.* 146; 106 *Id.* 166; 110 *Id.* 632; 18 *Id.* 34; 27 *Id.* 404; 76 *Id.* 509; 109 *Id.* 335; 112 *Id.* 607; 38 *Id.* 207.

The consideration was grossly inadequate, as shown by the evidence, and appellants have discharged the burden of proof, and where even the intent of parties is doubtful, an instrument absolute in form should be construed to be a mortgage. 38 Ark. 217; 13 *Id.* 126.

4. On an accounting the rents have more than paid the mortgage debt and the legal title should be decreed in appellant.

D. Dudley Crenshaw, for appellees.

1. The burden was on appellants to establish their case by proof, clear, unequivocal and convincing. 221 S. W. 481; 151 *Id.* 243; 143 *Id.* 95; 87 *Id.* 1027; 101 Ark. 611; 105 *Id.* 314. The presumption is that a deed is what it purports, and to overcome that presumption the evidence must be as stated—clear and convincing. 106 Ark. 583; 153 S. W. 797.

2. The finding of the chancellor will not be disturbed on appeal unless against the clear, preponderance of the evidence. 86 Ark. 212; 120 *Id.* 37; 185 S. W. 444; 169 *Id.* 961; 125 Ark. 572; 123 S. W. 395.

3. By the execution of her deed to appellee Mrs. Kimple conveyed both her legal and equitable title to appellee. 114 Ark. 121; 169 S. W. 238. Kimple had full title when the deed was executed and the deed was absolute. 97 Ark. 588; 135 S. W. 361; 203 Mass. 328; 89 N. E. 381.

4. The proof is not clear, unequivocal and convincing, as claimed by appellants, but the finding of the chancellor is supported by the great preponderance of the testimony.

HUMPHREYS, J. This suit was instituted by appellants against appellee in the Chicot Chancery Court to have a deed, absolute on its face, executed by Mrs. B. A. Kimple to Mary Powell, of date March 6, 1915, conveying lot 15, block 1, Holland's Addition to the town of Dermott, Chicot County, Arkansas, declared a mortgage in fact, for its cancellation, for the investiture of the title to said real estate in appellant, Sarah Anderson, and for an accounting of rents and profits since March 6, 1915. The bill, in substance, alleged that, at the time of the conveyance aforesaid, Mrs. B. A. Kimple held the fee simple title to said real estate by deed, which was in fact a mortgage, as security for the balance of the purchase price of $41 of said real estate, evidenced by notes in the sum of $8 each, executed by Sarah Anderson to her; that the original purchase price was $145, but that the said Sarah Anderson had reduced the amount to $41 by payments from time to time; that, being unable to pay the indebtedness and desirous of doing so, she entered into an agreement with John Powell, by which he was to pay the balance due Mrs. B. A. Kimple and take a deed to his wife, Mary A. Powell, as security for the amount; that he was to take possession of and rent the property until the amount was repaid, at which time the property was to be conveyed by Mary Powell to Sarah

Anderson; that her son, Alfonzo Anderson, occupied the premises and paid $3 a month therefor for twenty months, or a total of $60; that appellee has had possession and rented the property to other parties since that time, but has refused to make an accounting or to convey the property to appellant, Sarah Anderson, as per the agreement.

Appellee filed answer, denying all the material allegations in the complaint, and alleging that Mrs. B. A. Kimple conveyed the absolute title to said real estate to the said Mary Powell for a consideration, and not in trust to secure the balance of the purchase money due from the said Sarah Anderson to Mrs. B. A. Kimple. The prayer of the answer was for a dismissal of appellants' bill for the want of equity.

The cause was submitted upon the pleadings and evidence from which the court found that Mary Powell acquired both the legal and equitable title to said lot by deed from Mrs. B. A. Kimple, of date March 6, 1915; and that the evidence adduced by appellants was not sufficiently clear and convincing to establish their contention that the deed was in fact intended as a mortgage. In accordance with the findings, a decree was rendered dismissing the bill. From the decree of dismissal, an appeal was duly prosecuted to this court, and the cause is here for trial *de novo*.

It is impractical to set out the testimony in detail, so only a summary of the evidence of each witness will be attempted. Sarah Anderson, desiring to buy a home, arranged, through her husband, with B. A. Kimple to advance $145 for that purpose. The property, heretofore described, was purchased from Ruby M. Jones for that amount. Instead of making the deed directly to Sarah Anderson and taking a mortgage from her to secure the money advanced, B. A. Kimple paid Ruby Jones the money, and she executed a warranty deed on November 4, 1912, directly to Mrs. B. A. Kimple, as security for the purchase money, with the understanding that, when the money was repaid, Mrs. B. A. Kimple would

convey the property to Sarah Anderson. As evidence of the indebtedness, Sarah Anderson executed notes in the sum of $8 each, payable monthly, bearing interest at the rate of ten per cent. per annum from date until paid. Sarah Anderson paid fourteen of the notes, leaving a balance of $41 due, according to the evidence of herself and husband. According to the evidence of John Powell, the balance was $66. William and Sarah Anderson testified that John Powell agreed that if they would go to the farm with him he would pay the balance of the indebtedness for them, but, after doing so, he refused to settle with them or pay the balance they owed Mr. Kimple; that Mr. Kimple wanted his money, and John Powell agreed to advance it if they would allow him to take possession of and rent the house until repaid; that they agreed to his terms, and, pursuant thereto, he paid Mr. Kimple $41, the balance due on the notes, and, to secure himself, took a warranty deed from Mrs. B. A. Kimple to his wife, Mary Powell, on March 16, 1915, with the understanding that when the rents collected from the house equaled the amount paid, with interest, he would convey the property to Sarah; that their son, Alfonzo Anderson, remained in the house twenty months and paid John Powell $3 per month, or a total of $60, at which time he ceased paying, because John Powell refused to convey the property to his mother; whereupon John Powell put him out of possession; that they demanded a deed, but John Powell refused to make it, claiming to be the owner of the property; that John Powell has retained the possession of the property since that time.

B. A. Kimple testified that the parties came to his office to settle with him; that the only parties present, in addition to himself, were John Powell, William and Sarah Anderson; that John Powell paid him the balance due on the notes and said: "Now, the only paper I want is you give me a deed, and when they pay it out I will give them a deed back;" that his understanding

was that John Powell was to take a deed and hold it as security, just as he had held it.

John Powell testified that he made no agreement to pay Mr. Kimple's notes upon condition that William and Sarah Anderson would go to the farm with him; that William tried to borrow money from him and his wife to pay Mr. Kimple, but they declined to lend it; that, on the second visit, he said they were going to lose their home, and rather than let Mr. Kimple have it, they might have it if they would pay it out; that they agreed to do that, and, pursuant to the agreement, paid Mr. Kimple $66 and obtained absolute title to the property; that, at the time, Sarah Anderson surrendered her title bond to Mr. Kimple and Mr. Kimple surrendered it to him; that the deed was not intended as a mortgage to secure the money paid Mr. Kimple; that, when Sarah Anderson demanded a deed from him, he figured up the amount he had been out and proposed if she would pay him $105 he would try to get his wife to make her a deed; that she could have it for that additional amount, as far as he was concerned; that Sarah Anderson refused to pay him anything; that at the time William Anderson proposed to make them an absolute deed to the property on condition that they pay the Kimple notes, his wife, his son, Chester, and Wat Brooks were present.

His wife, Mary Powell, in the first part of her direct examination, corroborated her husband in this respect, but, later, said she authorized her husband to agree to sell the place back to them in case they repaid the $66. On her cross-examination, the following question was propounded to, and the following answer made by her:

"Q. You knew you was lending the money to him, didn't you?

"A. Yes, sir."

Chester Powell testified that he was not present when William Anderson came the second time to see his father and mother about borrowing money to pay his home out and never heard him tell them he would let them have the property if they would pay Mr. Kimple's

notes, but, that, at another time, William Anderson told him if John would pay the lot out, he could take it.

Wat Brooks testified that he did not hear the conversation between William Anderson and John Powell and his wife; but that he told him, when John and Mary Powell were not present, that he was down there to get John to help him out; that Mr. Kimple was going to take his lot and he would rather for John to have it than Mr. Kimple.

William Anderson, in rebuttal, denied the statements attributed to him by appellees and their witnesses.

Sarah Anderson was recalled, and testified that she never authorized her husband William to give John and Mary Powell the lot on condition they pay the Kimple notes.

The rental value of the property ranged from $2.50 to $7 per month, in the opinion of the several witnesses testifying upon that point.

In determining whether an instrument, absolute upon its face, was intended by the parties as a mortgage, the court "will consider the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances, verbal or written, as well as the acts and declarations of the parties." *Scott, White & Co.* v. *Henry & Cunningham,* 13 Ark. 112. In the application of this test to the evidence in a given case, it is necessary to indulge the presumption that a deed is what it purports to be on its face, and that the burden rests upon one asserting otherwise to overcome the presumption by clear, unequivocal and convincing evidence. *Gates* v. *McPeace,* 106 Ark. 583.

Appellants were not being unduly pressed by Mr. Kimple; at least, not to the extent of threatening foreclosure proceedings; the property was actually occupied by them as a home; they had paid two-thirds, or more, of the purchase price; they were not related to, or under any peculiar obligations to John Powell which would induce them to present their equity to him. According to the witnesses, their purpose was to save their property.

The inherent probabilities growing out of the situation of the parties, the kind of property, its value, and the inadequate consideration John Powell claims to have paid for it, are against appellee's claim that appellants gave their equity in it to him. Turning to the evidence itself in search of the weight thereof, three out of four of the witnesses present when the transaction was finally consummated testified that the deed was given as security for the money advanced by John Powell to pay Mr. Kimple's mortgage. Mr. Kimple was one of these witnesses, and the only disinterested witness present. The grantee in the deed testified that she knew she was lending the money to William Anderson. While there are conflicts in the evidence, it clearly, unequivocally and convincingly shows that the deed in question, though absolute on its face, was intended as a mortgage. Appellants have, therefore, met the burden resting upon them.

We also think it established by the weight of the evidence that appellees advanced only $41 in payment of Mrs. Kimple's notes and were fully repaid in the rents paid them by Alfonzo Anderson; that Alfonzo made the last payment of rent on November 6, 1916; that, since that time, appellees have wrongfully retained possession of the property; that the fair rental value thereof was $3 per month.

The decree is therefore reversed and the cause remanded with directions to reinstate the action, vest the title in Sarah Anderson, and render judgment in favor of appellants for $144, with interest at six per cent. for the average time, less the necessary repairs placed upon said property and the taxes paid thereon, with interest at the rate of six per cent. per annum from date of payment.

FELDER v. HALL BROTHERS COMPANY.

Opinion delivered November 15, 1920.

1. ABATEMENT AND REVIVAL—PREMATURE ACTION.—Where an action was prematurely brought, but that fact did not appear upon the face of the complaint, it should have been pleaded as a defense, and it was error to dismiss the action in the absence of such plea.

2. FORCIBLE ENTRY AND DETAINER—WRIT OF POSSESSION—DELIVERY BOND.—Though Kirby's Dig., § 3868, makes it the duty of a sheriff serving a writ of possession to proceed to deliver possession of the premises to plaintiff unless bond to retain the premises be given by the defendant within five days, execution of such bond by the defendant at any time before the defendant is ousted stays further proceedings, and it is the duty of the officer to accept the bond if tendered before ouster, even though the specified time has expired.

3. FORCIBLE ENTRY AND DETAINER—REMEDIAL STATUTE—CONSTRUCTION.—Kirby's Dig., § 3638, providing that an officer serving a writ of possession shall deliver possession of the premises to plaintiff unless bond to retain them shall be given by defendant within five days, is a remedial statute and should be liberally construed.

Appeal from Lee Circuit Court; *R. D. Smith,* Special Judge; reversed.

H. F. Roleson and *C. W. Norton,* for appellant.

It was error to allow Hall Bros. Company to intervene and become party to the record. Plaintiff was entitled to try the case as made by the petition and the sheriff's response. Hall Bros. Company were strangers to the record, and it was error prejudicial to appellant to allow them to intervene, as they have no interest and no proper place in this cause. Plaintiff's action is strictly against the sheriff.

Daggett & Daggett and *Mann & McCulloch,* for appellees.

1. There was no error in allowing Hall Bros. Company to intervene and become a party. 33 Ark. 451; Any one interested may defend in mandamus. 18 R. C. L. 330; 105 Am. St. R. 117; 15 S. W. 1089. Where the right is doubtful, mandamus will not issue. 44 Ark. 284; 95 *Id.* 118.

2. The statute is that the sheriff must allow the defendant *not less* than five days from the time the writ is served and defendant is summoned to appear, but does not say that the bond shall be filed not later than five days from service of the writ.

McCULLOCH, C. J. This is an action of unlawful detainer instituted by appellant against appellee, a domestic corporation, to recover possession of a farm in Lee County, which appellant leased to appellee for a term of years, and which, according to the allegations of the complaint, appellee was attempting to hold after the expiration of the term of said lease. It is not alleged in the complaint whether the lease contract was oral or in writing, and the sole allegation on that subject is that appellee obtained possession as tenant of appellant and "unlawfully withholds and detains the possession of said premises * * * after expiration of its tenancy and after lawful demand therefor in writing."

Affidavit and bond for writ of possession were duly filed, and the writ was issued and delivered to the sheriff, who proceeded to execute the writ and the summons by serving same on C. L. Whitted and Charles Brummel as agents of appellee. Those persons on whom the writ was served signified a desire to retain possession of the premises. After the expiration of five days, appellee not having given bond as provided by statute for retention of the premises, appellant made demand on the sheriff to oust the occupants under the writ, but, before the sheriff proceeded to do so, appellee gave bond to retain the premises. Thereupon the sheriff accepted the bond and returned it with the writ, refusing to accede to appellant's demand that the occupants of the premises be ousted. Appellant then filed a petition to the court to compel the sheriff to oust appellee from the premises. The sheriff responded, setting forth the facts above stated, and on hearing the petition the court overruled it. Appellant saved his exceptions and prosecuted an appeal from that ruling of the court.

Appellee filed a written motion to dismiss the action on the ground that, according to the provisions of the lease, which is alleged in the motion to be in writing and a copy of which is filed with the motion, the time has not expired and that the action was prematurely

brought. The court sustained the motion and dismissed the action, from which ruling and judgment of the court the appellant prosecuted an appeal. The two appeals have been docketed separately by the clerk of this court.

There are not properly two appeals before us. There is only one action pending between the parties, and the two rulings of the court are both brought up for review on one appeal from the final judgment of the court dismissing the complaint. We therefore treat the two appeals as one and proceed to dispose of the questions involved.

The first question presented is whether or not the court erred in dismissing the action, for, if the court's ruling in that respect was correct, then the matter of the sheriff's refusal to oust appellee under the writ becomes, for obvious reasons, immaterial.

The court erred in sustaining the motion of appellee to dismiss the action. If the action was prematurely brought, that fact did not appear on the face of the complaint, and it should have been pleaded as a defense and disposed of like any other issue. *Files* v. *Reynolds,* 66 Ark. 314; *Forschler* v. *Cash,* 128 Ark. 492.

The court did not err in refusing to order the sheriff to deliver possession of the premises to appellant after appellee gave bond. The statute regulating the proceeding of the sheriff in executing a writ of this kind reads as follows:

"Upon the receipt of such writ and obligation before required, the sheriff or other officer shall forthwith proceed to execute such writ by ejecting from the premises named therein the defendant or any servant, agent or employee, of his or any other person who shall have received or entered into the possession thereof after the issuance of such writ, and by delivering the possession thereof to the plaintiff or his authorized agent, and by summoning the defendant to appear and answer to the action according to the terms of such writ. Provided, if the defendant shall desire to retain possession of such

premises, he shall signify the same to the officer, who shall give the defendant five days in which to execute a bond in an amount equal to the bond given in such action by the plaintiff, with sufficient security to be approved by such officer, conditioned that he will deliver possession of the premises to the plaintiff, if the plaintiff recover in the action, and satisfy any judgment the court may render against him in the action. If such bond be given and delivered as above required, the officer shall leave the possession of such premises with the defendant, and shall return such bond with the writ into court." Kirby's Digest, § 3638.

This statute gives a defendant five days within which to give bond, but the specification of this time is not mandatory as a maximum. It is the duty of the officer to proceed to deliver possession of the premises in controversy to the plaintiff unless bond to retain the premises be given by the defendant within five days; but the execution of the bond at any time before the defendant is ousted stays further proceedings, and it is the duty of the officer to accept the bond if tendered before ouster, even though the specified time has expired.

The statute is remedial and should be liberally construed. *Smith* v. *Packard,* 98 Fed. 793. Its purpose was to give a defendant the right to retain possession during pendency of the action and to afford him a definite period of time within which to give the bond. If the time be extended by the failure of the officer to make final execution of the writ and the bond is given after the period specified, no injury is done to the plaintiff; but if the bond is not given and injury results to the plaintiff by reason of the failure of the officer to finally execute the writ with due expedition, then the officer is liable in damages for such injury. No question of injury arises in this case, however, for appellee gave the bond.

For the error indicated in dismissing the complaint the judgment is reversed and the cause remanded for further proceedings.

HILL v. IMBODEN.

Opinion delivered November 15, 1920.

1. PLEADING — FAILURE TO ANSWER CROSS-COMPLAINT — WAIVER.— Where defendant, in a suit to enforce a mechanics' lien, did not insist upon a formal answer to his cross-complaint, and went to trial without asking for a default decree, he is deemed to have waived the failure to answer.
2. MECHANICS' LIEN—TIME OF FILING CLAIM.—Where the items of an account on which a mechanics' lien was sought were furnished from time to time under a single contract, it was sufficient if the claim was filed within ninety days after the last item was furnished.
3. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S DECREE.— Where issues of fact were tried almost entirely on the testimony of the parties themselves, and there is a conflict in their testimony, the chancellor's finding accepting the testimony of one party as correct will not be disturbed on appeal.
4. MECHANICS' LIEN—BURDEN OF PROOF.—In an action to enforce a mechanics' lien, the burden is on the claimant to prove that he delivered the materials.

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

J. Allen Eades, for appellant.

1. The whole of the cross-complaint is absolutely undenied, and hence all material allegations are taken as confessed. 30 Ark. 362; 93 *Id.* 269; 91 *Id.* 30.

A good plea unanswered is always sustained. 21 Ark. 18; 25 *Id.* 105; see, also, 16 *Id.* 97; 19 *Id.* 96; 56 *Id.* 73; 51 *Id.* 368. Appellant's cross-complaint was unanswered, and he was relieved of all proof. It was error to allow judgment against appellant Hill.

2. Imboden failed to file his materialman's lien within the ninety days required by law. Kirby's Dig., §§ 4981-2; 132 S. W. 1004; 144 *Id.* 919; 102 Ark. 539; 32 *Id.* 59. The title was not filed in time and Hill can not be charged with a lien.

3. As to the contract to furnish Hill the lumber at $820. This is set out in the cross-complaint and is undenied and no proof was necessary. These positions are fatal to appellee's case.

Strait & Strait, for appellee.

1. The claim for lien was filed in time and the material furnished more than ninety days before the lien was filed. The cause of action accrues from the date of the last item. 14 Ark. 192; 91 *Id.* 968; 51 *Id.* 203; 74 *Id.* 528. The contract was a continuing one and terminated only on the completion of the improvements and the statute bar did not begin to run until the termination of the contract and the completion of the improvements. 25 Ark. 185; 27 *Id.* 343; 103 *Id.* 503.

Appellee was not required to divide his account for material into separate parts from time to time, but had the right to continue furnishing material until the furnishing was completed and then file his lien within the time provided by law. 43 Ark. 275.

2. Appellant was not entitled to judgment by default for failure of the appellee to file answer. The answer was filed though it does not appear in the record. Judgment by default can not be rendered on a claim for unliquidated damages, although it was not answered and no defense interposed, but there must be satisfactory proof by the complaining party. 90 Ark. 158; 1 *Id.* 53; 5 *Id.* 640; 12 *Id.* 599; 29 *Id.* 373; 39 *Id.* 491; 138 *Id.* 171; 60 *Id.* 399; 89 *Id.* 513.

The proof did not justify a recovery by Hill against Imboden. The appeal by Hill is not in good faith but for delay merely.

McCULLOCH, C. J. Appellant owned a certain lot or tract of real estate in Morrilton and constructed thereon a dwelling house, and barn and other outhouses. Appellee furnished all of the material for the construction of said buildings and filed a lien for the price, nothing having been paid on the bill. Appellee claims $1,720.79 for the price of said building material and he instituted this action against appellant in the chancery court of Conway County to enforce a statutory lien on the real estate on which the said buildings were constructed.

Appellee alleged in his complaint that he asserted a lien in the manner prescribed by statute by filing in the office of the clerk of the circuit court "within ninety days after the things aforesaid shall have been furnished * * * 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." Kirby's Digest, § 4981.

Appellant filed an answer denying the allegations of the complaint as to the quantity and price of the material furnished and the filing of the claim within the time prescribed by statute, and he also filed a cross-complaint in which he alleged that appellee made for him estimates that the material for the dwelling house would cost not exceeding $820, and for the barn not exceeding $200, and agreed with appellant to furnish all the material for those buildings at those prices; that the material to be so furnished should be of certain specified grades, and that the material furnished by appellee was of inferior grade, and that appellant sustained damages in the sum of $700 by reason of the use in said buildings by the carpenters of said inferior material.

The case was heard by the chancellor on voluminous testimony of each party given by depositions, as well as other testimony, and a decree was rendered in favor of appellee for the recovery of the full amount of his claim and declaring the amount to be a lien on the real estate on which the buildings are situated.

The first contention of appellant is that appellee failed to answer his cross-complaint, and that the court should have rendered a decree for the amount claimed therein. The record does not show that an answer to the cross-complaint was filed, nor does it show that appellant asked for a default decree on account of the failure to answer. On the contrary, it appears clearly from the record that each of the parties treated the facts alleged in the cross-complaint as being at issue and directed their proof thereto. Since appellant went to trial with-

out insisting on a formal answer to his cross-complaint and without asking for a default decree, he is deemed to have waived the failure to answer. *Pembroke* v. *Logan,* 71 Ark. 364; *Cribbs* v. *Walker,* 74 Ark. 104; *Hardie* v. *Bissell,* 80 Ark. 74; *Ward* v. *Blythe,* 92 Ark. 208.

It is next insisted that the claim for the lien was not filed within the time prescribed by the statute—that is to say, within ninety days after the material was furnished. The proof shows that all of the items of appellee's account were furnished from time to time under a single contract, and that the claim was filed, as prescribed by statute, within ninety days after the last item was furnished. This was sufficient. *Kizer Lumber Co.* v. *Mosely,* 56 Ark. 544; *O'Neal* v. *Lyric Amusement Co.,* 119 Ark. 454; *Burel* v. *East Arkansas Lumber Co.,* 129 Ark. 58.

Finally, it is contended that the findings of the chancellor on the issues of fact are not supported by the evidence. The only serious question on this branch of the controversy is as to the sufficiency of the proof to establish the fact that all of the items of material on appellee's account were delivered to appellant or delivered on the premises where same were to be used in the construction of the buildings. The issues of fact were tried almost entirely on the testimony of the parties themselves, and there is a conflict in their testimony. The chancellor accepted the testimony of appellee as correct. It can not be said that the findings were against the preponderance of the testimony, and in that state of the proof we should not disturb them.

Appellee testified that he agreed with appellant to furnish all the materials for the buildings at ruling market prices and that upon the instructions of the appellant he furnished materials as ordered by the carpenters and other workmen in charge of the work. Appellee's method in the sale of material was to check out the items when ordered and cause same to be loaded on a wagon for delivery, and the items were then entered on a delivery slip,

two carbon copies thereof being made for the drayman or driver who left one of the copies with the person to whom he delivered the material and procured the written receipt of such person endorsed on the other copy which was returned to appellee's office to be placed on file. The accounts against customers were made up of the entries copied from those delivery slips.

Appellee testified that his account against appellant is correct, and he produced with his deposition the delivery slips for each item, but all of those slips were not signed by appellant or the workmen on the job. Many of the slips were not signed, though it was the custom for the carpenters to sign the slips. During the progress of the trial appellant offered to pay to appellee in full of his account all of the items for which receipts had been signed by the workmen on the job, but appellee declined to accept the amount offered in full discharge of his claim.

Appellee's testimony established the fact that the accounts were correctly kept, but the drivers who loaded and delivered the material were not called as witnesses, and appellee did not show by direct testimony that all of the loads were delivered on the premises of appellant. However, appellee did testify that he gave appellant an itemized account, the same as that sued on, and that appellant made no objections to it, but on the contrary promised to pay it. He testified also that appellant called him out to the houses and that they looked them over together and appellant expressed himself as being satisfied and made no objections to the account. Appellant denied this, but the chancellor accepted the testimony of appellee, and we can not say that appellant's testimony preponderates over that of appellee.

The burden was on appellee to prove that he delivered the material, and we think that he has done so, and that, as before stated, the findings of the chancellor are not against the preponderance of the testimony. *Central Lumber Co.* v. *Braddock Land & L. Co.*, 84 Ark. 560.

The decree should be affirmed and it is so ordered.

WELLS FARGO & COMPANY EXPRESS v. ALEXANDER.

Opinion delivered November 15, 1920.

1. MASTER AND SERVANT—LIABILITY FOR SERVANT'S WRONGFUL ACTS.—The test of a master's liability for his servant's acts is not whether they were done during the existence of the servant's employment, but whether they were committed in the prosecution of the master's business, and pertain to the particular duties of the servant's employment.
2. MASTER AND SERVANT—LIABILITY FOR ASSAULT BY SERVANT.—Where the agent of an express company without authority ejected plaintiff by force from a room being constructed for the express company, but which had not been completed or delivered to the express company, the company will not be liable.

Appeal from Ouachita Circuit Court; *George R. Haynie,* Judge; reversed.

Mehaffy, Dorham & Mehaffy, for appellant.

The court's instructions were erroneous as given, and it was error to refuse No. 7 for appellant.

According to the undisputed evidence, it does not appear that O'Neal was acting in the line of his duty as agent when he made the assault. The court should have directed a verdict for appellant under the testimony. 93 Ark. 397; 75 *Id.* 579; 77 *Id.* 606. The master is not liable for the acts of his servant that are beyond the scope of his employment. Cooley on Torts, 627; 33 Neb. 582; 83 Ark. 193; 4 Labatt on Master and Servant, § 1466; 113 Pac. 386; 111 Ark. 208; 26 Cyc. 1527.

The act must not only be done while the servant is engaged in his master's service, but it must pertain to the particular act of that employment. 40 Ark. 323; 111 *Id.* 208. See, also, 18 So. Rep. 292; 42 Ark. 542; Cooley on Torts, p. 538. These authorities show that O'Neal acted beyond the scope of his authority and employment and appellants are not bound. None of the cases cited by appellee are applicable here.

W. R. Duffie and *Powell & Smead,* for appellee.

1. The evidence shows that O'Neal was the agent of the express company, and it was part of his duty to

protect it from loss; he was under bond for the faithful performance of his duties. The instructions were really more favorable to appellant than they had a right to ask. The testimony is conclusive that O'Neal was the agent of the express company and that he was acting for his principal and within the scope of his apparent or real agency, and the principal is liable for his tort, whether authorized or not. 75 Ark. 579; 96 *Id.* 358; 62 *Id.* 109; 42 *Id.* 542.

2. If the instructions assumed that O'Neal was the agent of the express company, the assumption was clearly warranted by the evidence, and there were no errors in them, given or refused. 90 Ark. 524; 91 *Id.* 97. See, also, 131 Ark. 411; 132 *Id.* 282; 75 *Id.* 579; 62 *Id.* 109; 96 *Id.* 258; 75 *Id.* 579.

McCULLOCH, C. J. This is an action instituted by appellee to recover damages arising from an assault committed by one O'Neal, alleged to be the agent of the two express companies who were defendants below, and who have prosecuted this appeal from the judgment rendered against them.

The express companies occupied, as a storage room and office, the baggage room of the St. Louis, Iron Mountain & Southern Railway Company at Malvern, Arkansas. The railway company erected a new passenger station at Malvern and prepared in the building a room for the use of the express companies. On February 23, 1916, the day the assault on appellee was made by O'Neal, the building had been completed except some inside finishing (carpentry work and painting) in the room to be occupied by the express companies. Neither the railway company nor the express companies had moved in, but were using the old station a short distance away. The proof adduced at the trial tended to show, however, that express matter, a package or crate of bananas and a box of vegetables, had been put into this room by O'Neal. The companies did not take possession of the new building until March 1, 1916. O'Neal had a key to the new ex-

press room which he turned over to the carpenter and painter in the morning, and it was returned to him at night. The workmen were employed by Nunn, who contracted to construct the building; and O'Neal received the key from a carpenter working under Nunn. Jones was the joint agent of the railway company and the express companies, and he employed O'Neal as helper or clerk. His duties, with reference to the express business, were to receive and deliver express matter and to keep the books. While the carpenters were at work in the new express room, appellee was invited into the room by them to join a party engaged in drinking whiskey, and appellee became intoxicated and went to sleep on a tool box. Others became intoxicated also and left the room in that condition. One of the workmen went out of the room to get a cup of coffee at a nearby restaurant, and as he returned O'Neal met him and demanded the key to the door. On receiving the key, O'Neal went into the room where appellee was asleep and assaulted him. The testimony tends to show that the assault was not provoked by appellee, and that O'Neal used excessive force in ejecting appellee from the room. The jury returned a verdict in appellee's favor and assessed damages in the sum of $1,000, which assessment was fully sustained by the testimony, if appellee is entitled to recover at all.

Numerous exceptions were saved to the rulings of the court in giving and refusing instructions, but we pass from them to a discussion of the vital question urged by counsel for appellants, as grounds for reversal, whether or not the testimony is sufficient to sustain the verdict. It is contended that, according to the undisputed evidence, it does not appear that O'Neal was acting in the line of his duty as agent of appellants when he made the assault on appellee.

This court has clearly stated the rules of law applicable to the facts of this case.

In *St. L., I. M. & S. Ry. Co.* v. *Grant,* 75 Ark. 589, we said that, if "the agent was acting for his principal

and in pursuance of his real or apparent agency at the time the tort was committed, then it may be said that he was acting in the course of his employment, and the principal will be liable for such tort, whether authorized or not."

And in the case of *Peter Anderson & Co.* v. *Diaz,* 77 Ark. 606, we quoted with approval the following rule announced by the Supreme Court of Nebraska in the case of *Davis* v. *Haughteller*, 33 Neb. 582:

"The test of the master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business."

A similar rule was announced by this court in the case of *Little Rock & Fort Smith Rd. Co.* v. *Miles,* 40 Ark. 323, where it was said:

"The act must be done not only while the servant is engaged in his master's service, but it must pertain to the particular act of that employment."

These principles were announced in other decisions of this court. *St. L. & S. F. Rd. Co.* v. *Wyatt,* 84 Ark. 193; *Sweeden* v. *Atkinson Imp. Co.,* 93 Ark. 397; *Robinson* v. *St. L., I. M. & S. Ry. Co.,* 111 Ark. 208; *Arkansas Natural Gas Co.* v. *Lee,* 115 Ark. 288; *Chicago Mill & Lumber Co.* v. *Bryeans,* 132 Ark. 282.

Tested by these principles, we do not think that, under the facts of this case, appellants are responsible for the tort committed by O'Neal. The premises where the assault was committed had not been delivered to appellants, and O'Neal had no authority, either real or apparent, to take possession for his principals. He was acting entirely outside of the line of his employment in using the premises for any purpose, and was not acting for his principals in attempting to eject appellee from the premises. The delegation to him of authority to handle express matter extended only to the premises selected by the principals—not to the selection of other premises on which to conduct the business; and the ques-

tion of liability is not affected by the fact that the premises had been selected by the principals for future use. It is the same as if the agent had attempted to use, for the business of his principals, premises wholly unknown to the latter.

The testimony does not show that O'Neal made the assault in protecting the packages of express in the room, but even if such proof appeared in the record it would not affect the question of appellant's liability, for O'Neal acted beyond the scope of his authority in putting the packages in the room, and this unauthorized act did not extend his authority over the premises so as to make his principals liable for his tort committed there. The testimony shows that O'Neal made the assault in an attempt to eject appellee from the room because he and his associates were befouling the room in their drunken orgy, and he had no authority from his principals, either real or apparent, to do anything at all with reference to the room or in it. There is nothing in our previous decisions militating against the conclusion we have reached.

The Grant case, *supra*, which is strongly relied on to sustain the liability of appellants, was one where the tort was committed by the agent at a place not on the premises of the principal, but there was proof of express authority to proceed in the prosecution of the particular business of the principal at any place, and the majority of the court sustained the liability on the ground that there was sufficient proof of authority. That case differs materially from this one, though controlled by the same principles.

The case of *Peter Anderson & Co.* v. *Diaz, supra,* was one where the assault was committed by the agent on the premises of the principal but not within the line of his duty, and we held, announcing and applying the rules of law before stated, that the principal was not liable for the tort of the agent. Under the facts of the present case, there was no real authority from the principals for the agent to do the unlawful act which he did

commit, either at that place or elsewhere, but if he had in fact been on the premises of the principals and attempting to protect the premises or the property situated there, he would have had apparent authority, and the principals would be responsible for his conduct. However, since O'Neal was not on the premises of his principals and had no authority, either real or apparent, to act for them at any place other than that selected by them, they are not responsible.

The judgment is therefore reversed and the cause is remanded for a new trial.

HART, J., (dissenting). Mr. Justice HUMPHREYS and the writer agree to the law as decided, but think that in its application to the facts of the present case, there was a question for the jury as to the authority of the express messenger to eject appellee.

CENTRAL COAL & COKE COMPANY v. FITZGERALD.

Opinion delivered November 15, 1920.

1. MASTER AND SERVANT—NEGLIGENCE—JURY QUESTION.—Where, in an action for the death of a mine worker who was struck by a dump car and thrown from a trestle, there was evidence that the foreman, after having directed the deceased to clear dirt from the track, permitted the car to be operated without taking precaution to protect him, the issue whether defendant was negligent was for the jury.
2. MASTER AND SERVANT—ASSUMED RISK—MASTER'S NEGLIGENCE.—A servant does not assume the risk of dangers that arise from the master's negligence unless he is aware of that negligence and appreciates the danger therefrom.
3. MASTER AND SERVANT—ASSUMED RISK—JURY QUESTION.—Though a servant was familiar with the danger incident to going upon a trestle leading from the tipple to remove dirt from the track, yet where he was proceeding in obedience to the orders of his foreman, whether he assumed the risk or was guilty of contributory negligence in not notifying the hoisting engineer that he was going upon the track was for the jury.

4. MASTER AND SERVANT—LIABILITY FOR FOREMAN'S NEGLIGENCE.—Where a foreman ordered a servant to go into a place of danger, the servant has a right to rely upon the foreman to protect him; and if he is injured through the neglect of the foreman to take proper precautions for his safety, the master will be liable.

Appeal from Sebastian Circuit Court, Greenwood District; *John Brizzolara,* Judge; affirmed.

James B. McDonough, for appellants.

1. The evidence is insufficient to show that any negligence of defendants caused the accident. 89 Ark. 581; 100 *Id.* 53; 86 *Id.* 289. The scintilla doctrine as to evidence does not prevail now in Arkansas. 114 Ark. 112.

2. It was an accident for which appellants were not liable. 116 Ark. 82. Verdicts can not be predicated upon conjecture. 113 Ark. 353; 116 *Id.* 82; 174 S. W. 574. See, also, 116 Ark. 82; 154 N. Y. 90; 136 *Id.* 423; 101 *Id.* 661; 64 Kan. 553; 74 Iowa 248; Elliott on Ev., § 89; 179 U. S. 658; 181 Fed. 91; 190 *Id.* 717.

Negligence must be proved and not presumed. 100 Ark. 462; 79 *Id.* 608. The operators of the train owed no duty to Morfew under the circumstances here, for he suddenly stepped in front of a moving car or train. 95 S. E. 311. No notice was necessary or warning, as Morfew was an employee and he had knowledge of the risk and danger. 29 Okla. 351; 187 Mass. 549; 96 Ark. 500; 174 S. W. 150; 107 Ark. 341. Inferences can not be built upon inferences or verdicts supported in that manner. 219 Fed. 686. Actually there is no testimony showing negligence of appellants and the burden was on them. 116 Ark. 82.

3. The court should have given a peremptory instruction for defendants, as there was no evidence of negligence.

4. The court erred in its instructions. 130 Ark. 583.

5. It was error to admit the evidence of Doctors Butler and Howard, giving their opinions as to the cause of death. 206 Fed. 765; 86 N. E. 606; 95 Kan. 451; 151 S. W. 950. It was also error to admit the testimony of

Mrs. Morfew as to conversations with her husband. 116 Ark. 555; 88 *Id.* 168; 115 *Id.* 584.

6. The verdict is excessive.

John W. Goolsby, for appellee.

1. The moving car was the proximate cause of the injury. This was for the jury, and they have settled it. 86 Ark. 289.

2. There is no testimony that Morfew knew of any danger to which he was exposed, and no notice was given him, nor was the danger obvious. 75 Ark. 291; 96 *Id.* 206; 77 *Id.* 458; 106 *Id.* 25.

3. The doctrine of assumed risk does not apply here. 106 Ark. 25. The question of contributory negligence was submitted to the jury on proper instructions, and their verdict should not be disturbed.

The verdict is not excessive. He suffered greatly, and could not sleep or rest, and he left a widow and two minor children.

WOOD, J. The Central Coal & Coke Company (hereinafter called company) owned and operated mine No. 11 in Sebastian County, Arkansas. It was a shaft mine. The coal, dirt and rock were drawn up in cars from the bottom of the shaft by steam power. The coal was brought up in separate cars from the rock and dirt. The mine had the usual tipple. There was a trestle built of wood on which ran the rock and dirt cars for the purpose of carrying away the rock and dirt from the tipple. This trestle started at the tipple and extended north for a distance of about eighty feet. At the tipple—the lowest point—the trestle was about ten or twelve feet high and it ascended at an angle of about twenty-five degrees. The place where the dirt car stood when not in use was at the lower end of the trestle next to the tipple. The dirt and rock were hoisted into a metal chute and were dumped from this chute into the rock and dirt car. This car ran on four wheels. It was six or seven feet long, three or four feet wide and about six feet high. It was a self-

dumping car. After the rock and dirt were dumped from the metal chute into this car, the car was then pulled up the trestle by steam power. From two to four feet north of where the dirt car stood at the lower end of the trestle there was a stairway extending from the ground to the trestle. The steps of this stairway were about ten or twelve inches wide and two and a half feet long. When the cars loaded with rock and dirt were ready to be hoisted, the men working on top were notified by signal bells and by whistle that the cars were coming up. The whistle was on top and all working on top could hear the signal. The dumping of the rock and dirt into the metal chute and into the dirt car also made a great deal of noise, which could have been heard by a man working anywhere on the trestle.

J. A. Morfew had been an employee of the company at the mine for about two years and was familiar with the manner in which the mine was operated. It was his duty to perform any work required of him by the top foreman or any one having authority over him.

The rock, dirt, and small fragments of coal that had been dumped at the upper end of the trestle had accumulated in the shape of a cone sloping at an angle of about forty-five degrees until it was about forty feet high at its highest point. It had filled in under the trestle to such an extent that the trestle and track, for a part of the distance from the tipple to the top of the trestle, rested on the dump. The coal in the dump was burning nearly all the time, but persons could go from the ground to the trestle up the dump without getting into the fire. The most practical way, however, to reach the trestle was by the stairway which was erected for the purpose of getting up to the tipple and dirt car. In hauling and dumping the dirt it gets to the track of the trestle and sometimes over the track, and when it does, in order to further use the dirt car, it is necessary to remove the dirt.

A man by the name of Marshall Chamlee was in the employ of the company as "top boss," having direction of the men working on top. It was necessary for one going on top to work to notify the dirt engineer for the protection of the men. Chamlee had been requested by a carpenter, who had some work to do about the trestle, to send some one up to remove the dirt off the trestle, and in compliance with this request Chamlee directed Morfew to remove it. The dirt had accumulated over the track near the north end of the trestle, and Chamlee directed Morfew to get a shovel and remove the dirt so that it would not interfere with the dumping of the dirt and stop the production of coal. Morfew went for the shovel, and Chamlee went about his work at some other place. He was called into the hoist engine room. Morfew ascended the stairway. He was observed about half way up. At that time the dirt car was standing where the dirt is dumped into it from the chute. It was in plain view of Morfew. He was on the ladder or the trestle right at the car, and when the dirt car started up, he either fell or jumped or the car hit him. A witness who was observing the accident could not tell which. Morfew's thigh was broken, and he had cuts about the face. He lived about twelve days after the accident; suffered a great deal, and said he was going to die. In the opinion of the physician who attended him he died from embolus, or clot in the blood, caused from the injury. Morfew said to one who was among those first to reach him after his injury, that the "car knocked him off." Another who was present just after the injury told Morfew that he had two bad cuts on his face and asked him what caused them. Morfew said, "The rock car hit me." It was suggested to him that the cuts were too high for that and Morfew then said: "I don't know whether the rock car hit me or not."

This action was instituted by the appellee as administrator of the estate of Morfew against the company and Marshall Chamlee, appellants, to recover damages

for the benefit of Morfew's widow and next of kin and of the estate of Morfew, alleged to have been caused by the negligence of appellants resulting in the death of Morfew.

The above are substantially the facts upon which the jury returned a verdict in favor of the appellee in the sum of $5,000. Judgment was rendered for that sum, from which is this appeal.

It could serve no useful purpose to set out in detail and discuss the instructions which were given by the court and the prayers of appellants for instructions which were refused. The rulings of the court in giving and refusing prayers for instructions correctly announce the law applicable to the facts of this record in accord with many previous decisions of this court on the issues of negligence, contributory negligence and assumed risk. One of the grounds urged for reversal by appellants is that there is no substantial testimony to show any negligence on the part of the appellants in causing the injury to Morfew; that the undisputed testimony on behalf of the appellee shows that the appellants were not negligent. Appellants therefore insist that the court erred in not giving appellant's prayer for instruction No. 1, directing the jury to return a verdict in their favor. Appellant's contention can not be sustained for the reason that the undisputed testimony shows that the appellant, Chamlee, was the "top boss" of the appellant company, and had direction of the men who were working at the top of the mine. The jury could have found that in compliance with his direction Morfew had obtained a shovel and was proceeding by way of the stairway or ladder to the trestle and to the place where the track was covered with dirt to remove the same, and that about the time that he reached the trestle, or immediately after he had got upon it, the dirt car was started toward the dump and either knocked him off, or else in his effort to avoid collision with it, he fell or jumped from the steps or ladder.

The testimony shows that Chamlee directed Morfew to clean off the dirt so that the car "could keep dumping" and so as not to "stop the production of coal." The jury had the right to conclude that Morfew understood from this that he was to proceed at once to the task of removing the dirt from the track, and that while so engaged the top boss, under whose immediate direction he was working, would see to it that no dirt car would be moved and run upon him. It appears from the testimony that, at the time the signal was given for the pulling of the dirt car, Chamlee was in the hoist engine room. The jury had the right to find from this testimony that Chamlee, the top boss, after having given directions to Morfew to move the dirt from the track, went to the hoist engine room and knowing that he had specifically directed Morfew to remove the dirt from the track, that he was negligent in not taking the necessary precaution to see that the dirt car was not moved while Morfew was engaged in removing the dirt.

As we view the evidence, the issue as to whether appellants were negligent under the circumstances was clearly one, not of law, but of fact for the jury. As we have already said, this issue was submitted under correct declarations of law. The undisputed testimony shows that the noise created by the dumping of rock and dirt into the metal chute, and from the metal chute into the dirt car, could have been heard by Morfew; also that bells were rung and the whistle was blown as signals for the hoisting of rock and dirt. These noises were distinct notice to the employees working at the top of the mine that the dirt car would soon move up the trestle. If the undisputed testimony showed that Morfew, as servant of all work about the top of the mine, voluntarily had undertaken, as a part of his duty, to remove the dirt from the trestle, being familiar with the methods of operating the mine, he would have had to take notice of the danger incident to the performance of this duty, and would have been held under such circum-

stances to have assumed the risk. Under such a state of case, no notice or warning to him of the danger he was in would have been necessary, and the appellants would not have been negligent in failing to give such notice. Under such circumstances, it would have been the duty of Morfew himself to have informed the hoisting or dirt engineer that he was going upon the trestle to remove the dirt. *Alleghany Improvement Co.* v. *Weir,* 96 Ark. 500; *H. D. Williams Cooperage Co.* v. *Kittrell,* 107 Ark. 341; *Nye* v. *Dalton,* 177 Mass. 549.

But such were not the facts, and therefore the court did not err in refusing to take from the jury the question of the issue as to whether or not Morfew had assumed the risk. The case, as we view the record, comes well within the doctrine that "the servant does not, when he enters the service of another, or while he continues in that service, assume the risk of dangers that arise from the negligence of the master, unless he is aware of that negligence and appreciates the danger therefrom. And, in the absence of knowledge on his part, the servant has a right to rely upon the assumption that the master has performed the duties devolving upon him so as not to expose him to the extraordinary hazards." *A. L. Clark Lumber Co.* v. *Northcutt,* 95 Ark. 291-295, and cases there cited. In the present case, although the undisputed testimony shows that Morfew was familiar with the methods of operating the mine and that he therefore must have known of the danger incident to going upon the trestle to remove the dirt from the track without taking the necessary precaution to first notify the hoisting or dirt engineer that he was going upon the track, still the undisputed testimony shows that he was directed to go upon the trestle to remove the dirt from the track by the top boss who had the right to direct his movements. The testimony warranted the jury in finding, as we have shown, that he was proceeding in obedience to the orders of his superior when he received the injuries. Appellants likewise certainly had no cause to com-

plain of the ruling of the court in submitting the issue to the jury as to whether or not Morfew was guilty of contributory negligence in obeying the orders of his superior. Appellants contend that the court erred in not permitting them to show by Chamlee that there was no duty of Chamlee to notify Morfew of any movement of the dirt car. But, since the undisputed testimony shows that Chamlee had directed Morfew to remove the dirt from the track and that Morfew was acting under Chamlee's directions, it follows, as a matter of law, by virtue of the relation between master and servant, that it was the duty of Chamlee to take all necessary precautions to protect Morfew while he was in a place of danger where he had gone under the express direction of the master. As is said in Labatt on Master and Servant, section 440, "The master and servant are not on the same footing. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged through the neglect of the master, it is but meet that he should be recompensed."

We have examined the other questions presented in the brief of learned counsel for appellants, but do not find there was any reversible error in the rulings of the trial court on any of the various questions presented. Its judgment is therefore affirmed.

BONHAM v. BROTHERHOOD OF RAILROAD TRAINMEN.

Opinion delivered November 15, 1920.

1. BENEFICIAL ASSOCIATIONS—MEMBERSHIP—ACTIONS FOR DAMAGES.—An action to recover damages for the wrongful expulsion of a member from a fraternal benefit society may be maintained without first exhausting the remedy by appeal to the tribunals of the society.
2. BENEFICIAL ASSOCIATIONS—MEMBERSHIP—REINSTATEMENT.—Where the purpose of a suit against a beneficial association is to be restored to membership, the courts will not interfere to relieve the member against a sentence of discipline, suspension or expulsion until the means of relief within the order, including appeals, afforded by the rules of the society, have been exhausted.

3. BENEFICIAL ASSOCIATIONS—REINSTATEMENT OF MEMBER.—Where a plaintiff asked for restoration to membership in a fraternal association and for damages for wrongful expulsion, but he agreed that the suit should be treated as an application for restoration of membership, the remedies by appeal within the society must be invoked before resorting to the courts for relief.

4. BENEFICIAL ASSOCIATIONS—METHODS FOR REDRESSING GRIEVANCES.—Fraternal societies may provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed method of procedure before invoking the power of the courts for reinstatement in the society.

Appeal from Baxter Chancery Court; *L. F. Reeder*, Chancellor; affirmed.

STATEMENT OF FACTS.

W. G. Bonham was expelled from the Brotherhood of Railroad Trainmen, a fraternal association, on the charge of having committed adultery with the wife of his brother, A. G. Bonham.

The prayer of his complaint was for a mandatory injunction to compel the association to restore him to membership and for damages for his alleged wrongful expulsion therefrom. The material facts are as follows:

W. G. Bonham and A. V. Bonham, his brother, were both members of the Brotherhood of Railroad Trainmen, which was organized for the purpose of advancing the social, moral and intellectual interests of its members and to protect their families. The association also issued benefit certificates to its members. The association had a written constitution and by-laws. The by-laws provided for the suspension or expulsion of members and that every member should be entitled to a fair trial for offenses involving suspension or expulsion. The by-laws also provided for the trial of the member upon written charges upon notice previously given him.

W. G. Bonham was employed as a brakeman by the railway company at the time of his expulsion, and he also had a benefit certificate in the association. On January 5, 1919, A. V. Bonham filed written charges against his brother, W. G. Bonham, accusing the latter of adul-

tery with his wife. W. G. Bonham was notified that a trial of the charges was set by the local lodge for January 19, 1919, before a committee which had been duly appointed to hear the said charges. W. G. Bonham appeared on that morning, and there was read to the committee appointed to try him an affidavit of the wife of A. V. Bonham, in which she stated that W. G. Bonham had been repeatedly guilty of adultery with her. The committee asked W. G. Bonham if he was guilty or not guilty. He replied that he was not guilty. The committee then told him he could retire from the room. He waited outside for some time, supposing that they were arranging the order of trial, and that they would call him in when they were ready to begin the trial. The committee did not call him in for trial, but reported to the lodge its finding to the effect that he was guilty of the crime of adultery with his brother's wife. The lodge then voted to expel him, and he was duly informed of that fact.

A section of the by-laws provides that if a member believes that an injustice has been done him on the trial of charges preferred against him, he may appeal to the president of the grand lodge within thirty days from the time the verdict is rendered against him.

The section also provides for the method of procedure in such a case. The by-laws further provide that, should the member consider the decision of the president of the grand lodge unjust, he may appeal to the board of directors, and, if its decision is not satisfactory, an appeal to the grand lodge may be taken, whose decision shall be final.

W. G. Bonham appealed to the president of the grand lodge within the time and in the manner provided by the by-laws. The president of the grand lodge sustained the decision of the local lodge. W. G. Bonham did not exercise his right under the by-laws to further prosecute his appeal, but brought this action in the chancery court against the local lodge to compel it to restore

him to membership therein and for damages for his wrongful expulsion.

The attorneys for W. G. Bonham and for the Brotherhood of Railway Trainmen filed in the court below for their respective clients a stipulation as follows:

"It is agreed that in the trial of this case the question of reinstatement shall first be submitted to the court in the same manner as though such question was the sole and only question for trial in the case, and the decision of the court on such question adverse to the plaintiff shall finally dispose of this case in this court and decree shall be entered for the defendant upon the whole case, subject to the right of appeal by the plaintiff."

At the trial of the case the plaintiff testified that he was not guilty of committing adultery with his brother's wife, and that he would have so testified at the trial before the committee of the local lodge, had he been permitted to do so.

It was also stipulated that the committee of the local lodge which tried W. G. Bonham and reported him guilty acted in perfect good faith in conducting the trial and making its finding.

The chancellor found the issues for the defendant and it was decreed that the complaint of the plaintiff should be dismissed for want of equity. The case is here on appeal.

Allyn Smith, for appellant.

1. The trial of appellant was not such as was provided for by the constitution and by-laws of the order, and he was entitled to be restored. There is no conflict in the evidence. Reasonable notice must be given of the charge and an opportunity to defend himself and a fair hearing. 76 Kan. 520; 22 Mich. 36; 91 S. W. 835; 107 Atl. 531; 67 Mich. 233; 34 N. W. 555. The proceedings to expel a member provided for in the by-laws must be strictly followed, and a member must be given an opportunity to defend himself. 107 Atl. 531; 67 Mich. 233; 35 N. Y. Supp. 214; 179 *Id.* 1; 149 *Id.* 771-4; 56 *Id.* 1052.

2. The trial was on Sunday, and the expulsion was void as against our Sabbath laws.

Williams & Seawel, for appellee.

1. Appellant had a fair trial in the order as provided for in its by-laws. Proper charges were filed and notice given of time and place. He had every opportunity to defend, but he made no effort to secure witnesses or introduce any evidence. His expulsion was legal and according to the laws of the order. 96 Ark. 117; 46 *Id.* 291.

2. The question of reinstatement was one purely of discipline, and appellant can not maintain an action in court until he has exhausted his remedies provided him by the order's by-laws. 13 S. W. 379; 69 *Id.* 114; 1 N. E. 571; 44 *Id.* 401; 105 *Id.* 977.

3. The fact that the expulsion was on Sunday was not pleaded, but if it had been it could make no difference. 60 L. R. A. 620; 19 R. C. L. 1250.

HART, J. (after stating the facts). Counsel for the plaintiff insists that one wrongfully expelled from a fraternal benefit society is not bound to exhaust his remedy within the order before seeking a remedy in the civil courts to be restored to membership and for damages for the wrongful expulsion.

Counsel insists that the expulsion was wrongful because he was not given a fair trial within the meaning of the by-laws of the association in that he was not permitted to testify and under oath deny that he was guilty of the charges preferred against him.

In *Independent Order of Sons and Daughters of Jacob of America* v. *Wilkes,* 98 Miss. 179, 52 L. R. A. (N. S.) 817, and in *St. Louis Southwestern Ry. Co. of Texas* v. *Thompson,* 102 Tex. 89, 19 Ann. Cas. 1250, the court held that an action to recover damages for the wrongful expulsion of the plaintiff from a fraternal benefit society may be maintained without first exhausting the remedy by appeal to the tribunals of the society. In each of the cases the court recognized that on appli-

cation to restore plaintiff to membership in the society the civil courts would not take jurisdiction until the applicant had exhausted his remedies under the laws of the society. The court said, however, that the same reason does not apply in a suit for damages. It was said that the right to apply to the courts for redress of injuries where property rights were involved exists in favor of all citizens and could not be abridged by any association except by consent of the members. In such a case the society would not be concerned in the member continuing in the order and would, therefore, have no ground upon which to stand in demanding that the remedy by appeal under the by-laws of the order should be exhausted before the society was called upon to respond in damages for wrongfully expelling one of its members. The case is different, however, where the expelled member seeks reinstatement in the order and asks to be restored to the rights and privileges of its members. In such a case the society is interested in the reinstatement of the member and his continuance in the order. The order in the present case was organized to promote the social and moral interests of its members and to protect their families. In order to do this, it provided for the expulsion of its members for certain causes. The control and discipline of its members within the limits provided for in the order is a part of the purpose of the organization of the association, and to accomplish this end the by-laws providing for the trial of the members and for appeals were established. The general rule is that, where the purpose of the suit is to be restored to membership in the society, the courts will not interfere to relieve a member against a sentence of discipline, suspension, or expulsion until the means of relief within the order, including appeals, afforded by the rules of society have been exhausted. 7 C. J., p. 1123, § 84, and cases cited in note 10. Many decisions from various courts of last resort of the several States are cited in support of the text; and we think the rule just announced is the correct one. This brings us to the consideration of the

question of whether the object of the present suit is merely to reinstate the member in the association or is an action for damages for the wrongful expulsion of the member.

The prayer of the complaint of the plaintiff seeks relief in both these respects. However, a stipulation as to the object of the suit was filed by the parties in the court below. The material part of the stipulation has been copied in our statement of facts and need not be repeated here. Reference to it will show that the plaintiff elected to treat this suit as an application to be restored to membership in the society. Treated as proceeding to restore his membership in the society, the decision of the court below was correct. The by-laws provide that the member may appeal from an adverse decision of the president of the grand lodge to the board of directors and in turn from that body to the grand lodge, whose decision shall be final.

Without discussing the question of whether or not the decision of the highest appellate tribunal of the society would be conclusive, we are of the opinion that the contract of the plaintiff with the society required him to first seek redress within the society itself by carrying the question to the highest tribunal in cases where the purpose is to be restored to membership in the society. The decided weight of authority is that fraternal organizations like the one in question may provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed method of procedure before invoking the power of the courts for reinstatement in the society. The members voluntarily enter such organizations and subscribe to their by-laws which, as we have above seen, are enacted alike for the protection of the members and the society. Hence where the member seeks to be restored to his rights and privileges in the society, he must pursue the course prescribed by the by-laws before resorting to the courts to enforce his claim.

It follows that the decree must be affirmed.

ROCK v. DEASON & KEITH.

Opinion delivered November 15, 1920.

1. SALES—WHEN CONTRACT COMPLETE.—Where an order for a carload of flour was taken subject to the seller's approval, the seller's acceptance constituted a completed contract.
2. SALES—FOOD CONTROL ACT—CONSTRUCTION.—The Food Control Act of Congress of August 10, 1917 (40 Stat. at L. 280), was not retroactive, and the rules promulgated under that act by the President did not affect sales of food completed prior to the passage of that act, though delivery was to be made subsequently.

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

STATEMENT OF FACTS.

Appellants sued appellees in the circuit court for damages for breach of a contract to purchase a car of flour and feed.

Appellees admit that they gave to appellants an order for a car load of flour which was to be shipped on September 15, 1917, but allege as a defense to the action that the National Government took charge of the manufacture and sale of the flour and prohibited its sale at the price they had contracted to pay for it, whereby they were prohibited without fault on their part from carrying out their agreement to purchase the flour.

They prayed that the cause be transferred to equity and that the contract be canceled. The circuit court transferred the case to equity without objection on the part of appellants.

The traveling salesman of one of the appellants took an order from appellees for a car of flour on August 7, 1917. The price of the flour was named in the order and the time of shipment was on September 15, 1917, or sooner. The order was subject to the acceptance of one of the appellants which was engaged in the manufacture of flour. That company received the order from its salesman, and on August 9, 1917, wrote a letter to appellees accepting the order and asking for shipping instructions. Other correspondence passed between the parties

in which appellants insisted upon appellees performing their contract by receiving the flour and appellees asked for a reduction in the purchase price because in the meantime the price of flour had gone down. Appellants refused to make any reduction in the price. Hence this lawsuit.

The court below found the issues in favor of appellees and dismissed the complaint of appellants for want of equity. The case is here on appeal.

McGill & McGill, for appellants.

The only specific defenses set in the answer are: (1) that the assignment to Chas. F. Rock was fictitious and fraudulent, and (2) that defendants were prohibited by the Federal food regulations from accepting the flour at the contract price.

(1) It is shown by the uncontradicted evidence that the assignment was valid and binding.

(2) The contract was not invalid at the time it was executed. In the absence of a stipulation in a contract relieving a party in case of war, the existence of a state of war is no excuse for a breach of the contract whether the contract is concluded before or after the commencement of hostilities. Ann. Cases 1918 A, 14; Ann. Cas. 1918 C, 390; 3 A. L. R. Cases 1-21 and note. The Food Control Act and regulations would not have prevented defendants from completing their purchase, even if there had been no express provision excluding its application from existing contracts. However, it was expressly provided that it should not be retroactive. See notes to 3 A. L. R., p. 35; 207 S. W. 72. The contract here was really completed August 7th by the signature of the mill company and acceptance by defendants. The Food Control Act was not passed until August 10 and its rules were not promulgated until August 24th.

HART, J. (after stating the facts). The decision of the chancellor was wrong. The order signed by appellees on August 7, 1917, constituted an offer to buy the car load of flour from appellants and the acceptance by

appellants on August 9, 1917, constituted a completed contract. *Emerson* v. *Stevens Grocer Co.,* 95 Ark. 421; *Cage* v. *Black,* 97 Ark. 613; and *Emerson* v. *Stevens Grocer Co.,* 105 Ark. 575.

In a case note to 3 A. L. R., page 35, it is said that the war measures embodied in the rules of the milling division of the United States Food Administration constitute no defense to an action for the breach of the contract to purchase flour, such regulations not operating, nor being intended to operate, to invalidate prior contracts and the case of *J. C. Lysle Milling Co.* v. *Sharp* (Mo. App.), 207 S. W. 72, is cited in support of the text. That principle controls here. The act of Congress relating to the Federal control of production of food and fuel was passed on August 10, 1917, and the section which controls here may be found in chapter 53, section 13 of 40 U. S. Statutes at Large, page 280, and Barnes' Federal Code, 1919, section 10, 191. The section provides, in substance, that whenever the President shall find it necessary to secure an adequate supply of necessities for the support of the army or the maintenance of the navy, or for any other public use connected with the common defense, he is authorized to requisition and take over, for the use or operation by the Government, any factory or plant, or any part thereof, in or through which any necessities may be manufactured or produced and to operate the same.

The section further provides that the President is authorized to prescribe such regulations as he may deem essential for carrying out the purposes of this section. It will be noted that the Food Control Act was not passed until August 10, 1917, and the rules were not promulgated by the President until August 24, 1917. The section of the statute in question does not purport to act retroactively.

As we have already seen, a binding contract between the parties was completed on the 9th day of August, 1917. This being before the passage of the Food Control

Act by the Congress of the United States, the appellees could not excuse themselves from performing the contract. The fact that they had until the 15th day of September, 1917, to give shipping directions, does not alter the case. The binding force of the contract took effect when the contract was completed, and that was on the day when the appellants accepted the offer of appellees for the carload of flour.

W. A. Chain, the general manager of the Security Flour Mills Company, was a witness for appellants. According to his testimony, the company received the order from Deason & Keith dated August 7, 1917, and accepted it in a letter mailed to them on August 9, 1917. The company asked for shipping instructions from Deason & Keith. The latter refused to give them or to receive the flour. The company was then compelled to sell the flour to other parties at a reduced price, so that it suffered a loss in the sum of $283.50.

The chancellor should have found that the appellees breached the contract, and have entered a decree in favor of appellants for the loss suffered.

It follows that the decree must be reversed and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

STOOPS v. BANK OF BRINKLEY.

Opinion delivered November 15, 1920.

1. CONTRACTS—CONSTRUCTION.—The first rule of construction of contracts is to give to the language employed by the parties to a contract the meaning they intended, and it is the duty of the court to do this from the language used where it is plain and unambiguous.
2. EVIDENCE—PAROL EVIDENCE TO EXPLAIN CONTRACT.—Where the language of a contract is clearly susceptible of but one meaning, parol evidence to vary its terms is not admissible; but where its meaning is doubtful, or it is susceptible of more than one meaning, parol evidence may be resorted to for the purpose of showing the real nature of the agreement.

3. EVIDENCE—PAROL EVIDENCE AS TO AMBIGUOUS CONTRACT.—While parol evidence to aid in the construction of an ambiguous written contract is admissible to show the subject-matter of the agreement, the circumstances surrounding its execution and the conduct of the parties under it, the parties will not be permitted to testify as to their construction of the language used.

4. MORTGAGES—AGREEMENT FOR PARTIAL RELEASE.—Where a mortgage given to secure the purchase price of lands stipulated that when the purchase price of $10 an acre should be paid on part of the lands a release should be made on the margin of the record releasing so much of the land sold, and it is shown that this clause was inserted to meet the purchaser's objection that he might be unable to pay the entire sum, and to enable him to acquire the portion for which he did pay, such release discharges the land so paid out not only from the mortgage but from the indebtedness secured thereby, so that it was not subject to attachment in a suit to foreclose the mortgage, even though it was still the property of the purchaser, and he was personally liable for the debt secured by the mortgage.

5. SUBROGATION—STATE'S LIEN FOR TAXES.—Where an attaching creditor paid taxes on the attached property, and the attachment is subsequently dissolved, the creditor is entitled to be subrogated to the State's lien for such taxes.

Appeal from Monroe Chancery Court; *John M. Elliott,* Chancellor; reversed.

STATEMENT OF FACTS.

On the 5th day of June, 1915, appellees brought this suit in equity against appellants to foreclose a deed of trust on real estate and also to attach other real estate on the ground that appellants were nonresidents. Appellants admitted the execution of the deed of trust sued on, and the foreclosure of the same, but defended the suit on the ground that the land attached had been released from the debt sued on.

Appellants, George B. Stoops and Gesina A. Stoops, his wife, live in Chicago, Illinois, and have lived there since before they purchased the land involved in this suit in September, 1912. George B. Stoops was a witness for himself. According to his testimony he was looking around to buy a good section of cut-over land in Arkansas, and Handford F. Donnelly came to see him

with reference to selling him some land. Donnelly told Stoops that he would show him over 1,760 acres of land and that if any of it suited Stoops he could have any portion of it at the same price. Stoops came to Arkansas and looked at the land in Monroe County, which is involved in this suit, and told Donnelly that section 12 was satisfactory to him. Donnelly finally told Stoops that he could not get section 12 without taking the whole tract. Stoops told Donnelly that he would not be able to do that because he did not have the money to handle a deal of that size. Donnelly replied that suitable terms would be made; and that he could sell all the land that he did not want for more than he was paying for it. Stoops finally told Donnelly that he would take it provided they would make a clause releasing him entirely from all encumbrances on any portion that he should pay off, in order that he might sell or do as he wished with it. Donnelly said that it would be all right.

We here copy from the record from the testimony of George B. Stoops the following:

"Q. State whether or not it was agreed that the plaintiff should hold the balance of the land which you had not paid off in full as full security for the balance of the debt.

"A. They were to hold the balance of the land after releasing whatever portions were released. They were to hold the balance for the remaining debt.

"Q. Was anything said about whether or not you would be required personally or otherwise to pay any of the balance of the debt except that the same would be secured on the real estate not released?

"A. There was nothing said about that. I was not to be held for anything except the balance of the mortgage on the remaining land, that is the mortgage against the land. I was not to be held for anything personally against it.

"Q. Then the land was to be held as full security for the debt?

"A. The land that was still not released was to be held for security, not what was released was to be held.

"Q. You understood from the deed of trust that you would have a perfect right to sell the land that was released?

"A. I did understand that, and that was the intention of having it done that it could be sold and there could be no claim come on it whatever."

Stoops at first thought the land he was purchasing belonged to Donnelly, but afterward ascertained that it belonged to the Bank of Brinkley. On the 14th day of September, 1912, the parties entered into a written agreement whereby Stoops was to purchase the whole 1,760 acres of land for $10 an acre, making an aggregate of $17,600. Part of this amount was to be paid in cash and the balance on deferred payments. A deed of trust was to be given to secure the balance of the unpaid purchase money. On the 28th day of October, 1912, George B. Stoops and Gesina A. Stoops, his wife, executed a deed of trust to G. Otis Bogle, trustee, for the Bank of Brinkley on the whole 1,760 acres to secure the unpaid purchase money which amounted to $12,000 as evidenced by nine promissory notes. After describing the notes for the deferred payments, the deed of trust conains the following: "All notes bearing interest from date until paid at the rate of eight per cent. per annum, interest payable annually on the 28th day of October of each year, and if default be made in the payment of said notes or either of them, or interest thereon when due, then all of said notes are to become due and payable upon such default, it being expressly understood, however, that said grantors, their heirs or assigns, shall have the right to sell all or any part of said land upon the payment to the holder of said notes the sum of ten ($10) dollars per acre on the land so sold, and, upon the payment of said sum, said notes are to be credited with the amount paid thereon and a release made on the margin of the record of this instrument releasing the part of

land sold by the grantors herein; it being further understood, that any such payment so made shall be made on the notes first falling due."

On cross-examination by Mr. Bogle, Mr. Stoops testified as follows in regard to the release clause which we have just copied:

"Q. I said no more to you or made you no other promises than is set forth in the deed of trust, did I?

"A. Well, nothing further than you said that I should have the right after this was released to do what I pleased with the land; it was mine and there would be no more claim against it, that I could do as I pleased sell it to any one. You said that.

"Q. Do you mean to say that after this land was released that you were not personally responsible for the payment of the notes that had not been paid?

"A. I mean to say that it was my understanding that the remaining land was to be security for the notes.

"Q. But you did not understand that you would be released from the payment of these notes, did you, Mr. Stoops, that had not been paid?

"A. Well, I did understand that I would be released except that they would hold the land for it, but not what had been released.

"Q. You understood then that you were responsible for the payment of the notes, did you not?

"A. Not anything further than the security of the remaining land. It was my understanding that, after I had paid as much as the full purchase price for the release of the land after what was paid in the beginning, that the land was to be entirely free."

On August 1, 1913, Stoops found out that he could not obtain the money to pay for the entire tract of land and elected to purchase 320 acres and pay $10 an acre therefor in accordance with the provisions of the deed of trust. He paid $3,413.23 for the 320 acres and a release deed was executed to him by Bogle as trustee. The deed recites that it was executed in conformity with the pro-

visions in the deed of trust, and that it was not intended to release any other land mentioned and described in the deed of trust. Altogether, Stoops paid about $9,000 on the purchase price of the whole 1,760 acres. This includes the amount paid for the 320 acres described in the release deed.

The trustee, G. Otis Bogle, who also was a director in the bank and an attorney therefor, testified in regard to the release clause in the deed of trust. We copy from the record as part of his testimony as follows:

"Q. Explain the following clause in the deed of trust executed by Geo. B. Stoops to the Bank of Brinkley, to secure the deferred payments, as follows:

"It being expressly understood, however, that said grantors, their heirs or assigns, shall have the right to sell all or any part of said land, upon payment to the holder of said notes the sum of $10 per acre on the land so sold, and upon the payment of said sum said notes are to be credited with the amount paid thereon and release made on the margin of the record in this instrument, releasing the part of the land sold by the grantors herein."

"A. At the time this matter was up, Stoops wanted this clause in the deed of trust, so that, in the event he wanted to dispose of certain portions of this land, he could do so, by paying $10 per acre, but there was no understanding with the Bank of Brinkley that it would not hold him personally responsible for whatever might remain due, after the foreclosure on the land that had not been released."

He further testified that it was not the understanding that the bank should hold as absolute security the land not released. He and other officers of the bank also testified that Donnelly was not connected with the bank and was not the agent of the bank in making the sale of the lands. Bogle said that Donnelly made a contract to purchase the land himself at $7 per acre and resold it to Stoops at $10 per acre. The bank then contracted

directly with Stoops. Stoops failed to pay the note for the purchase money which fell due in October, 1914. By the terms of the mortgage, if default was made in the payment of any note, all the notes became due. The bank then brought this suit to foreclose the mortgage and also attached the 320 acres of land embraced in the release deed on the statutory ground that appellants were nonresidents of the State.

The chancellor found that the balance due on the mortgage, principal and interest, amounted to $9,989.22, with interest at the rate of 8 per cent. per annum from March 20, 1916. The land embraced in the deed of trust was ordered sold in payment of this amount, and it was further decreed that if it did not sell for enough to pay the whole indebtedness the land attached should be sold to pay the deficiency. There was a deficiency of $2,359.52, after the land was sold under the foreclosure decree, and it was further decreed that the 320 acres of land embraced in the release deed should be sold under the attachment proceedings to pay this deficiency. Appellant prosecutes this appeal to reverse that part of the decree sustaining the attachment and ordering the land attached sold for the payment of the deficiency in the mortgage indebtedness.

C. F. Greenlee, for appellants.

Appellees had the right to retain or dispose of the 320 acres of land described in the release deed. The intention of the parties is plain. The land attached had been released from the debt sued upon. Appellants depend upon the plain contract made between the parties and ask that it be enforced. The Bank of Brinkley has not been defrauded out of a cent, and appellees have not come into court with clean hands; they have offered to return the $3,413.23 to appellants which they paid out for the land. 27 Cyc. 1415; 127 Ark. 577-583; 41 Minn. 14. The judgment here shocks one's sense of justice.

Lee & Moore, for appellees.

The case should be affirmed, as, when one executes a note for a valuable consideration, he should be required to pay same, and, when he refuses, his property should be sold to satisfy a judgment rendered on the note.

HART, J. (after stating the facts). It is the contention of counsel for appellants that under the release clause contained in the deed of trust, the 320 acres of land described in the release deed, and which were attached, could not be made liable for any part of the indebtedness secured by the deed of trust.

On the other hand, it is the contention of appellees that the release clause in the deed of trust only released the 320 acres described in the release deed from the mortgage, but that it was not the intention to release it from the debt secured by the mortgage. Appellees contend that, if the property still remaining in the deed of trust did not sell for a sufficient amount to pay off the indebtedness secured by the deed of trust, appellants would be liable for the deficiency, and that, because they were nonresidents, the 320 acres described in the release deed could be attached under section 344 of Kirby's Digest and sold to pay such deficiency. This brings us to a consideration of the release clause. It follows in the deed of trust immediately after the description of the notes, and for the sake of convenience we will again copy it:

"All notes bearing interest from date until paid at the rate of eight per cent. per annum, interest payable annually on the 28th day of October of each year, and if default be made in the payment of said notes or either of them, or interest thereon when due, then all of said notes are to become due and payable upon such default, it being expressly understood, however, that said grantors, their heirs and assigns, shall have the right to sell all or any part of said land upon the payment to the holder of said notes [of] the sum of ten ($10) dollars per acre on the land so sold, and, upon the payment of said sum, said

notes are to be credited with the amount paid thereon and a release made on the margin of the record of this instrument releasing the part of land sold by the grantors herein. It being further understood, that any such payment so made shall be made on the notes first falling due."

The majority of the court is of the opinion that it was the intention of the parties to release from the indebtedness secured in the deed of trust any portion of the land which should be selected and paid for by appellants at the rate of $10 per acre and that the deed of trust executed on the first day of August, 1913, which recites the payment of $3,413.23, releases from the indebtedness sued on the 320 acres of land described in it and ordered sold under the attachment proceedings. We think this intention is plain from the language of the release clause in the deed of trust. In any event, the majority of the court is of the opinion that the language of the contract is so doubtful and uncertain that resort may be had to parol evidence to explain it, and to show the real situation of the parties when it was executed.

The first rule of interpretation is to give to the language employed by the parties to a contract the meaning they intended. It is the duty of the court to do this from the language used where it is plain and unambiguous. Where the language is clearly susceptible of but one meaning, parol evidence to vary the terms of a written contract is not admissible. Where the meaning of the language of the contract is doubtful, or is susceptible of more than one meaning, parol evidence may be resorted to to show the real nature of the agreement. The admission of such testimony is, within the meaning of the terms employed in the written contract, to render certain that which is uncertain and to determine just what in fact the writing was intended to express. *Brown & Hackney* v. *Daubs,* 139 Ark. 53, and cases cited; *Johnson* v. *Mo. Pac. Rd. Co.,* 139 Ark. 507, and cases cited;

Railway v. *Shinn,* 52 Ark. 93, and *Weis* v. *Meyer,* 55 Ark. 18.

In this case the parties have introduced the parol testimony of the appellants and of the attorney for the appellees who prepared the deed of trust to construe the language of the release clause in the deed of trust. This can not be permitted. The parties can only show the subject-matter of the agreement, the circumstances surrounding its execution and the conduct of the parties under it as a means of interpreting the language used. *Watkins* v. *Greer,* 52 Ark. 65, and *Dugan* v. *Kelly,* 75 Ark. 55. Turning on the light of parol evidence showing the surrounding circumstances and motives and actions of the parties clears up the obscurity of the language in the contract itself, if there is any. Keeping in mind the position of the contracting parties and the circumstances under which they acted, the parol evidence introduced enables the court to determine just what the writing was intended to express. At the time the contract was entered into, Stoops only wanted to purchase a section of land. He was induced to purchase the whole tract of 1,760 acres under the promise that a clause would be inserted in the deed of trust given to secure the balance of the purchase money to the effect that he might at any time pay out any part of the land at the rate of $10 per acre and secure a deed of release thereto. Stoops paid a part of the purchase money in cash and gave a mortgage on all of the land to secure the balance, amounting to about $12,000. Thus it will be seen that he had paid over $5,000 of the purchase money at the time the deed of trust was executed. When he found out that he could not pay out the land, he elected to pay out a part of it and secure its release from the mortgage and secured the release deed above referred to from appellees. If the release deed only released the land embraced in it from the deed of trust or the mortgage, it is manifest that it would be of but little practical benefit to appellants. The release clause was made for his ben-

efit in case he could not pay out all of the indebtedness secured by the deed of trust. It would do him but little good to have the land released from the mortgage if it could be at once attached and thus again be made subject to a lien to pay off the mortgage indebtedness. The parties at the time the deed was executed knew that appellants were nonresidents and would continue to remain so. They must be presumed to have known that, as such nonresidents, the property, if released from the mortgage, would at once become subject to attachment and thus again appellees would have a lien on it for the payment of the mortgage indebtedness.

Therefore we think that the purpose of the release clause was to release from the mortgage indebtedness, and not merely from the mortgage, such portion of the land embraced therein which should be paid for at the stipulated price of $10 per acre. This construction is evidently the one placed upon it, not only by Stoops himself, but by Bogle, who represented the bank as its attorney, and who was also named as trustee in the deed of trust. We have copied in the statement of facts his testimony with regard to this point and need not repeat it all here. He was asked the direct question as to the purpose of the release clause in the deed of trust and the material part of it was read over to him. He replied that at the time Stoops wanted this clause in the deed of trust so that, in the event he wanted to dispose of a certain portion of this land, he could do so by paying $10 per acre. He further stated that there was no understanding of the bank that it would not hold him personally responsible for whatever might remain due after the foreclosure on the land that had not been released. So, according to Bogle's own testimony, the evident purpose of the release clause was to have released from the mortgage indebtedness any portion of the land which appellants might pay for at the stipulated price.

As we have already seen, it would be of but little practical use to them to merely free it from the lien of

the deed of trust. Stoops could not sell it to any advantage, because all prospective purchasers would know that they were subject to attachment because the mortgagors were nonresidents, and the balance of the mortgage indebtedness had not been paid. Of course, as explained by Bogle, it was not intended to release the mortgagors from personal liability for any deficiency that might remain after the foreclosure of the mortgaged property. We think that it was only intended to release the 320 acres embraced in the release deed from the mortgage indebtedness. The release of the 320 acres from liability for the mortgage indebtedness is quite a different thing from releasing the mortgagors from personal liability. The appellees now could attach any other property that Stoops had in this State and sell it and apply the proceeds to the payment of the deficiency, or appellees could go to the domicile of Stoops and obtain a personal judgment against him and subject his property there to the payment of the deficiency. But a majority of the court is of the opinion that, under the release clause of the mortgage, it was intended to release the 320 acres of land from the mortgage indebtedness, and not merely from the mortgage itself.

Therefore, the decree sustaining the attachment on the 320 acres of land embraced in the release deed of August 1, 1913, will be reversed and the cause will be remanded with directions to the chancellor to dissolve the attachment and to release the 320 acres of land from any lien whatever for the payment of the balance of the purchase money secured by the deed of trust which is foreclosed in this suit.

The court below is directed to allow appellee whatever amount of taxes it has paid on the 320 acres of land in controversy and to make said amount a lien on said lands. He who seeks equity must do equity. The State had a lien on these lands for the taxes, and appellee, having paid them, prevented a sale of the lands for the delinquent taxes, and was therefore not a volunteer in the

matter. The bank is entitled to be subrogated to the rights of the State and to have the taxes so paid by it refunded.

McCULLOCH, C. J. (dissenting). The language of the release clause of the mortgage is, I think, plain and unambiguous. It provides that the mortgagor "shall have the right to sell all or any part of said land upon the payment to the holder of said notes the sum of ten ($10) dollars per acre on the land so sold, and, upon the payment of said sum, said notes are to be credited with the amount paid thereon and a release made on the margin of the record of this instrument releasing the part of land sold by the grantor herein."

It means that land sold by the mortgagor to another person should be released from the lien of the mortgage. No intention is manifested to release anything except the lien. This is plain from the fact that there is no release provided for except in case the mortgagor sells "all or any part" of said land, and this clause gives him the right to do so on payment of the stipulated sum per acre. Conceding that appellant was entitled to the release on the payment of the stipulated sum, without having sold a part of the land, such release was only from the lien of the mortgage, and not from the debt itself in case appellees found an available remedy to enforce the debt in the hands of appellant. If appellant had sold the land thus released, the title passed to his grantee free from the lien. If he had made it his homestead, it could not have been subjected to the payment of appellee's debt. But as long as he owned the land, unless it is his homestead, it is subject to sale for any of his debts—to appellee or anyone else—and for this debt as well as for any other debt.

BROTHERHOOD OF RAILROAD TRAINMEN v. MERIDETH.

Opinion delivered November 15, 1920.

1. APPEAL AND ERROR—DIRECTION OF VERDICT—PRESUMPTION.—Where a verdict was directed against defendant, the Supreme Court will view the testimony in the light most favorable to it.
2. INSURANCE—PREMATURE ACTION.—A defendant insurance company will not be heard to contend that the suit of plaintiff claiming to be insured's second wife was prematurely brought, in that the procedure prescribed by the rules of the company for the collection of death claims had not been followed, where the efforts of plaintiff's attorneys to comply with such rules were met by the defendant's statement that it was estopped from further investigating the claim because of a suit brought on the same certificate by insured's first wife.
3. EVIDENCE—DECLARATIONS OF INSURED.—In a suit on a fraternal benefit certificate by one designated therein as insured's wife, it was proper to exclude testimony of a third person that insured told him that he had married a second time without obtaining a divorce from his first wife.
4. EVIDENCE—DECLARATIONS OF INSURED.—Where no change in the beneficiary designated in a benefit certificate is made, the interest of the beneciary becomes vested, and can not be defeated by proof of statements of the insured, whether the insured reserved the right to change the beneficiary or not.
5. MARRIAGE—PRESUMPTION AND BURDEN OF PROOF.—There is a presumption of validity in favor of any marriage which is shown to have been solemnized, and the burden of proving its invalidity rests upon him who questions its validity, though this requires proof of a negative.
6. MARRIAGE—VALIDITY—JURY QUESTION.—While the evidence, in a suit on a fraternal benefit certificate by one claiming to be insured's wife, would have supported a verdict to the effect that the presumption of the validity of the marriage has not been overcome, it was error to direct a verdict against the insurer, based simply on that presumption, where there was evidence tending to disprove its validity; the question being for the jury to determine.
7. INSURANCE—WARRANTY.—Where an applicant for fraternal insurance stated in his application that the designated beneficiary was his wife, and expressly warranted the truth of such statement, it can not be maintained that such statement was a representation, and if it was false there can be no recovery.
8. INSURANCE—BREACH OF WARRANTY.—Where an applicant for insurance warranted that the designated beneficiary was his wife,

the beneficiary can not recover on the theory that if not his wife she was at least a lawful dependent, though she might have recovered if she had been described as such dependent.

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

F. Weldin, for appellant.

1. The contract herein was void from the beginning for the reason that the insured made certain statements therein in breach of his warranties in said contract. The statements were warranties and were proved false as the beneficiary (appellee) was not the lawful wife of the insured. A wife of a man having another living wife not divorced is not a legal wife. 116 Ark. 501; Kirby's Digest, § 5176; 97 Ark. 272. The insured had a living wife other than the appellee beneficiary, and the policy was void, as there was a breach of the warranty. 120 Ark. 605; 121 *Id.* 185; 123 *Id.* 620; 14 R. C. L., p. 1375, par. 3 of note; 106 Ark. 213. The insured must comply with the constitution and by-laws in designating the beneficiary or the certificate is void. 2 A. L. R. 1676; 135 Ark. 65; Acts 1917, act No. 462, p. 2091; 29 Cyc. 118 B 1; 17 Ann. Cas. 660. The society can not waive an illegal designation of a beneficiary. 19 R. C. L. 1289, par. 84; 17 Ann. Cas. 865. The beneficiary fund can not legally be used except for the purposes designated by the society and the statute governing it. 117 Ark. 145; 27 Ann. Cas. 868. The beneficiary has no vested interest in the benefits until after the death of the insured if a change of beneficiary is permitted, and such change is permissible if not forbidden by the society. 97 Ark. 50; 81 *Id.* 512; 104 *Id.* 538; 133 *Id.* 411; 135 *Id.* 65; Ann. Cas. 1918 C, 1047; Ann. Cas. 1918 E, 263; 102 Ark. 72; Acts 1917, p. 2092, § 8.

2. It was error to admit the lodge receipts issued to insured by a lodge at Thayer, Mo., to prove that the insured lived at Thayer and the testimony of E. A. King was erroneously excluded. The entire testimony of W. D. Jackson was not competent and should have been ex-

cluded. The appeal from the action of the general secretary and treasurer of the order disapproving his claim was premature, as plaintiff was required to exhaust all remedies provided by the society before bringing suit. The action is premature. 14 Stand. Enc. Proc., p. 51-56; 19 R. C. L. 1228-40.

Murphy, McHaney & Dunaway, for appellee.

1. There was no error in instructing a verdict for appellee. Appellee was the wife of the member; but, if not the actual lawful wife, she was lawfully dependent upon the insured. When a marriage in fact has been shown, whether regular or irregular, the law raises a presumption of its legality, and casts the burden of proof on the party objecting to show that the marriage is illegal and void. 47 Okla. 276; Bishop on Mar. Div. & Sep., §§ 77, 956-8; 19 S. W. 560; 222 Mo. 74; 17 Ann. Cas. 678-80; 28 Col. 308; 64 Pac. 195; 89 Am. St. 193. See, also, as to presumption of legal marriage, 34 Ark. 518. A legal marriage is presumed. 67 Ark. 281; 131 *Id.* 221-4; 9 R. C. L. 568.

2. If not the actual lawful wife, appellee was lawfully dependent on the insured and a proper beneficiary. 18 Atl. 675; 52 N. J. L. 455; 20 Atl. 36; 33 N. E. 816.

3. Appellant has failed to abstract the testimony and the judgment should be affirmed under rule 9. 103 Ark. 430; 101 *Id.* 207; 92 *Id.* 426; 82 *Id.* 547.

SMITH, J. This is a suit by appellee to recover as beneficiary on a certificate of insurance issued by appellant company to one Arthur C. Merideth. Appellant (hereinafter referred to as the company) denied liability under the certificate for the reason, as it contends, that appellee was not the lawful wife of the insured, who had alleged in his application for said certificate that appellee was his wife and warranted his statements to be true, full and complete. There was a trial before a jury, but at the conclusion of the testimony the court directed the jury to return a verdict against the company, which was done, and this appeal is from the judgment so rendered.

Appellee seeks to defend the action of the court upon two grounds, first, that appellee was a legal wife, and, second, that, if not a legal wife, she was a lawful dependent, and that, under the terms of the certificate and the constitution of the company, recovery could be had in either capacity.

As the verdict was directed against the company, we must view the testimony in the light most favorable to it. It may be summarized as follows: Appellee testified that she and the insured were married on November 19, 1915, in Amarillo, Texas, and that they lived there for one month after their marriage, after which they moved to Memphis, Tennessee, where they lived for about eight months. That they then moved to Booneville, Arkansas; then lived in Jonesboro, Arkansas; at Sayre, Oklahoma; Tucumcari, New Mexico; Thayer, Missouri; Pine Bluff, Arkansas; and finally in Little Rock, Arkansas, in all of which places they had lived together as man and wife. That a marriage ceremony was performed by a minister, and that while the marriage license was issued to Charles A. Merideth and Winnie Adams, those persons were none other than herself and her husband, Arthur C. Merideth, he being known both by the names of Charles and Arthur. That she did not know until after her marriage that her husband had been previously married, and that she acquired this information by opening a letter in a lady's handwriting addressed to him. This letter was signed Nora Merideth, and the writer stated that she thought it best for her and the children that she marry again, as she understood he (her husband) had married. That insured admitted that Nora Merideth was his former wife, but he claimed that they had been divorced, and appellee was satisfied with the explanation. That insured claimed and was allowed exemption from military service on the ground that he was a married man, and that she was his wife, and that insured died October 19, 1918, in Little Rock.

Nora C. Merideth testified that her home was in Rector, Arkansas, where she had lived for thirty-two years, and had married Arthur C. Merideth on November 26, 1908, and from whom she was never divorced, and that her husband died in Little Rock on the 19th day of October, 1918. That she lived with her husband in Rector for four years, when he took up railroad work, and thereafter he was away from home a good part of the time, but Rector was still his home, and he visited her frequently except during the last four or five years, but he wrote her and sent her money during that time, and that while in Texas he wrote her to come and bring the children to him and he would furnish money for transportation; that the money was not sent, but he later came himself; that he came to Jonesboro and ran as a brakeman out of that city for about a year, when he went to Amarillo, Texas, and worked for the Rock Island Railway Company for two years, and that he was later transferred to Little Rock.

The clerks of the courts having jurisdiction in divorce cases of Clay County, in which Rector is situated, and of Craighead County, in which Jonesboro is situated, and of the county in Texas in which Amarillo is situated, testified that after having searched the divorce records there was nothing to be found showing a divorce to the insured.

The company offered—but the court excluded—the testimony of Norman Reeder to the effect that witness had been insured's neighbor while he lived in Rector, and that insured told him in the month of August, 1917, that, without obtaining a divorce from his first wife, he had married a second time.

There was offered in evidence the application of the insured for his certificate, which the company designated Form A, and the examination, which was designated Form B. The certificate of insurance by express terms made these forms a part of the contract.

Form A contained the question, To whom do you want benefits made payable? The answer was, Winnie Elsie Merideth (appellee). Following this the question was asked, "State relationship of the person or persons to you?" and the answer was, "Wife." This answer was followed by the printed statement, "I hereby warrant the foregoing statements and answers to be true, full and complete." This application was signed and dated May 18, 1917.

The examination also contained the following printed statement, which was followed by the second signature of the insured: "Note carefully the following Declaration and Agreement: I, the undersigned applicant, hereby agree * * * that all the foregoing statements and answers to questions in forms 'A' and 'B' I adopt as my own, admit to be material, warrant to be true, full and complete, and make the basis of the contract with said brotherhood (the company), and in the event any untrue or incomplete statements or answers have been made, this contract shall be null and void and of no effect."

The constitution and by-laws of the company gave the insured the right to change the beneficiary at will, and there was offered in evidence a prior application of the insured dated January 5, 1914, in which he applied for, and in response to which there was issued, a certificate to Nora Merideth, whose relationship to the insured was stated to be that of wife.

There was offered in evidence the constitution and by-laws of the company, by section 63 of which it was provided that "payment of death benefits shall be only made or certificates transferred to * * * lawful wife, * * * or persons lawfully dependent upon the member."

At the time the certificate was written deceased was a member of the Amarillo, Texas, local lodge, but he later changed his membership to Thayer, Missouri, and was a member of that lodge from January 5, 1914, to November 1, 1914, and made ten monthly payments of dues through

that local lodge. In the application for membership in the Thayer lodge the insured gave Jonesboro, Arkansas, as his postoffice address.

The company further contended that the suit had been prematurely brought, in that the procedure prescribed by the rules of the company for the collection of death claims had not been followed. This contention may be disposed of, however, by the statement that the undisputed evidence shows that attorneys representing appellee pursued these remedies with the greatest diligence; and the persistent efforts of the attorneys in this respect were terminated by a letter from the company containing the statement that the company was estopped from taking further action in the investigation of the claim because of a suit which had been brought on the certificate. The suit referred to was brought, not by appellee, but by Nora Merideth. See also *Bonham* v. *Brotherhood of Ry. Trainmen, ante* 117.

We think the court properly excluded the testimony of Reeder. In our case of *Lincoln Reserve Life Ins. Co.* v. *Smith,* 134 Ark. 245, we held that a policy of life insurance constitutes a contract between the insurer and the beneficiary, either under assignment or under the original designation in the policy itself, and that it was not competent to prove, as against the interest of the beneficiary, the declarations of the insured. That holding appears to be in accord with the great weight of authority. It is pointed out, however, that, while this is the general rule in suits on policies where the right to change the beneficiary does not exist, and in cases where the insured is held to have a vested interest in the policy of insurance, a different rule exists when the insured has the right at any time to change the beneficiary, and that members of the appellant company have the right to change the beneficiary. Counsel cite section 601 of the article on Insurance in 14 R. C. L., p. 1438, where it is said that, "On the other hand, some courts have held that the admissions and declarations of the insured are admissible

against his beneficiary, and no doubt this is the proper rule in the case of a benefit society, the beneficiary having no vested right; though some courts have held that the same rule applies as in the case of an ordinary life policy." Numerous cases are collected in the annotated cases which are cited in the notes to the text quoted. *Taylor* v. *Grand Lodge,* 11 L. R. A. (N. S.) 92; *Knights of Maccabees* v. *Shields,* 49 L. R. A. (N. S.) 853; *Nophsker* v. *Supreme Council, etc.,* 7 A. & E. Ann. Cas. 646; *Taylor* v. *Grand Lodge,* 11 A. & E. Ann. Cas. 260.

The majority of the cases collected in the annotated cases just cited support the distinction pointed out in the above quotation from R. C. L.; but we think the courts holding that no distinction should be made between the two classes of policies presents the sounder view. We think the better rule is that where no change in the beneficiary is made, and the insured dies, the interest of the beneficiary becomes vested, and can not thereafter be defeated by proof of statements of the insured.

Counsel for appellee cite numerous cases of other courts, as well as decisions of this court, to the effect that there is a presumption of validity in favor of any marriage which is shown to have been solemnized, and that the burden of proving its invalidity rests upon him who questions its validity, and that this is true, notwithstanding it requires proof of a negative. It is argued that, if this presumption is recognized and given effect, it can not be said that the insured had not obtained a divorce prior to his marriage to appellee.

Counsel for appellee correctly state the presumption of law, and the testimony in the case would have supported a verdict to the effect that this presumption had not been overcome; but, as the verdict was directed against the company, the question is whether the jury might not have found otherwise. Upon that issue, we are of opinion that this question of fact should have been submitted to the jury.

It is argued by learned counsel for appellee that the insured might have obtained a divorce at Thayer, Missouri; Tucumcari, New Mexico; or Sayre, Oklahoma. So he might have done. But, as to each place, there is a question as to the sufficiency of the residence of the insured to have obtained a divorce, and this question might, or might not, have been resolved in appellee's favor.

The point is made that the answers of the insured to the effect that appellee was his wife are mere representations, or a designation of the beneficiary, and as such were not material and did not invalidate the certificate, even though they are false. But we do not agree with counsel in this contention. In language express and unmistakable the truth of the answers set out above is warranted, and, if so, there can be no recovery if the answers are false. *National Americans* v. *Ritch,* 121 Ark. 185; *Brotherhood of American Yeomen* v. *Fordham,* 120 Ark. 605.

It is finally insisted that the judgment should be affirmed whether appellee was the lawful wife of the insured or not, as by section 63 of the constitution and by-laws of the company, quoted above, a member was permitted to take out a policy in favor of a lawful dependent. It is argued that appellee was a lawful dependent, inasmuch as she was living with the insured as his wife in good faith, believing herself to be such. Authorities cited in the brief of counsel for appellee support the view that a woman thus situated is a lawful dependent within the meaning of the language of policies of insurance, and constitutions and by-laws of insurance companies, employing that term. Cases holding to the contrary appear to be cases where the alleged wife was knowingly occupying an illicit relation.

Upon the authority of those cases, we would affirm the judgment, had the insured designated appellee simply as a lawful dependent in his application for the insurance. But this was not the designation employed by him. The company has seen fit to require a statement of the

relationship existing between the applicant and the proposed beneficiary, and has required that the answer stating that fact in the application be warranted by the applicant, and it must, therefore, be substantially true. It is not substantially true to designate as wife one whose relationship is only that of lawful dependent.

For the error in directing the verdict in appellee's favor the judgment must be reversed and the cause remanded for a new trial.

VAUGHAN v. HINKLE.

Opinion delivered November 15, 1920.

1. APPEAL AND ERROR—MOTION FOR NEW TRIAL UNNECESSARY WHEN.—An appeal by plaintiff from an order overruling his motion to retax the costs will not be dismissed because no motion for new trial was filed where the court's findings of fact bring into the record the error complained of.
2. COSTS—ON APPEAL.—Where, on a former appeal herein, this court held that an attachment was properly issued and wrongfully dissolved, the losing party became liable for the costs incurred under the attachment.
3. ATTACHMENT—ALLOWANCE FOR FEEDING CATTLE ATTACHED.—Where a sheriff employed plaintiff to care for attached cattle at a stipulated price, without having obtained an order of court to that effect, while such contract is not binding, a reasonable allowance should be made, not exceeding that agreed upon between plaintiff and the sheriff.

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

Samuel M. Casey, for appellant.

1. This litigation grows out of the case in 131 Ark. 197 which was reversed. When the case was retried, plaintiff Vaughan recovered judgment, *which carried the costs of the case,* and Vaughan is entitled to pay for the care and feed of the cattle. The effect of the decision of the circuit court was that the sheriff was legally in possession of the cattle, and, being legally in possession, he could make a binding contract for care and feed

without procuring an order of court in advance. The order directing him to take the cattle and hold them subject to the orders of court included the authority to secure feed and attention for the cattle without any further order of court. The court erred in disallowing the motion to retax the costs.

2. No motion for new trial was necessary, as the error appears of record. 46 Ark. 17; 57 *Id.* 374; 93 *Id.* 85; 61 *Id.* 33.

3. The court having elected to make a finding of facts in its judgment, this is conclusive on appellees on this appeal. As a matter of justice, the failure of the sheriff to make his return showing his contract for keeping the cattle should not prevent appellant from collecting his pay. The cattle were not taken under Kirby's Digest, § 366, but under §§ 4966-9. No order of court was necessary before incurring the expense of feeding and caring for the cattle.

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

1. No motion for new trial was filed, the errors do not appear of record. 27 Ark. 37; 26 *Id.* 452. See, also, 21 *Id.* 398; 46 *Id.* 17; 53 *Id.* 204; 93 *Id.* 382; 215 S. W. 385.

2. The judgment below is correct. There was no competent evidence that any such contract was ever made as that upon which appellant relies. The return of the sheriff was the best evidence, and no such return was ever made, and the parol evidence of appellant was not admissible or competent. Kirby's Dig., § 365. Parol evidence was not admissible. 22 C. J. 1007-8-9. The sheriff's return was not offered in evidence, and there was no competent evidence upon which to base a claim for compensation. If any such contract was made, it was against the law. Kirby's Digest, § 366; 38 Ark. 536. Courts uniformly refuse to allow fees or costs where the trustee or custodian is guilty of recklessness or mismanagement. 34 Cyc. 468; 82 Pac. 114; 151 S. E. 391; 107

N. W. 1063; 169 Fed. 497; 91 Atl. 514; 205 U. S. 202; 51 (Law. Ed.), U. S. 807; 75 Ark. 300; 65 *Id.* 219.

SMITH, J. The present appeal is a continuation of the case of *Vaughan* v. *Hinkle,* reported in 131 Ark. at page 197. As appears from the opinion on the former appeal, the original suit was instituted by Vaughan to collect from Hinkle the purchase price of a sum of money due upon the sale of one hundred and six head of cattle. At the original trial the court held that there was no legal evidence of a sale and directed a verdict in Hinkle's favor. The court also held that the attachment which had been issued should be quashed because no bond had been given by the plaintiff. We reversed the judgment in that case, and, in doing so, held that the testimony set out in the opinion made a case for the jury, and further that the court erred in quashing the writ directing the sheriff to take possession of the property. The cause was remanded for a new trial, and upon the retrial of the cause there was a verdict and judgment for Vaughan. Thereafter Vaughan filed a motion to retax the costs, and upon the hearing of this motion the court made the following findings of fact:

"*First.* That the sheriff without an order of court made a contract with the plaintiff, Vaughan, to care for the 106 head of cattle for 20 cents per head per day, and that the plaintiff kept 104 head of said cattle for fifty-eight days under said contract, and thereafter sold the cattle without an order of court, and while this cause was yet pending.

"*Second.* That the sheriff has not made any return of expenses thus incurred.

"*Third.* That the sheriff was without legal authority in making said contract, without an order of court.

"*Fourth.* That, under the circumstances of this attachment as shown by the evidence on the main trial of this case, this was an unnecessary, unreasonable and unwarranted expense, and should not be taxed as costs against the defendants."

Upon these findings the court overruled the motion to retax the costs, and Vaughan saved his exceptions and has prosecuted this appeal.

It is first insisted that the appeal should be dismissed for the reason that no motion for a new trial was filed. But that was unnecessary, as the court's findings of fact bring into the record the error complained of.

It appears from the first finding of fact that the sheriff made a contract with Vaughan to feed and care for the cattle at 20 cents per head per day, and that Vaughan kept 104 head of cattle for fifty-eight days under this contract. The final statement in the first finding of fact, together with the second, third and fourth findings of fact, disclose the reason of the court for disallowing any part of the costs claimed by Vaughan. These findings are: (a) That Vaughan sold the cattle while the cause was still pending without an order of court; (b) that the sheriff had not made any return of the expenses incurred under his contract with Vaughan; (c) that the sheriff had no authority to make a contract without an order of court.

It appears from the testimony found in the bill of exceptions that Vaughan retained control of the cattle under his contract with the sheriff until the attachment was dissolved by the court. There was also a verdict of the jury returned under the directions of the court finding that there was no sale. With the cattle thus left on his hands, Vaughan sold them and prosecuted an appeal to this court with the result which has already been stated.

The effect of the former opinion in this case, together with the trial in the court below upon the remand of the cause, is to establish the fact that the attachment properly issued and was wrongfully dissolved. This being true, the losing party became, and is, responsible for the costs incurred under the attachment.

The court below was correct in holding that the sheriff should have obtained an order for the care of the

attached property, it being live stock, which necessarily required expensive feeding. Failing to obtain an order of court to make the contract, there can be no recovery on the contract. But, as the expense was a necessary one, a reasonable allowance should be made on that account, and on the remand of the cause the court will hear testimony on the value of the services rendered and allow reasonable compensation therefor.

What we have just said disposes of the contention that the sheriff made no return of the expenses incurred. Such return, for the reasons stated above, would not have been conclusive, had it been made.

It has now been made to appear that Vaughan should not have sold the cattle upon the dissolution of the attachment; but that circumstance affords no reason for not allowing reasonable compensation for necessary attention to the cattle during the time they were properly impounded, towit, fifty-eight days.

The judgment of the court below will, therefore, be reversed and the cause remanded with directions to fix a reasonable compensation, not exceeding that agreed upon between Vaughan and the sheriff.

MURRAY TRANSFER COMPANY v. JONES.

Opinion delivered November 15, 1920.

1. WAREHOUSEMEN—FAILURE TO DELIVER GOODS—INSTRUCTION.—In an action against a warehouseman for refusal to deliver goods stored by plaintiff's sister and bequeathed to plaintiff, an instruction that if the goods were placed in storage and charges paid, and plaintiff at the time of demanding the goods offered to pay for having a search made for them, but the offer was declined, and the goods were subsequently sold by defendant, plaintiff would be entitled to recover their value, *held* more favorable to defendant than it had a right to ask, since no duty rested on plaintiff to pay for having the search made.
2. WAREHOUSEMAN—LIABILITY FOR LOSS OF GOODS.—In an action against a warehouseman for failure to deliver goods stored on demand, an instruction that if plaintiff requested delivery and defendant was unable to find the goods after diligent search, and

afterward the defendant sold the goods, and through no negligence of defendant plaintiff was not notified, defendant was not liable, was not erroneous.

3. WAREHOUSEMAN—CONVERSION OF STORED GOODS.—Where plaintiff's goods were wrongfully sold by the warehouseman with whom they were stored, plaintiff had a right to treat the sale as a conversion, without bringing replevin against the purchaser.

4. TRIAL—ABSTRACT INSTRUCTION.—In an action against a warehouseman for failure to deliver goods stored with it, an instruction as to the duty of a warehouseman receiving goods for storage without reward was properly refused where there was no evidence that the goods were stored without reward.

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

O. H. Sumpter, for appellant.

1. The court erred in overruling the demurrer. There was no allegation as to the contract of bailment between appellee and appellant and no allegation of acceptance of the bailment by appellant. 6 C. J. 1104, 1156.

2. The court erred in permitting incompetent testimony to go to the jury.

3. The instructions are erroneous; appellant at the most was liable for bad faith or gross negligence. 6 C. J. 1164.

John P. Streepey, for appellee.

1. The abstract does not comply with rule 9. 105 Ark. 63.

2. The appellant does not argue the assignments in the motion for new trial and they are waived. 91 Ark. 427-430; 103 *Id.* 391.

3. The demurrer was properly overruled, the complaint alleges that appellee placed a box in storage with the defendant company and that in appellee's sister placed two boxes storage and later tendered the storage charges, which were feused. The allegations were sufficient statement that appellee placed her goods in the warehouse and appellant accepted them and subsequently converted them. The testimony was sufficient to show

delivery and acceptance and the complaint is amended by the proof. 67 Ark. 426-9; 100 *Id.* 212-16.

4. The incompetent testimony complained of is not set out in appellant's abstract or brief. 104 Ark. 327-343.

5. The instructions follow the law. A warehouseman is a bailee for hire, and is held to the care that an ordinarily prudent man would give to his own goods.

SMITH, J. Appellant assigns as error for the reversal of the judgment, the action of the court in giving and in refusing to give instructions, and in failing to sustain a demurrer to the complaint.

The allegations of the complaint are as follows: That on or about May ....., 1909, Miss Christine Shaffer, a sister of the plaintiff, placed a box of household goods in storage with the defendant, a corporation under the laws of this State, and a year later plaintiff herself placed two boxes of household goods in storage with defendant, and thereafter Miss Shaffer paid the storage charges annually in advance on all of said boxes until her death in April, 1917. That Miss Shaffer at her death bequeathed her box to plaintiff by will, and immediately thereafter plaintiff went to the office of the defendant company and tendered the charges then due, but the tender was refused by the president of the defendant company, who informed plaintiff that the books of the company did not show that the boxes were then in the company's custody. Plaintiff insisted that the goods were in the company's warehouse, and offered to pay the charges of having the warehouse searched, but defendant's president refused to permit this to be done, and that thereafter, during the year 1919, the company sold the three boxes at public auction at the courthouse in the city of Hot Springs; and that defendant refused, upon request being made, to recover the goods or to pay their value as damages. The value was alleged and judgment therefor prayed.

The complaint does not specifically charge that the defendant company was a warehouseman and engaged in that business; but such is the effect of the allegations recited above, and the demurrer was therefore properly overruled.

Plaintiff offered testimony substantially supporting the allegations of her complaint, and the jury found in her favor upon conflicting testimony.

An instruction was given to the effect that, if plaintiff and her sister placed the goods in storage with the defendant, and paid the charges thereon in full, and at the time of the demand for them offered to pay any charges then due, and offered to pay to have the company's storage-room searched for her goods, but that the offer was declined, and that later the goods were sold at public auction by the company, plaintiff would be entitled to recover their value. This instruction was even more favorable to the company than it had the right to ask, as no duty rested on plaintiff to pay for having the company's warehouse searched.

The court gave an instruction to the effect that if plaintiff, after the death of her sister, requested the delivery of her goods, and the company was unable to find them after a diligent search, and afterward the goods were sold and, through no negligence of the company, plaintiff was not notified, and that the company had used reasonable care (such care as an ordinarily prudent person would use) to ascertain the owners of the goods to notify them of the intended sale, the company would not be liable. An exception was saved by the defendant to this instruction. But we think no error was committed in giving it.

The court also charged the jury that, if the goods were sold without authority, plaintiff had the right to treat the sale as a conversion by the company and to sue the company for their value without being required to bring replevin against the purchaser at the sale had by

the company. No error was committed in giving this instruction, as it correctly declared the law.

The court refused to give the only instruction asked by the company. It reads as follows: "The court instructs the jury that one who undertakes, without reward, to take care of the chattels or properties of another is required to use in its performance such care as men of common prudence, however inattentive, ordinarily take of their own affairs, and he will be liable only for bad faith or gross negligence which is an omission of such a degree of care."

A sufficient reason for refusing this instruction was that there was no testimony that the company received goods for storage "without reward" or had received the goods in question for storage "without reward." Upon the contrary, the company's business was that of a warehouseman, and according to plaintiff the charges for storage were paid annually and in advance until the time when the company denied having the goods in their possession.

No error appearing, the judgment is affirmed.

HALL v. BURNS.

Opinion delivered November 15, 1920.

1. FIXTURES—EFFECT OF WARRANTY DEED.—As between vendor and vendee, a warranty deed without reservations passes to the vendee all the property attached to the realty which is necessary, essential and adapted to the use of such property.
2. FIXTURES—KITCHEN CABINET.—A kitchen cabinet attached to a house in such way that it could not be removed without prizing it up or removing the molding, and without leaving the room in an unfinished condition, is a fixture, as between vendor and purchaser.

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

Huddleston, Fuhr & Futrell, for appellant.

The material facts here are undisputed, and it was error to send it to a jury. A verdict should have been directed and left to the jury to fix the damages. 38 Cyc. 1565-7; 97 Ark. 438, 442.

The cabinet was not a fixture but only a piece of furniture. 72 Am. St. Rep. 138. If a *fixture* at all, it was a domestic fixture and not a part of the realty. 40 S. E. 747; 67 L. R. A. 669. It was not a fixture. Tiedeman, Real Prop. (3 ed.), § 15; 120 Ark. 252; 1 Jones on Mortg., p. 620; 108 Mass. 191; 37 Am. Rep. 471.

S. R. Simpson, for appellee.

There is no error in the instructions. The cabinet was a fixture and part of the realty. 19 Cyc. 1408 (3); 52 Am. Dec. 615; 93 *Id.* 299. The true rule is laid down in 19 Cyc. 1036. See, also, 29 Cyc. 1037; 63 Ark. 625; 120 *Id.* 252. The intention of the party who annexes a chattel is the real test whether or not it remains a chattel or becomes a fixture. The cabinet was annexed to the realty. 73 Ark. 227.

The evidence was conflicting, and a case for a jury was made. 70 Ark. 230; 138 *Id.* 31-2.

The objections to the instructions not properly made, but they stated the law correctly, and the verdict is sustained by the law and the evidence.

HUMPHREYS, J. Appellee instituted suit against appellant in the Greene Circuit Court to recover the value of an alleged fixture and the damage caused by its removal from a dwelling sold by appellant to appellee, between the date of the sale and the date upon which appellee took possession of the premises. It was alleged that the fixture removed was a built-in kitchen cabinet. Appellant filed answer, denying that the kitchen cabinet was a fixture, but, on the contrary, alleged that it was only a piece of furniture.

The cause was submitted to the jury upon the pleadings and instructions of the court, which resulted in a

verdict and judgment of $10 against appellant, from which an appeal has been duly prosecuted to this court.

The substance of the facts is so briefly stated by appellant that we adopt the statement with slight modifications. Appellant sold appellee his home in Marmaduke for $4,000, and made no reservation of the kitchen cabinet in the deed. After the sale, and before appellee took possession, appellant removed the cabinet. This cabinet was a piece of furniture eleven feet long, thirty inches high, twenty-eight inches deep, with a back to it, complete like a counter, upon one end of which was another cabinet, or box, not fastened to the eleven-foot box, but merely sitting loosely upon it in the corner of the room. In order for the cabinet to fit closely up against the wall, eleven feet of the base-board and moulding on the north side of the room was removed and seven inches of the lower window casing and apron sawed off, three one-inch strips laid down on the floor and the cabinet placed on these strips and pushed back to place in the corner. The quarter-round, which had been removed, was then tacked around the outer edge of the cabinet, which came up higher than the cabinet and kept the mice from getting under it. Thus placed, it was impossible to remove the cabinet without prizing it up above the moulding or first removing the moulding. The house was built in the year 1909, or 1910, and this cabinet was made and placed in one room of the house in the year 1914. After the cabinet was placed in the room, and before appellant, Hall, sold the house to appellee, Burns, this room had been repapered without removing the cabinet and papering behind it, and, when the cabinet was removed by appellant, he fastened the base-board and quarter-round and portions of the window casing back in place. This gave an unfinished appearance to that part of the wall against which the cabinet had sat and left the walls of the kitchen covered with two kinds of paper.

The rule governing fixtures in a building, as between vendor and vendee, was recently announced by this court

in the case of *Stone* v. *Suckle,* 145 Ark. 137. In substance, the rule announced is as follows: "As between a vendor and vendee, a warranty deed without reservations conveying real property passes to the vendee all the property attached thereto which is necessary, essential and adapted to the use of such property; and where a vendor conveyed to a purchaser a hotel property in which he had placed certain ceiling fans which were adapted to the use of the hotel, and were necessary to its use as such, and in his deed of conveyance made no reservation thereof, the title to such fans passed to the vendee, notwithstanding the vendor did not intend to convey them with the hotel." The undisputed evidence not only shows that the cabinet was a necessary and convenient improvement adapted to the use of the house as a residence, but but was attached so that it could not be removed without prizing it up or first removing the moulding which had been nailed to the floor around it, and, when removed, it left the room in an unfinished condition. These undisputed facts established the cabinet to be a fixture as between the vendor and vendee, and the only question for the court to have submitted to the jury was the value thereof and the damages resulting from its removal. The main issue, as well as that of the value of the cabinet and damages for removal thereof, was submitted to the jury, so appellant received more favorable consideration by the submission of the main issue than he was entitled to.

Under this view of the case, it is unnecessary to discuss the alleged errors in giving and refusing instructions. The judgment is affirmed.

BARLOW v. CAIN.

Opinion delivered November 15, 1920.

1. WILLS—PRESUMPTION AGAINST PARTIAL INTESTACY.—A testator is presumed to intend to dispose of his entire estate, so that wills are to be so interpreted as to avoid partial intestacy, unless the language compels a different construction.

2. WILLS—PARTIAL INTESTACY.—Where a will, after reciting that the testator disposed of the residue of his estate, real and personal, after paying his debts, as follows, followed by provisions giving lands to his wife, son and daughter, and further that "it is my will that my son, T. F. Cain, take full control of all my notes and accounts that may be due or become due after my decease, and that he, my son, T. F. Cain, is to settle all my affairs and pay all of my indebtedness against my estate," there being no provision as to disposition of his other personal estate, *held* that testator died intestate as to the residue of personalty after payment of all debts and certain small bequests.

3. WILLS—DEVISE OF INCUMBERED LAND.—Where a will devised incumbered land to a son, and directed the son to pay all of the testator's debts out of his notes and accounts, the son was entitled to have the incumbrance discharged out of the personal property of the estate.

4. WILLS—TAXES ON DEVISED LAND.—Taxes on land devised to the testator's son were not a personal obligation of the testator, but constituted a lien on the land as it passed into the son's hands, being payable by him.

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

Jason L. Light and *Sloan & Sloan*, for appellants.

1. Joseph Cain died intestate as to his personal property. Appellants are entitled to share in the personal estate. The provision is not intended as a gift to T. F. Cain, but was inserted for the purpose of naming him as executor. The provision embraces only "notes and accounts" which can not by any sort of construction be held to include tangible property or money on hand. (1) The provision was not intended as a gift to T. F. Cain. "Take full control" is not synonymous with "give" or "bequeath." The latter words are much broader in meaning. 23 Ga. 472. "Absolute control means to manage but does not mean a gift." 62 Tex. 54, 61; 13 So. Rep. 744-6; 98 Ala. 426; 10 Atl. 577; 59 Vt. 557; 37 S. W. 924-7; 58 Am. St. 619. Cain was merely to take control and manage the notes and accounts and settle up the estate, that is, act as executor. The books are full of cases of partial intestacy. An express provision in a will that certain relatives shall receive no part of the testator's

property is utterly ineffectual as to intestate property. 163 Ill. 149; 81 Md. 347; 32 Atl. 316; 44 *Id.* 103; 59 Kan. 771; 132 N. Y. 338; 1 O. S. 279. Under our statute requiring the mention of names of children, this clause was intended for no other purpose than to make gifts of land to son and daughter valid. As to his personal estate, he died intestate. A testator is presumed to dispose of his entire estate, and partial intestacy is to be avoided unless the language of the will compels a different construction. 111 Ark. 54-61; 116 *Id.* 328. See, also, 228 Pa. St. 248; 77 Atl. 450; 4 Ind. 519; Page on Wills, 549-554.

2. In any event, a gift of notes and accounts can not tangible property, bank deposits and cash on hand. 51 N. H. 78; 40 Cyc. 1548 (XII).

3. T. F. Cain, the appellee, and Effie Darr took the land devised to them *cum onere,* and the administrator, T. F. Cain, did not have the right to pay the unprobated mortgage debt of the Commonwealth Farm Loan Company out of the funds of the estate. The land was subject to the mortgage debt at the time of the execution of the will and the death of the testator, and T. F. Cain and Effie Darr, devisee, took the land charged with the mortgage debt and had no right to exonerate the land from the lien by using funds of the estate for this purpose. 27 Barb. 610; 4 Bradf. 324; 111 N. Y. 270.

The statutes of this State contemplate that incumbrances on desired real estate shall either be paid by the devisee or by sale of the incumbered property, and that, in case the devisee should not elect to accept the devise and pay off the debt, no funds of the general estate should be used to discharge the incumbrance until the devised real estate has first been exhausted. Kirby's Dig., § 8018; Page on Wills, § 766; 110 Ark. 70-78; 33 N. J. Eq. 262; 128 Ark. 317-20.

4. The administrator was without authority to pay an unprobated claim out of the general funds of the estate, and the statute of nonclaim has now run. 29 Ark. 500-8; 53 *Id.* 559; 96 *Id.* 222.

5. The administrator had no right to use funds of the estate to pay taxes on devised real estate not required for the payment of debts. 2 Woerner's Law of Administration, § 518; 35 Ark. 180. All the exceptions to the settlements have really been sustained.

Hawthorne & Hawthorne and *D. K. Hawthorne,* for appellee.

Under the clause of the will giving Cain his personal property and full control over notes, accounts, etc., and all his affairs with instructions to pay all debts, the testator intended to include everything. 1 C. J. 596; 115 Ark. 9. This case is very controlling. See, also, 214 S. W. 813; 104 Ark. 439-448.

HUMPHREYS, J. This appeal involves the construction of the last will and testament of Joseph Cain, deceased. The will is as follows:

"I, Joseph Cain, of the county of Craighead, and in the State of Arkansas, being of sound mind and memory, and considering uncertainty of life, do therefore make, ordain, publish and declare this to be my last will and testament, revoking all former wills.

"That is to say, first: I commend my body to mother earth who gave it and to be buried in Christian manor; and then, after paying all my lawful debts, I give and bequeath and dispose of the residue of my estate, real and personal, as follows, towit: First, to my wife, Elizabeth C. Cain, I give the farm on which I live, or as much thereof as she has cause to use, with all singular the appurtenances thereunto belonging during her natural life or widowhood.

"Second: I give to my son, T. F. Cain, all of the southwest quarter of the northwest quarter of section twenty (20), in township fifteen (15), range five (5), east, except a strip sixteen (16) rods wide across the south end, leaving thirty-two acres herein conveyed. Also south half of the northwest quarter of northwest quarter of section twenty (20), township fifteen (15), range five (5) east, containing twenty (20) acres.

"Also, it is my will that my son, T. F. Cain, take full control of all my notes and accounts that may be due or become due after my decease, and that he, my son, T. F. Cain, is to settle all of my affairs and pay all of my indebtedness against my estate.

"And to my daughter, Effie Darr, and her bodily heirs, I will and bequeath the part of south half of southwest section 17, containing twenty acres; also the north half of the northwest quarter of the northwest quarter, section 20, all of the above described land in township 15 north and range 5 east.

"Also, the heirs of my daughter, Sallie Adams, and my daughter, Emma Akers, and my daughter, Lelia Adams, be willed one dollar each.

"In witness whereof, I have subscribed my name and affixed my signature hereunto, this the 8th day of August, 1916.

"Joseph Cain."

On the 3d day of October, 1917, T. F. Cain was appointed administrator, with the will annexed, of the estate by the probate court. In the course of the administration he procured an allowance to himself of $525 which he had paid out of his individual funds to the Commonwealth Farm Loan Company in satisfaction of a mortgage existing on the land which his father had bequeathed to him; also an allowance of $13.10 for taxes paid by him upon said real estate; also $961.29 paid to himself personally as legatee in the will. The grandchildren of Joseph Cain, deceased, excepted to the three allowances aforesaid. Judgment was rendered by the probate court overruling the first exception and sustaining the two latter exceptions. From that judgment an appeal was prosecuted to the circuit court, where, upon trial *de novo,* each exception was overruled and the settlement of the administrator approved. From the judgment of the circuit court overruling the exceptions an appeal has been duly prosecuted to this court.

Joseph Cain, deceased, purchased the land from George B. Darr and Effie Estella Darr, on November 11, 1915, for $1,000, $500 of which sum he paid, and, instead of paying the balance of the consideration, assumed the payment of the $500 mortgage which the grantors had executed to the Commonwealth Farm Loan Company. In the deed of conveyance, George B. Darr and Effie Estella Darr retained a lien upon the land to secure the payment of the mortgage indebtedness aforesaid.

It is insisted by appellants that the circuit court erred in construing the will to bequeath to appellee the personal estate of the testator. Appellee insists that, interpreted in the light of the presumption against partial intestacy, the personal estate passed to him under the latter part of the first clause, which is as follows, towit: "I give and bequeath and dispose of the residue of my estate, real and personal, as follows, towit;" and the third clause, which is as follows: "Also, it is my will that my son, T. F. Cain, take full control of all my notes and accounts that may be due or become due after my decease, and that he, my son, T. F. Cain, is to settle all my affairs and pay all my indebtedness against my estate." The rule of presumption against partial intestacy, applicable in the construction of wills, is aptly stated in *Booe* v. *Vinson,* 104 Ark. 439, in the following language: "A testator is presumed to intend to dispose of his entire estate, and it is to be borne in mind in the construction of wills that they are to be so interpreted as to avoid partial intestacy, unless the language compels a different construction." The question then is whether the language of the will under construction compels a different interpretation. The latter part of the first clause does not. It reveals a desire to make testamentary disposition of the residue of the testator's estate, both real and personal, in manner thereafter to be designated. It is tantamount to saying and only saying that the testator is going to devise and bequeath his real and personal property in subsequent clauses of the will. The

language, however, used in the third paragraph of the will clearly conflicts with the presumption against partial intestacy. That paragraph is a direction for his son to settle all his affairs and pay his indebtedness with his notes and accounts, and the son was authorized to assume full control of the notes and accounts for that purpose. Only two classes of personal property—notes and accounts—were dealt with in the paragraph, chattels, money and other classes of personal property being omitted. The testator understood the use of the words "give and bequeath" as evidenced by their use in other paragraphs of the will, and, had he intended by the third clause to give his son all his personal property, after paying his indebtedness, he would have used these words, or words of similar import, instead of conferring full control over them to his son, and would have included all his personal property, instead of designating a particular class of it. No provision appears elsewhere in the will for an executor, and we think this clause was intended by the testator for that purpose. The language of the paragraph being insufficient to bequeath the personal estate, the testator died intestate as to the residue of the personal property, after the payment of all debts and small bequests provided in the will; so it was error to overrule the exception to the allowance of the residue of the estate to appellee.

This conclusion renders it necessary to determine whether the allowance of $525, expended by appellee in payment of the mortgage on the real estate devised to him, was proper. Appellants contend that appellee took the real estate as devisee with a lien or incumbrance against it. We think not, for there is a provision in the will to the effect that the testator's debts should be paid with proceeds of notes and accounts. The only question then is whether the testator personally obligated himself to pay the mortgage indebtedness. He specifically assumed the mortgage indebtedness as a part of the consideration in the purchase of the land. Learned coun-

sel for appellee contend that this view of the case conflicts with the rule announced by this court in *Rice* v. *Felker,* 110 Ark. 70, and reiterated in *Walker* v. *Mathis,* 128 Ark. 317. Not so. The point decided in those cases is that a mortgagee does not lose his right to proceed against the land and the original mortgagor because a grantee of the mortgagor had assumed the payment of the mortgage. The court was therefore correct in overruling appellant's exception to this allowance.

Lastly, it is insisted by appellant that the court erred in allowing appellee $13.10 expended in liquidating taxes against the land. The taxes were not a personal obligation of the testator. They constituted a lien upon the land merely, and, thus burdened, it passed into the hands of the devisee. It was the devisee's, and not the administrator's duty to pay it. It was error to overrule the exception of appellants to this allowance.

For the errors indicated, the judgment is reversed and the cause remanded with directions to render judgment in accordance with this opinion.

BRINKLEY TOWNSHIP ROAD DISTRICT *v.* DIXON TOWNSHIP ROAD DISTRICT.

Opinion delivered November 15, 1920.

CERTIORARI—TIME OF TAKING PROCEEDINGS.—Under the rule that certiorari will be refused when the party seeking it fails to show that he has proceeded with expedition after discovering that it was necessary to resort to it, and especially where great public inconvenience will result from its use, the writ will be denied where petitioners, seeking to quash judgments consolidating and changing boundaries of townships and abolishing a special road district, did not proceed until two or three years after rendition of such judgments.

Appeal from Monroe Circuit Court; *Geo. W. Clark,* Judge; reversed.

C. F. Greenlee, for appellants.

The county court judgments were valid, and the circuit court erred in canceling them. The county court

and no other had the right to change the boundary lines of townships. The county court has exclusive original jurisdiction in matters pertaining to roads. This can not be invaded by the Legislature nor any court; act 422, Acts 1911, p. 365; 134 Ark. 121; 135 *Id.* 83; 92 *Id.* 93. The writ of certiorari should have been denied, as it is not the proper remedy, as an appeal could have been taken. 215 S. W. 600.

Lee & Moore, for appellees.

Certiorari was the proper remedy. Plaintiffs were not parties to any of the proceedings in the county court and had no right to appeal. 21 Ark. 267; 13 *Id.* 356; 52 *Id.* 222.

It is apparent from the language of the petition that the intention of the petition and the construction placed upon the order of the county court was to enable Brinkley township road commissioners under act 150, Acts 1915, to take supervision of the roads in Brinkley township. 29 Ark. 356; 86 N. E. 440. The county court can not amend or repeal an act of the Legislature. 72 Ark. 201. Where there is a special act applicable the general act does not apply. 68 *Id.* 130; 50 *Id.* 132. The general act is repealed so far as the special act applies. 36 Cyc. 1094; 84 Ark. 329; 215 S. W. 255.

HUMPHREYS, J. This is a proceeding in certiorari, instituted in the Monroe Circuit Court by appellees against appellants, to quash a judgment rendered on the 10th day of April, 1916, in the county court of said county, consolidating Brinkley and Eden townships and changing the township lines of Brinkley and Dixon townships by taking certain territory out of Dixon township and adding it to Brinkley township, and *vice versa,* for the purpose of enabling those interested in constructing and maintaining good roads to construct and maintain same; also to cancel a judgment of said county court made the 3d day of July, 1917, abolishing Dixon Special Road District.

Prior to the rendition of the two judgments sought to be canceled, the Legislature of the State had created Dixon Township Road District by act No. 209, Acts 1915, and the Brinkley Township Road District by act No. 150, Acts of 1915, both for the purpose of using the taxes levied and collected in said districts for rebuilding, repairing, draining, straightening and maintaining the public roads therein.

The cause was presented to the court upon the pleadings and exhibits thereto, which resulted in the cancellation of the judgments. From the judgment canceling the county court judgments aforesaid an appeal has been duly prosecuted to this court.

Appellants insist that the county court judgments were valid, and that the circuit court erred in canceling them. Appellees insist that the judgments were invalid because the effect of the two judgments was to change and modify the boundary lines of special road improvement districts created by the Legislature.

We think it unnecessary to enter upon the discussion as to whether the judgments were invalid, as the case must be reversed for another reason. The first judgment was entered April 10, 1916, and the second on July 3, 1917. The proceeding in certiorari was not instituted until November 1, 1919, more than three years after the rendition of the first judgment, and also two years and a half after the rendition of the second judgment. The subject-matter covered by the two judgments is of a public nature, relating to the change of boundary lines between townships and the transfer of territory from one district to another. Appellants failed to proceed with expedition. This court said in the case of *Johnson* v. *West,* 89 Ark. 604, that "the writ of certiorari is not a writ of right, and its allowance rests in the sound discretion of the court," and in *Black* v. *Brinkley*, 54 Ark. 375, said that the rule "is to refuse it when the party seeking it fails to show that he has proceeded with expedition after discovering that it was necessary to resort to it,

and especially where great public inconvenience will result from its use." Under the rule thus announced, as applied to the facts in the instant case, it was clearly an abuse of discretion of the court to allow the writ. It should have been denied.

For the error indicated, the judgment is reversed with directions to deny the writ.

HINES v. MAULDIN.

Opinion delivered November 22, 1920.

RAILROADS—PARTIES DEFENDANT.—Under Federal Control Act March 21, 1918, § 10, authorizing actions to be brought against "carriers," an action for personal injuries received by a passenger while the road was in the hands of the Director General was properly brought against the railroad company, notwithstanding the Director General's order that such suits should be brought against him and not otherwise; such order being unauthorized.

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

Action by Fred Mauldin, a minor, by his father, R. O. Mauldin, against the Director General of Railroads and the Missouri Pacific Railroad Company, for personal injuries received by reason of defendant's negligence while a passenger on defendant's train.

E. B. Kinsworthy and *R. E. Wiley*, for appellant.

It was error to render judgment against the Missouri Pacific Railway Company. The Ault case in 216 S. W. 3 is not applicable here and does not control this, and the order of the Director General No. 50, October 28, 1918, was in force at the time of the injury, and no action can be maintained against the company. The President of the United States by proclamation took possession and assumed control of the railway company, and the company was not liable. Chap. 25, § 10, 40 Stat. 456 (U. S. Comp. Stat. 1918, § 3115¾ j). Under this section the company was not liable. 140 Ark. 572. The company

was under the control of the Director General of the United States, and the company was not liable under the Federal Control Act and the judgment should be reversed.

The Ault case, 140 Ark. 572, fully settles this case against the contention of appellant. Under the Federal act a suit was clearly maintainable against the railroad company. 255 Fed. 795; 172 N. W. 918; 185 *Id.* 701; 257 Fed. 757; 102 S. E. 399; 84 So. Rep. 706. The interpretation of the act by the Director General is of no binding force, as the Director General and the company are both liable under the act.

WOOD, J. The appellee recovered judgment against the appellants in an action for damages for personal injuries. On the 21st day of September, 1919, the day on which the injury occurred, the Missouri Pacific Railroad Company (hereafter called company) was controlled, and the train causing the injury was being operated, by the Director General of Railroads. For that reason the appellant company asked the trial court to instruct the jury to return a verdict in its favor, which request the court refused. The only question presented on this appeal is whether or not the court erred in this ruling.

On December 26, 1917, under authority granted by Congress, the President of the United States issued a proclamation by which the company was placed under the control of the Director General of the Railroads. On March 21, 1918, Congress enacted a law, which, among other things, provides: "Carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and, in any action at law or suit in equity against the carrier, no defense shall

be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

Under proclamations by the President on December 26, 1917, and April 11, 1918, it is provided, among other things, that "until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes, but any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such."

On October 28, 1918, the Director General issued a general order, No. 50, which, among other things, provides that "actions at law, suits in equity and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss or damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, *and not otherwise.*"

The appellant company contends that, since this order of the Director General was in force at the time of the injury to Mauldin, for which the appellee recovered judgment, this action can not be maintained against the company. In *Missouri Pacific Railroad Co.* v. *Ault,* 140 Ark. 572, we had occasion to construe section 10 of the Federal Control Act, *supra.* We there said: "We are unable to find anything in the language or context used that indicates that the word "carriers" referred to the Director General. On the contrary, the plain meaning is that, so far as suing and being sued is concerned, the railroad occupied exactly the same status after being taken over by the Government as before." Again, in that case we quote the language of Judge Hand

in *Jensen* v. *Lehigh Valley Rd.*, 255 Fed. 795, as follows: "It appears to me that Congress pretty clearly meant, by the term 'carriers,' the corporations themselves, and that the right to sue them must remain, certainly till it is changed by some valid provision."

The appellant contends that the Ault case is not controlling here for the reason that the cause of action arose in that case before general order No. 50, *supra,* was issued, whereas the cause of action in the present case arose after the issuance of such order. But such a distinction in the facts, if there be such distinction, can make no difference in the construction to be placed upon section 10 of the Federal Control Act, *supra,* authorizing "actions at law and suits in equity to be brought against the carriers." The proclamations of the President and the orders of the Director General under such proclamations can not rise higher than the source from which the President derived his authority to make such proclamations. Neither section 10 of the Federal Control Act, nor any subsequent act of Congress, confers upon the President the power to authorize the Director General of Railroads to set aside the act of Congress, from which alone the President derived his power. The effect of the proclamation of the President and the order of the Director General under it, if given the construction contended for by the appellant, would be to set aside the express provision of section 10 of the Federal Control Act, authorizing actions to be brought against the carriers. This is beyond the power of the President and Director General.

We are aware that there is a contrariety of view in the decisions of various courts upon the construction of the statute, but until the Supreme Court of the United States, the highest authority on the subject, has spoken, we adhere to our conclusion in *Missouri Pacific Railroad Co.* v. *Ault, supra,* believing that such a decision is based upon sound reason, and that it is the correct interpretation of the Federal Control Act.

The judgment of the circuit court is therefore affirmed.

HOGUE v. SPARKS.

Opinion delivered November 22, 1920.

1. PLEADING—SUFFICIENCY OF COMPLAINT ON DEMURRER.—A complaint by an attorney to recover damages for interference with a contract between plaintiff and a client, seeking to prevent plaintiff from enforcing a judgment in favor of his client against property fraudulently conveyed by the judgment-debtor to a corporation of which defendant was an officer and attorney, is not demurrable for failure to allege specifically the insolvency of the judgment-debtor, where the complaint alleges that the defendant's wrongful acts deprived plaintiff of his remedy to collect the judgment and his fee.
2. ATTORNEY AND CLIENT—DEFEATING ATTORNEY'S CLAIM.—While an officer of a bank, to which a judgment-debtor has conveyed property may purchase such judgment to protect the bank, he had no right thereby to deprive the judgment-creditor's attorney of his interest in the judgment or to prevent him from collecting same.
3. TORTS—MALICIOUS INTERFERENCE WITH CONTRACT.—One who maliciously interferes with a contract between two parties, and induces one of them to break it, to the other's injury, is liable to the injured party for the damages so caused.

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

Robert D. Lee, for appellant.

1. The court erred in sustaining the demurrer. According to the allegations of the complaint, the clients of appellant were under a duty to permit him to collect their judgment in order that he might receive one-half of the proceeds thereof, and appellee with knowledge of the fact did maliciously, unlawfully and fraudulently cause, induce and procure appellant's clients to break their contract in order that he might control the litigation and render appellant's efforts to collect the judgment futile and deprived him of his right to collect his half of the judgment. 76 Kan. 49, 58-9; 90 N. Y. 208-12; 27 Ill.

149-51; 8 S. C. 100; 152 N. Y. 166. The demurrer admits the allegations of the complaint and they stated a good cause of action against appellee.

2. One who interferes between two contracting parties and causes one of them to breach a contract is guilty of a tort and liable in damages. 86 Ark. 130; 64 *Id.* 221; 151 U. S. 1, 14, 15; 70 N. C. 601; 76 *Id.* 355; 119 Ark. 508; 16 L. R. A. (N. S.) 746-754; 66 Ark. 190; 38 *Id.* 385; 13 *Id.* 193; 11 *Id.* 736.

C. Floyd Huff, for appellee.

In view of the facts that the claim for damages was problematical and wholly dependent upon the success of the suit in chancery to set aside the conveyances by Mrs. Horner of real estate in no wise involved in this litigation and that appellant could not have sustained any damages, occasioned by the compromise of the suit by appellant here by the Rushings prior to the termination of that action, it follows that appellant could not have established any damages sustained by him in the action by the Rushings, for the reason that unless appellant would have been successful in chancery suit in setting aside the conveyances involved and subjecting the property to the payment of the judgment against Mrs. Horner, and that the judgment would have been realized in full we are unable to see how appellant could establish damages in one-half the amount of the judgment.

In view of the assignment to Rix, appellant had no personal or pecuniary interest whatever in the judgment against Mrs. Horner. This opinion was shared by appellant at the time he brought the chancery suit, as he did not make himself a party thereto, although a long time prior thereto he had by record established his ownership of a one-half interest in the judgment. The cases cited by appellant do not apply. It is nowhere alleged that Sudie A. Horner is insolvent, and, if appellant is the owner of a one-half interest in the judgment against Mrs. Horner, the courts are open to him to enforce his remedy against Mrs. Horner.

Appellee, having been sued by the Rushings and called upon to defend his title to real estate, purchased from Mrs. Horner long before any judgment lien existed against Mrs. Horner, and knowing, as the complaint alleges, that the Rushings had but one-half interest in said judgment, and that no act of the Rushings could in any wise affect the interests of appellant in that part of the judgment he had recovered for his clients, and which by appellant's own act had been segregated and set apart from the interests of his clients. Appellee was wholly within his rights in settling the litigation by the purchase from the Rushings of the basis or subject-matter of the suit, and his act in so doing did not prevent appellant from enforcing any rights he may have had. The act of appellant himself in establishing in the chancery court his ownership of one-half of the judgment and decree he had obtained for his clients and the sale and transfer of that interest terminated the relation of attorney and client between him and his clients. The judgment for rents and profits had been recovered; the conveyance had been set aside and title vested in appellant's clients, and there was nothing further to be done, and there was no error in sustaining the demurrer as the relation of attorney and client had terminated, and the ownership of a one-half interest duly assigned to Rix.

WOOD, J. The appellant filed in the Garland Circuit Court the following complaint:

"Comes the plaintiff, James E. Hogue, and states that he is, and that on and before and at all times since the 13th day of December, 1917, has been, a regularly licensed attorney at law, and was and is actively engaged in the practice.

"That on the 13th day of December, 1917, the plaintiff obtained a judgment in the chancery court of Garland County, in the State of Arkansas, against Sudie A. Horner, and in favor of Taylor Rushing, and James Rushing for five thousand nine hundred fifty-four dollars and ninety-two cents.

"That the plaintiff obtained said judgment while acting as an attorney for the said Taylor Rushing and James Rushing, under a contract of emplyment with his said clients by the terms of which contract the plaintiff was to have and receive one-half of any and all sums which might be collected on said judgment as a compensation for his services in securing said judgment and in the collection thereof.

"That, acting under his contract of employment with his clients, the said Taylor Rushing and James Rushing, and with their knowledge, consent, and approval, the plaintiff on the 6th day of January, 1919, brought a suit in the chancery court of Garland County, against the said Sudie A. Horner and others and against the defendant, Charles C. Sparks, and the Hot Springs Savings, Trust & Guaranty Company, for the purpose of setting aside certain conveyances of valuable property which had been made to the defendant, Charles C. Sparks, by the said Sudie A. Horner, and for the purpose of setting aside certain mortgages and deeds of trust to other valuable property which the said Sudie A. Horner had made to the Hot Springs Savings, Trust & Guaranty Company.

"That the defendant, Charles C. Sparks, is an attorney at law, and at that time was, and now is, a stockholder and officer in the Hot Springs Savings, Trust & Guaranty Company, which is a corporation, and that said corporation then was and now is engaged in the business of lending money as a bank and trust company.

"That the defendant, Charles C. Sparks, in addition to being a stockholder and officer in said corporation, is also an attorney for same, and that he appeared as the attorney for said corporation in said suit.

"That in his complaint the plaintiff herein, acting for his said clients, alleged that the property conveyed to the defendant, Charles C. Sparks, and the property mortgaged to the said Hot Springs Savings, Trust & Guaranty Company by the said Sudie A. Horner, was subject to the payment of his clients' judgment for the reason

that said lands belonged to the estate of John J. Horner, deceased, at the time of his death, and that the demand upon which said judgment had been rendered constituted a lawful demand against the estate of the said John J. Horner, deceased.

"That the purpose of said suit was to subject said property to the payment of his said clients, and under his contract of employment it was the right and duty of the plaintiff to prosecute said suit to judgment and to a final and successful termination, and to collect said judgment and to receive one-half of the proceeds therefrom for his own use and benefit, and that the reciprocal duty of his clients, Taylor Rushing and James Rushing, was to permit him to do so without let or hindrance.

"That on or some time before the 13th day of May, 1919, the defendant, Charles C. Sparks, while said suit was still pending and with full knowledge of the plaintiff's interest in said judgment and of his rights and duties as herein stated, maliciously and with a design and intent to oppress, annoy, and harrass the plaintiff and to prevent him from successfully prosecuting said suit, and to force him to abandon said litigation, and with a design and intent to deprive the plaintiff of the fruits of said litigation, and of the benefits of his fees earned therein, and with a design and intent to acquire control of said suit and thwart and paralyze the efforts of the plaintiff to successfully prosecute said suit and to prevent him from collecting said judgment, and with a further design and intent to force a sale to himself of the plaintiff's interest in said judgment for a nominal consideration, and to actually acquire the benefits of said judgment himself, did unlawfully and fraudulently cause, induce and procure the plaintiff's said clients, Taylor Rushing and James Rushing, to break their said contract with the plaintiff and caused, produced and procured the said Taylor Rushing and James Rushing to sell and assign said judgment to the defendant.

"That the acquisition of said judgment by the defendant has put the defendant in a position to control said litigation, and has rendered the plaintiff powerless to further prosecute his suit for the collection of said judgment, for the reason that to be successful in such prosecution he would be forced to direct his operations against the legal representative of his own clients and would be forced to combat the efforts of this legal representative to prevent a successful prosecution of said suit, and that an effort to do this would necessarily be futile and unavailing.

"That, by the wrongful acts of the defendants herein complained of, the plaintiff has been deprived of his right and remedy to collect and receive the benefits of his half of said judgment which, together with six per cent. interest up to the date of filing this suit, is $3,245.43.

"That, in addition to this sum, the plaintiff has been deprived of his right and remedy to recover certain expenditures which he has made in the way of costs and expenses incurred in the prosecution of said litigation, amounting to more than $300, all to the damage and injury of the plaintiff in the sum of $3,543.43.

"Wherefore, the plaintiff, James E. Hogue, prays judgment against the defendant, Charles C. Sparks, for $3,545.43, and for all other and further relief."

The defendant filed the following demurrer:

"*First.* That the facts stated in said complaint are not sufficient to constitute a cause of action against this defendant.

"*Second.* That this suit is prematurely brought.

"*Third.* That this court is without jurisdiction of the parties and the subject-matter involved."

The court sustained the demurrer. The plaintiff stood on his complaint. The court entered a judgment dismissing the complaint and in favor of the defendant for costs, from which judgment is this appeal.

The complaint, "boiled down," alleges that appellant, as an attorney for the Rushings, had obtained a

judgment in their favor in the sum of $5,954.92; that under his contract with his clients he was to obtain the judgment and collect the same and to receive as compensation for his legal services one-half of any or all sums which might be collected; that, proceeding under his contract with his clients, appellant had brought suit against the appellee and the Hot Springs Savings, Trust & Guaranty Company to set aside certain conveyances of valuable property which had been made to them by the judgment-debtor, which property was subject to the judgment which he had obtained for the Rushings and in which he had a half interest; that the appellee, with knowledge of these facts and with the intent to prevent the appellant from collecting said judgment, and to acquire the benefits of the judgment himself, did unlawfully and fraudulently induce appellant's clients to break their contract with appellant by selling to him the judgment; that the sale of the judgment by appellant's clients and the purchase of the same by the appellee rendered the appellant powerless to further prosecute the suit against appellee and thereby deprived the appellant of his right to collect and receive the benefit of his half interest in the judgment, and the costs and expenses amounting to more than $300, which appellant had incurred in the prosecution of the suit against the appellee.

While the complaint is defective in that it fails to allege specifically that the judgment-debtor, Sudie A. Horner, was insolvent, and that therefore the judgment could not have been collected against her, nevertheless, such effect must necessarily be implied from the allegation "that, by the wrongful acts of defendant herein complained of, plaintiff has been deprived of his right and remedy to collect and receive the benefits of his half of said judgment." The defect in this particular could and should have been reached by a motion to make more definite and certain, rather than by demurrer. When the complaint is tested solely by its allegations, as it must be, it states a cause of action against the appellee for induc-

ing the clients of appellant to breach their contract with him by selling the judgment to the appellee, in which the appellant had a half interest. The complaint alleges that this was done with the intent of depriving the appellant of the fruits of the litigation and the benefits of his fees earned therein.

Learned counsel for the appellee brings forward in his brief certain matters which might properly be set up by answer in defense to the action, but these matters have no place in this record, which only presents the question of the sufficiency of the complaint. The appellee had a perfect right to purchase from the Rushings their interest in the judgment with a *bona fide* view of settling the litigation between them. That is one thing which the appellee had a right to do. But he had no right to induce them to sell to him the judgment with the intent of foreclosing the rights of appellant, or, in other words, for the purpose of so handling the litigation between them as to make it impossible for appellant to collect the judgment, which they had contracted that he should do, and for the purpose of depriving him of his one-half interest in the full amount of the judgment. That is another thing which the appellee had no right to do.

The allegations of the complaint show that the appellee by his acts has caused appellant's clients to breach their contract with him to his damage in the sum alleged. The facts alleged in the complaint and admitted by the demurrer bring the case within the well-established doctrine "that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other the party injured can maintain an action against the wrong-doer." *Angle* v. *Chicago, St. Paul, etc., Ry. Co.,* 151 U. S. 1-13; *Jones* v. *Stanley,* 76 N. C. 355; *Haskins* v. *Royster,* 70 N. C. 601; *Knickerbocker Ice Co.* v. *Gardner Dairy Co.,* 16 L. R. A. (N. S.) 746, and note; 26 R. C. L. 775, § 25; 2 Cooley on Torts, p. 592; 1 Jaggard on Torts, p. 634. This court

recognizes the doctrine in *Mahony* v. *Roberts*, 86 Ark. 130-139; *Wakin* v. *Wakin*, 119 Ark. 509-515. See, also, *Dale* v. *Hall*, 64 Ark. 221-224.

According to the allegations of the appellant's complaint, the clients of appellant were under a duty to permit him to collect their judgment in order that he might receive one-half of the proceeds thereof, and appellee, with knowledge of this fact, did, "maliciously, unlawfully and fraudulently cause, induce and procure" appellant's clients to break their contract by selling to appellee their judgment in order that he might control the litigation and render appellant's efforts to further prosecute the suit and collect the judgment futile, which deprived him of his right to collect and receive his half of said judgment.

The court erred in sustaining the demurrer. The judgment is therefore reversed, and the cause will be remanded with directions to overrule the demurrer to the complaint.

PEARROW v. STATE.

Opinion delivered November 22, 1920.

1. LARCENY—INSTRUCTION—WEIGHT OF EVIDENCE.—In grand larceny an instruction that "the possession of property recently stolen and unexplained by the defendant affords presumptive evidence of his guilt" is erroneous as being on the weight of the evidence.
2. LARCENY—POSSESSION OF STOLEN PROPERTY.—Possession of property recently stolen and unexplained by the defendant is a circumstance which may be proved and may be considered by the jury; and if, in connection with the other facts and circumstances proved in the case, it induces in the minds of the jury a belief beyond a reasonable doubt of the defendant's guilt, it becomes sufficient to warrant a conviction.
3. CRIMINAL LAW—INSTRUCTIONS.—Error of the court in charging that unexplained possession of recently stolen property is presumptive of guilt was not cured by telling the jury in the same instruction that such possession is a fact from which an inference of guilt may be drawn.

4. CRIMINAL LAW—PROOF OF CORPORATE EXISTENCE.—Where the ownership of property alleged to have been stolen was charged to be in a certain railroad company, "a corporation," it was only necessary for the State to prove the *de facto* existence of the corporation, and evidence of general reputation of its corporate existence was sufficient.

5. LARCENY—OWNERSHIP OF PROPERTY.—In a prosecution for larceny the ownership, general or special, of the property alleged to have been stolen must be proved.

6. WITNESSES—CROSS-EXAMINATION.—On cross-examination of defendant's father in a prosecution for larceny, it was error to permit questions concerning articles of merchandise found in his possession which were not alleged or shown to have been recently stolen.

7. CRIMINAL LAW—IMPROPER CROSS EXAMINATION—HARMLESS ERROR.—In a prosecution for grand larceny, error of the court in permitting the cross-examination of defendant's father concerning articles found in his possession not alleged or shown to have been recently stolen was not prejudicial where such possession was explained by the witness.

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

Brundidge & Neelly and *G. G. McKay,* for appellant.

1. The court erred in instructing the jury as to the effect of the possession of recently stolen property. 140 Ark. 413; 116 Ark. 357; 83 *Id.* 192; 125 *Id.* 260.

2. It was error to permit the witness Jones to testify that the Missouri Pacific Railway Company was a corporation. 58 Ark. 98; 108 *Id.* 339; 84 *Id.* 140.

3. Also to permit the State's attorney to question Green Pearrow relative to certain articles found in his house. 120 Ark. 143; 8 R. C. L., § 194.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. The objectionable part of instruction No. 2 was so modified or defined as to eliminate any idea of a charge upon the weight of the evidence. As given, it in no way invaded the province of the jury. 91 Ark. 495; 79 *Id.* 432; 119 *Id.* 163. The instruction as modified and as a whole is unobjectionable. 134 Ark. 413.

2. The questions and answers objected to were undoubtedly admissible. 120 Ark. 123.

WOOD, J. The appellant was indicted with Clyde Pearrow for burglary and grand larceny in White County, Arkansas, alleged to have been committed on the 1st day of December, 1919. He was tried separately. The burglary was alleged to have been committed by feloniously breaking and entering a box car being in possession of the Missouri Pacific Railroad Company, a corporation, with an intent to steal four bolts of dress goods of the value of $60, thirty-six window shades of the value of $72, and sixteen cases of cigarettes of the value of $1,280, the property of the railroad company, a corporation.

A witness testified that he and Clyde Pearrow broke into two cars on the night of the alleged burglary and took therefrom sixteen cases of cigarettes, some dress goods, and window blinds. Witness supposed that the appellant took his part home with him. Witness sold two cases of the cigarettes for appellant to Otis Parham.

Parham testified that he bought 20,000 cigarettes from the appellant about the last of January, 1920, for which he paid him $65. The cigarettes were delivered by one Lotis Lockaby. Clark Pearrow said they were his, and he gave him a check for $65.

Sheriff Plant testified that he searched appellant's house and found some dress goods—two pieces of cloth. Another witness testified that he was present when appellant's house was searched and found thirty-three yards of cloth, two kinds, one red-checkered and the other blue. There were three or four pieces. Over the objection of appellant, witness testified that the Missouri Pacific Railroad Company was a corporation.

Green Pearrow, the father of appellant, was introduced as a witness in appellant's behalf. He testified that the officer searched his house at the time they searched appellant's. Over the objection of appellant,

the prosecuting attorney was allowed to question this witness as to certain articles of merchandise that were found in his house, which articles embraced many things not alleged to have been recently stolen.

The court gave certain instructions, and among others, the following: "You are instructed that the possession of property recently stolen and unexplained by the defendant, affords presumptive evidence of his guilt. Such possession is a circumstance which may be proved and taken into consideration by the jury, and if, in connection with the other facts and circumstances proved in the case, it induces in the minds of the jury a belief, beyond a reasonable doubt, of the guilt of the defendant, it becomes sufficient to warrant a conviction."

Appellant objected generally and specifically to the giving of this instruction on the ground that it was a charge upon the weight of the evidence. The trial resulted in a judgment of conviction, from which is this appeal.

The court erred in telling the jury "that the possession of property recently stolen and unexplained by the defendant affords presumptive evidence of his guilt." This language was an instruction on the weight of the evidence which was condemned by this court as erroneous and prejudicial in the quite recent case of *Long* v. *State,* 140 Ark. 413, when we said:

"The rule is that the unexplained possession of recently stolen property is a fact from which an inference of guilt may be drawn." It is wholly within the province of the jury to draw or not to draw such an inference, and it is an invasion of the province of the jury to tell them, as a matter of law, that the unexplained possession of recently stolen property raises a presumption of guilt. Other cases holding to this effect are cited in *Long* v. *State, supra.* The latter part of the instruction is a correct statement of the law, but it did not cure the vice of the language of the first part, just quoted.

There was no testimony that the property alleged to have been stolen was the property, or in possession, of the Missouri Pacific Railroad Company. Since the ownership of the property was alleged to be in the Missouri Pacific Railroad Company, a corporation, it was only necessary for the State to show the *de facto* existence of the corporation. Evidence of general reputation of its corporate existence was competent and sufficient to prove it. Section 3984, Kirby's Digest; *Fleener* v. *State,* 58 Ark. 98; *Mears* v. *State,* 84 Ark. 136-140; *Brown* v. *State,* 108 Ark. 339; 3 Bish., New Criminal Procedure, § 752.

The ownership, general or special, of the property alleged to have been stolen should have been proved. The cross-examination of the witness, Green Pearrow, concerning the articles of merchandise found in his possession, but which were not alleged or shown to have been recently stolen, was improper and should not have been permitted by the court. The possession of these articles, however, was explained by him, and no prejudicial error to appellant could have resulted in such examination. But the other errors indicated were prejudicial, and for these errors the judgment will be reversed and the cause remanded for a new trial.

FELKER v. BOATMEN'S BANK.

Opinion delivered November 22, 1920.

1. BILLS AND NOTES—VALIDITY OF NOTE OF BANK OFFICERS FOR ACCOMMODATION OF BANK.—A note executed by the officers of a bank individually is not invalid because the lender was advised by its makers that it was for the accommodation of the bank, and that it was executed in their individual names because they did not want the books of the bank to show the note as a liability; though it would be unlawful for the officers to omit to make entries in the bank's books showing that the note was a liability of the bank, their intention to violate the law would not invalidate the note unless the money was advanced by the lender to enable the makers to carry such purpose into effect.

2. BILLS AND NOTES—JOINT ACCOMMODATION MAKER—NOTICE OF DISHONOR.—A joint accommodation maker of a note is primarily liable under Neg. Inst. Law, § 29 (Acts 1913, p. 279), and it is not entitled to notice of dishonor.

3. LIMITATION OF ACTIONS—NEW ACTION AFTER DISMISSAL.—A cause of action on a note is not barred where an action was brought on it within five years from maturity, where such action was dismissed and a new action brought within a year on the same cause of action.

4. LIMITATION OF ACTIONS—NEW ACTION AFTER DISMISSAL—PAROL EVIDENCE.—Parol evidence is admissible to show that a new action is based on the same cause of action that was involved in a former action dismissed within a year of the bringing of the new.

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

Rice & Rice, John R. Duty and *Dick Rice,* for appellant.

1. The note was against public policy and void. Acts 1913, pp. 462 to 497, especially § 37; 176 Pac. 245; 109 Fed. 421, 433-5; 21 *Id.* 299; 61 *Id.* 993; 145 U. S. 421; 176 Pac. 245; 174 U. S. 669.

2. The cause of action is barred by limitation. Kirby's Dig., §§ 5083, 5069; 25 Cyc. 1315. See, also, 54 N. E. 200; 47 S. E. 336, 912; 30 L. R. A. 142; 66 N. Y. 385; 75 *Id.* 150; 11 Okla. 699; 23 Cyc. 1292.

3. Defendant signed the note as an accommodation maker. Acts 1915, p. 279. No notice of dishonor was given or protest made and the surety was discharged. 57 Ark. 437; 21 S. W. 1065; 125 *Id.* 107; 153 *Id.* 449; 195 *Id.* 589; Ann. Cases 1917 B, 835. The principal was discharged by the election to look to the Bank of Rogers. 31 Cyc. 1578.

E. H. Thomas (Kansas City, Mo.), for appellee.

1. The suit was not barred. 69 Ark. 311; 77 *Id.* 382; 172 Fed. 738; 11 Ark. 344; 17 *Id.* 533; 22 *Id.* 103; 49 *Id.* 246; 109 U. S. 426; 133 *Id.* 553; 101 Fed. 94-5.

2. As an accommodation maker, appellant was liable. Daniel, Neg. Inst., § 1302. He was not entitled to notice. Daniel, Neg. Inst., § 995b.

3. No agency was involved and no election to look to the Bank of Rogers.

4. The judgment is according to law for the right party and is sustained by the evidence. The great weight of authority is against appellant's contention. 109 Fed. 421, 433-5; 236 *Id.* 316; 8 C. J., 722-3; 73 S. W. 893; 34 N. Y. Supp. 1054; 76 Am. St. 771. The contract or arrangement was not contrary to our statutes. 182 Fed. 593-4; 174 *Id.* 86.

WOOD, J. This is an appeal from a judgment rendered by the circuit court of Benton County in favor of the appellee against the appellant in the sum of $31,200, the judgment to bear interest at the rate of 8 per cent per annum from date until paid. The facts are substantially as follows:

On April 2, 1914, W. E. Talley, president of the Bank of Rogers, W. R. Felker, its vice president, and George M. Jennings, who was interested in the bank, acting in pursuance of a resolution by its board of directors authorizing the president, vice president and cashier of the bank to borrow money and pledge its assets as security therefor, borrowed of the appellee the sum of $25,000, for which they executed their joint promissory note signed by them individually. The note bore interest at the rate of 8 per cent. per annum from maturity until paid, and was due six months after date. The note was secured by a deposit of $30,000 of the capital stock of the Citizens' Bank of Rogers, which was a part of the assets of the Bank of Rogers. It was understood between the makers and the payee that the loan was for the use and benefit of the Bank of Rogers. The vice president of the appellee, who negotiated the loan on its part, was notified that the makers were signing the notes as individuals because they "did not want it to show as a liability on the books of the bank," and appellee's vice president agreed that individuals should sign the note. Before the note was executed, the appellee required that W. R. Felker furnish it a statement of his individual as-

sets and liabilities, which was done. The appellee deducted six months' interest from the face of the note and placed the remaining proceeds to the credit of the Bank of Rogers, and that bank from time to time drew on such funds until July 16, 1914, when the Bank of Rogers failed. At that time appellee's books showed the sum of $3,250 as a balance of the proceeds of said loan to the credit of the Bank of Rogers, which sum the appellee credited on the note above mentioned.

On July 26, 1914, appellee notified the appellant that the collateral was not sufficient, and that, in pursuance of the provisions of the note, the appellant within twenty-four hours would have to furnish additional security. This was not done. Appellee then, in accordance with the provisions of the note, declared the same due and brought an action against the makers. Judgment by default was rendered against Talley and Jennings. The appellant answered and moved to transfer the cause to equity, which was done. On the 14th day of August, 1919, the appellee took a nonsuit, and on the next day brought this action in the circuit court on the note for the balance alleged to be due thereon. The appellant denied that he was due the appellee any sum on the note, alleged that the appellee had accelerated the maturity of the note and declared the same due on the 28th of April, 1914, and that the note was, therefore, barred by the statute of limitations. The appellant also set up that the note was without consideration and void; that he was an "accommodation endorser or surety" and that no demand had been made upon the Bank of Rogers, the principal; that the note was illegal and void because it was entered into under an arrangement between the appellee and the president of the Bank of Rogers, the object of which was to deceive the public and the Bank Commissioner of the State of Arkansas; that the arrangement was in fact a loan to the Bank of Rogers, which loan was not to appear on the books of that bank, nor the appellee bank as a liability of the Bank of Rogers, but as an asset;

that the note was made in violation of law, and was therefore void.

The appellant contends, first, that the note sued on is void for the reason that it was executed in violation of act 113 of the Acts of 1913, providing for the organization and control of banks, etc. Section 37 of that act reads in part as follows: "Every bank shall make to the commissioner, whenever required by him, a statement of its assets and liabilities as shown by its records at the close of the business on the day designated * * * . Such reports shall be verified in case of a corporation by the oath of either its president, vice president, cashier or secretary, and in addition thereto it shall be attested by not less than two directors."

Section 38 reads in part as follows: "The reports required by this act shall embrace the amount paid up, capital, surplus, net undivided profits, deposits, bills payable or bills rediscounted, and all other liabilities of whatsoever character. It shall also state the * * * cash on hand and on deposit in other approved banks and trust companies, subject to check, with the amount and character of all other assets, together with such other information as the commissioner may require."

Viewing the evidence in the strongest possible light for the appellant, it only shows that the vice president of the appellee was informed by the president of the Bank of Rogers at the time the loan was being negotiated that the makers preferred to make it an individual or directors' loan, rather than a loan to the bank, because they did not want the loan to show as a liability on the books of the bank, and that the vice president of the appellee agreed that individuals should sign the note. Now, the appellee bank had the right to loan, and the makers as individuals had the right to borrow, for the accommodation of the Bank of Rogers the amount of money evidenced by the note. The makers of the note had a right to deposit this sum with the appellee bank to the credit of the Bank of Rogers. This transaction violated no law

of Arkansas, and the note evidencing the contract was based upon a valid and valuable consideration. The appellee performed its part of the contract when it advanced the money and placed the same, at the direction of the makers, to the credit of the Bank of Rogers. The fact that the vice president of the appellee, at the time the loan was made, was told by the makers that they were negotiating the loan in their names because they did not want the books of the Bank of Rogers to show the note as a liability did not render the contract as to the loan illegal. This contract was complete when the money was advanced and the note executed. The purpose of the makers of the note to camouflage the books of the Bank of Rogers by making or omitting to make entries showing that the note was a liability of the bank, if carried into effect, would be a violation by them of sections 37 and 38 of act 113, *supra.* But this showed only an intent upon their part to do something in the future that would be illegal. Although the agent of the appellee was advised that such was their purpose, the testimony does not warrant the conclusion that the money was advanced by the appellee in consideration of such purpose, or to enable the makers of the note to carry such purpose into effect.

Section 24 of our banking laws makes it a felony for any person to knowingly or wilfully cause to be made any false statement or false entry in the books of any bank, or to knowingly subscribe to or exhibit false papers, or make or publish any false statement concerning the assets or affairs of any bank with the intent to deceive the commissioner or examiner. Even though it could be said that the contract evidenced by the note in suit was made with full knowledge by appellee that the purpose of the maker of the note was to make, or cause to be made, false entries on the books of the Bank of Rogers, in order to deceive the Bank Commissioner or examiner, nevertheless there is no provision in our

banking law rendering any contract void which has been entered into with such intent by its makers.

This case on the facts can not be distinguished in principle from the cases of *Hanover National Bank of City of New York* v. *First National Bank of Burlingame, Kansas,* 109 Fed. 421, and *Leonard* v. *State Exchange Bank,* 236 Fed. 316. It was held in those cases (quoting syllabi in the first case) that "where a statute commands certain parties to do, or prohibits them from doing, certain acts, and prescribes the penalties for their violation of its commands, courts may not inflict other penalties for its violation upon other parties, not named in the law, by the avoidance of their contracts. * * * One who has received the benefits of the performance by the plaintiff of a contract which was neither *malum in se* nor *malum prohibitum* can not successfully defend an action for the payment of his indebtedness arising therefrom on the ground that he intended to do some illegal act, which was neither a part of the consideration or of the performance of the agreement."

The appellant, as a joint accommodation maker, was primarily liable, under our law on negotiable instruments. Therefore, no notice of dishonor had to be given him. Act 81, § 29, Acts of 1913, p. 279; 3 Daniel on Negotiable Instruments, 95 B.

The appellant next contends that the appellee's cause of action is barred by the five-year statute of limitations. Under certain conditions expressed in the note, the appellee had the right to accelerate the payment, which it did by declaring that the note was due not later than the 28th day of July, 1914. On September 9, 1914, the appellee brought the original action on the note in the Benton Circuit Court. The cause, on motion of the appellant, was transferred to the chancery court, where it remained until the 14th day of August, 1919. At that time, the appellee suffered a nonsuit and on the 15th day of August, 1919, brought this action in the Benton Circuit Court. The court found from the pleadings in the orig-

inal suit and on oral testimony that the action pending in the chancery court, upon which nonsuit was taken, was the same as the present cause of action. The appellant's contention is that this could not be shown by oral testimony. The appellee introduced the clerk of the circuit court, who identified the pleadings in the original cause, and the court considered these in determining whether the two actions were based on the same cause of action, and also the testimony of Talley, the president of the Bank of Rogers, to the effect that he and appellant had executed only one note to the appellee and that the note sued on was the only one he knew anything about. This testimony was competent. The court was correct in finding that the appellant's cause was not barred by the five-year statute of limitations. Section 5083 of Kirby's Digest; *Bank* v. *Magness,* 11 Ark. 344; *Biscoe* v. *Madden,* 17 Ark. 533; *Walker* v. *Peay,* 22 Ark. 103; *Little Rock, M. R. & T. Ry.* v. *Manees,* 49 Ark. 248; *Smith* v. *McNeal,* 109 U. S. 426; *Glenn* v. *Liggett,* 135 U. S. 533. The above cases are cited in *Alexander* v. *Gordon,* 101 Fed. 91, 94, 95. See, also, *Watkins* v. *Martin,* 69 Ark. 311.

There is no error in the record. The judgment is therefore affirmed.

MOORE *v.* AVERY.

Opinion delivered November 22, 1920.

1. WILLS—LIFE ESTATE WITH POWER OF DISPOSAL.—Under a will devising a life estate in land with remainder to the legitimate heirs of the body of the devisee, and with power to dispose of the land by will in case the devisee dies without such heirs of the body, the devisee was empowered to dispose of the property by will.
2. WILLS—CONSTRUCTION.—In construing a will, the paramount rule is to arrive at the testator's intention, which must be done from the language used where it is plain and free from ambiguity; parol evidence being admissible in aid of construction only when the language used is doubtful or susceptible of two meanings.
3. WILLS—CONSTRUCTION.—Where one having a life estate in certain land with absolute power of disposing of it by will con-

tracted with another who furnished the money to improve such land that he would devise the land to him, and in pursuance thereof devised to the latter all of his property, real, personal and mixed, he will be held to have devised the property of which he had the power of disposition.

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

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellee to declare void a will made by Harry Moore, deceased, in favor of the defendant James Avery.

Appellants allege that they are the owners of the property involved in this suit by reason of being the heirs-at-law of Harry Moore, deceased, and further allege that by contract with each other they have agreed that Mary Haley and Ed Averitt, two of the appellants, shall have a one-half interest in the property, and that the other one-half interest shall vest in Harry Moore, an illegitimate son of Harry Moore, deceased.

It is agreed by the parties that the findings of fact made by the chancellor are correct, and his findings are substantially as follows: Dinah Averitt originally owned the property in controversy. On the 30th day of May, 1895, she executed her last will and testament, whereby she devised the property in controversy to her grandson, Harry Moore. The clause in question in the will is as follows:

"For and during the term of his natural life, and after his decease to the heirs of his body (being legitimate and born in lawful wedlock), their heirs and assigns forever, in equal shares, as tenants in common, and in the event the said Harry Moore dying without heirs of his body surviving him as aforesaid, then said land and premises shall go to and pass by the execution and operation of this will to such person or persons as my grandson, Harry Moore, as aforesaid, by his last will and testament shall direct and appoint and for the uses, pur-

poses, trusts and limitations herein contained and set forth."

By a subsequent clause she devised to Harry Moore in fee simple other real estate owned by her in Hot Springs, Arkansas. After her death Harry Moore, the devisee in the will, took possession of the property. He sold the property which was devised to him in fee. A fire destroyed the buildings on the property involved in this lawsuit. Harry Moore was in ill-health and without means with which to rebuild. In order to do so, he asked a friend to lend him enough money to build a house on the property in controversy, and told his friend that he would make him a will devising him the property in controversy in fee if he would lend him the money. It was understood between them that Harry Moore did not have the fee in the property, but only the power to dispose of it by will and for this reason he was unable to make a present conveyance in order to secure money to rebuild on the property. In order to secure money to rebuild and to obtain something to live on for the balance of his life, he agreed to make a will in favor of James Avery if the latter would advance him the money necessary to rebuild on the property. It was understood that the money so advanced was not a loan to Harry Moore which was intended to be repaid, but that it was given him by James Avery in anticipation that Harry Moore would use it in building a house on the property in question and would execute a will in Avery's favor so that the latter would get the property at Moore's death. Moore executed a will which is as follows:

"Know All Men by These Presents: That I, Harry Moore, domiciled and residing in the city of Hot Springs, in the State of Arkansas, and being an unmarried man more than twenty-one years of age, and being of sound mind and memory, do hereby make and publish this my last will and testament, and hereby revoking any and all other or former wills by me heretofore made.

"*First.* Having no wife or children, and having no living descendant of a deceased child or children, and having no living parent or parents, nor a living ancestor or ancestors of parent or parents, all of my property, real, personal and mixed, including goods and chattels, lands and tenements, rights, credits, and choses in action, situated in the State of Arkansas, or elsewhere, I will, devise and bequeath to my friend and relative, James Avery, of the city of Little Rock, in the State of Arkansas, for his sale and use and benefit the same as if said property had been conveyed to the said James Avery by me while in full life.

"*Second.* I hereby nominate, constitute and appoint my said friend and relative, James Avery, to be sole executor of this my last will and testament and direct that he be required to give only such bond as is in the judgment of the court may be required for the protection of the creditors of my estate, if there should be any creditors.

"In testimony whereof, I have hereunto set my hand and seal, and publish and declare this to be my last will and testament, in the presence of two witnesses named below, on this the 24th day of Janaury, 1914."

Harry Moore died and James Avery claims the property under this will. Hence this lawsuit.

The chancellor found the issues in favor of the defendant, and the complaint of the plaintiffs was dismissed for want of equity.

The case is here on appeal.

R. G. Davies, for appellants.

The will of Moore was intended as a mortgage to secure defendant in whatever amount of money he might advance to rebuild the houses and, being so intended as a mortgage, it is not a will that can be enforced, and is therefore void. *The money was not loaned* but advanced for the purpose of rebuilding on the property, and was not to be repaid, but in consideration of said advancement defendant was to receive a will giving him title to

said property at Moore, Sr.'s, death. The only question is, can such an agreement be enforced? It is settled in this State that all persons have an untrammeled right to dispose of their property by will as they please, if within the statutory limitations; that testators are not required by law to do exact justice to expectant relations, and their motives or partialities, affections or resentments, are not subject to examination by the courts. 102 Ark. 30; 9 Ann. Cases 943, notes; Ann. Cases B 1912, 422; 139 Am. St. Rep. 73; 126 Ark. 503; 129 Mass. 435; 44 Am. Rep. 780. Under these authorities, Moore, Sr., under the will of Dinah Averitt, having no legitimate children, had authority to make the agreement with defendant to make the will to him he did make. 87 Ark. 243. Under the will of Dinah Averitt, Harry Moore, Sr., could not lawfully execute such an instrument as the one under which defendant claims title. 31 Cyc. 1137-1144. The will of Dinah Averitt did not authorize Moore, Sr., to either mortgage or sell the remainder of the estate for his own benefit, *and that is what* he did. 112 Ark. 527; 51 *Id.* 61.

The money was *advanced,* and was a loan to be repaid, and the will was intended as a security for a loan. 56 Am. Dec. 451. The will of Moore, Sr., was intended as a mortgage to secure defendant in whatever amount he might *advance* to him to rebuild the houses, and, thus being a mortgage, or so intended, it is not a will and can not be enforced and is void. It was not a will; it was a conveyance, or mortgage, which Moore, Sr., had no right to execute, and it was not even an execution of the power of appointment contained in the will of Dinah Averitt. It could not be a mortgage until it was recorded, and it was not acknowledged. 87 Ark. 243 does not apply, and does not sustain the chancellor in his findings, nor does 102 Ark. 30 sustain the chancellor, nor 112 *Id.* 527. This case differs from all those cases cited.

Where a testator gives a life estate only, with power to the life-tenant to *convey* the estate *absolutely,* the life-tenant may defeat the estate of the remainderman by

the exercise of the power of disposal during the lifetime. Where the whole will is considered and read together, it was the manifest intention to give the wife a life estate, with the *added* power of disposing of the whole estate during her lifetime, and having exercised this power during her lifetime, the estate vests in those to whom she granted it. 112 Ark. 527. The authorities cited by the chancellor do not sustain him but are to the contrary. The correct rule is stated in 49 Pac. 404; 75 Ky. 1323. The money was *advanced* by Avery and the instrument was executed as a security for repayment, or was a conveyance *in praesenti* of Moore's interest. 56 Am. Dec. 451; *Ib.* 457; 61 Ga. 462; 27 Am. Dec. 590-601; 15 Am. Dec. 48. The estate was not divested by the will of Moore, Sr., as shown by the will itself and the authorities cited.

Philip McNemer, for appellee.

1. The will of Dinah Averitt shows that Harry Moore, Sr., can will this property to whoever he wishes. It is a life-estate in law, with absolute power of disposal by will, and is valid. 112 Ark. 527; 126 *Id.* 216; 87 *Id.* 243; 22 Am. & E. Enc. Law 1133; 129 Mass. 453; 85 *Id.* 363.

2. The intention of Aunt Dinah's will is not violated in Moore, Sr.'s, will to James Avery. 31 Cyc. 1137; 2 Pom., Esq. Jur., par. 920, p. 1655. Appellee rests upon the will as probated and appellants can not question it. Appellants have not offered to return one cent of the $3,500 paid out by appellee, but are still seeking this property, and they are without equity, and the findings of the chancellor are correct upon any theory of the case.

HART, J. (after stating the facts). It is conceded by counsel on both sides that the only issue to be decided is whether or not the property has legally passed to James Avery under the will referred to in the statement of facts. In the first place, it is contended by counsel for the plaintiffs that the will of Dinah Averitt did not give

to Harry Moore the power to dispose of the property in question. Counsel relies upon the cases of *Patty* v. *Goolsby*, 51 Ark. 61, and *Douglass* v. *Sharp*, 52 Ark. 113. We do not think these cases are applicable. There is nothing in either case to indicate that the testator intended to give to the life-tenant the absolute power to dispose of the fee in the estate. Such intention is clearly indicated in the will of Dinah Averitt. In this respect the case is ruled by that of the *Union & Mercantile Trust Co.* v. *Hudson*, 143 Ark. 519. In that case the clause under consideration was as follows:

"*Second.* I give, bequeath and devise all the rest and residue of my estate owned by me at the time of my death, real, personal and mixed, to my mother, Charlotte D. Turner, to have, hold, use and enjoy during her natural life, it being my desire that she shall have the absolute right to sell or incumber it without any restrictions whatever."

The clause in the instant case which we have copied in our statement of facts, and need not repeat here, in plain language gives Harry Moore the power by his last will and testament to dispose of the property in question. It first gives it to him for his natural life, and, in the event of his dying without heirs of his body surviving him, then the property shall go to such persons as Harry Moore by his last will shall direct and appoint.

Having decided that the will of Dinah Averitt gives to Harry Moore the power to dispose of the property, we come to the question of whether or not the will of Harry Moore devised the property to James Avery. We think it does.

It is contended by counsel for plaintiffs that it does not, because the devise shown by the first clause of the will is, "All of my property, real, personal and mixed, * * * I will and devise to my friend and relative James Avery," etc. In construing a will the paramount rule is to arrive at the intention of the testator, and this must be done from the language used, where it is plain and

free from ambiguity. Parol evidence is admissible in this class of cases, to the same extent as in other cases, in aid of the construction of written instruments, when the language used is doubtful, or susceptible of two meanings, and no further. You may show the conditions as they exist at the time of the execution of the will and the surrounding circumstances, so as to place the court in the position of the testator. *Fitzhugh* v. *Hubbard,* 41 Ark. 64, and *Eagle* v. *Oldham,* 116 Ark. 565. In the application of this rule in the instant case, it is proper to consider the conditions as they existed at the date of the execution of the will, and the surrounding circumstances, in order to find out what was intended by the testator. The record shows that Harry Moore had conveyed by deed all of the property devised to him in fee by his grandmother, Dinah Averitt, and that the building on the property in question, which had been devised to him for his natural life by his grandmother, had been destroyed by fire. Harry Moore was ill and infirm, and had no means with which to rebuild on the property or to support himself for the remainder of his life. He thought that he had the power to dispose of the property in question under the will from his grandmother. He offered to make a will in favor of a friend to this property if his friend would advance him money with which to rebuild. His friend declined to make the advance because he was afraid that Harry Moore might change his mind and make another will devising the property to others. Finally, he agreed with James Avery, a friend and relative, that, if the latter would advance him money with which to rebuild, he would execute a will devising the property in question to him in fee simple. This agreement was carried out by the execution of the will in question. The question of the specific enforcement of an agreement of this sort does not arise in this case. The agreement was carried out by the execution of the will, and Harry Moore died without revoking it. Hence the only question for our consideration is whether or not the language of the will, together with

surrounding cimcumstances, is sufficient to devise the property in fee to James Avery. We think so. The testator devised all of his property, real, personal and mixed, to his friend and relative, James Avery. The word "all" was sufficiently broad and comprehensive to include any property to which the testator had the power of disposition. The will of Dinah Averitt gave Harry Moore the absolute power to dispose of the property without any restrictions whatever, and the language used, "all my property," was sufficiently compresensive to include the property in question. In short, if Harry Moore had the power to dispose of the property by will, he did dispose of it by devising all of his property to his friend and relative, James Avery.

There is nothing in the language of the will indicating a contrary intention on his part.

It follows that the decree must be affirmed.

PEARROW v. STATE.

Opinion delivered November 22, 1920.

1. WITNESSES — CROSS-EXAMINATION AS TO COLLATERAL MATTERS.— Where one accused of burglary takes the stand as witness, it was proper to permit the State to cross-examine him about other crimes which he had committed, for the purpose of testing his credibility.
2. CRIMINAL LAW — CONFESSIONS — ADMISSIBILITY.—Findings of the trial court that certain confessions of the defendant were not obtained by threats or promise of reward *held* sustained by the evidence.
3. WITNESSES—ADMISSIONS PROCURED BY THREATS.—Affidavits as to his participation in similar crimes committed a short time previously, procured from accused by threats, should not be allowed to go to the jury, even to test his credibility.
4. CRIMINAL LAW — ADMISSIONS — VOLUNTARY CHARACTER.—Where there was testimony tending to show that certain affidavits made by accused were procured by threats, though the court found, before admitting such affidavits, that they were voluntarily made, it was error to refuse to instruct the jury that such statements were not admissible unless freely and voluntarily made.

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

STATEMENT OF FACTS.

Clyde Pearrow was indicted for the crime of burglary and grand larceny charged to have been committed by breaking into some box cars owned by the Missouri Pacific Railroad Company, and taking therefrom some dress goods, window shades and cigarettes.

Lotis Lockaby was a witness for the State. According to his testimony, Clyde Pearrow, Clark Pearrow, Monroe Price and himself broke into a box car belonging to the Missouri Pacific Railroad Company on its right-of-way near the town of Bald Knob in White County, Arkansas, at about two o'clock at night on the 27th day of December, 1919. They each took four cases of Camel Cigarettes from one box car. They broke into another box car the same night and got eight bolts of dress goods and some window shades. Lockaby sold his cigarettes for $8 a thousand. There are ten thousand cigarettes to the case. He did not know what the defendant did with his part of the cigarettes. Lockaby made a statement to the special agents of the railroad company, in the office of its local attorney in Bald Knob, about the burglary. He was arrested and stayed in jail two nights before he made bond.

Subsequently, at the instance of the defendant and some of his relatives, Lockaby made another written statement under oath in which he stated that the first statement made at the instance of the representatives of the railroad company was obtained by threats and by promises to turn him loose if he would make a statement implicating the defendant and others in the box car burglary. Lockaby stated on the stand that this latter statement made by him was not true, and that he made it to please the defendant and his friends, because they had insisted on him making it.

Another witness for the State testified that the defendant offered to sell him some Camel cigarettes at $5

per thousand soon after the burglary of the box car occurred. He did sell cigarettes to other persons who were in the witness' place of business.

According to the testimony of Ed Burford, he took a trunk full of cigarettes to Little Rock for the defendant soon after the burglary occurred.

Two other witnesses testified that the defendant sold them Camel cigarettes soon after the burglary occurred. One of them stated that the defendant gave him a quantity of cigarettes to sell for him.

The defendant was a witness for himself, and denied that he had anything whatever to do with taking any goods from the box cars of the Missouri Pacific Railroad Company. He denied that he offered cigarettes for sale soon after the burglary occurred. The defendant also testified that the special agents of the railroad company arrested him and carried him to the office of its local attorney in the town of Bald Knob; that they cursed him and threatened in every way to induce him to make a confession that would implicate himself and others in taking the goods from the box cars.

On cross-examination, the defendant admitted that he had signed several statements relative to the alleged burglary, but said that the statements were never read over to him, and that he did not know what was in them; that they were made at the office of the local attorney of the railroad company at the time, and he was threatened to be put in a sweat box if he did not make a confession of the alleged burglary.

Other witnesses for the defendant corroborated his testimony and further stated that he was on the train on his way to Memphis on the night the burglary was committed.

In rebuttal, it was shown by the State that no threats were made against the defendant and the witness Lockaby and others to induce them to make a confession of the burglary, nor was any hope of escape from punishment held out to them as an inducement to confess the crime.

In rebuttal, the State also introduced in evidence several affidavits signed and sworn to by the defendant in which he admitted that he, together with Lotis Lockaby and Bud Sims, broke into a box car of the railroad company at Bald Knob and took out some bolts of domestic, meat and tobacco and carried them home.

In another sworn statement he said that he merely went with Sims and Lockaby and helped them carry away some meat, lard and other goods which they told him they had taken from a box car of the railroad company. In still another affidavit the defendant admitted that he carried some bolts of domestic away which Lockaby and another person had taken from a car in the yards of a railroad company at Bald Knob.

The jury returned a verdict of guilty of grand larceny against the defendant and fixed his punishment at one year in the penitentiary. From the judgment of conviction, he has duly prosecuted an appeal to this court.

Brundidge & Neelly and *G. G. McKay,* for appellant.

1. The court erred in admitting as evidence the affidavits of defendant to the effect that he and other persons had broken into the box car and taken the goods; this was improper as a confession. These statements were not admissible, as they were statements relative to other offenses and not connected with the case at bar. 114 Ark. 481; 107 *Id.* 568; 66 *Id.* 53; 18 L. R. A. (N. S.) 768-791-9; 115 Ark. 390. See, also, 17 Ann. Cases 868; 3 *Id.* 893.

2. The evidence of Jake Smith as to how defendant was treated by the special agents of the railroad company, was competent, and it was error to refuse the testimony.

3. It was error to refuse to permit defendant to testify as to the conduct of State's attorney in the grand jury room.

4. Instruction 6, asked by defendant, was improperly refused. 114 Ark. 472; 17 Ann. Cases 868; 3 *Id.*

893. No. 10 should have been given. 130 Ark. 347; 109 *Id.* 332; 74 *Id.* 397; 1 R. C. L. 572.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. The affidavits were admissible in evidence. 3 Enc. of Ev. 774; 217 S. W. 788; 132 Ark. 531; 133 *Id.* 264; 136 *Id.* 473.

2. What we have stated, *supra,* is applicable also as to the evidence of Jake Smith.

3. What happened in the grand jury room was privileged, as the indictment itself is not even a presumption of defendant's guilt. 122 Ark. 197.

4. The instructions are correct, and stated the law, and there is no error.

HART, J. (after stating the facts). It is earnestly contended by counsel for the defendant that the judgment should be reversed because the trial court admitted in evidence the affidavits of the defendant to the effect that he and other persons had broken into box cars belonging to the railroad company and had taken therefrom goods at other times than that charged in the indictment. Counsel contends that the defendant's connection with these crimes had nothing whatever to do with the crime for which he was being tried, and that its admission as evidence in the case at bar constituted error calling for a reversal of the judgment.

The defendant's declaration that he participated in other similar crimes about the time the crime in question was charged to have been committed was not admitted in evidence by the court to establish the guilt of the defendant in the present case. The affidavits were only admitted in evidence for the purpose of affecting the credibility of the defendant. They related to similar crimes which had been committed at Bald Knob along about the time the crime charged in the indictment was shown to have been committed. The defendant took the stand in his own behalf, and when he does so he is subject to the same rules of evidence and impeachment as

any other witness. To test his credibility, the State had the right on cross-examination to ask him about other crimes which he had committed about the same time and shortly before that time.

It is well settled in this State that a witness may be cross-examined, not only upon the facts involved in the issue, but also upon such collateral matters as may enable the jury to appreciate their fairness and reliability. To accomplish this purpose large latitude has been allowed in cross-examining the witness in collateral matters to enable the jury to comprehend just what sort of a person they are called upon to believe. *Hollingsworth* v. *State,* 53 Ark. 387; *Younger* v. *State,* 100 Ark. 321 and cases cited, and *Jordan* v. *State,* 141 Ark. 504.

Again, it is insisted that the alleged confessions contained in these affidavits were improper because they were obtained by threats from the defendant. The State introduced testimony tending to show that these affidavits of the defendant were not secured by threats, and the finding of the trial court in this regard will not be disturbed on appeal. *Dewein* v. *State,* 114 Ark. 472.

It is next insisted that the court erred in refusing to give instruction No. 6 asked by the defendant, which is as follows: "The jury are instructed that, before any admission or statements made by the defendant can be used against him as evidence, such statements or admissions must have been freely and voluntarily made, and where such statements, if any, are induced by threats of harm, promises of favor, a show of violence or inquisitorial methods are used to extort a confession, then the same is attributed to such influence and can not be used against the defendant."

The Attorney General admits that this instruction is correct in form, but he insists that there was no error in refusing it because it was not a confession of the crime for which the appellant was indicted and convicted. We do not think this makes any difference. The affidavits of the defendants were introduced to affect his credibility as a witness, and if, after he was arrested

for the crime charged in the indictment, he was forced to admit his participation in similar crimes committed a short time before the crime charged in the indictment, such declaration of his guilt of other crimes, if obtained by threats, should not be allowed to go to the jury, even to test the credibility of the defendant who had become a witness for himself. One reason for the exclusion of a confession obtained by threats is that it is a maxim that no one ought to be compelled to accuse himself. Another ground for excluding confessions induced by threats, or by hope of reward, has been called "the fox hunter's reason." This proceeds not only upon the ground that testimony obtained under such circumstances is unreliable, but upon a spirit of fairness to the accused. *Dewein* v. *State,* 114 Ark. 472, and cases cited.

While the declaration of the defendant to the effect that he had participated in similar crimes a short time before the crime charged in the indictment was committed does not constitute a confession of the crime charged in the indictment, still the statements contained in the affidavits of the defendant to the effect that he had committed similar crimes at about the same time affected his credibility as a witness, and therefore should not have been admitted in evidence by the court in rebuttal unless they were voluntarily made. In other words, if the defendant was induced to make the affidavits by threats or by promises of release from the crime charged in the indictment, they were inadmissible even in rebuttal as affecting his credibility, for the same reason that a confession of the crime charged in the indictment under such circumstances would be inadmissible. In each instance the witness would be compelled by threats to give evidence against himself.

The court in admitting the affidavits found that they were voluntarily made and its finding in this regard has evidence legally sufficient to support it and can not be disturbed on appeal. The jury were the judges of the weight to be given to this testimony after it was admitted by the court. The defendant was entitled to an

instruction on this point. The one asked by him was correct and it was error to refuse to give it because the point was not covered in any of the instructions given by the court. The refusal of the court to give the instruction constituted prejudicial error, and for that error the judgment must be reversed and the cause remanded for a new trial.

KELLY HANDLE COMPANY v. SHANKS.

Opinion delivered November 22, 1920.

1. MASTER AND SERVANT—DEGREE OF CARE.—It is the duty of a master to use ordinary care to furnish suitable appliances for the work which it requires its servants to perform.
2. MASTER AND SERVANT — ASSUMED RISK — QUESTION FOR JURY.—Where a mill worker who had been accustomed to operating a ripsaw, but had never operated a cut-off saw, and was injured by a cut-off saw bucking, the question whether he assumed the risk of operating a cut-off saw was for the jury, though there was testimony that the danger was obvious.
3. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—In an action for injuries to a servant, an instruction which in plain terms predicated plaintiff's right to recover on his having exercised due care for his own safety is not objectionable as ignoring the defense of contributory negligence.
4. MASTER AND SERVANT—ASSUMED RISK—INSTRUCTIONS.—Instructions that a servant does not assume any risk arising out of the failure of the master to use ordinary care to provide a reasonably safe place, and that if the servant knew of the unsafe condition of the machinery or place where he was employed, and made no complaint, he assumed the risk therefrom, *held* erroneous in ignoring the principle that the servant assumes patent risks to the same extent as if known by him.
5. APPEAL AND ERROR—PREJUDICIAL ERROR.—Where instructions were erroneous as ignoring issues in the case, and were in conflict with other instructions, the error calls for reversal, since the court can not know that the jury did not follow the erroneous instructions.
6. TRIAL—INSTRUCTIONS.—It was not error to refuse instructions which were either argumentative in form or were covered by other instructions given by the court.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. H. Dudley,* Judge; reversed.

STATEMENT OF FACTS.

Ben Shanks sued the Kelly Handle Company to recover damages for injuries received by him while operating a rip-saw in the handle mill of the company. The evidence adduced by the plaintiff is, substantially, as follows:

The Kelly Handle Company owned and operated a handle mill in the city of Blytheville, Arkansas, and Ben Shanks had been working for it about fifteen months when he was injured. Previous to the day he was injured, Shanks had been operating a block-saw. Timber was brought into the mill in the form of blocks, and it was his duty to take the blocks and shape them into handles to go into lathes. In doing this work, he generally sawed the wood with the grain. Shanks had run lathes and saws before working for the handle company, but he had never operated a cut-off saw until the morning of his injury. The foreman of the mill was his stepfather, and on the morning of the injury he directed Shanks to operate the rip-saw as a cut-off saw. Shanks went to work at the machine about nine o'clock in the morning and continued to operate it until noon. He discovered that there was something wrong with the machine, but he did not know what it was. At noon he took the saw off and filed it, thinking that would make it work better. During the afternoon the saw kept bucking and jumping, but Shanks kept on working, thinking it would get better after a little while. About three o'clock he put a piece of timber into the saw for the purpose of sawing it into wedge blocks. When the timber was placed against the saw, it caused the saw to pinch and buck at the same time. This caused the block to be kicked up. Shanks got hurt because the saw pinched the timber and made it kick back, and this caused Shanks' hand to slip into the saw, and injured it so badly that it had to be cut off. Shanks was twenty-eight years old at the

time, and had worked in various positions in a handle factory since he was twelve years of age. The piece of timber which injured him was green hickory, and the bark was not off of it entirely, and it was slick. This is substantially the testimony of Shanks himself.

It was shown by other witnesses that a cut-off saw is used to cut timber across the grain, and that a rip-saw is used for the purpose of sawing it lengthwise, or cutting with the grain of the timber. In undertaking to use a rip-saw to cut across the grain, there is danger of the saw bucking and letting the operator's hand go into the saw. The reason the saw bucks is because it does not clear its way.

One of the witnesses testified that, during his thirty years' experience in the mill business, he had never before seen a rip-saw used for a cut-off saw. A cut-off saw has a diamond point tooth, and a rip-saw has a hook tooth. It requires less force to push timber to a hook tooth saw than it does with a diamond saw. Pushing too hard on a hook tooth saw makes it pinch. The saw which injured Shanks was attached to a table or frame which was old and shaky and too light for the work it was doing. One end of the table was higher than the other and the table was shaky. The mandrel was fastened into the table upon which the saw was run. The saw was on one end of the mandrel, and the balance wheel was on the other end for a pulley for it to run on. The boxing was loose, and this had a tendency to cause the saw to continually buck and kick the timber back out of it and this would make the saw pinch. It took a good deal of power to press the timber through the saw, and if it had been a cut-off saw it would have fed much easier. The fact that the table was too light and shaky and out of plumb also caused the saw to pinch.

Evidence was adduced by the defendant tending to show no negligence on its part and contributory negligence and assumption of risk on the part of the plaintiff. Other facts will be stated or referred to in the opinion.

The jury returned a verdict for the plaintiff, and

from the judgment rendered the defendant has appealed.

Buck & Lasley, for appellant.

1. It was error to refuse to instruct a verdict for defendant. Every defect in the machinery was patent and defendant assumed the risk clearly. 58 Ark. 130; 82 *Id.* 534; 135 *Id.* 563; 105 *Id.* 437. See, also, 129 *Id.* 96; 123 *Id.* 119; 55 N. E. 724; 56 *Id.* 574. It is clear that appellee assumed the risk as a matter of law. 107 Ark. 534; 82 *Id.* 534; 99 *Id.* 377.

2. The court erred in refusing instructions requested by appellant. 104 Ark. 509; 101 *Id.* 542; 63 *Id.* 177; 56 *Id.* 387; 107 *Id.* 476; 87 *Id.* 324; 96 *Id.* 504; 97 *Id.* 472; 79 *Id.* 81.

3. Appellant's instruction No. 10 should have been given. 90 Ark. 411; 95 *Id.* 560; 100 *Id.* 465; 92 *Id.* 102.

4. No. 11 asked by appellant should have been given and it was error to give the one on the court's own motion as No. 3. It was in conflict with others given. 99 Ark. 385; 83 *Id.* 61; 76 *Id.* 225. And there was no evidence upon which to base them. The failure to instruct appellee was not the proximate cause of the injury. 93 Ark. 153; 107 *Id.* 341. The instructions are conflicting and not harmonious. 83 Ark. 61; 76 *Id.* 226; 74 *Id.* 585.

5. The verdict is excessive and the result of prejudice or passion.

W. W. Farabough, W. M. Hall and *Chas. L. Neelly,* of counsel, for appellant.

Davis, Costen & Harrison, for appellee.

1. A verdict for defendant was properly refused to be instructed. The machine was dangerous, but the danger was not patent, and appellee did not assume the risk. The warning was not sufficient. 115 Ark. 380. Every question presented here has recently been decided by this court against the appellant's contentions. 128 Ark. 586.

2. There is no error in the instructions given, and those refused were covered by those given. The court

properly told the jury what risks were not assumed by appellee. 124 Ark. 588; 128 *Id.* 586. The court's instructions properly declared the law. 81 Ark. 247; 90 *Id.* 476; 128 *Id.* 591; 125 *Id.* 588.

3. The verdict is not excessive. 101 Ark. 376. It is reasonable.

HART, J. (after stating the facts). It is earnestly insisted by counsel for the defendant that the plaintiff knew all about the defects in the machine and that he assumed the risk.

The evidence on the part of the plaintiff tended to show that the table was too light and shaky, and that one end was higher than the other. The witnesses said that this had a tendency to cause the saw to pinch and throw back the wood which was being sawed. There was also a defect in the mandrel which caused the saw to pinch.

Another witness said that he had never seen a rip-saw used for a cut-off saw before. The use of a rip-saw in the place of a cut-off saw had a tendency to make the saw pinch because the teeth in the two kinds of saws were different. A rip-saw is used generally to cut wood with the grain and a cut-off saw is used generally to cut it against the grain.

It was the duty of the defendant to use ordinary care to furnish suitable appliances for the work which it required its servants to perform. *Wilcox* v. *Hebert,* 90 Ark. 145; *St. L. S. W. Ry. Co.* v. *Lewis,* 91 Ark. 343; *Headrick* v. *H. D. Williams Cooperage Co.,* 97 Ark. 553, *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1.

The evidence was sufficient to warrant the jury in finding that the defendant was negligent in this respect, but it is earnestly insisted by counsel for the defendant that the plaintiff, as a matter of law assumed the risk. They point to the fact that the plaintiff was twenty-eight years of age at the time he was injured, and that he had worked in a handle factory in various capacities since he was twelve years of age. He was accustomed to operating a rip-saw and to filing and setting it.

Other witnesses testified that the defective condition of the table and the mandrel was apparent to any one with any experience in operating saws of any kind. Hence they urged that the danger was obvious and patent to the plaintiff, and that he assumed the risk by continuing at work operating the saw.

We do not think that it can be said as a matter of law that the plaintiff assumed the risk. He testified that he knew that the saw pinched and bucked, but that he did not know what caused this. He first thought that it was caused by the saw being too dull. He filed and set the saw at the noon hour in order to remedy this. He had never operated a rip-saw as a cut-off saw before. While he had been accustomed to a rip-saw, it can not be said, as a matter of law, that he knew and appreciated the danger of using a rip-saw for a cut-off saw on the occasion in question.

One witness testified that in all his thirty years' experience in a handle mill he had never seen a rip-saw used before to do the work of a cut-off saw. It was shown that it required more force to operate a rip-saw to cut timber against the grain than it did to operate a cut-off saw. It was also shown that, on account of having different shaped teeth, a rip-saw was likely to pinch when used as a cut-off saw. The fact that the plaintiff tried to remedy the defect in the saw by filing it shows that he did not know what caused the saw to buck and pinch. He had never operated a rip-saw as a cut-off saw, and we think under the circumstances the question of assumed risk was one for the jury. His stepfather had told him to use the saw in question, and the fact that he continued to operate it for two hours after noon could not operate to take the case from the jury. He had attempted to remedy the defect in the saw at noon and failed to do so. It is true it kept pinching and bucking after he went to work with it in the afternoon, but it can not be said that, because he kept on at work for nearly two hours, he, as a matter of law, assumed the risk.

Therefore, the court did not err in submitting the case to the jury.

It is insisted that the court erred in giving instruction No. 3. The error complained of is that the instruction ignored the defense of contributory negligence. We do not deem it necessary to set out the instruction. In plain terms, the instruction predicates the plaintiff's right of recovery upon his having exercised due care for his own safety. If he exercised due care for his own safety, he was not guilty of contributory negligence.

It is also contended that the court erred in giving instructions Nos. 14 and 15, which are as follows:

"14. The servant does not assume any risk arising out of the failure of the master to use ordinary care to provide a reasonably safe place and reasonably safe instruments and appliances with which to work, but only such as are normally and necessarily connected with the employment."

"15. Where a servant knew of the unsafe condition of the machinery with which, and the place where, he was employed to work and made no complaint or request that such condition be remedied, he will be held to have assumed all of the risks of the injury from the operation of said machinery and the place where he was employed, and in this case if you find from the evidence that the plaintiff knew of the unsafe or improper machinery and that he made no complaint concerning the same, your verdict should be for the defendant."

It is urged by counsel for the defendant that instruction No. 14 is erroneous because the servant does not assume the hazards and risks arising out of the failure of the master to furnish a reasonably safe place and reasonably safe appliances with which to work where the servant himself knows the risk and appreciates the danger, or where the risk is patent and obvious.

It is insisted that the defects of the instruction in this respect are cured by instruction No. 15, which immediately follows instruction No. 14. This contention is made in the application of the rule laid down in *St.*

Louis, Iron Mountain & Southern Railway Company v. *Rogers,* 93 Ark. 564, to the effect that where two instructions follow each other and from the language used, or the relation which the instructions bear to each other, it is apparent that they are to be read together and can be read together so as to harmonize with each other, it is our duty to so treat them.

In the application of this rule it is claimed by counsel for the plaintiff that instruction No. 15 cures the defect in No. 14, and that the two instructions should be read in connection with each other, and when so done each supplements and harmonizes the other.

The trouble about this contention is that instruction No. 15 is not itself correct. Instruction No. 15 told the jury in conclusion that, if it should find from the evidence that the plaintiff knew of the unsafe or improper machinery and made no complaint concerning the same, its verdict should be for the defendant. The instruction did not go far enough. An employee is required to notice patent defects in the machinery about which he is employed and is bound to assume the risks thereof to the same extent as if their existence had been within his actual knowledge. *Jones* v. *Malvern Lumber Co.,* 58 Ark. 125, and *Fullerton* v. *Henry Wrape Co.,* 105 Ark. 434.

There was testimony in the present case that the defects in the machine were so obvious as to be apparent to a person of ordinary intelligence, and in such cases the law charges the servant with the knowledge of the danger. The submission of this issue was ignored in both instructions Nos. 14 and 15. The principal contention of the defendant was that the defects in the machine were so obvious that the plaintiff could not have helped seeing them and realizing the danger of continuing at work with the machine without it being repaired. The instructions ignored this issue, and were therefore at variance with the other instructions in the case. The court can not know but that the jury followed these erroneous instructions, and on that account found in favor of the plaintiff.

It follows that the giving of these two instructions constituted prejudicial error, calling for a reversal of the judgment.

Again, it is insisted by counsel for the defendant that the court erred in refusing certain instructions asked by it. We do not deem it necessary to copy these instructions in the opinion and discuss them in detail. Some of them, for instance, were in regard to the burden of proof. The court in its instructions to the jury placed the burden of proof upon the plaintiff, and it was not required to repeat instructions on this point at the request of the defendant. Besides, the instructions for the defendant on this point are argumentative in form, and for that reason should not have been given. So, too, in regard to the instructions asked by the defendant on the question of assumption of risk. Its instructions on this point were either argumentative in form or were covered by the instructions given by the court. It did not constitute error for the court to refuse to repeat instructions on the same point.

For the error in giving instructions Nos. 14 and 15 by the court, the judgment must be reversed and the cause remanded for a new trial.

KNUCKLES v. PRESSLEY.

Opinion delivered November 22, 1920.

1. LANDLORD AND TENANT—BREACH OF CONTRACT—INSTRUCTION.—In an action for breach of a share-cropper's contract, which required the cropper to work for the landlord when not engaged in making the crop, it was error to refuse to instruct the jury that if the cropper refused to work for the landlord in accordance with the contract the landlord would be entitled to damages.
2. LANDLORD AND TENANT—MUTUALITY OF CONTRACT.—A contract which requires a share-cropper to work for the landlord when not working on the crop, and required the landlord to pay him certain wages during the year, is not unilateral.
3. LANDLORD AND TENANT—DAY'S WAGES—CONSTRUCTION.—A contract calling for the employment of a share-cropper at specified daily wages contemplates an ordinary and customary day's work,

and the landlord's demand that he work from 12 to 14 hours a day would be legal excuse for not working for the landlord.

4. JUSTICES OF THE PEACE—JURISDICTION.—Where a defendant in a justice's court counterclaimed unliquidated damages, without asking judgment in any particular sum, and a verdict was rendered for defendant for an amount exceeding $300, the error was cured by the defendant remitting the excess.

5. JUSTICES OF THE PEACE—DISSOLUTION OF ATTACHMENT—JUDGMENT.—On the dissolution of an attachment, it was proper to give judgment for the defendant for the value of the attached property where the plaintiff had sold it.

Appeal from Clay Circuit Court, Eastern District; *R. H. Dudley,* Judge; reversed.

E. G. Ward, for appellant.

1. The court erred in expressing an opinion as to the credibility of the plaintiff when he placed his construction upon the contract in regard to work on farm and at machinery. It was a matter for the jury and not the court to determine the credibility of the witness and the weight of his evidence. 63 Ark. 457; 69 *Id.* 489; 32 L. R. A. 766.

2. The court erred in instructing the jury that this contract was one of employer, and employer only, when upon its face it shows otherwise. The whole contract must be construed together and the intention of the parties thereto ascertained. 108 Ark. 36.

3. The verdict of the jury and judgment are in excess of jurisdiction. The judgment was for more than $300, and a justice has jurisdiction of damages only for $100. 90 Ark. 105; Black on Judgments, § 138. The court erred in striking from the consideration of the jury the element of damages by reason of the defendant's failure and refusal to labor for plaintiff on farm and at machinery, as mentioned in their contract. It was error to refuse instruction No. 1 for plaintiff. This request correctly states the law.

W. E. Spence, for appellee.

1. There was no error in refusing instruction No. 1 for plaintiff. Appellant excepted but he failed to bring

it into his motion for new trial. His objections to the other instructions, 1 to 7, are too general, and can not be considered. No exceptions were saved to the remarks of the court, and none are shown by the bill of exceptions.

2. The judgment is not in excess of the court's jurisdiction. It was not a suit for damages but for compensation due him for the wrongful taking of his property, and the justice had jurisdiction to the extent of $300. 61 Ark. 33; 69 *Id.* 433. There is no question as to the jurisdiction of the court to render judgment for $300.

SMITH, J. The parties to this litigation entered into the following contract:

"*Know All Men by These Presents:*

"That R. B. Knuckles and C. C. Pressley have this day entered into an agreement whereby the said R. B. Knuckles is to furnish the land, seed, team and tools to cultivate about ten acres of cotton and twelve acres of corn, more or less, on his place located in sections 4 and 9 in township 21 north, range 8 east, in Clay County, Arkansas, and the said C. C. Pressley is to cultivate and gather said crop so raised on said land; both corn and cotton is to be divided equally, half and half.

"It is further agreed between the parties hereto that said C. C. Pressley is to work for said R. B. Knuckles, while not working in the crop, as long as he does reasonably fair work, and the said R. B. Knuckles agrees to pay him the sum and price of $1.50 per day for farm work and $2 per day for work at mill or machinery, all during the year 1919, and the said C. C. Pressley agrees to give possession of said property so occupied on the 1st day of January, 1920, unless a new contract for rent is entered into by said parties hereto.

"Witness our hands and seals on this January 28, 1919.

"R. B. Knuckles,
"C. C. Pressley."

The parties disagreed, and litigation resulted, and on October 4, 1919, Knuckles sued out an attachment

against Pressley in the court of a justice of the peace, and claimed damages in the sum of $100 for an alleged breach of the contract by Pressley. An appeal was prosecuted from the judgment of the justice of the peace, and the case was tried in the circuit court before a jury. At this trial each claimed that the other had breached the contract. The court submitted to the jury the questions of fact upon which the attachment was sued out, and the jury found against Knuckles on that issue. Pressley filed no pleading of any kind, but the jury found in his favor for $404. He elected to remit all of said judgment in excess of $300, and the court rendered judgment for that amount, from which is this appeal.

Knuckles testified that Pressley had failed to properly work the crop, or to gather it, and had refused, without right, to work for him on the farm and at the mill when not employed in the crop; but that Pressley had worked at another mill. Pressley assigned several breaches of the contract by Knuckles, and while he admitted that he had refused to work at Knuckles' mill he testified that he refused so to do because Knuckles demanded that he work from twelve to fourteen hours per day. Knuckles gathered and disposed of the crop, and the testimony is conflicting as to the amount of cotton and corn grown and the price received for it.

Knuckles asked only one instruction, and that the court refused to give. The instruction was to the effect that if it was found that Pressley refused to work for Knuckles after a request so to do in accordance with the terms of the contract, Knuckles would be entitled to damages for a breach of the contract. The instruction also stated the measure of damages, and its accuracy as a statement of the law is not questioned. The refusal of the court to give the instruction is defended upon the ground that the court had excluded the testimony upon which this claim of damage was based, and that no objection had been made to that ruling. Counsel is mistaken, however, in this respect. Appellee was being

cross-examined upon this subject, and had just stated that his reason for refusing to work for appellant was that "I told him I would not work for him twelve or fourteen hours per day." Thereupon the court stated that "that item of damage will be stricken from the consideration of the jury," and to that ruling exceptions were duly saved.

It is insisted that the judgment in appellee's favor is void, inasmuch as the verdict assessing the damages exceeded $300.

We think the instruction requested by appellant, or one of similar purport, should have been given. In other words, the court should not have excluded the question of damages on account of appellee's alleged failure to work for appellant on his farm or at his mill. The contract was not unilateral. The contract required Knuckles to give Pressley work "all during the year 1919" at the prices stated. It was contemplated that Pressley should devote his time to the crop when it needed attention, and that when not so employed he should work for Knuckles either on the farm or at the mill, and that Knuckles should furnish employment under these conditions all during the year 1919. Of course, the provision of the contract fixing the compensation contemplated an ordinary and customary day's work; and if Knuckles demanded that Pressley should labor from twelve to fourteen hours per day to earn a day's pay, this would have afforded Pressley a legal excuse for not working for Knuckles. But that was one of the questions of fact in the case, and the court should not have excluded the testimony, and should have given the requested instruction.

We think there was no failure of jurisdiction. Pressley filed no written pleadings, and had not asked judgment in any particular sum. The jury evidently gave to the testimony in appellee's behalf its highest probative value, as is evidenced by the verdict returned; but the damages claimed were unliquidated and Pressley asked no judgment for an amount in excess of the justice's jurisdiction, as is evidenced by the fact that he

remitted the sum in excess of that jurisdiction. *Hunton* v. *Luce,* 60 Ark. 146.

It was proper, on the dissolution of the attachment, to give judgment for the value of Pressley's interest in the attached property, as Knuckles had sold it. *Fortenberry* v. *Gaunt,* 69 Ark. 433; *Norman* v. *Fife,* 61 Ark. 333.

As the judgment asked by Pressley, and as rendered by the court, does not exceed the jurisdiction of the justice of the peace we would affirm the judgment but for the error above indicated. For that error the judgment is reversed.

CARTER *v.* RANDOLPH COUNTY.

Opinion delivered November 22, 1920.

HIGHWAYS—OPENING AND CHANGING ROADS—APPEALS.—Under Public Acts 1911, p. 364, authorizing the county court to open new roads and change old ones, and providing that landowners may appeal "as now provided by law from judgments of the county court," a landowner may appeal within six months as provided by Kirby's Digest, § 1487, which is the general statute regulating appeals from the county court, and is not required to appeal within the time specified in § 3006, the statute relating to road proceedings under the eminent domain statute.

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

Jerry Mulloy and *E. G. Schoonover,* for appellants.

The sole question is whether appellants, in appealing from the awards of damages in the county court, should have proceeded under § 3006, Kirby's Digest, instead of § 1487 *Id.* The right of appeal from county courts is reserved in our Constitution, and the Legislature is without authority except to designate reasonably the manner in which such right may be exercised. Const., art. 7, §§ 14, 33; 90 *Id.* 219; 118 S. W. 1010; 204 *Id.* 746. A consideration of act 422, Acts 1911, is useful only for the purpose of ascertaining what method has been outlined for taking appeals under our statutes. Kirby's

Digest, § 1487, should govern, and the court erred in dismissing the appeal. The general statute applies. 68 Ark 130; 56 S. W. 779. Section 3006 does not apply. 90 Ark. 219; 204 S. W. 746; 219 *Id.* 314; 203 *Id.* 260. It was error to dismiss the appeal.

SMITH, J. Proceeding under the authority of act 422 of the Public Acts of 1911 (Public Acts 1911, page 364), the county court of Randolph County made an order widening and extending a certain public road in that county, thereby taking certain lands, for the purposes of the road, belonging to appellants. The county court made an order assessing the damages, and within six months thereafter, but after the lapse of more than ten days, appellants attempted to appeal. The circuit court dismissed the proceedings upon the ground that the appeal should have been taken within ten days after the rendition of the judgment in the county court, and this appeal is from that order.

It is obvious, from the facts stated, that the question to be decided is, whether appellants, in perfecting their appeal to the circuit court, should have proceeded under the provisions of section 3006 of Kirby's Digest, instead of section 1487 of Kirby's Digest.

The last mentioned section is the general statute governing appeals from the final orders and judgments of the county courts, and is the applicable statute in any case where the proceeding is had under a statute which does not fix a different time within which appeals shall be prosecuted. *McMahan* v. *Ruble,* 135 Ark. 85; *Huddleston* v. *Coffman,* 90 Ark. 219; *Horn* v. *Baker,* 140 Ark. 173.

Section 3006 is the statute which prescribes the time and manner of taking appeals from final orders of the county court vacating, altering or reviewing any county road where the proceeding was had under the eminent domain statute.

Act 422 of the Acts of 1911 by its express terms amends section 7328 of Kirby's Digest, which, as was stated in *Sloan* v. *Lawrence County,* 134 Ark. 125, was

a section of the act of May 8, 1899 (Acts 1899, p. 347), providing the method and procedure for working public roads where a public tax had been voted and levied pursuant to the terms of Amendment No. 3 of the Constitution.

In the case of *Sloan* v. *Lawrence County, supra,* we said that this act 422 is an independent one on its face, and confers authority for the procedure therein authorized without reference to any other law on the subject. It confers power on the county court to open new roads and to change old ones, and provides a procedure for landowners who refuse to donate the right-of-way for the proposed roads and are aggrieved at the award of damages made in the county court. The act provides that if the owner "is not satisfied with the amount allowed him by the court, he shall have a right of appeal as now provided by law from judgments of the county court. * * *"

We think the right of appeal here referred to was the general right of appeal conferred by section 1487 of Kirby's Digest; and as the appeal in the instant case was taken within the time and manner provided by section 1487, it follows that the court was in error in dismissing the appeal. That order will, therefore, be reversed and the cause will be remanded with directions to reinstate the appeal and to hear same on its merits.

COX v. FISHER.

Opinion delivered November 22, 1920.

LANDLORD AND TENANT—QUANTITY OF LAND—USE OF "APPROXIMATELY." —In a lease of the cleared land in three sections, "approximately 650 acres," the use of the word "approximately" implies that the acreage has been estimated, and is merely descriptive of the property conveyed, and not a covenant as to quantity; but its use will not prevent the courts from granting relief if the difference is acreage is so great as to amount to a gross mistake, where the contract of conveyance was procured by misrepresentation, fraud or deceit.

Appeal from Mississippi Circuit Court, Osceola District; *R. H. Dudley,* Judge; affirmed.

W. J. Driver, for appellants.

1. The representation of the acreage in the written contract was in material excess of the actual acreage and was binding on the lessor and assignor; and,

2. The court erred in directing a verdict for defendants. 19 Ark. 102; 61 *Id.* 120; 100 *Id.* 280; 101 *Id.* 95; 24 Cyc. 918; 43 Ark. 462; 95 *Id.* 150; 100 *Id.* 280; 147 Mass. 403. When the testimony is all considered, no real issue of fact is involved, but the case turns on the recital of acreage in the contract, which is conceded to be an amount in material excess of the actual acreage, and, as a matter of law, a verdict should have been directed for appellants.

J. T. Coston, for appellees.

1. The words of the contract between Fisher and Equinn, "approximately 650 acres of cleared land," do not constitute a covenant that there were 650 acres of cleared lands, and therefore defendants were not liable.

2. But, if they do, it is not a covenant that runs with the land, and Fisher, plaintiffs' remote lessor, is not liable to the plaintiffs. Nor is Equinn liable, because his contract with plaintiffs contains no such language, but he merely quitclaimed "all his right, title and interest" under his contract with Fisher.

3. Defendants are not liable further, for the reason that Equinn told plaintiffs that the acreage was not guaranteed to him and that he would not guarantee the acreage to them, and they had *no right to rely* on the recital in the contract between Fisher and Equinn. To entitle one to recover for fraud, one must not only have *relied* on a false representation, but must have had the right to rely upon it. The cases cited for appellant are not in point, because it is not shown that any representations were made to plaintiffs by either Fisher or Equinn. On the contrary, the uncontradicted evidence shows that Equinn, who dealt with plaintiffs, absolutely

refused to make any representations as to the acreage. The contract was for a lump sum. At no time was it leased for so much per acre. The acreage was not warranted. 141 S. W. 671. There was no warranty as to quantity. 129 S. W. 788. These two cases ought to end this suit. 95 Ark. 133. The covenant did not run with the land. 2 Devlin on Real Estate, 1761-2; 130 S. W. 557-8.

4. Equinn only quitclaimed to plaintiffs, and was not liable. 59 Ark. 303. The recital of acreage was not a warranty, and plaintiffs did not rely on it, nor had they a right to do so. 47 Ark. 165; 30 *Id.* 373; 65 *Id.* 940.

SMITH, J. On September 22, 1917, Fisher and Equinn entered into a written contract, whereby Fisher leased to Equinn a certain farm for an annual rental of eight thousand dollars for a period of three years, dependent, in a measure, on the price of middling cotton at Memphis, Tennessee. The leased lands were described as follows: "All of the cleared land owned by party of the first part on the following sections, towit: Sections 29, 32 and 33, all in township 13 north, range 12 east, approximately 650 acres of cleared land."

Thereafter Equinn assigned the lease to Cox and Turnage. After taking possession of the land, Cox and Turnage caused it to be surveyed, and the survey disclosed there were only 578.26 acres of cleared land. Cox and Turnage then sued Equinn as immediate lessor and Fisher as remote lessor for misrepresenting the quantity of land embraced in the lease contract. It is not claimed that either Fisher or Equinn made any oral representation as to the quantity of land in cultivation. Upon the contrary, the undisputed testimony shows that during the negotiations leading up to the assignment of the lease Equinn was asked to guarantee the acreage, and, if he would guarantee the acreage, and answered that he would not guarantee anything; and it is not contended that he made any representation in regard to the acreage. There is no circumstance in the case to make an issue of fraud or deception. The cause of action is based

solely on the recital in the lease that there were approximately 650 acres of cleared land, when in truth and in fact there were only 578.26. A verdict was directed for the defendants, and the plaintiffs have appealed.

The action of the court is defended upon several grounds: (a) that the words in the contract do not constitute a covenant; (b) that, if there was a covenant, it was not one running with the land; (c) that in the assignment Equinn quit-claimed to the plaintiffs only "all his right, title or interest" under his contract with Fisher; and (d) that there was no fraud or misrepresentation, as Equinn made no representation and declined to give any guaranty.

In the early case of *Harold* v. *Hill,* 19 Ark. 103, this court said that the words, "more or less," when employed in a deed conveying lands, are descriptive of the premises to be conveyed, rather than a covenant as to quantity; yet, if there was misrepresentation, or fraud, or deceit, as to the acreage to be conveyed, their employment would not prevent courts from granting relief, if the difference in acreage was so considerable as to amount to gross mistake.

The words, "more or less," or the word, "approximately," employed in the instant case, or other words of similar import, imply that the acreage has been estimated and are merely descriptive of the property conveyed, and no covenant as to quantity exists because of their use, but their use will not prevent courts from granting relief, if the difference in acreage is so great as to amount to gross mistake, where the contract of conveyance was procured by misrepresentation, fraud or deceit.

In the case of *Solmson* v. *Deese,* 142 Ark. 189, the grantor did not know that the representation as to acreage was false. Yet we said it was not essential that that fact be shown, as the difference between the acreage stated in the deed and the actual acreage was so great as to constitute gross mistake; but the grantor there had in fact made representations as to acreage.

Counsel for appellants cite the cases of *Harold* v. *Hill, supra; Drake* v. *Eubanks,* 61 Ark. 120; *Pollock* v. *Steinke,* 100 Ark. 228; *Brown* v. *Lemay,* 101 Ark. 95, as authority for an action for false representation, even though words of approximation or estimate were employed in the deed. To these might be added the cases of *Joseph* v. *Baker,* 95 Ark. 150; *Solmson* v. *Deese, supra; Neely* v. *Rembert,* 71 Ark. 91; *Carroll* v. *Jacks,* 43 Ark. 462; *Haynes* v. *Harper,* 25 Ark. 541; and perhaps others. But in all those cases there was the contention that a representation in regard to acreage had been made which proved to be false. Here there was, not only no representation, but an express refusal to make representation. The lease contract must, therefore, be construed as one not by the acre, but in gross, in which the assignees, or sub-tenants, took only the actual acreage, whether much or little, without recourse on either the landlord or the immediate tenant—their assignor. *Brown* v. *Lemay, supra; Ryan* v. *Batchelor,* 95 Ark. 375.

As what we have just said disposes of the case, it is unnecessary to consider the other propositions upon which counsel for appellees seek to uphold the judgment.

Judgment affirmed.

WM. R. MOORE DRY GOODS COMPANY *v.* FORD.

Opinion delivered November 22, 1920.

1. PLEADING—DEFECTIVE STATEMENT—REMEDY.—It is no ground for demurrer that a cause of action is defectively stated; the remedy therefor being a motion to make more definite and certain.
2. CREDITOR'S SUIT—DEMURRER.—A complaint seeking to subject to plaintiff's judgments property which the judgment-debtor is alleged to have fraudulently conveyed to his wife in fraud of creditors is not demurrable for failure to state what the property is and how it was acquired.
3. BANKRUPTCY—DISCHARGE OF PARTNERSHIP.—A discharge in bankruptcy of a partnership in which the individual members are not adjudicated bankrupts has no effect upon the individual liability of such members.

4. CREDITOR'S SUIT—UNCOVERING PERSONALTY.—A creditor's bill may be brought to uncover personal as well as real property.
5. CREDITOR'S SUIT—PARTIES.—A creditor's bill may be brought by a creditor for the benefit of himself and all other creditors, or all the creditors may join in a single suit.

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

King & Whatley, for appellants.

The chancery court erred in sustaining the demurrer and redering judgment against appellants. The appellants stated a cause of action and it was error to sustain the demurrer. Courts of equity can tell molasses from whiskey and can see fraud. The individual members of the firm of Ford & Wheeler did not obtain a discharge in bankruptcy from their individual debts and were liable for their individual debts.

SMITH, J. Appellants filed in the Lafayette Chancery Court the following complaint:

"In the Lafayette Chancery Court. Wm. R. Moore Dry Goods Company and Stephen Putney Shoe Company, Plaintiffs, v. W. H. Ford and Mrs. Alta M. Ford, Defendants. Nos. 1614, 1635.

"COMPLAINT.

"1. The plaintiff, Wm. R. Moore Dry Goods Company, a corporation organized under the laws of Tennessee, doing business at Memphis, Tennessee, states that on the 28th day of April, 1916, it filed a suit in this court against the defendant, No. 1614, to subject their property to a judgment in the Lafayette Circuit Court, rendered on February 22, 1916, for $727.24, bearing six per cent. interest from date, with costs against W. H. Ford, one of the defendants. Said judgment is in Record Book 15 of the circuit court records of Lafayette County, Arkansas, on page 188.

"2. On said 28th day of April, 1916, Stephen Putney Shoe Company, a corporation doing business at Richmond, Va., filed suit in this court against the defendants, numbered 1635, to subject their property to a

judgment of the Lafayette Circuit Court for $173.20, rendered on February 22, 1916, bearing six per cent. interest from date, with costs against W. H. Ford and H. L. Wheeler. Said judgment is in Record Book 15, page 187, of the circuit court records of Lafayette County, Arkansas.

"3. At a subsequent term of this Honorable Court, the said two cases were consolidated and continued from time to time, until November 20, 1918, when said suit was by this Honorable Court dismissed without prejudice.

"4. Said judgments have not been settled as promised by W. H. Ford, and the lien has been revived.

"5. Plaintiffs state that all the property owned and controlled by Mrs. Alta H. Ford came to her through her husband, W. H. Ford.

"6. On or about January 1, 1915, W. H. Ford was in the mercantile business in Lewisville, Arkansas. He had several thousand dollars worth of goods; he took in, as an equal partner, H. L. Wheeler, who put in $500 cash, and continued the business under the firm name of Ford & Wheeler until July, when the firm filed a petition in voluntary bankruptcy. The bankrupt firm of Ford & Wheeler was declared bankrupt, and the first meeting of the creditors was held on July 6, 1915. That part of the stock of goods that remained in the store was advertised and sold by the trustee in bankruptcy. Neither of the firm filed individual petition nor did either of them ask for a discharge, and it was afterward disclosed that a large portion of the goods was taken out of the stock of goods and disposed of by the bankrupts, in fraud of creditors.

"7. That W. H. Ford has been doing business in his wife's name, since his petition in bankruptcy, to defraud the plaintiffs and avoid payments of said judgments.

"8. That statements were made to obtain credit with A. M. Ford, as owner of real estate, to Stephen Putney Shoe Company, to obtain credit for Ford & Wheeler, and, upon the strength of said statements, Ford

& Wheeler obtained credit from Stephen Putney Shoe Company, for which judgment in its favor was obtained.

"Therefore, this suit being brought within twelve months from the dismissal, or nonsuit, of the said consolidated causes, plaintiffs pray this Honorable Court, after hearing the evidence, to render a decree subjecting the property of both the defendants to satisfy said judgments, and all other proper and adequate relief."

A demurrer was filed to this complaint on the ground, first, that there was a misjoinder of parties plaintiff; second, because no facts sufficient to state a cause of action are set out therein. The demurrer was sustained, and, as plaintiff refused to plead further, the complaint was dismissed, and this appeal is from that decree.

Disposing of the grounds of demurrer in reverse order, it may be said that it is no ground for demurrer that a cause of action is defectively stated, if one is stated at all. The appropriate motion in such case is one to make definite and certain. We said, in the case of *Citizens Bank of Mammoth Spring* v. *Commercial National Bank,* 107 Ark. 142, that, although the material allegations of a complaint are ambiguous and uncertain, if the inference may be drawn therefrom by a fair intendment that facts exist sufficient to constitute a cause of action, the defect must be corrected by motion to make more definite and certain, and not by demurrer. We have many cases to that effect.

We gather from the allegations of the complaint, that the plaintiffs had obtained judgments at law, which they could not enforce against W. H. Ford and H. L. Wheeler. That the firm of Ford & Wheeler obtained a discharge in bankruptcy, but the individual members thereof did not. That Mrs. Ford, the wife of W. H. Ford, owns and controls the property which came to her through her husband, and that she had acquired this property in fraud of creditors. The complaint does not state specifically what this property was, nor how it was acquired; but these were allegations to have been reached by motion to make definite and certain.

The complaint contains the affirmative allegation that individual partners composing the firm of Ford & Wheeler did not obtain a discharge in bankruptcy. There appears to be a conflict in the authorities as to the effect of the discharge of a partnership on the liability of the individual partners. A recent case which reviews the authorities on the subject is that of *Horner* v. *Hamner,* 249 Fed. 134, decided by the Court of Appeals of the Fourth Circuit. Among other cases there cited is that of *Francis* v. *McNeal,* 228 U. S. 695. The Court of Appeals held that the discharge of a partnership has no effect upon the individual liability of the partners. It was there stated that "it has been uniformly held that, in a proceeding by a partnership, in which the individuals are not adjudicated bankrupt, they are not entitled to a discharge." See, also, *Armstrong* v. *Norris,* 247 Fed. 253.

The suit was, therefore, in the nature of a creditor's bill to uncover property, and such a suit may be brought to uncover personal property as well as real property. *Bob, alias Robert Crow* v. *Powers,* 19 Ark. 442; 8 R. C. L., page 6; 15 C. J., page 1401. See, also, cases in note to the case of *Harris* v. *Beasley,* 32 A. & E. Ann. Cas. 949.

If the suit was in the nature of a creditor's bill, it was not improper for more than one creditor to sue. A creditor may sue for the benefit of himself and all other creditors, or all the creditors may join in a single suit. There was, therefore, no misjoinder of parties plaintiff.

It follows, therefore, that the demurrer should not have been sustained, and the decree dismissing the complaint will be reversed, and the cause will be remanded with directions to treat the demurrer as a motion to make the complaint more specific and to require of plaintiffs that this be done.

MCCULLOCH, C. J. (dissenting). I fail to discover a single allegation of the complaint which constitutes a cause of action against the defendant, Alta M. Ford. It is not an instance of imperfect or indefinite statement of a cause of action. The prayer of the complaint is that a

decree be rendered "subjecting the property of both the defendants to satisfy said judgments," but no property is described in the complaint or even mentioned except in the vague statements in paragraph 5 that "all of the property owned and controlled by Mrs. Alta M. Ford came to her through her husband." There is no allegation as to how or when or under what circumstances property came to Mrs. Ford from her husband nor what property so came to her. The allegation in paragraph 7 that "W. H. Ford has been doing business in his wife's name since his petition in bankruptcy to defraud the plaintiffs and avoid payment of said judgments," amounts to nothing at all in the absence of statements of other facts essential to a cause of action. No cause of action is stated even against W. H. Ford except for recovery of judgment at law on the former judgment against him.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. ROGERS.

Opinion delivered November 22, 1920.

1. RAILROADS—FEDERAL CONTROL—PARTIES.—So much of General Order No. 50 of the Director General of Railroads as required that actions for damage to property thorugh the negligent operation of railroads during Federal control should be brought against the Director General, *and not otherwise*, was void as in conflict with the Federal Control Act of March 21, 1918, providing that such suits may be brought against the carrier.
2. RAILROADS—RECOVERY OF PENALTY DURING FEDERAL CONTROL.—Under the Federal Control Act, subjecting carriers during Federal control to all loss and liability of common carriers existing before the passage of the act, unless inconsistent with the Federal Control Act, or other applicable act, or some order of the President, it was not error to render judgment against the Director General for the penalty and attorney's fee prescribed by Kirby's Digest, § 6774, as amended by Acts 1907, p. 144, for failure to post stock killed, wounded or injured by railroad trains.
3. APPEAL AND ERROR—PRESUMPTION AS TO OMITTED ALLEGATIONS.—Where a case before the Supreme Court brings up merely the pleadings and judgment, it will be presumed, in favor of the judgment, that defects in the allegations of the complaint which would have been supplied by the proof were thus supplied.

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

James B. McDonough, for appellants.

1. It was error to render judgment. 216 S. W. 3 is not overlooked. The train was operated by the Director General of Railways under the Federal Control Act and the order of the President of the United States. The operation of the train was by the supreme governing power of the Nation, and all State regulations and rules in conflict therewith fall. *N. Pac. Ry.* v. *N. Dakota,* 250 U. S. 135; 247 U. S. 3; 174 N. W. 605; 218 S. W. 912; 219 *Id.* 245, 252; 263 Fed. 538; 177 N. W. 29; 260 Fed. 280; 258 *Id.* 945; 256 *Id.* 549, 361; 254 Fed. 880; 257 *Id.* 243; 264 *Id.* 947, 1005. See, also, 175 N. Y. S. 84; 101 S. E. 376; 175 N. W. 580; 102 S. E. 376; 175 N. W. 580; 102 S. E. 532; 253 Fed. 45.

2. Plaintiff was not entitled to a judgment for the penalty against the Director General or the corporation. 216 S. W. 3; 92 S. W. 191; 162 Fed. 803; 90 N. Y. 762; 72 Vt. 55; 78 Kan. 600. The allegations of the complaint are not sufficient to authorize a judgment for the penalty. Act 61, Acts 1907, p. 141, amending Kirby's Digest, § 6774. No notice was posted, as required by law, in writing, and under act 61, Acts 1907, the judgment for penalty and attorney's fee must be reversed.

Lake & Lake, for appellee.

1. The company was liable and the court properly rendered judgment against it. 216 S. W. 3. That case really controls every point in controversy. See, also, 172 N. W. 918, 841; 81 So. Rep. 417; 82 *Id.* 286; 216 S. W. 781; 255 Fed. 850; 202 S. W. 878-9; 106 Atl. Rep. 587; 174 N. Y. Supp. 682; 175 *Id.* 84; 254 Fed. 875; 257 Fed. 75-7; 258 *Id.* 952; 173 N. W. 701; 258 Fed. 945; 260 *Id.* 280; 259 *Id.* 361; 256 *Id.* 549.

2. The plaintiff was entitled to the penalty. 202 S. W. 878. Under act 61 the penalty follows.

3. The allegations of the complaint are sufficient to support a judgment for the penalty. 130 Ark. 378. If

the complaint was insufficient, the proper remedy was a demurrer. An objection like this can not be first made on appeal; it is too late. There was no bill of exceptions in this case. 126 Ark. 118; 37 *Id.* 528; 26 *Id.* 647.

HUMPHREYS, J. This suit was instituted by appellee against appellants in the Sevier Circuit Court to recover double damages and a reasonable attorney's fee, under the provisions of act 61, Acts of 1907, amending section 6774 of Kirby's Digest, for killing two mules on the 12th day of November, 1918, through the negligent operation of a passenger train. The trial of the cause resulted in the rendition of a judgment against both appellants for the double value of the animals and an attorney's fee of $150. An appeal has been prosecuted to this court to test the validity of the judgment on the recitals in the record without the aid of a motion for a new trial or a bill of exceptions.

It is first insisted that error was committed in rendering judgment against appellant, Kansas City Southern Railway Company, because the train was being operated by the Director General under the Federal Control Act and order of the President of the United States at the time the mules were killed. The date of the Federal Control Act was March 21, 1918. The date of order No. 50, issued by the Director General of Railroads, pursuant to the proclamation of the President of the United States in relation to the institution of suit against the Director General, was October 28, 1918. The Federal Control Act authorized the institution of suits of this character in courts of law or equity against the carrier during the period of Federal control, notwithstanding the fact that the railroad property was being operated by the United States Government. *Mo. Pac. Rd. Co.* v. *Ault,* 140 Ark. 572. It is contended, however, that the judgment against the carrier is in conflict with order No. 50, promulgated by the Director General pursuant to the order of the President of the United States, because the order provided that suits for damage to prop-

erty through the negligent operation of railroads during Federal control should be brought against the Director General, and not otherwise. This part of order No. 50 must be regarded as void because the President and Director General were without authority to abrogate the express provisions of the Federal Control Act with reference to the institution of suits of this character against carriers. *Lavelle* v. *Northern Pacific Railroad Co.* (Minn.), 172 N. W. 918. The two grounds aforesaid, urged as invalidating the judgment against the carrier corporation, were determined adversely to the contention of appellants in the case of *Hines* v. *Mauldin, ante,* p. 170.

It is also insisted by appellants that it was error to render a judgment against either the Director General or the carrier corporation for a penalty. The insistence is that act 61, Acts 1907, amending section 6774 of Kirby's Digest, under which judgment was obtained, did not provide for a penalty against the Director General, and that the carrier corporation was exempt from the penalty because it was not operating the train at the time the mules were killed. So far as suing and being sued is concerned, our construction of the Federal Control Act is that it did not change the status of the railroads. It was said in the case of *Mo. Pac. Rd. Co.* v. *Ault, supra,* that "insofar as suing and being sued is concerned, the railroad occupied exactly the same status after being taken over by the government as before." A careful examination of the Federal Control Act reveals that no exceptions were made therein exempting railroads during Federal control from the provisions of penalty statutes. On the contrary, section 10 of the Federal Control Act subjected carriers during Federal control to all laws and liabilities of common carriers existing before the passage of the act, unless such laws or liabilities are inconsistent with the Federal Control Act or some applicable act or some order of the President. There is no inconsistency between act 61, Acts 1907, amending section 6774 of Kirby's Digest, and the Federal Control

Act, or any other applicable act or any valid order of the President.

Lastly, it is insisted that the allegations of the complaint are insufficient to support a judgment for double damages and an attorney's fee, because the complaint omitted to allege a failure by appellants to post the stock, and because the complaint omitted to specify the kind of notice appellee served on appellants. It is unnecessary to discuss whether material defects exist in the complaint, as such defects, if existing, may have been supplied in the course of the trial by the proof. If thus supplied, it was proper at the conclusion of the evidence to treat the complaint as amended to conform to the proof and to render judgment accordingly. Every reasonable presumption must be indulged in favor of the validity of the judgment as the case is before us on the recitals in the record, and not before us on a bill of exceptions and motion for a new trial.

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

O'KANE v. McCUEN.

Opinion delivered November 22, 1920.

LANDLORD AND TENANT—CONSTRUCTION OF LEASE.—Where a lessor rented land for four years, the lease stipulating that the lessee agrees to pay the lessor $7 per acre "for each year," provided that after the first year the lessee shall have the option of re-renting and paying the customary cash price for the land, the option was for the lessee's benefit, and where it was not exercised by him, the rental of $7 per acre prevailed during the entire term.

Appeal from Logan Circuit Court, Northern District; *James Cochran*, Judge; affirmed.

J. D. Benson, for appellant.

1. The court erred in granting a new trial because it changed its views of the construction to be placed upon the contract, and its *last* construction was error. The

only instruction given was erroneous. The contract is not skilfully drawn and has some seeming contradictions or ambiguities, *but the intention of the parties is clear,* and, in arriving at the intention of the parties, all parts of the contract must be considered, and its terms and provisions must be read and considered in the light of all other parts. 99 Ark. 112; 93 *Id.* 493; 96 *Id.* 320; 94 *Id.* 461; 13 C. J. 525.

2. The contract must so be construed, if possible, *that all its terms* may take effect. 101 Ark. 22; 149 S. W. 518; 18 Ark. 65; 13 C. J. 525. No word in a contract should be treated as surplusage and disregarded if any meaning which is reasonable and consistent with the other parts can be given it. The intention of the parties shall be effectuated. 94 Ark. 461; 28 *Id.* 282. It is clear from the testimony that both parties understood that after the year 1915 the lessee was to pay the customary rent on similar land whether it was higher or lower than $7. Where there is nothing to the contrary in the language of the contract the parties may by mutual consent interpret ambiguous provisions for themselves, and the court must enforce the contract according to that interpretation. 71 So. Rep. 443; 13 C. J. 542, 785. Where two clauses are inconsistent and conflicting, they must be so construed to give effect to the intention of the parties as collected from the whole instrument. 84 Ark. 431. See, also, 53 *Id.* 58; 23 *Id.* 582; 9 Cyc. 579, 587.

3. There was no error in the trial of the case and it was error to grant a new trial. The proof shows that the customary rents for 1916 and 1917 was $7 per acre, and that was the rent paid for those years, but the proof abundantly shows that rents were $10 per acre for 1918, and the judgment should be reversed and judgment entered here on the verdict of the jury.

Robert J. White, for appellee.

The contract admits no other construction than that McCuen had the exclusive right to change the amount of rents under the contract and had the right to

hold the land for the entire term of the lease or to refuse to do so as he saw fit. The acceptance of $7 rent for 1916 and 1917 estops O'Kane from claiming more for the year 1918. Appellee was certainly entitled to notice if the rent was to be increased to more than $7. The court's action in sustaining the motion for a new trial had the effect of a peremptory instruction for defendant. The contract admits of no other construction than that McCuen alone has the exclusive right to change the amount of rents, and he had the right to hold the land for the entire term of the lease or refuse as he saw fit, and the court below put the proper construction on the contract which was the one followed by the parties in their dealings during the entire life of the lease. 185 S. W. 825; 234 Fed. 448; C. C. A 196; 105 S. W. 972; 116 N. E. 971. See, also, 172 Mass. 23; 109 N. E. 730; 29 *Id.* 623; 61 Ark. 380. Putting the most favorable view for appellant possible, the contract was a lease from year to year. 61 Ark. 380. A notice to quit is necessary to determine a periodical tenancy. Gear on Landlord and Ten., p. 85, § 32; 2 Vroom 133; 70 Ark. 355; 65 *Id.* 471; 169 Pac. 896. No matter what ground the court sustained the motion for new trial upon appellant has sustained no injury because he could not recover under any phase of the case.

HUMPHREYS, J. This suit was instituted by appellant against appellee to recover an additional $3 per acre on 492 acres in McLean's Bottom in Logan County, under a rental contract entered into between appellant and appellee on the 4th day of November, 1914.

Appellee filed an answer, pleading payment in full of all rents due under the contract, and denying that he owed appellant an additional $3 per acre upon said land for the year 1918.

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 in favor of appellant for $1,282.85.

A motion for a new trial was filed, and, upon hearing, sustained. The judgment was thereupon set aside and the complaint dismissed on the ground that appellant was not entitled to recover on the rental contract. From the judgment dismissing the complaint, an appeal has been duly prosecuted to this court.

The undisputed facts disclosed that appellee entered into possession of the land described in the rental contract and paid appellant $7 an acre therefor as rental for the years 1915, 1916 and 1917, and that for those years the appellant accepted that amount in full settlement of rents due thereon; that, during the year 1918, appellee occupied the premises and advanced appellant $2,600 on rents for that year; that, in August, 1918, he rented the lands for the year 1919 upon the basis of one-fourth of the cotton to be raised and twelve bushels of corn per acre on that portion of the land to be planted in corn; that, on the first Sunday in January, 1919, the parties met for a final settlement of the rentals due for 1918. At that time appellant contended under the provisions of the contract that he was entitled to $10 an acre for the year 1918, and appellee contended that he was responsible under the terms of the contract for only $7 per acre. No settlement was reached between them, and their disagreement resulted in a suit by appellant against appellee for the balance due on the basis of $10 per acre. Appellee tendered and deposited in court the amount of $7 per acre. The controversy therefore involves the question of whether appellee is indebted to appellant, under the terms of the contract, for any amount in excess of $7 per acre. The evidence tended strongly to show that the rental value of the lands in question for the year 1918 was $10 per acre. The circuit court construed the contract to mean that appellant had agreed to take, and appellee to pay, $7 per acre for the use of the land for the year 1918. Was this interpretation correct? In order to determine the question, it is only necessary to set out the following paragraphs of the contract:

1. "The party of the first part (appellant) has this day rented or leased to the party of the second part (appellee), for a period of four years, unless sooner terminated, and under the terms and conditions hereinafter mentioned and set forth, the following described land, towit: all the land of the party of the first part known as the lower farm or the Almond place, situated on or near the Arkansas River in Logan County, Ark., being about five hundred acres, more or less, and except thirty-six acres, more or less, known as the Cobb Earle lease, said lease expiring December 31, 1915, when said lands shall be a part of this lease also.

2. "The said party of the second part agrees to pay the party of the first part the sum of seven dollars per acre for the above described land for each year, provided that after the first year the said party of the second part shall have the option of rerenting and paying the customary cash price per acre, for said land, same being based on prices paid in the immediate vicinity for lands of a like grade.

3. "It is further agreed and understood that the option mentioned above as to the extension of this lease beyond the year 1915 does not carry the right to extend this contract beyond the year 1915, but only the right of the second party to rent or lease on the condition herein mentioned."

Appellant insists that the writing in its entirety constitutes a lease of the lands in question from appellant to appellee for the year 1915, at $7 per acre, with a refusal to appellee to rent the lands for three consecutive years thereafter at the customary cash rental value thereof. We can not so construe the contract because such construction would nullify the four-year rental period provided for in the first paragraph and the provision in the second paragraph to the effect that appellee should pay appellant "the sum of $7 per acre for the land for each year" (referring to the four-year rental period provided in the first paragraph). The first and second paragraphs of the contract point unerringly to

the conclusion that the parties intended the lease to be for four years at $7 per acre, with the refusal on the part of the lessee to pay the customary rental value for the property after the first year instead of $7 per acre. It is also quite clear that the option, or privilege, was for the benefit of the lessee, and not the lessor. As the privilege or option was for the benefit of the lessee, it is apparent that it was the intention of the parties that the price of $7 per acre for the use of the land should prevail through the entire term of the lease, unless the lessee should elect at the expiration of the first year to re-rent the land for the customary cash price per acre, which necessarily meant a lower rental than the $7 per acre provided in the contract. The third paragraph of the contract related to the result or effect in case the lessee elected to take advantage of the option or privilege. The effect was to convert the contract for a term of four years at $7 per acre into a contract for one year at $7 per acre, with the refusal thereafter on the part of the lessee to rent or lease the land at the cash rental value for the balance of the term. It necessarily follows that, unless such election was made by the lessee, the rental agreement of $7 per acre, provided for in the first and second paragraphs, should prevail during the entire term. If this construction be placed upon the third paragraph, it harmonizes it with the first and second paragraphs of the contract. Any other construction would create a conflict between the sections.

No election was made by the lessee to pay the cash rental value of the land at the expiration of the first year, and it was therefore proper for the court to construe the contract, in its application to the undisputed facts of the case, as being a lease for four years at $7 per acre. That amount having been tendered into court by appellee, it was proper to dismiss appellant's complaint.

No error appearing, the judgment is affirmed.

OLIVER v. BOLINGER.

Opinion delivered November 22, 1920.

1. PUBLIC LANDS—REFUNDING PURCHASE MONEY.—Under Const., art. 5, § 28, and art. 16, § 12, providing that money shall not be paid out of the treasury until appropriated by law, money paid for lands forfeited to the State for taxes can not be repaid on a refunding certificate of the Commissioner of State Lands without a specific appropriation therefor.

2. STATES—DUTY OF AUDITOR TO DRAW WARRANTS.—Kirby's Dig., §§ 3405-6, 4905-6, 4912, requiring the Auditor to issue warrants for the refund of money paid for lands forfeited to the State, are not in conflict with section 3415, prohibiting the Auditor from drawing a warrant unless the money has been previously appropriated by law, and such warrants should not be issued until an appropriation therefor has been made.

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

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellant.

Section 29, article 5, Constitution 1874, directs the manner in which all moneys shall be paid out of the State treasury. All statutory enactments to the contrary are void and of no force whatever. This section has often been interpreted as upholding appellant's position. Under Kirby's Digest, §§ 3405-6, 4905-6 and 4912, it was incumbent upon the State Auditor to issue his warrant. 125 Ark. 101. It was clearly the duty of the Auditor to refuse to issue the warrant as the Treasurer was not authorized to pay same.

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

It was the duty of the Auditor to issue the warrant for the refunding the purchase money of land to which the State had no title at the time the Land Commissioner sold it to Bohlinger. Many statutes have been passed which afford relief in such cases. Kirby's Digest, §§ 3405, 4905-6. It was clearly the Land Commissioner's duty to issue a refunding certificate to the purchaser and

of the Auditor to issue a warrant. Kirby's Digest, *supra.* Art. 5, § 29 of the Constitution does not prohibit the *issuance of warrants,* but only forbids the money to be drawn from the treasury except where there is specific appropriation. The statutes do not conflict with the Constitution. Kirby's Dig., § 3415, is taken from Rev. Stat. chap. 18, § 17, and there is no sound reason why any one who has a valid claim against the State should not receive a warrant, whether or not there is money in the treasury to pay it. Kirby's Dig., § 4755. No legislative appropriation is necessary. Such money does not *belong to the State,* and no appropriation is necessary for money paid by mistake, and such an act does not violate article 5, section 29 of the Constitution. The land did not belong to the State nor did the money, and she properly directed her officers to return the money to which she had no rightful claim. The acts which we have set out are clearly constitutional.

HUMPHREYS, J. This suit originated in the Second Division of the Pulaski Circuit Court, and is a mandamus proceeding by appellee against appellant to compel the issaunce of a warrant by the State Auditor, directing the State Treasurer to pay appellee $300, which was paid into the treasury by appellee in consideration of certain lands which had been forfeited to the State of Arkansas for the nonpayment of taxes due thereon for the years 1896 and 1897. The money was paid into the treasury and the deed procured from the State Land Commissioner, pursuant to statutes of the State governing the sale of lands forfeited and certified to it for the nonpayment of taxes. Prior to the sale of the land by the State to appellee, the State had, by legislative grant, conveyed the identical land to the Red River Levee District No. 1 in aid of a drainage scheme, which grant contained a number of conditions. A contest arose between the two grantees of the State over the title to the land. It was contended by appellee that, on account of the nonperformance of the conditions contained in the land

grant to the levee district, the conditions in the grant had failed, and that the title to the land had reverted to the State. This contest resulted in a final decree to the effect that the legislative grant to the levee district was an absolute, and not a conditional, grant, and that the lands belonged to the levee district, never having reverted to the State. Thereafter, on April 13, 1920, appellee procured a refunding certificate from the Commissioner of State Lands, directing the Auditor upon presentation of the certificate to issue a warrant to appellee for the sum of $300. Upon presentation of the certificate the Auditor refused to issue a warrant on the ground that no appropriation had been made to cover it, and this suit followed.

It is contended by appellant that, under sections 3405, 3406, 4905, 4906 and 4912 of Kirby's Digest, it was incumbent upon the State Auditor to issue a warrant to cover the amount paid into the State treasury by appellee in consideration of the conveyance aforesaid. The statutes aforesaid contain ample authority for the issuance of the warrant by the Auditor and the payment thereof by the Treasurer, if any money had been specifically appropriated by the Legislature for the purpose. No such appropriation has been made by the Legislature. The statutes, to which our attention has been called, are necessarily limited in operation and effect by the constitutional provisions controlling the withdrawal of money from the State treasury. There are two provisions in the Constitution of 1874 governing the manner in which money in the State treasury may be drawn or paid out. The sections are as follows:

Section 29, article 5. "No money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill; and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriation shall be for a longer period than two years."

Section 12, article 16. "No money shall be paid out of the treasury until the same shall have been appropriated by law; and then only in accordance with said appropriation."

In construing these sections of the Constitution, this court said, in the case of *Dickinson* v. *Clibourn,* 125 Ark. 101, that "a specific appropriation is an absolute prerequisite to the drawing from or payment out of the State treasury of any money therein required to be appropriated. No money for general, ordinary, special, contingent or other expense, no money at all, can be legally drawn therefrom, except under the forms of law in accordance with an appropriation properly made." The effect of this construction is to prevent money, which has been deposited in the State treasury through forms of law, from being withdrawn without specific appropriations first made by the Legislature. The money in the instant case was paid into the treasury through statutes providing for the purchase of lands which had been forfeited to the State for the nonpayment of taxes. The money thus paid in comes strictly within the prohibition against paying money out of the treasury without specific appropriations therefor. We think there is nothing in the contention that the Auditor should be required to issue the warrant, even if the Treasurer is without authority to pay it. The statutes cited by appellant are as obligatory upon the Treasurer to pay the warrant as upon the Auditor to draw it. It would be an entirely useless ceremony for the Auditor to draw a warrant upon the treasury which could not be collected from or paid by the Treasurer. Again, there is a statute which specifically forbids the Auditor to draw a warrant against the State treasury unless the money has been previously appropriated by law to pay it. The statute referred to is section 3415 of Kirby's Digest and reads as follows: "No warrants shall be drawn by the Auditor or paid by the Treasurer, unless the money has been previously appropriated by law, nor shall the amount drawn for or paid under any one head ever exceed the

amount appropriated by law for that purpose." We do not think that statute in conflict with the statutes cited by appellant. All may become effective and operative after, but not before, an appropriation has been made in accordance with law to cover the amount for which the warrant is to be drawn or issued.

For the error indicated, the judgment is reversed and the cause remanded with directions to dismiss the application for a writ of mandamus.

STAR LIME & ZINC MINING COMPANY v. ARKANSAS NATIONAL BANK.

Opinion delivered November 29, 1920.

1. VENDOR AND PURCHASER—LIEN OF RENEWAL NOTES.—Notes given in renewal of notes given for the purchase of land, and evidencing the debt for the purchase of land, constitute liens on the land.
2. VENDOR AND PURCHASER—RENEWAL NOTES.—The fact that the debt for the purchase money of land is not in the form of the original notes as recited in the deed does not affect the validity of the lien except as against innocent purchasers who are in some way misled by the change in the form of the obligation.
3. EVIDENCE—RECITAL OF DEED.—Though a deed of land executed by a subvendee recites that part of the purchase money has been paid, neither the original vendor, nor one to whom he has transferred the purchase money notes, is bound by such recital.
4. VENDOR AND PURCHASER—NOTICE OF PURCHASE MONEY LIEN.—One who purchases land takes with notice of recitals in a deed in his chain of title reciting the execution of purchase-money notes.
5. VENDOR AND PURCHASER—NOTICE—INNOCENT PURCHASER.—A purchaser of land who fails to inquire at available sources, when put on notice of outstanding purchase money notes, as to whether such notes have been paid to the original seller can not claim to be an innocent purchaser.
6. VENDOR AND PURCHASER—EXTINGUISHMENT OF LIEN BY PAYMENT.—Payment of a note secured by vendor's lien extinguishes the lien, which can not be revived by reissue of the note.
7. VENDOR AND PURCHASER—WHERE LIEN NOT EXTINGUISHED.—When payment of a vendor's lien note is made on condition agreed upon at the time that the security shall be kept alive and transferred

to the new creditor, the payment does not extinguish the security, and a court of equity will enforce it, the transaction constituting, not a payment, but a purchase.

8. VENDOR AND PURCHASER—PURCHASE OF VENDOR'S LIEN NOTE.—Where there was an express agreement between the debtor and the cashier of a bank which furnished money to pay a purchase money note that the note should be held by the bank and the date of payment extended, but the debtor failed to notify the creditor of this agreement, and the latter accepted the money as payment and so marked the note, but the cashier declined to accept the note, and the creditor subsequently changed the indorsement so as to assign the note, this was sufficient to keep the lien alive.

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

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

1. The note was not secured by a lien against the property. A cursory examination of the records would have shown that there was no such note in existence against the property and hence no lien in favor of the original holder or any *bona fide* transferee. There was no deed or instrument of any kind on record or in existence giving a lien for this $4,000 note against the property involved as against innocent third parties who relied on the public records of Searcy County. Appellee is not a holder of the note in due course. The note which appellee accepted as collateral was past due and appellee was not an innocent holder in due course, etc. The note was further assigned "without recourse" by Hudspeth, and neither he nor the First National Bank had any authority to make collection. 7 C. J. 609; 58 N. W. 102; 63 Ohio 374.

2. The note was a nullity when delivered to appellee. The balance due had been paid, all that was owing, and the note was marked "paid," and it could not be reissued. When a negotiable note is once paid off, the instrument becomes dead and all liens extinguished, and it can not be reissued. 3 R. C. L. 502; 63 Am. Dec. 700; 21 R. C. L. 115; 19 *Id.* 439; 6 N. Y. 449; 98 N. H. 138. The payment of the debt *ipso facto* extinguishes any mort-

gage or lien. 70 Am. Dec. 655. Once paid, the note was a nullity, 4 Ark. 546, and can not be reissued. 7 Cyc. 790. When the note was paid by Webb, the debt was extinguished and the lien destroyed. 84 Ark. 86; 8 C. J. 590.

W. F. Reaves and *Carmichael & Brooks,* for appellee.

1. The appellant, Star Lime & Zinc Company, can not complain because it took the deed subject to the recitals therein. The judgment as to it is right. 66 Ark. 121; 74 Am. St. 74; 81 Am. Dec. 353.

2. The note was not a nullity when delivered to appellee. It was the intention of the Arkansas National Bank to keep the note alive and "marked paid in error" shows the intention of the parties was to keep it alive as well as the lien. There were no intervening rights of third parties here, and the bank acted in good faith and without negligence and the lien should be preserved and enforced. 54 Ark. 153; Story, Eq., § 110; 2 Pom., Eq. Jur., § 849. The intention of the parties should govern 57 Ark. 219. Substantial justice has been done, and the testimony supports the decree.

McCULLOCH, C. J. This is an action to foreclose liens on certain real estate in Searcy County, and the controversy relates to conflicting claims of priority. The tract of land in controversy is known as the Bonner Lime Kiln property and was formerly owned by S. W. Woods, of Marshall, Searcy County. Woods entered into a contract to sell the property to Willson, Nicholson and Trentham, for the sum of $9,000, payable in installments, and later he conveyed it to Webb and Craig at the direction of the three original purchasers. Woods' deed to Webb and Craig recited, as consideration, the purchase price of $14,000, payable $1,000 cash and balance in five installments due in three, six, nine, twelve and fifteen months respectively, each for $3,000 except the first, which was for $2,000, and those installments were evidenced by notes executed by Webb and Craig to Woods,

which said notes were recited in the deed and constituted liens on the property conveyed. The two last notes were not delivered to Woods but at the request of Webb and Craig, he indorsed those notes in blank and "without recourse" and they were returned to Webb and Craig. The reason for this is not directly explained in the testimony but it is inferable that those two notes went to the original purchaser, Willson, Nicholson and Trentham. Subsequently Trentham transferred one of those notes to appellants Campbell and Jarman. The first three notes were delivered to Woods, which, with the $1,000 cash payment, made the consideration of $9,000 he was to actually receive as purchase price of the land. Subsequently Woods agreed to extend the time of payment of the notes which he held, and by agreement of the parties the three notes were consolidated into two renewal notes for $4,000 each, payable in six and nine months, respectively, from date of execution.

Woods assigned the new notes to A. T. Hudspeth, cashier of the First National Bank of Marshall, to secure payment of a loan of money.

Webb and Craig sold and conveyed the land to appellant Star Lime & Zinc Mining Company by deed, reciting consideration of $15,000, and also containing the following recital: "This deed is given subject to vendor's lien note of fourteen thousand dollars, of which five thousand dollars has been paid." The last mentioned grantees borrowed $15,000 from appellants Campbell and Jarman and mortgaged this property to secure the loan, and Campbell and Jarman also purchased from Trentham the note for $3,000 of Webb and Craig to Woods due fifteen months after date of execution.

Jarman was treasurer of appellant Star Lime & Zinc Mining Company. Campbell was an attorney and examined the abstract of title when the Zinc & Mining Company purchased the property and when he and Jarman made the loan. He testified that one of the Webb and Craig notes to Woods for $3,000 marked "paid" was at-

tached to the abstract, that another of the notes for $3,000 (the one due twelve months after date) was purchased by him and Jarman. Another one of these notes (the one due fifteen months after date) was attached to a draft for $3,135 drawn on Jarman as treasurer by Hudspeth, which was paid and applied by Hudspeth on the first of the $4,000 notes held by him as collateral from Woods. Campbell testified that he was not aware of any other outstanding notes and had no information concerning the $4,000 notes in the hands of Hudspeth. It does not appear, however, that he made any further inquiry concerning the unpaid balance on the notes recited in the deed of Woods to Webb and Craig.

The first note of $4,000 held by Hudspeth was reduced to $1,000 by a credit thereon of the amount paid by Jarman, treasurer, and later Webb applied to Mays, cashier of appellee bank, for a loan of $1,056 to use in paying the balance due on the note, with interest. Webb stated to Mays that the amount sought would complete payment of the purchase price of the land. Mays agreed to advance the sum asked for and "take the note up and carry it for sixty days." Mays gave Webb the sum in currency to cover the amount of balance due on the note and instructed him to get the note. Webb paid the money to Hudspeth, and the latter marked the note "paid," and gave it to Webb who carried it to Mays. Mays declined to take the note because it was marked "paid" and sent it back to Hudspeth to get him to erase the word "paid" and assign the note without recourse, which Hudspeth did and the note was delivered to Mays in that form. This all occurred within an hour or less time.

Woods and Hudspeth instituted this action to recover on the last note of $4,000 and to enforce the vendor's lien. Appellee, Arkansas National Bank, intervened and asked for foreclosure of its lien for amount of balance due on the note held by it under the assignment of Hudspeth.

Appellant Lime & Zinc Company filed answer, defending on the ground that the $4,000 notes were not re-

cited in the conveyance and did not constitute liens on the property. Campbell and Jarman intervened and asked foreclosure of the lien of their mortgage and for the $3,000 note held by them, and that same be declared prior to any other lien.

On final hearing the chancery court decreed foreclosure of all the asserted liens, giving priority first to Woods and Hudspeth on the last $4,000 note; next to Arkansas National Bank for the balance of the first $4,000 note assigned to Hudspeth; next to Campbell and Jarman for the $3,000 note held by them; and last to Campbell and Jarman on their mortgage notes.

Appellants, without conceding the correctness of the decree, refrained from contesting the priority of Woods and Hudspeth and they appeal only from that part of the decree which declared the priority of appellee.

It is first insisted that the notes for $4,000 never became liens on the land because they were not recited in the deed. These notes were, however, given in renewal of some of those recited in the deed, and they evidenced the debt for purchase money and constituted liens on the land. *Triplett* v. *Mansur,* 68 Ark. 230; *Daniels* v. *Gordy,* 84 Ark. 218; *Griffin* v. *Long,* 96 Ark. 269.

The fact that the debt is not in the form of the original notes as recited in the deed does not affect the validity of the lien except as against innocent purchasers who are in some way misled by the change in the form of obligation—for instance, if a subsequent purchaser took a conveyance on the faith of the exhibition of the original notes marked "paid" without information that renewal notes had been executed. But no such state of facts exists in this case. Appellants did not rely on such evidence of the fact that the original notes had been paid. The deed of Webb and Craig to the mining company contained recital that five thousand dollars of the purchase price had been paid, but neither Woods nor the holder of the notes executed to him were bound by these recitals. Woods' deed to Webb and Craig, which was in the line of

title of appellants, recited all of the notes, and appellants were bound to take notice of the lien for their payment. Only three of the original notes ($9,000 in all) fell into the hands of appellants, and this left unaccounted for $5,000 of the original debt recited in the deed. They were on notice from the recitals of the deed, and should have inquired whether or not the remainder of the debt had been paid. Having failed to inquire at available sources, they can not successfully assert a claim of being innocent purchasers.

It is next contended that the lien of the new note held by appellee was extinguished by the payment of the note while in the hands of Hudspeth, and that the subsequent erasure of the endorsement showing payment and the assignment of the note did not serve to revive the lien. It is undoubtedly true that the payment of a note secured by a lien extinguishes the lien which can not be revived by reissue of the note. *Bailey* v. *Rockafellow,* 57 Ark. 219. But it is equally established that when the payment is made on condition agreed upon at the time that the security shall be kept alive and transferred to the new creditor, such payment does not extinguish the security and a court of equity will enforce it. In other words, the transaction constitutes, not a payment, but a purchase. *Bailey* v. *Rockafellow, supra,* and cases cited. The facts of this case bring it within the latter rule. There was an express agreement between Webb, the debtor, and Mays, the cashier of appellee bank at the time the money was furnished, that the note should be "taken up and held" by appellee for sixty days so as to extend the date of payment. Webb failed to notify Hudspeth of the agreement, and the latter accepted the money as a payment and so marked the note, but Mays declined to accept it, and Hudspeth in a very short time thereafter changed the endorsement so as to assign the note. This was sufficient to keep the security alive. It is shown that Hudspeth had no authority from Woods to assign the note, but only Woods can complain. He does not complain, and is in no attitude to do so, for the assignment did not interfere

with his security for the remainder of his debt, the court having subordinated the lien of the note held by appellee to the lien of the note owned by Woods. Moreover, Woods does not appeal from the decree.

Affirmed.

W. P. BROWN & SONS LUMBER COMPANY v. SIMS.

Opinion delivered November 29, 1920.

1. TAXATION—ASSESSMENT—REMEDY FOR OVERVALUATION.—Equity will grant relief against void tax assessments, but not against those which are merely erroneous for overvaluation, where a statutory remedy by appeal is afforded.
2. TAXATION—BREACH OF ASSESSOR'S PROMISE TO SUBSTITUTE CORRECT LIST.—Where the agent of a foreign corporation submitted to the assessor a list of the corporation's property containing an excessive valuation, relying upon the assessor's promise to accept a corrected list after it should be obtained, the breach of the assessor's promise to substitute the corrected list did not constitute such an unanticipated casualty as to render the excessive assessment invalid.

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

Cooper Thweatt, for appellants.

We agree with the lower court that the assessment for 1918 is governed by act 234, Acts 1917, but plaintiff was not negligent in not supplying its resident agent with all the data to make a proper assessment at the time required by the statute. There is no statute making it the duty of a nonresident to supply its resident agent with a list of its property. Plaintiff was not negligent, and is not estopped from seeking relief in chancery. 7 Am. Digest (Key No. Series), p. 2527, art. 462 (a), "Taxation." If a taxpayer makes application for a reduction of his assessment and furnishes satisfactory proof of a mistake, it is the duty of the assessor to correct it. 37 Cyc. 1018. The assessor has power to lower an assessment, and a promise to do so when he knew the assessment was too high gave plaintiff the right to apply to

equity for relief. 37 Cyc. 1266, 1079, 7111; 18 Am. Dec. Digest, § 451 (r).

Equity will interfere to prevent excessive overvaluation of a person's property. 71 Pac. 946; 8 Arizona, 221; 18 Am. Dec. Dig., § 6085 (e); 8 Ky. Law Rep. 706. Under the above authorities the allegations of the complaint show fraud and justify the interference of a court of equity. They also show that appellant had no adequate relief at law, as he was misled by the assessor's silence until too late to appeal to the county court.

Emmet Vaughan, for appellee.

The opinion of the chancellor defines clearly the remedy of appellant, and he should have pursued it. The county court clearly had jurisdiction. Art. 7, § 2, Const. 1874; act 234, Acts 1917. The chancery court had no jurisdiction to afford relief against appellant's own negligence.

McCULLOCH, C. J. Appellant is a foreign corporation engaged in the lumber business in this State, and is the owner of personal property here. Its local manager usually attended to the listing of its property for taxation. This is an action instituted by appellant in chancery against the collector of taxes for Prairie County to restrain the latter from attempting to collect taxes on appellant's property for the year 1918. It is alleged in the complaint that the valuation of appellant's property was excessive, and that the error was caused by the conduct of the county assessor.

According to the allegations of the complaint, the county assessor called on appellant's local manager to assess the property for the year 1918, and said manager, not having sufficient information at hand to make out a correct list of appellant's taxable property, made a list from the assessment for the last preceding year (1917) and delivered it to the assessor. the allegation of the complaint is that the manager did this under advice of the assessor and upon the latter's promise that a correct

list would be accepted when furnished later. The list for the year 1917, as furnished by the assessor, showed a valuation of $92,200, but subsequently appellant furnished from its home office in the State of Kentucky a correct list of the taxable property in Prairie County for the year 1918 of the valuation of $26,680 and said list was mailed to the assessor, but the latter failed to substitue the correct list according to his promise, and the taxes were extended on the tax books upon the valuation originally furnished by the manager. The chancery court sustained a demurrer and dismissed the complaint for want of equity.

We are of the opinion that the court was correct in its decision. Courts of equity will grant relief against void tax assessments, but not against those which are merely erroneous on account of over-valuation where a statutory remedy by appeal is afforded. *Clay County* v. *Brown Lumber Co.,* 90 Ark. 417; *Clay County* v. *Bank of Knobel,* 105 Ark. 450.

It was the duty of appellant to cause its taxable property to be correctly listed at the time specified by law, and it had no right to rely on the unauthorized promise of the assessor to substitute another list to be furnished later. The alleged broken promise of the assessor did not constitute such an unanticipated casualty as to render the excessive assessment invalid. Appellant should have pursued the remedy afforded by statute to correct the assessment, and, having failed to do so, it can not resort to a court of equity for relief.

Affirmed.

FRASER v. KECK.

Opinion delivered November 29, 1920.

1. PUBLIC LANDS—LEASE OF SCHOOL LANDS.—The county judge of Mississippi County acts, not in a judicial or *quasi*-judicial, but in a ministerial, capacity in performing services under Acts 1905, p. 398, authorizing him to lease certain wild and uncleared sixteenth section school lands of the county.

2. MANDAMUS—DISCRETIONARY POWERS.—Discretionary powers, even when exercised by an officer acting in a ministerial capacity, will not be controlled by mandamus.

3. PUBLIC LANDS—LEASE OF SCHOOL LANDS—BINDING CONTRACT.—There is no binding contract between the county judge of Mississippi County and an individual for lease of wild and uncleared sixteenth section school lands of the county until a writing is executed evidencing the terms of the contract and until a bond is approved by the judge, and prior thereto the judge has power to recede from the negotiation with or without good reason.

4. MANDAMUS—APPROVAL OF BOND OF LESSEE OF SCHOOL LAND.—The discretion of the county judge of Mississippi County to approve the bond of a lessee of school lands, under Acts 1905, p. 398, is not subject to control by mandamus.

Appeal from Mississippi Circuit Court, Osceola District; *R. H. Dudley,* Judge; affirmed.

W. J. Driver, for appellant.

The county judge acts in leasing the school lands not as a judicial officer but purely in a ministerial capacity. Mandamus was the proper remedy. 14 Ark. 699; 20 *Id.* 337; 26 *Id.* 237; 129 *Id.* 286; 60 Pac. 367; 112 U. S. 50.

Joe Rhodes, Jr., for appellees.

1. This agreement or contract is in two sections of the statute of frauds and is void. Act 156, Acts 1905, p. 398; 111 Ark. 336. It was void for lack of description in notice, and the lease was for more than ve years.

2. The act was judicial, as the court had discretion to grant or refuse the order, and mandamus did not lie. 18 R. C. L., § 28, p. 117; *Ib.*, § 32, p. 119; 106 Ark. 48.

3. Mandamus is not a writ of right but is within the discretion of the court. 18 R. C. L., § 52, p. 137; 122 Ark. 337-9; L. R. A. 1917 F, p. 539. Act 156, Acts 1905, confers judicial power on the county judge, and the acts were matters involving official discretion and were not ministerial and the judgment is right.

McCULLOCH, C. J. A statute applicable only to Mississippi County was enacted by the General Assembly of 1905 (Acts 1905, p. 398) authorizing the county judge to

lease the "wild and uncleared sixteenth section school lands" of the county for a term of not exceeding five years.

The statute provides that the lease shall be made on "terms satisfactory to the county judge," upon the lessee entering into a good and sufficient bond to be approved by said judge. It is also provided that, before leasing any of said lands, the county judge shall cause notice to be given for thirty days of the time and place of the leasing by publication in a newspaper and by posting.

The county judge of Mississippi County gave notice of his intention to lease such school lands, and on the day mentioned in the notice appellant appeared and entered into an oral agreement with the judge for a lease of certain lands for a term of five years. The terms of the lease were agreed on with the further agreement that a written contract should be later prepared and signed. A few weeks later appellant presented to the judge for execution a written contract in accordance with said oral agreement and also a bond for approval by the judge, who declined to approve the bond or execute the contract on the ground that protests had been made against the leasing of the lands by taxpayers, and on the further ground that the agreement had been made upon a misconception of the real facts in regard to the susceptibility of the lands to cultivation. The written draft of the contract provided for the removal of timber, clearing and cultivation of the land and the construction of a certain number of houses of different kinds.

Appellant presented to the circuit court his petition to compel the county judge, by mandamus, to approve the bond and execute the written lease contract tendered by appellant. Certain taxpayers joined the county judge in an answer to appellant's petition and the cause was heard on oral testimony. The circuit court denied the petition.

The lawmakers designated the county judge as the proper person to act for the public interest in leasing the unimproved school lands, but might have conferred that authority on any other officer or person. The fact that the county judge was selected did not change the character of the service to be performed under the statute. We are therefore of the opinion that counsel for appellant is correct in the contention that the county judge acts, not in a judicial or *quasi*-judicial, but in a ministerial capacity in performing services under this statute. *Glenwood Cemetery Land Company* v. *Routt,* 17 Col. 156, 28 Pac. 1125; *Colorado Fuel & Iron Company* v. *Adams* (Col.), 60 Pac. 367.

However, the statute confers discretionary powers; and such powers, even when exercised by an officer acting in a ministerial capacity, will not be controlled by mandamus. *Jobe* v. *Urquhart,* 102 Ark. 470; *Robertson* v. *Derrick,* 113 Ark. 41.

The statute does not require that the leasing shall be done by the method of competitive bidding. In the nature of this case, that would be impracticable, for the transaction is so intricate as to necessarily call for negotiations between the lessor and lessee to determine the precise terms on which the land is to be improved. The statute necessarily implies the execution of a written contract, for a lease for the maximum length of time is within the statute of frauds. Also a bond is required which the judge must approve. Now, all of this demonstrates that there is no binding contract until a writing is executed evidencing the terms of the contract and until a bond is approved by the judge. Until that is done, the transaction is *in fieri*—a matter of negotiation between the parties and the discretion of the county judge still continues. It is the same as if the negotiations were between two individuals concerning a contract required, under the statute of frauds, to be in writing. The discretion of the county judge extends to the approval of the bond. His discretion in that regard is not subject to control, and

the contract is not complete until the bond is approved. It is no answer to say that the county judge had, in this instance, exercised full discretion in negotiating the terms of the contract. His discretionary powers extended down to the execution of the written contract and the approval of the bond, and his action, even down to the last moment, can not be controlled. He had the power to recede from the negotiation, either with or without good reason, at any time before the negotiations ripened into a binding contract.

The circuit court was correct in its conclusions, and the judgment is therefore affirmed.

RUDDELL v. REVES.

Opinion delivered November 29, 1920.

1. EXECUTION—RIGHTS OF PURCHASER—SALE UNDER ALLEGED LIEN.—The rights of a purchaser at an execution sale were not affected by the seizure and sale of the property to enforce an alleged superior laborer's lien, if there was no such valid lien.
2. MASTER AND SERVANT—LABORER'S LIEN FOR HAULING ARTICLE.—Under Kirby's Dig., § 4995, *et seq.*, giving laborers a lien on the production of their labor, and section 5011, giving them a lien on any object, thing, material or property for labor done or performed thereon, hauling an article merely for the purpose of transporting it does not create a lien unless such labor forms a part of the act of converting material into a product, or unless the hauling is for the purpose of having work done on the article transported and the hauling forms a part of the work to be done.
3. MORTGAGES—NECESSITY OF RECORD.—Under Kirby's Dig., § 5396, a mortgage not legally recorded is unenforceable against those who acquired specific liens on the property.

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

W. K. Ruddell, for appellants; *J. B. & J. J. McCaleb,* of counsel.

1. Appellants Ottinger and Goforth were entitled to a lien for hauling the ore. Kirby's Dig., § 5011; 71 Ark. 334; 75 *Id.* 104; 58 Am. St. Rep. 545.

2. The court erred in refusing to allow appellee Reeves to testify that he knew there was a deed of trust on the ore in controversy. 33 Ark. 328, 336. It was competent evidence that he had actual knowledge, and, if so, his execution sale would not be good, as he knew there was a valid lien on the ore. 42 Ark. 236; 109 *Id.* 151. Appellants were in possession and had the right to contest the validity of the sale. 29 Ark. 270-7.

3. It was error to peremptorily instruct the jury that appellee was a *bona fide* purchaser. Parties who purchase at their own execution sale take title subject to the prior equities of other parties. 128 Ark. 462; 53 *Id.* 137; 2 Crawford's Dig., 2119. It was also error to allowing appellee to amend the complaint.

4. It was error to give the peremptory instruction as there was evidence to sustain a verdict before a jury. 137 Ark. 293; 86 Ark. 86; 89 *Id.* 230; 93 *Id.* 272; 118 *Id.* 128.

5. Objections to the parties to a suit can not be raised for the first time in this court. 91 Ark. 30, 38.

Samuel M. Casey, for appellee.

There is no satisfactory evidence that appellants had any lien or its nature. The mere hauling the ore to the railroad gave no lien. 50 Ark. 244; 54 *Id.* 522; 71 *Id.* 337. See, also, 71 Ark. 517.

McCULLOCH, C. J. Appellee sued appellants for the conversion of a lot of manganese ore which had been mined and hauled to a railroad station. Appellee claimed title to the ore as purchaser thereof under an execution sale against one Hamer, the former owner. Appellant converted the ore, claiming ownership under a subsequent sale to satisfy a lien asserted against Hamer by certain laborers on account of having hauled the ore from the mine to the railroad station. Appellants also pleaded as defense an unforeclosed mortgage on the ore executed by Hamer to T. A. Gray; but, when the mortgage was offered in evidence at the trial, it appeared not to have been

legally filed for record, and the court excluded it. There was a verdict in appellee's favor, which the jury returned under peremptory instructions of the court.

The material facts are undisputed, and the only questions of law presented relate to the defense offered by appellants. They claimed, as before stated, under a sale to enforce a lien asserted by certain laborers for hauling the ore. If there was a lien at all, it was superior to the rights of appellee under his purchase at the execution sale. If there was no valid lien, his rights as such purchaser were not affected by the subsequent seizure and sale to enforce the lien, and appellants are liable for the conversion.

The statute under which the lien was asserted reads as follows:

"The laborer who performs work or labor on any object, thing, material or property, shall have an absolute lien on such object, thing, material or property for such labor done and performed, subject to prior liens and landlord's liens for rents and supplies, and such liens may be enforced within the same time, and in the same manner now provided for by law, in enforcing laborer's liens on the production of labor done and performed." Kirby's Digest, § 5011.

Prior to the enactment of this statute, laborers were given a statutory lien only on the production of their labor. Kirby's Digest, § 4995, *et seq.*

The statute quoted above enlarged the rights of laborers so as to give a lien "on any object, thing, material or property" on which they performed labor. Hauling an article merely for the purpose of transporting it, does not create a lien under either of the statutes unless such labor forms a part of the act of converting material into a product, or unless the hauling is done for the purpose of having work done on the article transported and the hauling forms a part of the work to be done. *Klondike Lumber Co.* v. *Williams,* 71 Ark. 334; *Allen* v. *Roper,* 75 Ark. 104.

The mortgage had not been legally recorded, and was therefore unenforcible against those who acquired specific liens on the property. Kirby's Digest, § 5396; *Smead* v. *Chancellor,* 71 Ark. 507.

The trial court submitted to the jury the question of the amount of damages to be assessed, and the verdict is supported by the evidence.

Affirmed.

STOVER v. ROBINSON.

Opinion delivered November 29, 1920.

1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE OR DISALLOWANCE OF CLAIM.—The allowance or disallowance of a claim against an estate in the probate court is a judgment by which all parties are bound, unless fraud is shown in the procurement.
2. JUDGMENT—RELIEF IN EQUITY.—A complaint in equity seeking relief against the disallowance of a claim in the probate court which alleged that plaintiff had a valid claim against a certain estate; that the claim was disallowed by the probate court; that plaintiff, through her attorneys, made repeated calls upon the county clerk, asking whether the claim had been passed upon and was informed that it had not been; and that, by reason of the clerk's misrepresentation and without negligence on the part of herself or her attorneys, plaintiff had lost her right of appeal, *held* not to state a cause of action.

Appeal from Conway Chancery Court; *Joe T. Rogers,* Chancellor; reversed.

Strait & Strait, for appellant.

1. There is absolutely no proof that the judgment disallowing the claim was procured by fraud, misrepresentation or other unfair advantage by the administrators, the attorneys or any one else connected therewith. The undisputed proof is that no one interested in the case tate of Carl Meier, deceased, knew of the disallowance by the probate court until the January following. The whole theory of appellee is that the judgment should be set aside and the case reopened because she did not know of the disallwance in time to enable her to appeal and

for the further reason that the court's order was entered by *nunc pro tunc* order. The order itself shows that the matter came up for hearing on July 9, 1917, the day set. This became a public record, and appellee had six months to appeal. There was no fraud or concealment in law or fact, and she has lost her right of appeal. She should have taken the necessary steps to appeal within the time allowed. 108 Ark. 526; 204 S. W. 598. While the *nunc pro tunc* order has no bearing on the case, the decree is erroneous, because (1) if appellee had any grounds of relief she had a complete statutory remedy by petition to the probate court. (2) No fraud is alleged or proved against the administrators or any one else connected with the estate in obtaining the judgment. (3) The cause as disclosed by the facts is wholly without merit. (4) If appellee lost her right of appeal, it was the result of her own negligence and that of her attorneys, and she is barred of any right to relief in equity. Kirby's Digest, § 4431. The statute gives an adequate and a complete remedy, and equity will not interfere or intervene. 48 Ark. 510; 82 *Id.* 330; 93 *Id.* 266. See, also, 81 *Id.* 41; 93 *Id.* 266.

2. To justify a court to reopen a case and set aside the judgment of the probate court, fraud must be shown *in procuring* the judgment of the successful party. 73 Ark. 440; 68 *Id.* 492; 107 *Id.* 136; 194 S. W. 499. See, also, 75 *Id.* 166; 90 *Id.* 261; *Ib.* 166; 84 Ark. 61; 93 *Id.* 462; 39 *Id.* 256; 50 *Id.* 217. No fraud was practiced on the court, and the remedy was by appeal. 113 Ark. 185.

3. The claim is without merit, as no valid cause of action is shown by the proof. 120 Ark. 255; 96 *Id.* 520. To entitle a party to relief in equity against a judgment at law, it must be shown not only that the *judgment was unjust* but that it was not *the result of negligence.* 43 Ark. 107. See, also, 51 Ark. 341; 61 *Id.* 341; 113 *Id.* 185; 76 *Id.* 582. She lost her right of appeal by her own negligence and that of her attorneys. 15 R. C. L. 195; 64 Ark. 126; 66 *Id.* 183; 13 *Id.* 600; 14 *Id.* 32. A meritorious defense must be shown, and that the party has been

guilty of no negligence and has no remedy at law, or equity will not intervene. 61 Ark. 347.

J. Allen Eades, for appellee.

Chancery has jurisdiction to set aside the allowance in the probate court of a claim obtained by fraud. 73 Ark. 440; 68 *Id.* 492; 33 *Id.* 575. Appellee had no way to get an appeal, as the judge and clerk told her at all times that no action had been taken on her claim. Under the testimony and law the decree is correct.

WOOD, J. This appeal is from a decree of the chancery court of Conway County, reopening and setting aside a judgment of the probate court of Conway County disallowing a claim of $2,000, which the appellee sought to have probated and allowed by the probate court. The complaint alleged that the plaintiff (appellee here) was the owner and holder of a check given her by Carl Meier in the sum of $2,000, which remained unpaid, and which she presented to the administrators for approval and payment, which was refused. She then presented the check to the probate court of Conway County, and that court on January 15, 1918, passed upon the claim and disallowed the same, and by a *nunc pro tunc* entry showed that the order of disallowance was made on July 9, 1917; that the plaintiff, through her attorneys, made many calls upon the county clerk and his deputy asking if said claim had been passed upon, and was informed by them that it had not been; that, relying upon these representations of the clerk and his deputy, the plaintiff, without negligence on her part or her attorneys, had lost her right to appeal; that her claim was a just and honest one, and that the misleading statements of the clerk and his deputy were a fraud and deception, which, unless corrected, would cause the loss of her claim. She, therefore, prayed that the judgment of the probate court be set aside and that the cause be reopened before the probate court, in order that she might further prosecute her claim.

The defendant below answered and admitted that they were the administrators of the estate of Meier; that the claim was presented to them; that the same was disapproved and disallowed, and admitted that the same was on the 9th day of July, 1917, presented to the probate court, and that it was on that day disallowed, but denied that the claim was diallowed on the 14th day of January, 1918. They denied all the other material allegations of the complaint and set up certain affirmative defenses, which are not necessary to mention, and further alleged that the judgment of the probate court of July 9, 1917, was a bar to appellee's action. The appellants also filed a demurrer to the complaint, which it appears was not passed upon.

It is unnecessary to incumber the record by setting out the testimony upon which the trial court made its finding and entered its decree setting aside the judgment of the probate court. The judgment had become final, and, even if it be conceded that the appellee lost her right of appeal without negligence on her part or the part of her attorneys and through the misrepresentations of the clerk of the probate court and his deputy to the effect that the claim had not been passed upon, still this would not justify the chancery court in setting aside the judgment of the probate court. The allowance or disallowance of a claim against an estate in the probate court is a judgment by which all parties are bound unless fraud be shown in its procurement. *James* v. *Gibson,* 73 Ark. 440; *Scott* v. *Penn,* 68 Ark. 492; *Berbridge* v. *Gotch,* 107 Ark. 136; *Vanness* v. *Vanness,* 128 Ark. 543; *Radford* v. *Samstag,* 113 Ark. 185, and other cases cited in appellant's brief.

The complaint does not allege, nor does the testimony show, that there was any fraud practiced upon the probate court by the appellants or the attorney for the estate of Meier in procuring the judgment of disallowance of the claim of the appellee. The complaint was, therefore, fatally defective and might have been dismissed on

that ground. The court, however, did not rule on the demurrer, but the cause was disposed of on the evidence, and there is no testimony to show that the judgment of disallowance was procured through any fraud practiced upon the court by the appellants or the attorney for the estate of Meier. Furthermore, the appellee would not be entitled to relief in equity against a judgment of the probate court disallowing her claim on the ground that her appeal was not perfected, whether through the negligence of herself or her attorneys, or through the negligence of the clerk of the probate court. *Waldo* v. *Thweatt,* 64 Ark. 126. See, also, *Scroggin* v. *Hammett Grocer Co.,* 66 Ark. 183. See *Awbrey* v. *Hoopes,* 145 Ark. 502.

There is no merit in the appeal. The decree is therefore reversed and the cause is dismissed.

COMSTOCK *v.* COMSTOCK.

Opinion delivered November 29, 1920.

1. DOWER—SETTLEMENT IN NATURE OF JOINTURE.—An antenuptial agreement between husband and wife that the wife shall take a child's part in her husband's estate, except as to the homestead, being intended in lieu of dower, though not a technical jointure, will be deemed an equitable jointure.
2. HUSBAND AND WIFE—ANTENUPTIAL AGREEMENT—CONSIDERATION.—Marriage is a sufficient consideration for an antenuptial agreement.
3. HUSBAND AND WIFE—ANTENUPTIAL AGREEMENT—CONSTRUCTION.—Where antenuptial contracts are freely entered into, are not unjust or inequitable, and there is no fraud, they should be liberally construed to effectuate the intention of the parties, and should be looked upon with favor and enforced accordingly.
4. HUSBAND AND WIFE—ANTENUPTIAL AGREEMENT—ACKNOWLEDGMENT.—Under Kirby's Dig., § 5167, an antenuptial contract is valid as between husband and wife, though not acknowledged.
5. WITNESSES—HUSBAND AND WIFE.—Kirby's Dig., § 3905, rendering a husband and wife incompetent to testify for or against each other, has reference to suits affecting third persons, and, since the enactment of the Married Women's Acts (1915, p. 684; 1919, p. 36), a husband or wife may sue the other, and either is a competent witness in suits between them.

6. HUSBAND AND WIFE—ANTENUPTIAL AGREEMENT.—Evidence *held* to show that an antenuptial property agreement was just and reasonable.

7. HUSBAND AND WIFE—MARRIAGE SETTLEMENT.—A settlement upon the wife after marriage in lieu of an equitable jointure, if fair and equitable, will be upheld.

8. FRAUDS, STATUTE OF—SETTLEMENT IN LIEU OF JOINTURE.—Where a husband and wife by an antenuptial agreement fixed a jointure for the wife, a subsequent parol settlement whereby the wife accepted a lump sum and released her husband's estate was not an agreement for the sale of land within the statute of frauds.

9. HUSBAND AND WIFE—SETTLEMENT IN LIEU OF DOWER.—Where a wife who had entered into an antenuptial agreement fairly fixing her property rights accepted a sum in satisfaction thereof, and the payment was fair and reasonable, she is estopped thereafter from asserting rights against her husband's estate.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; reversed.

E. L. Matlock, for appellant.

1. The antenuptial contract was a jointure and reasonable, and bars dower. Kirby's Digest, §§ 2695-6; 62 Ark. 79; 140 N. W. 872; 21 Cyc. 1255; 79 Ky. 517; 98 N. E. 588; 108 *Id.* 691; 110 *Id.* 34; 130 N. W. 155; 87 Ark. 175.

2. Marriage was a sufficient consideration to support the antenuptial contract. Such contracts, when freely entered into and when not unjust or inequitable, are favored and enforced and liberally construed to give effect to the intent of the parties. 123 Pac. 742; 33 Kan. 449; 61 *Id.* 683; 116 Ind. 545.

3. At common law husband and wife could not contract with each other, but in equity they could, and are bound if the contract is fair and reasonable. 46 Ark. 542; 41 *Id.* 177; 42 *Id.* 503; 95 *Id.* 523; 75 *Id.* 127; 67 *Id.* 16; 101 *Id.* 522. All the equities of this case are with appellant, as he lived up to the provisions of the antenuptial contract, and it should be upheld.

Sam R. Chew, for appellee.

1. The contract sued on is a nullity and void on its face, as it does not comply with the law, and is indefi-

nite and uncertain. It was not acknowledged and recorded.

2. Appellant was not a competent witness. Even if a good and valid contract, *the action* here is premature and untimely, and the authorities cited for appellant are not in point.

WOOD, J. On the 20th day of August, 1914, the appellant and appellee entered into the following contract:

"Whereas, R. Comstock, of Uniontown, Arkansas, and Ella Babb, of the same town and State, have entered into an agreement to marry, and whereas, the said R. Comstock has an estate or property and children of his own, and the said Ella Babb has an estate or property of her own; therefore this agreement is made. The said R. Comstock agrees to bear all expenses of the entire family, except the clothing or wearing apparel for Mrs. Babb's children, which are to be borne by the Babb estate. The said Ella Babb in lieu of dower and widow's right agrees to take that part of the estate which each child shall inherit, counting herself as a child, except as to homestead, only what is known as a child's part as her dower of R. Comstock's estate, should he die first."

The appellant and appellee were married on September 11, 1914, and lived together until about May, 1919, when they separated. In the early part of January, 1918, the appellant paid to appellee the sum of $2,000, which appellant claims was paid by him to the appellee and accepted by her in settlement of the ante-nuptial contract. After the alleged settlement the appellee refused to join appellant in the conveyance of her dower interest in certain real estate of appellant, and after the separation appellant instituted this action against the appellee, the purpose of which was to confirm the ante-nuptial contract and the settlement made between the appellant and the appellee and to divest appellee of any possibility of dower in appellant's lands.

The appellee, in her answer, admitted that the appellant had paid her the sum of $2,000, but denied that

such payment was made in settlement of the ante-nuptial contract. She alleged that she and the appellant found that it would be impossible to live peaceably and quietly together, both having children by a former marriage, and that they agreed to separate, and that the $2,000 was paid to her to enable her to buy a home which she and her children could occupy separately and apart from the appellant and his children. She alleged that the so-called ante-nuptial contract was void because it was never acknowledged; that she did not refuse to join the appellant in the conveyance of his real estate, but claimed that she was entitled to the value of her expectant dower interest in the proceeds of such sales. She prayed that appellant's complaint be dismissed for want of equity. The ante-nuptial contract, *supra,* was introduced in evidence.

Over the objection of appellee, the appellant testified substantially as follows: That after their marriage, and while they were still living together, he paid to the appellee the sum of $2,000, which was a settlement under the ante-nuptial contract "to cover everything up to January, 1918." It was agreed that, if they continued to live together and accumulated more money, the appellee would get her share of it. The $2,000 was paid the appellee for her interest in whatever property appellant had up to January 1, 1918, and appellant then had in mind to give appellee a share in any property accumulated thereafter upon the basis of the contract. He did not know that they were going to separate. Before the settlement, appellee had purchased a home. They continued to live together until May or June, 1919, when she moved into her own home. After the payment to his wife of the $2,000 and up to the time of the separation, he had not accumulated any more property, but on the contrary, if there were any change, he had lost. In addition to the $2,000, he gave his wife before she left him $65, the proceeds of some old accounts that he did not consider of any value at the time he made the settlement. Appellant had six children by a former marriage. At

the time the ante-nuptial contract was executed and at the time of the marriage appellant estimated his estate to be worth between fourteen and sixteen thousand dollars, but at the time he paid the appellee the $2,000, appellant doubted if his estate was worth as much as fourteen thousand dollars. At the time appellant paid the appellee the $2,000 there was no agreement that appellee should have any further interest in appellant's property. He understood that she was claiming an interest in his home place in addition to her home, and he wanted to settle the whole matter because he might die first, and he told her when he paid her the money that she would have no further claim on his real estate, and she agreed to it, and made one or two deeds after that without demanding any money, but had recently refused to sign a lease unless appellant would give her one-half of the money, and thereupon appellant brought this suit. Appellee left appellant voluntarily, and there was no agreement between them that he would support her if she left him. He told her that he could not keep up two homes, and she replied: "I am going if I don't get a cent."

The appellee testified that she bought the Wood property where she then lived, paying $2,000 for it; that she knew that she was not going to stay with her husband and told him that she was going to buy the property, and he said that it might be a good idea, and that he would pay her what she was due if she would agree to move if he died before she did. She accepted the $2,000 on those terms. Appellant said that it would not affect the ante-nuptial contract. Appellee did not decline to join appellant in the execution of deeds except as it might affect her interest. At the time the appellant paid her the $2,000 he said that $2,000 was what her part would be, and that he would pay it to her then if she would give up the homestead rights. He said he was worth about $14,000. He told appellee at the time they were married that his estate was worth $20,000. Appellee moved to the house where she now lives about one year after the

appellant paid her the $2,000. Appellee joined her husband in the sale of some real estate after he paid her the $2,000. He told her that he had to sell the same to settle some debts. She did not get any of the money. Appellee had an estate of somewhere about $8,000 in real and personal property at the time she and appellant were married.

The court entered a decree declaring that the $2,000 paid by the appellant to the appellee was an advancement and constituted a lien upon her dower interest in appellant's property. The court also decreed that the ante-nuptial contract between the appellant and the appellee be canceled and that the appellant's complaint be dismissed for want of equity, and that the appellee have a judgment for all costs, etc. From that decree is this appeal.

In *Bryan* v. *Bryan,* 62 Ark. 79-84, we said: "Jointure is defined to be 'a competent livelihood of freehold for the wife of lands and tenements, to take effect in profit and possession presently after the death of the husband, for the life of the wife at least.' " 2 Blackstone, Com. 137. "One mode of barring the claim of a widow to dower," says Mr. Washburn, "is by settling upon her an allowance previous to marriage, to be accepted by her in lieu thereof." Though the ante-nuptial contract under review may not be technically a jointure, under the provisions of our statute, sections 2695-96-97, it was nevertheless intended by the parties as a provision, made by the appellant and accepted by the appellee, in lieu of dower. The court, therefore, was correct in treating the contract as erecting an equitable jointure. See 4 Kent's Com. 55; *Rieger* v. *Schaible,* 81 Neb. 33, 115 N. W. 560, 17 L. R. A. (N. S.) 866; 16 Ann. Cas. 700; *Stilley* v. *Vogler,* 14 Ohio 610; 1 Tiffany on Real Property, § 226, p. 789; Words and Phrases, "Jointure;" Scribner on Dower, p. 408, *et seq.*

Marriage was a sufficient consideration for the ante-nuptial contract. Where such contracts are freely entered into and are not unjust or inequitable, and there is

no fraud, they should be liberally construed to effectuate the intention of the parties and should be looked upon with favor and enforced accordingly. *Henry* v. *Butler,* 123 Pa. 742-744, and cases there cited; *In re Appleby's Estate,* 111 N. W. 305. See, also, *Nesmith* v. *Platt,* 114 N. W. 1053-1056; *Sanders* v. *Miller,* 79 Ky. 520; *In re Thormon's Estate,* 144 N. W. 5-6. The contract was valid between the appellant and the appellee, although it was not acknowledged. Section 5167, Kirby's Digest.

Section 3095, subdivision 4, Kirby's Digest, renders husband and wife incompetent to testify for or against each other. This statute was enacted with reference to the laws of the marital relation at the time of its passage. At that time the husband and wife could not contract with, nor sue each other. The statute had reference, of course, to suits that were brought by husband or wife against third parties, or *vice versa.* But, even if the above statute could be held to apply to suits between husband and wife, our married women's acts of 1915, p. 684, and of 1919, p. 36, has changed entirely the status of married women and has removed all their common-law and statutory disabilities. See *Fitzpatrick* v. *Owens,* 124 Ark. 167. These statutes would by necessary implication repeal the old statute and render husband and wife competent as witnesses for or against each other in suits between them.

Without going into detail, we are convinced, from the face of the contract and the evidence adduced, that, when the personal status of the parties, their ages, their respective families, and their separate properties are considered, the ante-nuptial agreement was a just and reasonable one.

The only remaining questions are, could the equitable jointure erected by this ante-nuptial agreement be settled by the parties after their marriage, and was there a fair settlement? Even before the passage of the last acts, *supra,* enfranchising married women, this court has

upheld and enforced, in equity, contracts that were made on fair and equitable terms between husband and wife. *Scogin* v. *Stacey,* 20 Ark. 265; *Gainus* v. *Cannon,* 42 Ark. 503; *Bowers* v. *Hutchinson,* 67 Ark. 15; *Hannaford* v *Dowdle,* 75 Ark. 127; *Donald* v. *Smith,* 95 Ark. 523.

The learned chancellor erred in holding that the agreement for a settlement of the ante-nuptial contract under the terms shown in the evidence was "an independent parol agreement for the sale of an interest in lands," and therefore within the statute of frauds. It was in no sense a sale of her dower interest, or the interest that was provided for her in lieu of dower by the jointure. It was simply an agreement upon her part to accept $2,000 in lieu of the provisions made for her by the ante-nuptial contract. The provision made for her by the ante-nuptial contract, except as to the homestead, was wholly contingent upon her surviving him and upon his having an estate, which a child could inherit. The appellant was in possession of the land. He paid appellee $2,000, and she accepted the same in settlement or fulfillment of the ante-nuptial contract. If there was no fraud and the contract was fair and reasonable, the chancery court should uphold and confirm it, not as a new and independent contract, but as relating to, and in fulfillment of, the ante-nuptial agreement. See 21 Cyc. 1255. No fraud is charged against the appellant. His estate at the time of the settlement of the ante-nuptial contract was worth not exceeding $14,000. He had six children. The settlement was made on the basis of the ante-nuptial contract that appellee was to have the value of a child's part in the estate which was estimated at $2,000. In view of the fact that her interest under the ante-nuptial agreement was wholly contingent and that she removed the contingency by anticipating and settling in advance her interest by accepting the $2,000 in fulfillment of the jointure provision, we regard the settlement as in all respects fair and just to her and one that she should not be allowed to repudiate. By such settlement she has been

enabled to enjoy in advance the benefits of an ante-nuptial contract, which she could not have enjoyed unless she lived longer than the appellant. There is no testimony in the record to warrant the conclusion of the trial court that the appellant intended the $2,000 as an advancement to the appellee, or that the appellee received the same as such. On the contrary, the testimony shows that appellant paid to the appellee and the appellee accepted the sum of $2,000 as "her share" of the appellant's estate. Under these circumstances, the appellee should be estopped from claiming that the agreement by which this settlement was consummated is invalid. *In re Adams Estate*, 140 N. W. 872.

The court erred in its findings and judgment. The decree is therefore reversed, and the cause is remanded with directions to enter a decree divesting the appellee of any and all interest in the estate of the appellant, and for such other and further proceedings as may be necessary according to law and not inconsistent with this opinion.

ELLIS & COMPANY v. FARRELL.

Opinion delivered November 29, 1920.

1. APPEAL AND ERROR—DISMISSAL OF COUNTERCLAIM—HARMLESS ERROR.—The dismissal of a counterclaim interposed by defendants as assignees of another alleged to have a claim against plaintiff was not prejudicial to defendants where the written contract on which defendants based the alleged counterclaim did not contain the assignment relied on.
2. EVIDENCE—PAROL EVIDENCE OF WRITTEN CONTRACT.—In an action for breach of contract for the sale of steel rails, where defendants contended that plaintiff had resold the rails to a third person, to whom defendant had delivered them at plaintiff's request, and plaintiff denied that any such contract had been made, the alleged contract between plaintiff and the other was not a collateral issue, and such contract, if in writing, could not be proved by parol evidence without laying a proper foundation therefor.

3. APPEAL AND ERROR—BRINGING UP REJECTED EVIDENCE.—A ruling excluding evidence of a contract can not be reviewed where appellants failed to set out the rejected evidence in the bill of exceptions.
4. EVIDENCE—RES INTER ALIOS ACTA.—In an action against a seller for breach of the contract, where defendant relied on delivery to a third person to whom he alleged plaintiff had resold the goods, letters written by the third person to defendant relative to the alleged resale were inadmissible against plaintiff.
5. TRIAL—REPETITION OF INSTRUCTIONS.—It was not error to refuse to give a requested instruction completely covered by the instructions given by the court.

Appeal from Calhoun Circuit Court; *Chas. W. Smith,* Judge; affirmed.

STATEMENT OF FACTS.

J. J. Farrell sued T. J. Ellis & Company to recover damages for an alleged breach of contract for the sale by Ellis & Company to him of certain steel rails. Ellis & Company denied they had breached the contract and as a further defense to the action alleged that Farrell had failed to deliver to Meyer Katz five miles of 25-pound steel rails at Arkansas City, Arkansas, whereby Katz was damaged in the sum of $5,000, and that Katz had assigned and transferred this contract to them.

On motion of the defendants the court dismissed that part of the answer of Ellis & Company which pleaded as a counterclaim or set-off the assignment of the contract of Katz to them. The defendants duly excepted to the ruling of the court in this regard.

The plaintiff, J. J. Farrell, was a witness for himself. According to his testimony, on the fifth day of April, 1917, he entered into a written contract with T. J. Ellis & Company for the purchase of all the 35-pound steel rails they had for $26 per ton and all the scrap iron rails at $12 per ton, the rails to be delivered f. o. b. on the cars at Ellisville, Arkansas, within sixty days. Pursuant to instructions from Farrell, Ellis & Company shipped two cars of steel rails to McIntire at Pine Bluff, Arkansas, and these cars do not enter into this contro-

versy. Farrell then sold two cars to Meyer Katz of St. Louis, Missouri, at $38 per ton and instructed Ellis to weigh them out and ship them to Katz at St. Louis. Farrell instructed Ellis to collect the money from Katz for the rails before he shipped them to him. Ellis did this, and retained the amount due his firm by Farrell for the purchase price of these two cars of rails and kept the balance, $654, which belonged to Farrell, and which was the profit he had made on these two cars of rails. Farrell sold the balance of the rails to the Shull Lumber Company of Lonoke for $40 per ton. There were about 5 3/4 miles of these rails. Ellis & Company also shipped these rails to Katz at St. Louis, and the latter refused to pay for them because he alleged that Farrell had failed to deliver to him certain other rails at Arkansas City, Arkansas, which Farrell had sold to him.

According to the evidence adduced in favor of Ellis & Company, Farrell sold all the rails to Katz, and they shipped out the rails to Katz at St. Louis, as they were instructed to do by Farrell. The agent and attorney of Katz gave them a draft for the purchase price of the rails at $38 per ton. Ellis & Company presented this draft for payment at the bank on which it was drawn, and the bank refused payment because it had been instructed to do so by Katz. Farrell had not paid Ellis & Company for these rails, and Katz subsequently paid to Ellis & Company the amount due them by Farrell for the purchase price of the rails. Ellis & Company and Katz then entered into a contract which reads as follows:

"This agreement, made and entered into this 6th day of September, 1917, by and between T. J. Ellis and S. C. Ellis, both of the city of Ellisville, and State of Arkansas, copartners doing business under the firm name and style of T. J. Ellis & Company, parties of the first part, and Meyer Katz, of the city of St. Louis, and State of Missouri, party of the second part, witnesseth: That, for and in consideration of the sum of $2,194.74 in hand paid to parties of the first part by said party of the second

part, the receipt of which said parties of the first part do hereby acknowledge, the said parties of the first part do hereby sell, assign, transfer and set over unto said party of the second part, the contents of the following cars of material, towit: Contents of car 31448, N. Y. C. & H., weight 62,900 pounds relaying rails. Contents of car 566, T. & B. V., weight 61,200 pounds relaying rails. Contents of car 113062, M., K. & T., weight 88,-900 pounds relaying rails. Contents of car 92365, R. I., weight 72,600 pounds relaying rails Contents of car 90686, R. I., weight 72,000 pounds relaying rails. Contents of car 383, M. C., weight 57,000 pounds of scrap iron. The total consideration for the contents of said cars being the sum of $4,400.04 minus $2,205.30, heretofore paid said parties of the first part by said party of the second part, leaving a balance of $2,194.74 above paid by said party of the second part to said parties of the first part.

"To have and to hold the aforesaid goods, wares and merchandise unto said party of the second part and his heirs and assigns forever, said parties of the first part hereby warranting that they have good title to the said goods and full right and authority to sell the same in the manner aforesaid, and that the same are free and clear of all incumbrances and liens.

"It is further stipulated and agreed that in the event one J. J. Farrell, of Brinkley, Arkansas, shall in the future assert any claim against parties of the first part on account of the alleged balance due said Farrell for the material above specified, and in the event said Farrell shall at any time hereinafter bring suit against said parties of the first part, said party of the second part does hereby agree that in the event said Farrell shall obtain judgment against said parties of the first part on account of the contents of said cars aforesaid, then said party of the second part hereby agrees to indemnify and hold harmless said parties of the first part for any moneys that they may pay said Farrell on account of said judg-

ment so obtained; provided, however, that this indemnity shall not hold good in the event that said parties of the first part shall not notify said party of the second part in sufficient time to give him an opprtunity to defend in said parties of the first part's name any action which said Farrell may bring against said parties of the first part.

"It is further agreed that a draft heretofore made payable to T. J. Ellis & Company, signed by A. Borden, in the sum of $4,450, drawn on Meyer Katz, shall be surrendered simultaneously with the execution of this agreement to said party of the second first. T. J. Ellis, S. C. Ellis, parties of the first part, Meyer Katz, per Louis Mayer, attorney, party of the second part."

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

The jury returned a verdict for the plaintiff in the sum of $1,500, and from the judgment rendered Ellis & Company have duly prosecuted this appeal.

C. L. Poole, Thos. T. Dickinson and *Powell & Smead,* for appellants.

1. The court erred in dismissing the set-off or counterclaim of the defendants. 134 Ark. 313; 135 *Id.* 534; 134 *Id.* 311. See, for construction of our new statute, 138 Ark. 38, 84; 217 S. W. 774; 16 Mo. 656. See, also, Kirby's Digest, § 509; 86 Mo. 613; 131 *Id.* 668; 69 Ark. 62.

2. Appellants are not liable to appellee at all, as there was no breach of the contract by them and the court erred in its instructions.

T. D. Wynne and *C. F. Greenlee,* for appellee.

Counsel for appellant *assume* that there was a written contract between appellee Farrell, and Katz, whereby Farrell sold to Katz steel at Arkansas City and Ellisville, and that Farrell failed to comply with his part of the contract, to the damage of Katz in the sum of $5,000, and that this contract and claim for damages were duly

assigned to appellants. But there was no such contract, and no ground for their contention or argument. 70 Ark. 364. No such contract is found in the bill of exceptions, and the law cited by appellants do not apply. If Farrell did agree to sell steel to Katz at Arkansas City and failed to carry out the contract, appellants could not procure an assignment thereof for the purposes of abrogation in this action. 34 Ark. 144. Since there was no contract and no assignment thereof, it is not necessary to discuss the question whether the assumed assignment was valid or not. The right to recover is clear, and there is no error in the instructions; the verdict is too small by $694.

HART, J. (after stating the facts). It is first insisted by counsel for the defendants that the court erred in dismissing their set-off or counterclaim against Farrell. It will be remembered that the defendants alleged in their answer that Farrell had sold to Katz about five miles of steel rails at Arkansas City, and had failed to deliver them to Katz, to his damage in the sum of $5,000, and that Katz had assigned his claim against Farrell to them.

The court dismissed this part of the answer of the defendants, and it is insisted that this constituted error calling for a reversal of the judgment.

Counsel for the defendants contend that Katz had a right to assign his claim for damages to the defendants, and that they could use it as a set-off in the action against the claim of the plaintiff. Conceding this to be true, the action of the court in dismissing the answer in this respect was not prejudicial error.

Counsel for the defendants were allowed to introduce in evidence the contract they made with Katz. The contract is set out in our agreed statement of facts and need not be repeated here. It bears date of the 6th day of September, 1917. In it Ellis & Company, for the consideration of $2,194.74 sold and transferred to Katz six cars of steel rails, being the steel rails which are the subject-matter of this lawsuit. In the contract it was agreed that if the plaintiff, Farrell, should in the future assert

and maintain any claim against T. J. Ellis and S. C. Ellis for said cars of steel rails, Katz would indemnify them for any money that they might have to pay Farrell. There is nothing whatever in the contract assigning to Ellis & Company the rights of Katz under an alleged contract between him and Farrell for the sale of certain steel rails at Arkansas City. Hence the action of the court in dismissing the part of the defendants' answer referred to did not constitute prejudicial error.

Again, it is insisted that the court erred in not permitting a witness to testify about a contract between Farrell and Katz whereby Farrell sold to Katz the steel rails, which are the subject-matter of this lawsuit, for $38 per ton. Farrell denied that any such contract had been made and objected to parol evidence concerning the same on the ground that the contract itself was the best evidence. The plaintiff was correct. Such contract was not a collateral issue in the case. It was not claimed that it had been lost and it could not be proved by parol testimony without laying the proper foundation therefor. *Lee Line Steamers* v. *Craig,* 111 Ark. 550, and cases cited, and *Home Ins. Co.* v. *North Little Rock Ice & Electric Co.,* 66 Ark. 538. If Ellis & Company wished to interpose as a defense to the action of Farrell against them that Farrell had sold the rails in question to Katz and that they had merely shipped the rails to Katz in accordance with the terms of this contract and the instructions of Farrell, they should have introduced the contract itself in evidence instead of trying to establish its contents by parol evidence. It will be noted that counsel for the defendants purported to read from the contract and was asking the witness if such contract had not been signed by Farrell and by Katz. The court properly held that the contract itself was the best evidence of its contents. Even if they had offered the contract itself in evidence, we could not review the ruling of the circuit court because of the failure of the defendants to set out the re-

jected instrument in the bill of exceptions. *Supreme Lodge Knights of Pythias* v. *Robbins,* 70 Ark. 364.

It is also insisted that the court erred in not admitting in evidence two letters written by the attorney of Katz to Ellis & Company relative to the contention of Katz with regard to the contract between himself and Farrell. There was no error in the court's ruling in this respect. These letters were not directed to Farrell and were not received or read by him. Therefore he could not in anywise be bound by their contents. The matters contained in them were hearsay, so far as regards the controversy between Farrell and Ellis & Company.

According to the testimony of the plaintiff, he bought from the defendants the steel rails in question, and the defendants subsequently sold and delivered them to Katz and collected the money therefor whereby the plaintiff suffered a loss of profits because he had contracted to sell the rails to another party at an advanced price.

On the other hand, it was the contention of the defendants that they had entered into a written contract with Farrell for the sale of certain steel rails to him at a stipulated price. A part of the rails was delivered to McIntire and to Katz by Ellis & Company under instructions from Farrell. The defendants retained the proportionate part of the purchase price due them for these rails and also the sum of $654, which was due Farrell as his profits in the transaction. Thus far the facts are undisputed. The defendants claim, however, that Farrell sold the remainder of the steel rails which they had sold him to Katz of St. Louis, and they had shipped these rails to Katz and accepted a draft for the purchase money from the agent and attorney of Katz, as they were directed to do by Farrell, and that payment on this draft was refused by Katz without any fault on their part.

The respective theories of the parties to this lawsuit were submitted to the jury under proper instructions which we have considered and find to be correct. There-

fore, we do not deem it necessary to set them out and discuss them in detail.

Counsel for the defendants also complain that the court refused to give an instruction asked by them. We do not deem it necessary to set out this instruction. It was completely covered by the instructions given by the court.

Therefore the judgment will be affirmed.

DAVIS v. STRAUS.

Opinion delivered November 29, 1920.

1. JUDGMENT—JURISDICTION OF EQUITY.—A court of chancery can inquire into the orders and proceedings of the probate court only in the manner and upon the same ground that it may investigate the judgments and proceedings of other courts, upon charges of fraud, accident or mistake.
2. EXECUTORS AND ADMINISTRATORS—APPROVAL OF SALE—ATTACK IN CHANCERY.—As the aid of chancery can be invoked in regard to orders of the probate court only on the ground of fraud, accident or mistake, the remedy of appeal being provided for errors and irregularities, an order of the probate court approving an administrator's sale of goods for $28, when it was appraised at $181.55, was not subject to attack in equity.
3. EXECUTORS AND ADMINISTRATORS — ACCOUNTING.—Where the administrator allowed the heirs to take possession of personal property, and they recovered insurance on its destruction by fire, he can not be required to account to them therefor.

Appeal from Garland Chancery Court; *B. H. Randolph*, Special Chancellor; affirmed.

STATEMENT OF FACTS.

Hamp Davis and Florida Davis brought this suit in equity against Gus Straus and others as sureties on the bond of the administrator of the estate of Ella Davis, deceased, to surcharge and falsify said administrator's account, and as grounds therefor allege that said administrator took into his possession certain property of said decedent and failed to account for the same.

Ella Davis died owning two dwelling houses and the furniture therein situated in Hot Springs, Arkansas. Hamp and Florida Davis and two other persons were her sole heirs-at-law. Administration was had upon her estate. The administrator resigned and Chas. Webb. who by virtue of his office as sheriff, was public administrator for Garland County, took charge of the estate and administered it.

The furniture in one of the houses was appraised at $575.85. Florida Davis and Hamp Davis lived in this house and took possession of the furniture. The house and furniture were subsequently destroyed by fire, and the heirs at law of Ella Davis, deceased, including Hamp and Florida Davis, obtained judgment against the insurance company, for the value of the furniture. The furniture in the other house was appraised at $181.55. The administrator took possession of this furniture.

J. H. Breckinridge, a deputy sheriff, attended to the duties pertaining to the administration, for Webb, the sheriff. The property which was inventoried at $181.55, and which was appraised for that amount, was sold by the administrator under orders of the court for $28. The report of sale of the administrator was duly confirmed by the court. The administrator filed his final account current in which he purported to account for all the personal property which came into his hands as administrator, and among the items in his account was the amount for which this personal property sold.

J. H. Breckinridge was a witness for the defendants. According to his testimony, the property, which was appraised at $181.55, consisted mostly of old household furniture which was in reality of but little value and a good deal of it was junk. No appeal was taken from any of the probate proceedings by any of the heirs of Ella Davis, deceased.

Other facts will be stated or referred to in the opinion. The court found the issues in favor of the defendants, and the plaintiffs have appealed.

R. G. Davies, for appellants.

There never was a case of worse administration of an estate than this. Property worth at least $1,000 was sold by Lewis for $23. Webb was insolvent, and his bond as sheriff is the only possible means of redress. The terms of the bond cover this liability, and plaintiffs are entitled to justice. The whole proceeding in the probate court and the administration was a fraud, and plaintiffs are entitled to redress.

Geo. P. Whittington and *L. E. Sawyer,* for appellees.

Appellants had their day in court and the right to appeal from the order approving the final account. They did not do so, nor even object; if aggrieved, they should have appealed, instead of waiting until Webb was dead. The chancellor was justifiable under the evidence in dismissing the complaint. Appellants knew that Webb was administrator and that Breckinridge was acting for him and that the matter was pending in the probate court. They had access to the records and could have known what orders and judgments were being rendered; they should have objected and appealed. It is too late after Webb's death and after waiting two years.

HART, J. (after stating the facts). The decree of the chancellor was correct. Counsel for the plaintiffs seek to reverse the decree on the ground that the furniture which was inventoried at $181.55, and which was taken possession of by the administrator and sold for $28, was worth considerably more than its appraised value, and that therefore the action of the administrator was fraudulent.

A court of chancery can inquire into the orders and proceedings of the probate court in the manner and upon the same ground that it may investigate the judgments and proceedings of other courts, upon charges of fraud, accident, or mistake. Under our Constitution, the probate court has exclusive original jurisdiction relative to the estates of deceased persons, and its judgments and proceedings in such matters cannot be reviewed or re-

versed in a collateral proceeding in chancery. Ample provisions have been made for appeals from such orders and decrees to the circuit court and Supreme Court for any mere errors and irregularities in the poceedings. The aid of chancery can only be invoked to surcharge and falsify the accounts of the administrator on the ground of fraud, accident, or mistake and to vacate and set aside such orders and damages as have been procured by fraud. *McLeod* v. *Griffis,* 51 Ark. 1; *Nelson* v. *Cowling,* 89 Ark. 334, and *Beckett* v. *Whittington,* 92 Ark. 230. The property, which was appraised at $181.55, was actually taken charge of by the administrator and sold under the orders of the probate court. A report of sale was made by the administrator which was duly approved by the court. The administrator accounted for the proceeds of sale in his final account current which was also confirmed by the court. No appeal was taken by the heirs of Ella Davis, deceased, from these judgments. Hence the matter is *res judicata.*

The record discloses that the furniture in the house which Hamp and Florida Davis lived in was not included in the final settlement of the administrator, and the judgment of the probate court is not conclusive as to it, because that which has not been considered by the probate court can not be said to be adjudicated. The account of the administrator can not be surcharged on this account however, for another reason. The record shows that the administrator allowed Hamp and Florida Davis to take possession of this property, and when it was destroyed by fire, they recovered from the insurance company the value thereof.

It follows that the decree must be affirmed.

PAYNE v. WOOD.

Opinion delivered November 29, 1920.

DAMAGES—WHEN EXCESSIVE.—Where plaintiff brought action for the killing of his horse by striking it with a train in August, 1918, and did not sue for prior injuries to the horse by another train inflicted in May of that year, and did not ask to amend his complaint to include the first injury, and did not object to an instruction that the jury should not consider the first injury, a judgment for $100 will be set aside; the undisputed testimony showing that the horse was almost valueless at the time he was killed.

Appeal from Ouachita Circuit Court; *Chas. W. Smith,* Judge; reversed.

Daniel Upthegrove, J. R. Turney and *Gaughan & Sifford,* for appellant.

1. The complaint should not be treated as amended to conform to the proof, as the cause of action was barred. The court erred in refusing to direct a verdict for defendant, as there was no evidence that the horse had any value at the time he was injured. The court correctly refused to allow plaintiff to amend the complaint. Kirby's Digest, § 6145; 75 Ark. 465; 132 *Id.* 368; 124 *Id.* 207. The action was barred. Kirby's Dig., § 6776; 59 Ark. 447; 3 L. R. A. (N. S.) 269, note C.

2. The verdict is excessive, and a verdict should have been directed for defendant, as the injury was unavoidable, and the presumption of liability under the statute was overcome.

HART, J. Appellant prosecutes this appeal to reverse a judgment for the alleged negligent killing of a horse belonging to appellee by one of appellant's passenger trains.

According to the evidence adduced by appellee, he found his horse crippled near appellant's railroad track on the morning of May 6, 1918. Before that time the horse was worth $150, but after that time he was not able to do any work and was almost valueless. On Au-

gust 1, 1918, the horse was struck by one of appellant's passenger trains and was killed.

The testimony of the engineer operating the passenger train in August, 1918, tended to show no negligence on the part of appellant.

At the request of the appellee the court instructed the jury that, in case it should find for appellee, it should assess his damages in the amount of the cash market value of the horse at the time he was killed.

At the request of the appellant, the court told the jury that appellee could only recover the value of the horse at the time he was killed and could recover nothing on account of the injury alleged to have been inflicted on the horse by one of its trains prior to the time he was killed.

The record shows that appellee brought this suit to recover damages for killing his horse by striking it with one of appellant's passenger trains on the 1st day of August, 1918. Appellee did not sue to recover for the injuries alleged to have been inflicted upon his horse by one of appellant's trains during the month of May, 1918. He did not ask to amend his complaint to include this injury. Without objection on his part, the court instructed the jury that it could not consider the injury to the horse which was inflicted in May, 1918, in assessing damages. If appellee wished to recover for this injury, he should have asked to have the complaint amended and have objected to the instruction given by the court limiting the amount of his recovery to the value of the horse at the time he was killed in August, 1918. Not having done so, he was only entitled to recover the value of the horse at the time he was killed in August, 1918. At that time the undisputed evidence shows that the horse was of little or no value. The jury returned a verdict in favor of the appellee for $100. There is no evidence to support it. Therefore, the judgment must be reversed and the cause remanded for a new trial.

TATUM v. WALLIS.

Opinion delivered November 29, 1920.

1. HIGHWAYS—ROAD IMPROVEMENT DISTRICT.—A road improvement district created by the Legislature will not be disturbed by the courts unless the statute is arbitrary and discriminating on its face.
2. HIGHWAYS — ROAD IMPROVEMENT DISTRICT — LANDS INCLUDED.—While no lands can be included in a road improvement district unless it is specially benefited, it is not practical in all cases to include all the lands which will in some measure be benefited, but there must be no arbitrary exclusion of lands.
3. HIGHWAYS — ROAD IMPROVEMENT DISTRICT — DISCRIMINATION.—1 Road Laws 1919, p. 634, creating a road improvement district, held not discriminatory for failure to include in that district lands already embraced in two other such districts, one created under the Alexander Road Law, and the other under a prior special act of the Legislature, which has subsequently been held by this court to be void.

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

Reid, Burrow & McDonnell, for appellant.

Act 203, Acts 1919, is void. It is unjust, unequal, confiscatory and discriminatory. It is unjust and the discrimination is so arbitrary and manifest as to amount to fraud, which is admitted by the demurrer. This case falls within the rule in case of *Ruddell* v. *Rutherford,* 145 Ark. 49. See, also, 130 Ark. 70; 214 S. W. 56. The legislative findings as to benefits *are not conclusive.* They will be overthrown when the mistake is arbitrary or obvious and demonstrable. 130 Ark. 70; 214 S. W. 56; 213 *Id.* 767; 65 Pa. 146; 3 Am. Rep. 615. The act is void. 218 S. W. 381; 130 Ark. 70; 214 S. W. 56; *Ruddell* v. *Rutherford,* 145 Ark. 49.

E. K. Edwards, for appellees.

The act is not arbitrary. The Legislature had authority to select the lands to be embraced in the district, and the matter left is to its discretion, and the mere fact that lands outside the district may be benefited does not deprive the Legislature of the power to create a district

in which shall be included lands which are benefited. 214 S. W. 23; 102 Ark. 553; 200 S. W. 501; 215 *Id.* 882; 213 *Id.* 767. When the Legislature creates an improvement district, it thereby declares that the lands embraced therein will be benefited. 103 Ark. 452. The courts can not disturb this finding and declaration. 214 S. W. 23; 215 *Id.* 882. The objection that it does not include lands at either end of the road is concluded by 125 Ark. 325; 200 S. W. 501; 102 Ark. 553. All doubts as to the validity of the statute should be resolved in its favor. 213 S. W. 767.

SMITH, J. Appellants own lands lying in Road Improvement District No. 7 of Sevier County, Arkansas, and seek by this suit to have the act of the General Assembly creating that district declared void. That act was numbered 203 and was approved March 7, 1919, and is to be found at page 634 of volume 1 of the Road Acts of 1919.

It is alleged that the act is unjust, unequal, confiscatory, discriminatory, unconstitutional and void, because certain lands lying adjacent to and abutting on the proposed road, which will be directly benefited and enhanced in value by the construction of the road, are not included in the district. That a part of such lands are owned by the commissioners of the district, and other lands by their relatives; while still other lands owned by appellants, and others similarly situated, are included within the proposed district and will be taxed therein, although the benefits to be derived are not any greater than those upon lands abutting on the road and not taxed. A demurrer to the complaint was sustained, and this appeal is from that decree.

Attached to the complaint, and made an exhibit to it, is a map, which appellees say is old and inaccurate, and which does not show all the present unimproved roads lying within, and leading out of the proposed improvement district.

The map does show, however, the boundaries of the improvement district, which are set out in the act creating it. Roughly speaking, the improvement district is a parallelogram, twelve and a half miles long, from the northern to the southern boundary, and six miles wide from its eastern to its western boundary. The north line of the district coincides with the north line of sections 25, 26, 27, 28, 29 and 30, township 8 south, range 30 west; and the south line coincides with the half-section lines of sections 25, 26, 27, 28 and 29, township 10 south, range 30 west; and, to a very large extent, the east and west boundary lines of the district are the east and west lines of range 30 west.

A part of the lands in favor of which it is said a discrimination has been made lies north of and adjacent to the district. Other lands in favor of which it is said a discrimination has been made lie south of and adjacent to the district. The south boundary of one tract and the north boundary of the other mark the termini of the road to be improved. The road which it is proposed to improve runs through these two tracts, but the improvement of that road terminates at their boundaries. It is said that this fact makes the act arbitrary, discriminatory, and therefore void, for the reason that these favored owners may use the road without being required to contribute to its cost.

It is not contended that any lands are included in the district which will not be benefited by the proposed improvement. The insistence is that lands have been omitted which will be benefited, and which should therefore be assessed, and this omission constituted the discrimination complained of.

It will be borne in mind that the district in question is one of legislative creation, and it is therefore our duty not to disturb it unless it has been made to appear that the statute is arbitrary and discriminatory on its face.

Counsel for appellants insist that the case of *Ruddell* v. *Rutherford*, 145 Ark. 49, is conclusive of that issue.

In that case we held that the elimination of a certain section of land made the act discriminatory and void because the only practical way of going from a section of land retained in the proposed district to the improved road, was by traversing the section which had been eliminated. Nothing of that kind is true here, for an inspection of the map of the district makes it certain that, if one should travel from any point in the district directly toward the road to be improved, he would reach the road without, at any time or place, getting beyond the limits of the improvement district.

Stripped of the unimportant and irrelevant issues, the question is whether the omission from the district of the tracts north and south of the district constitutes an arbitrary discrimination against the lands lying within the district.

We answer this question in the negative. It is obvious, as we have several times said, that improved roads must have termini, and the districts which are to be charged with their cost must have boundaries. It is probably true that every improvement district of this kind benefits a wider expanse of territory than can be embraced within the district. No land can be included unless it is specially benefited, but it is not practical in all cases to include all the lands which will in some measure be benefited. There must be no arbitrary exclusion of lands, for when this is done a discrimination results. Appellants insist that such is the effect of the act in question, and the correctness of that contention is the question we have for decision.

Here the east and west boundaries of the district are substantially parallel with the road to be improved. Practically speaking, the road runs through the center of the district. The road is as long as the district, and ends at the north and south boundaries of the district. It is true that all people just north of the district, as well as those just south of it, can use the road and will pay nothing for that use; but that fact is not decisive of the issue. The improvement of the road ends at the

boundaries of the district, but the road itself does not. It runs north from the district, and south from the district, and connects with still other roads, which, with it, unite the towns and communities of that county with those of other counties.

We can not know what finding the Legislature may have made as to the distance north and south from Lockesburg within which the territory would be tributary to that town. Lockesburg is in the center of the district and the largest town in it, but there are other towns in the district. *Hill* v. *Echols,* 140 Ark. 474, 215 S. W. 882. We do know that the road which it is proposed to improve runs on beyond the boundaries of the district and connects with other towns and communities. The Legislature may have been of opinion that in course of time these other roads might be improved, and, if so, the cost of that improvement would have to be borne by the territory through which those roads ran.

As a matter of fact, on the same day on which act 203 was approved, act 204 was also approved (volume 1, Road Acts, 1919, page 652). This act 204 was entitled "An act to create the Horatio and Eastern Road Improvement District of Sevier County." Section 1 of the act declares its purpose to be to improve the Horatio and Ben Lomond road from the corporate limits of the town of Horatio, through the towns of Paraclifta and Ben Lomond, to the town of Brownsville. Paraclifta is one of the towns in No. 7, and the district created by act 204 would have continued the improvement of the road which forms the subject of the improvement in District No. 7. Sections 27 and 28, 33 and 34, township 10 south, range 30 west (the lands south of district No. 7 and in favor of which it is alleged act No. 203 has made a discrimination), were included in the district created by act 204, and consequently would have been taxed to construct that improvement.

It does appear that in the case of *Milwee* v. *Tribble,* 139 Ark. 574, we held act 204 void. This was done because the act included a section of land five miles from

other lands in the district. It was insisted that the inclusion of that section was a clerical error; but it was in the act, and we could not strike it out. But for that error, the lands herein in question would have been included in that district. They may yet be included in that or some other district, and no doubt will be when the roads running through that territory are improved.

We can not know all the facts and conditions existing at the time act 203 was passed, but it will be presumed that the Legislature had that knowledge. As illustrating that fact, counsel for that district call attention to the fact that the lands just north of district No. 7 had been included in a district organized under the Alexander Road Law and known as Road Improvement District No. 2. That district includes all the lands north of district No. 7, which it is here claimed should have been embraced in district No. 7. It is pointed out that this fact appears from the public records in the office of the State Highway Commission. So that, if these lands had been included in district No. 7, as appellants here say they should have been, the lands would then have been included in two districts, instead of one, and both of those districts would be improving portions of the same road.

As is pointed out in the brief of counsel for the road district, the Alexander Road Law district, or district No. 2, the legislative district created by act 203, and the legislative district created by act 204, are adjacent and were each organized to improve roads lying within their boundaries; and we can not say that an arbitrary discrimination has been shown in the creation of district No. 7 as a result of the boundaries which have been fixed by the Legislature. *Harrison* v. *Abington,* 140 Ark. 115; 215 S. W. 255. The decree of the court below will, therefore be affirmed.

HART, J. (dissenting). Mr. Justice WOOD and the writer think the action of the Legislature in excluding the lands immediately north and south of and adjacent to the road improved was an arbitrary act within the

meaning of the rule laid down in *Ruddell* v. *Rutherford,* 145 Ark. 49.

It is true, as stated in the majority opinion, that roads must have termini and road districts must have boundaries. It is a far different thing, however, to say that road districts must end somewhere than to say that they may end anywhere. If the lands adjoining the road on the sides thereof are especially benefited by the improvement, it is equally apparent that the lands immediately north and south are benefited, and no testimony can alter this fact. The land owner could go from his land to the improved road and if any one is benefited he would be benefited. It is no answer to say that the lands immediately north and south were attempted to be placed in other road districts. This could only affect the assessment of benefits. It might have been that the omitted section in *Ruddell* v. *Rutherford, supra,* was in another road district. But the court held that the only practical route for the owner of section 19 to enter the road would be to go through section 18. So it was said that if section 19 was benefited it was equally apparent that section 18 would be benefited. Of course, the benefit to the lands was to enable the occupants to travel over the improved road. So here the owners of the lands immediately north and south of and adjacent to the proposed road will derive benefit from the road if the lands included within the boundaries of the district will derive any benefit. In this respect the district in the instant case is different from that in *Hill* v. *Echols,* 140 Ark. 474. In that case the court held that the act of the Legislature in omitting lands in another county could not be regarded as discriminatory, although they were apparently as much benefited as the lands within the district. The reason was that the lands were in another county, and, under the jurisdiction vested in the county courts, the roads of the county might be sufficiently improved under the general road and county taxes as not to be needed to be placed in a special improvement district.

An investigation on the part of the Legislature might have disclosed such a state of facts. In the instant case both the road and road district lie in the same county, and no such reason could exist. No amount of investigation on the part of the Legislature could show that the lands within the district are especially benefited and those immediately north and south of the end of the improved road are not specially benefited. Therefore the action of the Legislature in excluding the lands in question was arbitrary and rendered the act unconstitutional.

MANLEY CARRIAGE COMPANY v. FOWLER & HILL.

Opinion delivered November 29, 1920.

BILLS AND NOTES—INSTRUCTION.—In an action on a note which defendants claimed had been paid to plaintiff's assignor, plaintiff denying such payment, an instruction to find for defendants if plaintiff was not an innocent purchaser was erroneous; the jury should have been charged to find for plaintiff if the note had not been paid, but to find for defendants if the note had been paid, provided plaintiff was not an innocent purchaser.

Appeal from Hot Spring Circuit Court; *W. H. Evans,* Judge; reversed.

E. H. Vance, Jr., and *Albert W. Jernigan,* for appellant.

1. This is the second appeal in this case. 194 S. W. 708. The only additional testimony in behalf of defendant was that of George Luckadoo, whose testimony did strengthen defendant's plea of payment of the last note sued on, or as to agency of Embree.

2. The court erred in giving the fifteenth and sixteenth instructions, as there was no evidence upon which to base them. The evidence shows that the note sued on was transferred to plaintiff for a valuable consideration before maturity and has never been paid. The burden was on defendants, and they have utterly failed to prove their case.

E. D. Gleason, for appellees.

The instructions given are correct and the verdict is sustained by the evidence. The jury correctly decided the case.

SMITH, J. This is the second appeal in this cause, and the opinion on the former appeal contains a statement of the issues. *Manley Carriage Co.* v. *Fowler & Hill,* 128 Ark. 299, 194 S. W. 708.

The carriage company, hereinafter referred to as the plaintiff, sued to recover on one of four notes given in payment of an order placed by Fowler & Hill, hereinafter referred to as the defendants, with the Embree Carriage Company. The defendants testified that the note had been paid. This was denied by the plaintiff, which also claimed to have been a *bona fide* holder of the note at the time of the alleged payment. We reversed the judgment in favor of defendants, and in doing so said there was nothing in the record to show that the plaintiff was not an innocent purchaser.

The testimony at the trial from which this appeal comes is practically identical with that recited in the former opinion, except that we now have before us the additional testimony of J. G. Embree and George Luckadoo, and the insistence is that this additional testimony makes a question of fact for the jury.

The court gave numerous instructions at the request of the respective parties dealing with the question of the alleged agency of Embree.

An instruction numbered 16 stated the conditions necessary to constitute one an innocent purchaser, and in effect told the jury to return a verdict for defendants if the finding was made that plaintiff was not an innocent purchaser. This instruction was erroneous because plaintiff's ownership of the note is undisputed, and it therefore has the right to recover judgment on the note, whether it is an innocent purchaser or not, if the note has not been paid.

At the second trial there was offered in evidence a letter signed Embree Carriage Company, which was written on stationery with the following caption:

"EMBREE CARRIAGE CO.,
J. G. Embree, Gen. Mgr.
Embree-McLean High Grade Vehicles
Office 5469 Von Versen Ave.
St. Louis, Mo."

Embree admitted that he was not in the carriage business except to take orders, which were sent to the plaintiff to be filled, and that he had no factory at the address given above, or elsewhere. Embree-McLean was the name of a defunct company which went out of business in 1907 or 1908. The witness testified that plaintiff company passed on all his orders. That this was done for the purpose of determining whether the plaintiff company would fill the orders on time or require cash payments, and that when they were filled on time he turned over to plaintiff company any paper he had accepted from purchasers in payment of the orders given him, and that the note in suit passed to the plaintiff in this manner. In the letter referred to above, as well as in another letter, both of which were written more than a year after the transfer of the note in suit, Embree wrote the bank which had the note for collection and referred to the note in language indicating continued interest in it.

Luckadoo testified that in 1914, at about the time the sale was made out of which this litigation arose, he bought buggies from Embree, who was then representing plaintiff company and the Peters Buggy Company. Embree carried catalogues of both companies, but was pushing the sale of plaintiff's goods, although witness bought the Peters buggy. Embree made sales of plaintiff company's buggies in Hot Springs, which were delivered there, and continued to call on witness, as the representative of the plaintiff company, until 1918.

There is no question in this case of lack of consideration; and there has been no plea of failure of consid-

eration. Plaintiff company paid value for the notes, and is an innocent purchaser of the note in suit, unless it took the note from Embree as its agent, a fact denied by its representatives and by Embree.

We think the record now before us presents a question which was not present in the former record, and that is whether plaintiff company was an innocent purchaser, and the decision of that question depends on the existence or absence of an agency contract between the plaintiff company and Embree.

The case is now fully developed, and upon a resubmission to the jury (which must be ordered because of the erroneous instruction set out above) the jury should be directed to find, first, whether the note has been paid. If it has not been paid, the finding should be for plaintiff, whether it is an innocent purchaser or not. A second question arises if the note has not been paid, and that is whether plaintiff is an innocent purchaser, and the answer to that question depends on the existence or nonexistence of an agency on the part of Embree.

For the error indicated, the judgment is reversed and the cause remanded with directions to submit these two questions of fact to the jury.

HAWKINS v. STATE.

Opinion delivered November 29, 1920.

LARCENY—ALLEGATION OF OWNERSHIP IN TENANT.—Where a tenant was to raise a crop and pay a portion of the proceeds as rent, title to the crop was in the tenant, so that the ownership of the crop was properly alleged to be in the tenant in an indictment for larceny of a portion of it.

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

E. M. CarlLee, for appellants.

The indictment alleges ownership of the cotton in Fred Raspberry. Allegations of ownership in an indictment for larceny must be proved as alleged. 73 Ark.

33. There was a fatal variance in the proof from the allegations in the indictment, and part of the oral instruction given by the court is clearly erroneous. 108 Ark. (*Brown* v. *State*). A verdict for defendants should have been given. The names of the owners of the cotton were not alleged in the indictment so as to enable the court to pronounce upon the conviction according to the rights of the case, and they can again be placed jeopardy for the same offense.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. The exceptions to the instructions were *en masse* and can not avail unless all of them were erroneous. 40 Ark. 413; 133 *Id.* 68. The instructions really state the law, and there was no error. 140 Ark. 413. Furthermore, the exceptions do not call attention of the court to the failure to give the instructions and are not preserved in the motion for new trial. 114 Ark. 415.

2. There was no error in refusing to direct a verdict. 24 Ark. 545; 134 *Id.* 107-8. The evidence certainly sustained the charge in the indictment.

HUMPHREYS, J. Appellants, Rison Hawkins and Lieutenant West, were indicted, tried and convicted in the Woodruff Circuit Court, Northern District, of the crime of grand larceny, and the punishment of each was assessed at one year in the penitentiary. From the judgments of conviction appeals have been duly prosecuted to this court. The indictment charged them with unlawfully and feloniously stealing, taking and carrying away of 1,700 pounds of seed cotton of the value of $170, the property of Fred Raspberry. The facts revealed that Fred Raspberry rented the land from Mr. Stanley for the year 1919; that he was to pay one-fourth of the proceeds of the crop of cotton as rent for the use of the land; that he was to haul the cotton to the Augusta Mercantile or People's Gin to be ginned and baled; that, when sold, the merchant was to retain one-fourth of the proceeds for Mr. Stanley and pay Fred Raspberry the re-

maining three-fourths; that, on the 7th or 8th day of November, 1919, in compliance with the rental contract, Fred Raspberry took 1,700 pounds of lint cotton raised on Mr. Stanley's place to the aforesaid gin; that, the hour being late, the wagon was driven under a shed, where, during the night, the seed cotton was stolen by appellants.

Appellants contend that, under the facts stated, the title to the seed cotton was in Mr. Stanley and Fred Raspberry jointly, and not in Fred Raspberry alone, as alleged in the indictment; that the failure to allege ownership in both created a fatal variance between the allegation of ownership in the indictment and the proof. The soundness of this contention must depend upon the correct interpretation of the rental contract. Under the terms of the contract, Fred Raspberry was to raise the cotton and pay Mr. Stanley one-fourth of the proceeds derived therefrom, as rent for the use of the land. This constituted an ordinary tenancy. *Birmingham* v. *Rogers,* 46 Ark. 254. The law is well settled that in an ordinary tenancy the title to the property is in the tenant and not in the landlord; that the extent of the landlord's interest is a lien upon the crop for the payment of his rent. *Upham* v. *Dodd,* 24 Ark. 545. The title to the seed cotton was therefore in Fred Raspberry, the tenant, and not in Mr. Stanley, the landlord. For that reason, it was proper to allege the ownership in Fred Raspberry. No variance existing between the allegation and the proof of ownership, the judgment is affirmed.

McCRACKEN v. STATE.

Opinion delivered December 6, 1920.

1. HIGHWAYS—PRESCRIPTIVE USE.—A road becomes established as a public highway by prescription when the public, with the owner's knowledge, has claimed and continuously exercised the right of using it for a public highway for the period of seven years, unless it was so used by leave, favor or mistake, even though the public travel may have somewhere slightly deviated from the original track by reason of some obstacle.

2. HIGHWAYS — PRESCRIPTIVE USE.—After continuous and unrestricted use of a road for the statutory period of limitations, the public acquires an irrevocable right to its use, even though the use was originally permitted under a contract with one or more individuals, since the owner, in order to preserve his right to revoke the use beyond the period of limitations, must maintain his control over the way by some overt act showing the use continued as a permissive one.

3. CRIMINAL LAW — INSTRUCTION — ASSUMING DISPUTED FACT.—In a prosecution for obstructing a public road, an instruction that in order to convict defendant it must be found beyond reasonable doubt that "within one year next before the defendant was arrested on said charge of obstructing a public road he did obstruct said public road" *held* not to assume that the road was public.

4. CRIMINAL LAW—ADMISSION OF EVIDENCE HARMLESS WHEN.—In a prosecution for obstructing a public road, admission in evidence of letters from the county judge to the road overseer, directing the latter to require defendant to remove an alleged obstruction was harmless where there was no issue as to the obstruction nor as to the demand for its removal.

5. CRIMINAL LAW—ELECTION TO PROSECUTE.—In a prosecution for obstructing a public road, where the evidence showed that there were not two roads, but two branches to a single road only a few feet apart, and both branches were obstructed by the same act, the State should not have been required to elect on which of the two branches it should base the prosecution.

6. CRIMINAL LAW—QUESTION NOT RAISED BELOW.—In a prosecution originating before a justice of the peace for obstructing a public road, where evidence that defendant was notified by the overseer to remove the obstruction was admitted without objection, defendant can not complain for the first time on appeal that the information did not allege such notification or that he permitted the obstruction to continue after being so notified.

7. CRIMINAL LAW—JURISDICTION OF JUSTICES OF THE PEACE.—Under Const., art. 7, § 40, giving justices of the peace jurisdiction in misdemeanors, justices of the peace have jurisdiction of prosecution for obstructing highways, though the statute (Kirby's Dig., § 1758) provides that the person who so obstructs a public road is "liable to indictment in the circuit court."

Appeal from Marion Circuit Court; *J. M. Shinn*, Judge; judgment modified.

Williams & Seawel, for appellant.

1. The evidence wholly fails to establish that the road obstructed was a public road by prescription. It was not established by any order of the county court. If a public road, it was such solely by prescription. The ferry was a private enterprise, and could be abandoned at any time by the owner. The owner had no right to make a landing there against the wish or consent of the appellant or his predecessor in title. 84 Ark. 21-27. The use of the road was permissive and not adverse. 7 Metc. (Mass.) 33; 39 Am. Dec. 754. The owner did not consent to the user of his land as of right, and the user by permission was not adverse and no basis for prescription, and it makes no difference how long such permissive user continued. 37 Cyc. 27; 19 C. J. 887, § 53 (d); 50 Ark. 53; 47 *Id.* 431; 83 *Id.* 236; 60 N. E. 915; 55 *Id.* 953. Upon breach of the agreement by which the license was acquired, appellant had the right to revoke it and close the road in any manner he saw fit. 19 C. J. 887; 73 Ark. 296; 64 *Id.* 339; 88 *Id.* 248.

2. If the evidence is sufficient to establish the obstruction of a road established by prescription, still the court erred in the admission and rejection of testimony connected with the trial and in its refusal to exclude certain evidence relating to another road after the State's election to exclude its consideration from the prosecution. It was error to admit the letter from J. H. Black to Ed. Gilbert and in stating in the presence and hearing of the jury that the testimony with reference to the road which defendant was charged with obstructing was not material, so far as same tended to establish that said road was opened over lands owned by defendant through a contract agreement to establish a ferry and ferry privileges. It was also error to permit Cal. Hogan and George Billings to detail a quarrel between appellant and said Hogan in regard to the obstruction across the road not in controversy. It was irrelevant and immaterial and prejudicial. 67 Ark. 594; 69 *Id.* 134.

3. The court erred in its instructions given and in refusing those asked by appellant. No. 2 is misleading and does not state the law. 88 Ark. 20, 28. No. 1 directed a verdict for the State, which was error, and the same defect is in No. 3 and should not have been given. 82 Ark. 503. The court has no discretion to withhold instructions appropriate to any theory of the case sustained by competent evidence, and it was error to refuse the instructions asked by appellant. 50 Ark. 545; 92 *Id.* 71; 99 *Id.* 265, 283.

4. There was no evidence authorizing the court in directing the jury to fix any penalty for an obstruction to the road for which the State elected to prosecute appellant. The prosecution was under Kirby's Digest, § 1758, and a penalty did not accrue until after the party was notified by the overseer to remove the obstruction. 54 Ark. 354; 82 *Id.* 131.

5. If there was evidence sufficient to authorize the court to direct the jury to fix a penalty in case of conviction, still it was not of such nature as to warrant the fixing of a definite period of time for its operation. The question of time should have been left to a jury.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. The evidence shows that this was a public highway by prescription and the evidence warrants a conviction.

2. The objections to the testimony are not well taken. Where a highway is established by prescription it matters not if same has slightly deviated from the original track by reason of an obstruction placed across the road. 47 Ark. 431.

McCULLOCH, C. J. This prosecution was begun against appellant before a justice of the peace of Marion County on information filed by the prosecuting attorney, charging the offense of obstructing a certain public highway. The charge is that appellant did obstruct "the public road which extends from Oakland to Flippin by then and there felling trees and building fences across

said public road at and near Pace's Ferry on the north or left bank of White River."

Appellant was convicted in the trial before the justice of the peace, and on the trial anew in the circuit court he was again convicted. At the point where the offense is charged to have been committed, White River flows in an easterly or slightly southeasterly direction. Appellant and his brother own a farm on the north or left bank of the river where there is a ferry known as Pace's Ferry, which has been maintained there for the past thirty years or longer. It was formerly operated by means of oars and poles, but during the year 1902 it was changed to a cable ferry. The public road runs toward the ferry between appellant's farm and a farm known as the Anglin place. Formerly the road running immediately to the ferry was several hundred yards further west than the present ferry landing, where the cable is attached, but when the cable was installed, the ferry owner made arrangements with appellant's mother, who then owned the land, to permit travel over the land to the landing place then being established. The ferry owner agreed to allow the landowner free ferriage for the privilege of letting the public use the road to the ferry. At that time the road traveled from the ferry landing to the mouth of the lane between appellant's land and the Anglin place, a distance of about 150 yards, ran west, close to the river, under what the witnesses call "the bank," and up over the bank to the mouth of the lane. The road under the bank was frequently muddy and impassable, and in the year 1911 the ferry owner obtained permission from appellant to open a way or road for public use in getting to and from the ferry by going straight over the bank from the ferry landing and thence along the bank to the mouth of the lane. The two roads—the old one and the new—were about thirty feet apart. The testimony adduced by the State tended to show that both of those roads had been continuously used by the public since the respective dates of the permission given

by the landowners, and the contention on the part of the prosecution is that the public acquired a right of prescription to use the roads and that in that way they became public highways. It is not correct to say that there were two roads, for there was in fact only one road, but there were two branches of it for the short distance from the mouth of the lane to the ferry landing.

Early in the year 1920, appellant got into a controversy with the ferryman about compliance with the agreement for free ferriage and decided to stop up both of the approaches to the ferry. He built a wire fence across the old road below the bank and felled trees across that road, and he built a fence and a gate across what is termed the new road up the bank from the ferry landing. The road overseer demanded the removal of the obstruction, which demand was refused, and this prosecution was then begun.

During the progress of the trial, appellant's counsel made a motion that the State be required to elect which of the obstructions would be relied on as constituting the offense, and there was an election made by the prosecuting attorney to base the prosecution on the obstruction across the old road under the bank.

It was expressly agreed by appellant's counsel that the only issue of fact involved in the trial was whether or not the road was a public road.

The first contention is that there is no evidence that the road obstructed was a public highway. The testimony introduced by the State tended to establish the fact, as before stated, that the public used the road continuously for more than seven years, down to the time it was obstructed by appellant, but it is insisted that the use was merely permissive and was conditioned on the promise of the ferryman to give free passage to the landowner. Counsel argue that the use of the way to the ferry was a mere license granted to the owner of the ferry in consideration of free ferriage being afforded to the landowner, and that the license could be withdrawn,

and was so withdrawn, on the failure of consideration. Conceding that such was the effect of the grant, so far as concerns the rights of the ferry owner, it does not follow that the public has not gained a permanent and irrevocable right-of-way by continued use for the statutory period of limitation. This court in *Howard* v. *State,* 47 Ark. 431, announced the following rule with reference to the establishment of a public highway by prescription: "A road becomes established as a public highway by prescription, where the public, with the knowledge of the owner of the soil, has claimed and continuously exercised the right of using it for a public highway for the period of seven years, unless it was so used by leave, favor or mistake; and this though the public travel may have somewhere slightly deviated from the original track by reason of any obstacle that may have been placed in it." That rule has been adhered to in later cases, and is the well established law of this State.

It necessarily follows from the law thus announced, that it is immaterial how and under what circumstances the unrestricted use of the way by the public began. If the use is continuous and unrestricted for the statutory period of limitations, the right becomes permanent and irrevocable, even though the use was originally permitted under a contract with one or more individuals. In order for the owner to preserve his right to revoke the use beyond the period of limitations, he must maintain his control over the way by some overt act showing the use continued as a permissive one. The evidence in the case does not disclose any such act on the part of the owner. The way was used continuously by the public without let or hindrance. There is, it is true, a conflict in the testimony, but that conflict has been settled against appellant by the verdict of the jury.

Objections were made to certain instructions given by the court on this issue, and the rulings of the court in that respect are assigned as errors.

The first instruction does not, as contended, assume that the road obstructed was a public highway. That instruction told the jury that in order to convict appellant it must be found beyond reasonable doubt that "within one year next before the defendant was arrested on said charge of obstructing a public road, he did obstruct said public road." This does not assume that the road was public, but it submitted that question to the jury.

The second instruction, which was objected to, defined the acquisition of a prescriptive right by the public, in accordance with the law as hereinbefore announced. Under the last clause of the instruction, the jury were permitted to find that there was an acquisition of the prescriptive right by use for seven years before the contract between the original owner of the land and the ferry keeper. That was correct, for it is unimportant when the right was acquired. If the right was once acquired, it could not be taken away from the public by a contract between the ferry keeper and the owner of the abutting land.

It is next contended that the court erred in admitting in evidence letters from the county judge to the road overseer directing the latter to require appellant to remove the obstruction. This was not material, for the reason that there was no issue in the case as to the obstruction, nor as to the demand for removal of the same.

It is urged that the court erred in directing the jury to assess, in addition to the fine prescribed by statute, a penalty for the failure to remove the obstruction after demand. The statute reads as follows: "If any person shall obstruct any public road by felling any tree or trees across the same, or placing any other obstruction therein, he shall be guilty of a misdemeanor, and liable to indictment in the circuit court of the proper county, and, on conviction thereof, be fined in any sum not exceeding fifty dollars, and shall forfeit two dollars for

every day he shall suffer such obstruction after he shall have been notified to remove the same by the overseer. Provided, this shall not extend to any person who may cut down any timber for rails, wood or other lawful purpose who shall immediately remove the same out of the road, or to any person who shall dig a ditch or drain across such road on his own lands and who keeps the same in repair.'' Kirby's Digest, § 1758.

It is argued that the undisputed evidence is that demand was made only for the removal of the obstruction to the new road running directly up the bank, and that the State elected to prosecute solely on the charge of obstructing the other branch of the road—the old one running under the bank—and that no penalty can be assessed under that charge. We have already said that under the evidence there were not two roads obstructed. Two branches of the road were obstructed by the same act, and a demand for removal was necessarily applicable to the obstruction to both branches of the road. The court should not have required the State to elect, for there could not have been more than one conviction under the charge made and the evidence adduced.

The court directed the jury to assess a penalty, if they found appellant guilty, of $2 per day from March 17 to June 2, 1920. The jury assessed the penalty for 82 days. The evidence is undisputed, but it is a little uncertain as to when the demand was made for removal of the obstruction. The obstruction did, however, continue for at least 75 days, from March 19th to June 2d, and the error can be cured by remitting $14 of the penalty, which will be done. In all other respects the judgment is affirmed.

McCULLOCH, C. J. (on rehearing). Appellant raises now for the first time the point that the information filed against him does not contain an allegation that he was notified by the overseer to remove the obstruction or that he permitted the obstruction to continue after being notified by the overseer, and that the punishment

for the continuation of the offense could not be imposed in this case. We consider it is too late to raise this question at this time.

The record shows that the case was tried on the sole issue of fact as to whether or not the road obstructed was a public road within the meaning of the statute. Evidence was adduced, without objection, establishing the fact that appellant was notified by the overseer to remove the obstruction, and the court instructed the jury, without any objections on the part of the appellant as to that feature, that in assessing the punishment the jury should add $2 per day from the date of the failure to remove the obstruction after notice, up to the time of the trial. The only instructions requested by appellant and given by the court at his request related to the issue whether or not the road obstructed was a public one within the meaning of the law. This prosecution was, as shown in the original opinion, begun before a justice of the peace on an information filed by the prosecuting attorney. It is too late, under the circumstances of the trial below, for appellant to raise the question that the information fails to contain allegations of notice by the overseer for the removal of the obstruction and a continuation of the offense after such notice.

It is also urged that the justice of the peace had no jurisdiction of the offense charged in the information. Counsel rely on the language of the statute which provides that when any person obstructs a public road "he shall be guilty of a misdemeanor and liable to indictment in the circuit court of the proper county," etc. That part of the statute which reads that the person "is liable to indictment in the circuit court" was not intended to confer exclusive jurisdiction on that court, for the other language of the statute in express terms declares the offense to be a misdemeanor.

Under the Constitution of 1874, art, 7, § 40, justices of the peace are clothed with "such jurisdiction in misdemeanor cases as is now or may be prescribed by law," and the jurisdiction thus conferred has not been taken

away by general statutes, nor do we think the effect of the statute now under consideration takes away that jurisdiction as to this particular offense. Our decision in *Ganns* v. *State,* 132 Ark. 481, we think, conclusive of this question against appellant's contention.

Other points urged in the petition for rehearing have been sufficiently discussed in the original opinion.

Rehearing denied.

HART, J. (dissenting). In my opinion the uncontradicted evidence shows that the owner of the ferry agreed to give the landowner free ferriage for the privilege of extending a road from his ferry landing to the public road, which might be used by passengers going to and from the ferry.

The public used the road under this agreement, and there is nothing in the record tending to show that the public used the roadway adversely; or that the landowner ceased to exercise the qualified dominion over the passageway from the ferry to the public road, which his contract with the ferryman gave him. The qualified use of the road by the public with the owner's leave for the purpose of going to and from the ferry will not support a claim of highway by prescription. *Jones* v. *Phillips,* 59 Ark. 35.

Judge WOOD concurs in this dissent.

ARMOUR & COMPANY *v.* DRURY.

Opinion delivered December 6, 1920.

1. APPEAL AND ERROR—VERDICT SUSTAINED BY CONFLICTING EVIDENCE.—In the case of a conflict in the evidence, a verdict for plaintiff will be sustained if supported by substantial evidence.
2. FOOD—IMPURITY—EVIDENCE.—Plaintiff's evidence that sausage eaten by his wife had in it a green substance with an offensive odor, in connection with defendant's testimony that the sausage could not be in that condition, when prepared according to the

methods employed in defendant's packing house, justified the jury in finding that the sausage in question was not prepared with ordinary care, and that it caused the death of plaintiff's wife.

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

W. C. Kirk, Cul L. Pearce and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. This case was reviewed here in 140 Ark. 371. On second trial the evidence was substantially the same. This case is governed by the simple rules of negligence, and it was incumbent on plaintiff to show that defendant failed to exercise ordinary care; that, while the jury might, from the plaintiff's evidence, infer negligence, yet such inference could only carry the case to the jury in the absence of any evidence tending to show due care on the part of the defendant. It was error to refuse to direct a verdict under the former decision. 140 Ark. 378-9. The evidence was undisputed, and the jury should have been directed to find for defendant. 89 Ark. 574; 200 Fed. 322; 247 *Id.* 932; 89 Ark. 581; 100 *Id.* 462-4; 120 N. E. 396. The latter case is squarely in point. See, also, 196 Mass. 440-4; 82 N. E. 682; 15 L. R. A. (N. S.) 885; 163 Ill. 518; 100 N. E. 1078; 139 Mass. 411; 1 N. E. 154; 52 Am. Rep. 715; 34 L. R. A. 464; 132 Tenn. 546; 11 N. W. 392; 68 L. R. A. 342; 114 Ark. 140; 169 S. W. 810.

2. Negligence is a fact and must be proved, and an inference of negligence is rebutted by any evidence showing due care. 140 Ark. 378 and cases *supra.*

3. The uncontradicted evidence on part of defendant tended to show a high degree of care, thereby conclusively rebutting any inference of negligence which the jury might have drawn from the testimony of plaintiff. Persons or corporations who manufacture meat products for food must use ordinary care of prudent persons engaged in such business. 247 Fed. 921-31; 20 Atl. 517; 74 Fed. 195; 135 U. S. 554-570; 145 Fed. 424;

43 N. Y. 123; 38 N. E. 102; 39 *Id.* 958; 34 L. R. A. (N. S.) 1179-1191.

4. The court erred in giving instructions Nos. 1, 2 and 6 for plaintiff. There was no evidence that defendant was guilty of negligence in the manufacture and handling of the sausage.

G. G. McKay and *Brundidge & Neelly,* for appellees.

1. The testimony is practically the same as in 140 Ark. 378, and the case should be affirmed, as there was evidence to sustain the veridct.

2. There was proof of negligence, and this is not rebutted by evidence showing due care. 139 Ark. 495; 118 *Id.* 218; 77 *Id.* 9; 75 *Id.* 491; 121 *Id.* 531. See, also, 29 L. R. A. 718. The inference of negligence was not rebutted by showing due care. 29 Cyc. 636. The question of ordinary care is one for the jury to settle. 110 Ark. 495; 124 Ga. 121; 1 L. R. A. (N. S.) 1178; 110 Am. St. 157; 52 S. E. 152; 19 Am. Neg. Rep. 107; 5 A. L. R. 246.

3. The instructions correctly state the law, and the evidence shows negligence.

McCULLOCH, C. J. Appellee sued appellant to recover damages caused by alleged negligence of appellant in manufacturing and selling impure sausage which, when eaten, caused the death of appellee's wife. On a former trial of the case the trial court gave a peremptory instruction in favor of appellant, but this court held that it was error to give the instruction and reversed the judgment and remanded the cause for a new trial. 140 Ark. 371. The history of the case and the testimony adduced by appellee in support of his cause of action were set forth in the opinion of this court and need not be repeated. The testimony introduced by appellee is substantially the same as in the last trial. In disposing of the case here on the former appeal, we said: "We think the testimony as a whole is sufficient to warrant a submission of the question of negligence to the jury. This is not building a presumption or an inference of fact

upon a presumption, but the circumstances are such as fairly warrant the inference that Mrs. Drury ate the sausage, that the sausage contained a poison, and that it caused her sickness and death, and that appellee was negligent either in failing to discover the disease which produced the poisonous alkaloid or in failing to properly prepare or handle the meat, thereby causing it to become a poisonous substance." The proof practically excluded any idea of the meat becoming contaminated after it left the possession of appellee. It was received by the local dealer from the public carrier and taken from the original package on the day it was eaten by Mrs. Drury, and then contained a poisonous substance, * * * Appellee's method of slaughtering animals and preparing meat for distribution and sale were matters entirely within the knowledge of its own employees, and the circumstances found in this case were at least sufficient to make a *prima facie* case and shift to appellee the burden of proving that there was no negligence in this respect. It is not a case where the thing speaks for itself so as to create a presumption of negligence, but there are circumstances which warrant such an inference and cast upon appellee the burden of clearing itself of the charge by showing that ordinary care was observed in the preparation and distribution of the food, the consumption of which caused the injury complained of."

At the trial now under review appellant introduced an abundance of testimony, not only on the issue of care in the preparation and handling of the meat, but also on the issue as to the cause of the sickness and death of appellee's wife. Expert testimony was introduced by appellant tending to establish the fact that Mrs. Drury's illness was not attributable to poison from eating sausage or at least that the cause of her illness was so much a matter of conjecture that the inference was not reasonably warranted that it was caused by eating impure sausage. However, this testimony raised a conflict on

that issue, and we can not say that the verdict of the jury is unsupported by substantial evidence.

The other testimony introduced by appellant gave a detailed account of the method in vogue in appellant's packing house of slaughtering animals and preparing the meat for food. It appears from this testimony that the work is done under the supervision of experienced men and under the inspection of agents of the Federal Government—that the animals slaughtered and meat thereof were carefully examined by skillful men before being prepared for food, to discover diseases of any kind, and that the employees handling the meat and the tools and machinery used were kept clean so as to prevent contamination. The testimony is reasonable and consistent and is undoubtedly sufficient to show that appellant employed ordinary care—even a higher degree of care—in selecting wholesome meat and in preparing it for use and getting it out to retail dealers. The sausage of which Mrs. Drury ate was prepared at the Kansas City packing house of appellant during the month of March, 1918. It was shipped from Kansas City on March 13th, and arrived at the Little Rock distributing office on March 17th, and it was shipped to Graham, the retailer at Bald Knob, on March 21st, reaching the latter place on March 21st, the same day it was sold to appellee and eaten by his wife. In preparing the sausage at the packing house the meat was sewed up in new canvass bags, after being chopped and ground, and was then cooked. It was then dipped in hot paraffin to prevent moulding and to keep it in good sanitary condition. After the stocks of sausages were paraffined, they were packed in boxes and then trucked to the chilling or refrigerating room and held until shipment, generally not more than two days later.

It is earnestly insisted that the verdict is not supported by sufficient evidence in that the testimony introduced by appellant as to the selection and preparation of meat is undisputed and shows that appellant exercised

ordinary care and was not guilty of negligence. It is not correct, however, to say that the testimony on that issue is undisputed. There is, indeed, no direct contradiction of the narrative of facts given by the witnesses introduced by appellant as to the method of selecting and preparing the meat. There is an indirect contradiction by the testimony of appellee to the effect that the stick of sausage of which his wife ate contained "a green, slimy piece about as big as your thumb" which was wet and soggy and gave out a bad odor—smelled like it was rotten. The jury could have rejected the testimony of appellee, but we must assume that they accepted it as true. The jury, notwithstanding the fact that the stick of sausage was impure, might have found that its condition was the result of accident and not necessarily of negligence, but the jury were not bound to so find from the testimony. Two of the witnesses introduced by appellant testified that the stick of sausage could not possibly be in the impure condition appellant claimed to find it in, after the meat was selected, prepared and handled according to the methods employed at appellants' packing house. This warranted the jury in finding, if they believed appellee's testimony that he found the stick of sausage to be in the condition as related, that appellant did not observe the precautions stated by the witnesses in selecting and preparing the meat and that there was negligence in one of these respects. This was, in other words, a circumstance which warranted the jury in finding that ordinary care was not observed by appellant. This made a substantial conflict in the testimony which it became the duty of the jury to settle. We can not say, therefore, that there is not a legal sufficiency of testimony to sustain the verdict.

The assignments of error in regard to instructions given by the court all go to the question of legal sufficiency of the evidence. We find no error, and the judgment is affirmed.

WOOD and SMITH, JJ., dissent.

GRAND LODGE OF FREE AND ACCEPTED MASONS v. TAYLOR.

Opinion delivered December 6, 1920.

1. TAXATION—EXEMPTION OF PROPERTY USED FOR CHARITY.—Under Const., art. 16, § 5, exempting "buildings and grounds and materials used exclusively for public charity," a complaint in a suit to restrain the collector from collecting personal property taxes from a masonic lodge, alleging that its funds are derived from initiation fees and annual dues of members, and that its funds are expended for expenses, such as hall rent, purchase of paraphernalia used in conferring degrees, salaries of secretary, etc., and that the remainder is reserved for charity, that the charity of the lodge is not withheld from non-members, but the most of its charity is confined to its own members and their dependents, *held* insufficient when the complaint contains no allegation that the property assessed has been set apart to be "used exclusively for public charity."
2. TAXATION—EXEMPTION OF PROPERTY USED FOR CHARITY.—Whether property is used exclusively for public charity depends not upon the character of the corporation or association owning the property sought to be exempted, but, regardless of the character of the owner, to the direct and exclusive use of the property for public charity.

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

Troy W. Lewis, for appellants; *W. C. Adamson, W. Burt Brooks* and *Grover T. Owens,* of counsel.

Ala. 478; 145 Iowa 514; 26 L. R. A. (N. S.) 696; 124 N.

1. A Masonic lodge is a charitable institution. 37 W. 316; Ann. Cases, 1912 A, 1183.

2. Its property is used exclusively for charitable purposes and under our Constitution is exempt from taxation. Const. (1874), art. 16, § 5; 57 Ark. 445; 84 *Id.* 497; 79 Neb. 462.

3. The demurrer admits the verity of all the allegations contained in the petition.

4. The court erred in sustaining the demurrer to the amended petition which stated facts as to the use of property in sufficient terms to make a clear case of exemption. 25 Ind. 518 and cases *supra.* The property of the lodge is used exclusively for charitable purposes and

is exempt. 1 Cooley, Taxation, p. 348; 57 Ark. 445; 84 *Id.* 497; 81 *Id.* 243; 23 L. R. A. 545; 60 Neb. 642; 72 Me. 432; 50 Md. 421; 68 Tex. 698; 160 Pa. St. 572; 157 Mo. 51; 108 Ky. 333; 92 Tenn. 188; 19 L. R. A. 289. See, also, 43 Ark. 525; 57 *Id.* 445; 87 *Id.* 497; 84 Ark. 500. The property was used exclusively for charitable purposes, and it is so alleged, and it is exempt. Cases *supra;* 11 C. J. 338, § 58; 87 N. E. 602; 96 *Id.* 1032.

Geo. W. Emerson, Prosecuting Attorney, and *John W. Newman,* for appellees.

It is not alleged that the property of the lodge is used exclusively for public charity, and is not exempt. 57 Ark. 445-9; 84 *Id.* 497-9; 128 *Id.* 555. Such property as used in this case is not exempt, as it is not used exclusively for charitable purposes.

McCULLOCH, C. J. Appellant, Western Star Lodge No. 2, Free and Accepted Masons, is a subordinate organization of appellant, Most Worshipful Grand Lodge of Ancient York Rite Masons of the State of Arkansas, a society incorporated by special statute, enacted by the General Assembly of the year 1846. Acts 1846, p. 136.

Appellants instituted this action to restrain the tax collector of Pulaski County from collecting the taxes assessed against the personal property of Western Star Lodge. The contention is that the property of Western Star Lodge is exempted from taxation under a provision of the Constitution, which exempts "buildings and grounds and materials used exclusively for public charity." Article 16, section 5, Constitution of 1874.

The court sustained a demurrer to the complaint. It is alleged in the complaint that the said Grand Lodge was incorporated under the aforesaid statute as a charitable corporation, and that all of the subordinate lodges under its jurisdictions are charitable organizations; that Western Star Lodge derives its revenues exclusively from initiation fees and annual dues of members and from voluntary gifts from its members, and that it expends its funds for expenses, such as hall rent, purchase

of paraphernalia used in conferring degrees, salaries of the secretary and tyler, dues to the Grand Lodge, and occasional luncheons at social meetings, and that the remainder is reserved for charity, dispensed by a committee of the lodge to destitute Masons, and to needy widows and orphans of deceased Masons; that said lodge does not conduct any business nor receive any funds for profit or dividends, and that no member thereof receives any pecuniary benefit from the funds in the treasury except as charity, when in need. It is also alleged that "the charity of the lodge is not withheld from non-members and the dependent families of non-members, and the protection is often extended to them, but the most of its charity is confined to its own members and their dependents."

The complaint contains no direct allegation that the property assessed has been set part to be "used exclusively for public charity." The general allegation to that effect is controlled by, and must be restricted to, the specific facts pleaded. It will be noted that the exemption extends only to "buildings and grounds and materials used exclusively for public charity."

We do not consider it necessary to a decision of this case to define the word "materials," as used in the exemption clause. Nor do we deem it necessary to determine whether the allegations of the complaint are sufficient to characterize appellants as public charitable institutions within the meaning of the Constitution. It is sufficient for a decision of this case to rest it upon the failure of appellants to allege that the property taxed is "used exclusively for public charity." This language of the exemption clause refers, not to the character of the corporation or association owning the property sought to be exempted, but, regardless of the character of the owner, to the direct and exclusive use of the property for public charity.

In *Brodie* v. *Fitzgerald*, 57 Ark. 445, the court said: "The guarded language of the Constitution describing

the property to be exempted as 'buildings and grounds and materials used exclusively for public charity,' leaves no room for doubt that it was not the intention to exempt any other property from taxation save such as is used exclusively for public charity, and that the exemption can not be extended to property leased or rented and from which revenue is derived, though the same be applied solely to support the charity." And in *Hot Springs School District* v. *Sisters of Mercy,* 84 Ark. 497, we said: "It is well settled that no one can exempt his property from taxation simply by an exclusive use of the income for public charity; * * * But a different rule prevails where the property is directly and exclusively used for that purpose." See, also, *School Dist. of Fort Smith* v. *Howe,* 62 Ark. 481, and *Robinson* v. *Indiana & Ark. Lbr. Co.,* 128 Ark. 550.

It follows, therefore, that no cause of action is stated in the complaint, and the chancery court was correct in sustaining a demurrer.

Affirmed.

SUPERIOR OIL & GAS COMPANY *v.* SUDBURY.

Opinion delivered December 6, 1920.

EXECUTORS AND ADMINISTRATORS—AUTHENTICATION OF CLAIMS OF CORPORATIONS.—Under Kirby's Digest, § 110, as amended by act May 28, 1907, the claim of a corporation against a decedent's estate must be authenticated by the affidavit of the cashier or treasurer; the affidavit of the secretary being insufficient.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. H. Dudley,* Judge; affirmed.

Davis, Costen & Harrison, for appellant.

1. The court erred in refusing to permit plaintiff to show by witnesses Beale and Davis their conversation and transactions with Sudberry relative to the sale and purchase of the stock. K. & C. Dig., § 3403, only applies to parties to the record. 46 Ark. 306. Mere in-

terest in the transaction or result does not disqualify. 63 *Id.* 556; 183 S. W. 187.

2. It was error to admit in evidence the letter addressed to B. A. Lynch and the testimony of Lynch. It was incompetent and immaterial. 14 C. J., § 289; 71 Ark. 379-384.

3. The court erred in refusing instructions 3 and 6 asked by plaintiff. They were correct. There was no evidence that Beale had any authority to trade in the stock of the plaintiff company or that they ever ratified any contract alleged to have been made by him.

4. The court erred in refusing instruction No. 1 for plaintiff. No effort was made by defendant to show payment, or any evidence offered by way of defense, and a verdict should have been directed for plaintiff.

Buck & Lasley, for appellee.

The claim was not properly verified and the statute in regard to presentation of claims against estates was not complied with. The affidavit is unsigned and there is no *jurat;* nor is the complaint verified. Kirby's Dig., § 114; 132 Ark. 410; *Lay* v. *Thompson,* 145 Ark. 194. The claim was barred by nonclaim. All the issues were submitted under proper instructions, and the verdict is conclusive.

McCULLOCH, C. J. Appellant instituted this action in the circuit court of Mississippi County against the estate of J. G. Sudbury, deceased, to recover the sum of one thousand dollars, alleged to be due on a stock subscription made by said decedent. The complaint was amended by interlineation so as to allege that said decedent executed and delivered to appellant a promissory note for said stock subscription and that the note had been lost, without having been paid. Besides other defenses, the executrix of decedent's estate pleaded the statute of nonclaim. Kirby's Digest, § 110, as amended by act of May 28, 1907. There was a trial before a jury and upon the issues submitted by the court in its instructions, a verdict was returned in favor of appellee.

There are several assignments of error, but we think that the evidence fails wholly to show compliance with the statute in regard to presentation of claims against estates of deceased persons. The statute provides that the authentication of such a claim made by a corporation must be made by the cashier or treasurer of the corporation (Kirby's Digest, § 116) and that the affiant shall state that "he has made diligent inquiry and examination, and that he does verily believe that nothing has been paid except the amount credited, and that the sum demanded is justly due." Kirby's Digest, § 117.

There is in the record a writing which was exhibited with the complaint and introduced in evidence as an affidavit authenticating the claim of appellant, but it does not meet the requirements of the statute. Appellant is a corporation, and the affidavit purports to have been made by the secretary. That is not sufficient. *Lanigan* v. *North,* 69 Ark. 62. Moreover, the affidavit is unsigned, and there is no jurat of an officer attached to it. In fact it is no affidavit at all, nor do the contents of the writing meet the requirements of the statute. The complaint was not verified by affidavit.

Affirmed.

WARE v. STATE.

Opinion delivered December 6, 1920.

1. REMOVAL OF CAUSES—RACIAL DISCRIMINATION.—A murder case is not removable from the State court to the Federal court because the defendants are negroes, and negroes have been excluded from previous grand juries and from the grand jury which indicted the defendants.
2. CRIMINAL LAW — CHANGE OF VENUE.—Where a petition for a change of venue was supported by the affidavits of four negro men who testified that their belief that the defendants could not obtain a fair and impartial trial in the county was predicated upon the sentiment that they had heard expressed principally in the vicinity of their residences and upon an article appearing in a local paper, but their examination showed that they had no general acquaintance throughout the county, had not visited various portions of the county since the indictments were returned, and had no opportunity to know the general sentiment

of those qualified to serve as jurors throughout the county, the lower court did not abuse its discretion in denying the petition.

3. CONSTITUTIONAL LAW—EQUAL PROTECTION—RACE DISCRIMINATION. —Whenever by any action of a State, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a negro, the equal protection of the laws is denied, contrary to the Fourteenth Amendment.

4. CRIMINAL LAW—CONSTRUCTION OF RECORD.—Where the record recites that defendants' motions to withdraw their pleas and to move to quash the indictments were overruled, but later recites that defendants were permitted to file their motions to quash the indictments, which were overruled, were then arraigned and pleaded not guilty, the record will be held to show that the motions to quash were presented before their arraignment.

5. CONSTITUTIONAL LAW—EQUAL PROTECTION.—Where a negro defendant in a murder case moved to quash the indictment upon the ground that negroes had been excluded from the grand jury that found the indictment on account of their color, it was error to overrule the motion without hearing evidence in support of the allegation.

6. JURY—CHALLENGE TO THE PANEL.—A challenge to the panel of the petit jury may be made at the time when the accused is called upon to select a jury for the trial, although he has already been arraigned and pleaded to the indictment.

7. INDICTMENT AND INFORMATION—OBJECTION TO PANEL OF GRAND JURY.—A motion to quash the indictment because of objection made to the grand jury is in the nature of a plea in abatement, and must come before the plea in bar.

8. INDICTMENT AND INFORMATION—PLEADING.—Where applicable, the rules of pleading in civil and criminal proceedings are the same.

9. INDICTMENT AND INFORMATION — ERROR IN NAMING CRIME.—In cases of indictment the name of the crime is controlled by the specific acts charged, and an erroneous name does not vitiate the indictment.

10. CRIMINAL LAW—EFFECT OF MOTION TO QUASH INDICTMENT.—In a murder case, a paper styled "a motion to quash the indictment" will be treated as a challenge to the panel of the petit jury where that was the purpose of the instrument.

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

Ed. Ware, Will Wordlow, Albert Giles, Joe Fox, John Martin, and Alf Banks, Jr., were convicted of murder, and appeal.

Scipio A. Jones and *Murphy, McHaney & Dunaway,* for appellants.

1. It was error to deny the petition for removal to the Federal court. 154 U. S. (38 Law. Ed.), 901; 170 U. S. 213; 100 *Id.* 303.

2. It was error to overrule the petition for change of venue without giving any reason.

3. The denial of the petitions to temporarily withdraw the pleas of not guilty for the purpose of presenting motions to quash the indictments was an abuse of discretion. 100 U. S. 303. The motions to quash should have been restrained for maladministration of the law in selecting jurors. *Ib.*

4. In completing the juries only white men were summoned.

5. The testimony of Aubrey Burke was wholly irrelevant and prejudicial. The methods used were contrary to law. 2 Blackstone, Com. (3 ed., by Cooley), p. 325. See 154 U. S. 34-45; 162 *Id.* 566; 121 Ark. 220-226; 37 S. E. 627; 107 Atl. 554; 132 Cal. 631; 100 N. Y. S. 126; 69 S. W. 536; 65 *Id.* 1093; 85 Pac. 63.

6. The court erred in instructions 9 and 10 for the State, and the giving of No. 6 did not cure the error. 100 Ark. 218-24.

7. Evidence of another crime or offense was not admissible. 72 Pa. St. 63; 73 Ark. 262; 75 *Id.* 427; 91 *Id.* 558. The testimony was incompetent. The evidence is not sufficient to sustain a conviction, besides the many errors in the admission of testimony and the errors in the instructions.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. There was no error in denying the petition for removal to the Federal court. 170 U. S. 38; 162 *Id.* 566; 121 Ark. 226.

2. No error in overruling motion for change of venue. Kirby's Digest, § 2317. The testimony of the subscribing witnesses does not meet the requirements of

the statute. 121 Ark. 326; 107 *Id.* 29; 76 *Id.* 279; 80 *Id.* 360; 98 *Id.* 137; 95 *Id.* 241.

3. The court properly denied appellants' petition to temporarily withdraw the pleas of not guilty. No discrimnation in the administration of the law in this State was shown. 100 U. S. 313.

4. No errors were committed in the admission of testimony nor was there any error in the instructions. The verdict is supported by the evidence and there is no error in the instructions.

WOOD, J. These cases are separate appeals from judgments of the Phillips County Circuit Court. The cases have been consolidated here for the purpose of briefing, and they can be disposed of in one opinion. This is the second appeal. *Banks* v. *State,* 143 Ark. 154.

On the second trial each of the defendants was convicted of murder in the first degree, and by the judgment of the court sentenced to death. When each case was called for trial in the lower court, each defendant filed a petition for removal to the Feneral court, in which, among other things, it was alleged that the defendant was a negro, and that both the grand and petit juries were made up exclusively of white men; that negroes were excluded from the juries solely on account of their color; that this was pursuant to a custom and practice which had been sanctioned by the circuit courts and Supreme Court, by which the defendant was deprived of his right under the Constitution and laws of the United States. The court refused to remove the causes to the Federal court. Each of the defendants then filed a petition for a change of venue, duly verified by them and supported by the affidavits of four negro men, who testified in substance that their belief that the defendants could not obtain a fair and impartial trial in Phillips County was predicated upon the sentiment they had heard expressed principally in the vicinity where they resided and from reading an article appearing in the Helena World. It was shown that the Helena World was a daily newspaper

published in Helena; that it had a general circulation over Phillips County among the whites and also among the negroes; that on the 7th day of October, 1919, an article was published in that paper headed "Inward Facts About the Negro Insurrection." That article was the report of a committee of seven, consisting of the president of the Business Men's League of Helena, the sheriff, the county judge, the mayor of the city of Helena, and other prominent citizens, who were chosen to conduct the investigations with a view of punishing the guilty. Among other things the article stated that the present trouble with the negroes in Phillips County is not a race riot. It is a deliberately planned insurrection of the negroes against the whites, directed by an organization known as the Progressive Farmers and Household Union of America, established for the purpose of banding negroes together for the killing of white people. The article was quite lengthy and entered into detail showing how the organization of the negroes was brought about, the purpose for which it was organized, and the plans adopted for carrying out such purpose. Among other things, it was stated that Robert L. Hill, who organized the union, told the members that it was necessary for them "to arm themselves in preparation of the day when they should be called upon to attack their white oppressors." He told them that the government had called the organization into existence, and it would be supported by the government in defense of the negroes against the white people; that those of the union who were not able to buy munitions would be supplied by the union from the government storehouse at Winchester, "where arms, munitions, and trained soldiers would be ready for instant use." The article stated that "every negro who joined these lodges was given to understand that ultimately he would be called upon to kill white people;" that the time for the attack had been set, but plans had not been entirely perfected, and the shooting of the officers brought on the insurrection ahead of schedule. The usual expression of Hill

to the members of the union was "get your racks filled for the day to come." The court denied the petition for change of venue, and the defendants duly excepted to the ruling.

The defendants in each case filed a motion asking that they be allowed to withdraw their former pleas of not guilty. They set up that when these pleas were entered they had been given no opportunity to procure counsel of their own choice and knew nothing of their rights. They also asked in these motions that the indictments be quashed because the grand jury that indicted them was composed wholly of white men, negroes being excluded therefrom solely because of their race. The defendants in each case filed a motion which is entitled "Motion to Quash the Indictment." In this motion it is alleged that the grand jury which found the indictment was composed of white men selected by the jury commissioners, who were also white men, negroes being excluded therefrom on account of their color; that the jury commissioners selected the grand jury and also excluded all colored men therefrom solely on account of their color, in violation of their rights under the Fourteenth Amendment and the laws of Congress. Included in this motion was the further allegation "that the present petit jury to serve at the present term was selected in the same way, colored men being excluded by the jury commissioners on account of their color." The motion concluded with a prayer that "the jury commissioners who selected the juries be summoned to testify to the matters set up in the motion and that the indictments be quashed and the present panel of the petit jury be set aside." The court overruled the "motion to quash the indictment," and the record shows that "to the action of the court in overruling the motion to quash the indictment and refusing to hear evidence upon said motion, the defendants duly and properly excepted." Each of the defendants was then arraigned and entered a plea of not guilty.

The regular panel of the petit jury was composed wholly of white men. The jury in each case was completed after the exhaustion by the defendants of their peremptory challenges, and only white men returned by the sheriff as talesmen, or jurors, on the special *venire facias* ordered by the court. All the defendants, except Martin, moved to quash and set aside the sheriff's return of talesmen under the special *venire facias* ordered by the court on the ground that "they were colored men, of African descent, and that the sheriff in summoning the talesmen for the completion of the jury had discriminated against them, on account of their race and color, by rejecting and refusing to summon any colored man, of whom there were many qualified to serve on the jury, solely because of their color, thereby denying to them the equal protection of the law, and due process of law, in violation of the rights guaranteed to them under the first section of the Fourteenth Amendment to the Constitution of the United States." The prayer of these motions was that "the court hear evidence hereon and that the sheriff's return to said order be quashed and the talesmen discharged." The record shows that "the motion to quash the sheriff's return to the special venire was by the court overruled, and that to the ruling, order and action of the court in overruling said motion and in failing and refusing to hear evidence thereon, the defendants at the time duly and properly excepted."

I. The court did not err in refusing to remove the causes to the Federal court. There is nothing in our Constitution or statutes, or in the interpretation thereof by this court, to show that jurors of the African race are excluded from jury service in this State solely on account of their color. There has been no interpretation of our Constitution and laws by this court to show that in advance of a trial negroes could not enforce in the judicial tribunals of this State all the rights belonging to them in common with their fellow citizens of the white race. *Castleberry* v. *State,* 69 Ark. 346. Such is not the

law nor the public policy of this State or in any portion of it. The fact, therefore, that negroes had been excluded because of their race from previous grand juries and the grand jury which indicted the defendants, even if such were the fact, would not authorize a removal of the causes to the Federal court. *Gibson* v. *Mississipi,* 162 U. S. 566; *Smith* v. *Mississippi,* 162 U. S. 592; *Tillman* v. *State,* 121 Ark. 322.

II. A majority of the court is of the opinion that the lower court did not err in denying the appellants' petition for a change of venue. The affiants to the supporting affidavits were examined at length. Their examination showed that they had no general acquaintance throughout the county, had not visited various portions of the county since the indictments were returned, and therefore had no opportunity to hear an expression of the general sentiment of those qualified to serve as jurors throughout the county. They, therefore, had no knowledge or information, except of a very limited and local character, of any prejudice existing in the minds of the inhabitants of the county. They based their belief mainly upon reading the report of the committee in the Helena World concerning the "Insurrection of the Negroes" against the whites, and we can not say, as a matter of law, that this inflammatory article was sufficient foundation to justify the affiants in swearing that they believed that the minds of the inhabitants of the county were so prejudiced against the appellants that they could not obtain a fair and impartial trial. *Tillman* v. *State, supra,* at pages 326, 327; *Wolfe* v. *State,* 107 Ark. 29; *Williams* v. *State,* 103 Ark. 70; 100 Ark. 218; *Hobson* v. *State,* 121 Ark. 79; *Dewein* v. *State,* 120 Ark. 302. A majority of the court is of the opinion that the lower court did not abuse its discretion in holding that the affiants who signed the supporting affidavits were not credible persons in the sense of the statute, and therefore did not err in denying the petitions for a change of venue. In this conclusion the writer does not concur, for

he is of the opinion that the appellants had fully complied with the statute and were entitled to a change of venue.

III. Facts well pleaded are set forth in the motions entitled "Motion to Quash the Indictment," which, if true, show that the petit jury was selected in violation of the Constitution and laws of the United States. Fourteenth Amendment to the Constitution of the United States Revised Statutes, § 1977; Civil Rights Act of March 1, 1875, ch. 114, § 1; U. S. Comp. Stat. Ann., § 3926. The motions, therefore, presented Federal questions which are controlled by the decisions of the Supreme Court of the United States.

In *Carter* v. *Texas,* 177 U. S. 442-447, it is said: "Whenever by any action of a State, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment to the Constitution of the United States. *Strauder* v. *West Va.,* 100 U. S. 303; *Neal* v. *Delaware,* 103 U. S. 370, 397; *Gibson* v. *Mississippi,* 162 U. S. 565." See also *Virginia* v. *Reaves,* 100 U. S. 313; *Smith* v. *Miss.,* 162 U. S. 592; *Williams* v. *Miss.,* 170 U. S. 213. The same rule applies to petit juries.

In *Carter* v. *Texas, supra,* the motion to quash the indictment was in all essential particulars the same as the motions in the cases at bar. It was presented before the defendant had been arraigned and entered his plea to the indictment. In that case "the court refused to hear any evidence in support of the motion, and thereupon overruled the same without investigating into the truth or falsity of the allegations of the motion, to which action of the court, the defendant then and there excepted." While there is a record entry in the present cases showing that the defendants presented a mo-

tion asking that they be permitted to withdraw their pleas entered at the former term of the court on the ground that they had been given no opportunity to employ counsel or procure an attorney of their own choice and knew nothing of their rights to move to quash the indictment and asking that they be permitted to file motions to quash the indictments, and showing that this motion was overruled, yet immediately following the above record entry is another record entry showing that the defendants were permitted to file their motions to quash the indictments and that these motions were overruled. Following this, the record recites in each case that "the defendant was then arraigned, asked to plead either guilty or not guilty to the indictment against him, and pleaded not guilty."

While the last two record entries are in apparent conflict with the first, yet, taking the whole record together, the effect of the last recitals is to show that the court reconsidered its action in refusing to allow the defendants to withdraw their former pleas and to file motions to quash the indictments, and did allow these motions to be filed before the appellants were arraigned and before their pleas were entered to the indictments on which they were put upon their last trial. "An arraignment is a reading of the indictment by the clerk to the defendant and asking him if he pleads guilty or not guilty to the indictment." Section 2272, Kirby's Digest. The statute does not contemplate two arraignments on the same indictment. Therefore, as we view the record in the present cases, it is conclusively shown that the motions to quash the indictments were presented and passed upon by the court before appellants were arraigned and entered their pleas.

"The question whether a right or privilege claimed under the Constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of a State court is itself a Federal question." *Carter* v. *Texas, supra; Neal* v. *Delaware, supra; Mitchell* v.

Clarks, 110 U. S. 633; *Boyd* v. *Nebraska, ex rel. Thayer,* 143 U. S. 135.

Did the court err in refusing to hear testimony on the motions? While no written pleas were required of the State in answer to the motions, yet it does not appear that the State, orally or otherwise, in any manner controverted the facts set forth in the motions. The prosecuting attorney did not ask that witnesses be called to disprove the allegations. But the appellants prayed that the "jury commissioners who selected the juries be summoned to testify upon this motion," and that the indictments be quashed, and the present panel of the petit jury be set aside. The record thus shows an offer and an attempt upon the part of the appellants to introduce evidence in support of their motions. *Brownfield* v. *So. Car.,* 189 U. S. 427. Under these circumstances the ruling of the court in refusing the prayer of appellants to hear evidence on the motions was but tantamount to disposing of the same as if on demurrer. *Castleberry* v. *State,* 69 Ark. 346. The ruling of the court was equivalent to saying that the facts, although properly pleaded and true, were in law not sufficient. In *Castleberry* v. *State, supra,* after quoting from *Carter* v. *Texas, supra,* we held that it was error to overrule a similar motion, and concluded the opinion by saying: "The court below erred in overruling the motion to quash without hearing the evidence. The appellant was entitled to introduce testimony to sustain the allegations in his motion." This doctrine was also recognized in *Franklin* v. *State,* 85 Ark. 534, but in that case the motion was overruled because the defendant did not offer to introduce evidence in support of it. See also *Brownfield* v. *So. Carolina, supra; Rogers* v. *Alabama,* 192 U. S. 226. In the last case it is said: "It is a necessary and well settled rule that the exercise of jurisdiction by this court can not be declined where it is plain that the fair result of a decision is to deny the rights." In that case the State

trial court had stricken from the files a motion similar to the ones under review here because of its length.

In *Whitney* v. *State,* 59 S. W. 895, the Supreme Court of Texas, after citing *Carter* v. *Texas, supra,* and other decisions of the Supreme Court of the United States, says: "We understand the court to have held in *Carter* v. *State,* above, that wherever the Federal question is made it is the duty of the court to probe the matter in order to determine whether or not the Fourteenth Amendment had been violated in the formation of the jury." We can not escape the conclusion, therefore, that the court erred in refusing to hear evidence upon appellants' motions and in overruling such motions without hearing the evidence. In addition to the other authorities above cited, see *Yick Wo* v. *Hopkins,* 118 U. S. 356; Brannon on the 14th Amendment, p. 336 *et seq.; Bush* v. *Kentucky,* 107 U. S. 110; *Ex parte Virginia,* 100 U. S. 339; *Rogers* v. *Alabama,* 192 U. S. 226; Collins on the 14th Amendment, p. 73; *Collins* v. *State,* 60 S. W. 42; *Bullock* v. *State,* 47 Atl. 62; see Taylor on Due Process of Law, p. 329 *et seq.*

But, if it be conceded that the court refused to hear the evidence and overruled the motions on the ground that the appellants had entered pleas on these indictments at a former term of the court and had failed to challenge the grand jury at the proper time and in the proper manner, and that the motions as to the grand jury were, therefore, too late, still no such reasons as these would avail in support of the ruling of the court in overruling appellants' motions to set aside the regular panel of the petit jury. Appellants alleged also that the petit jury was selected by the jury commissioners, and that colored men were excluded therefrom on account of their color. If appellants had already been arraigned and had pleaded to the indictments at a former term of the court, that term of court had elapsed, and the regular panel of the petit jury selected at that time had passed out with that term, and appellants at the succeeding term

were called upon to face an entirely new panel of the petit jury selected for the term at which the appellants were last tried. If the appellants were not allowed to challenge the regular panel of the petit jury at the term when they were called upon to face such panel and when the jurors were to be selected to try them, and if objection to the panel could be had only before arraignment and not thereafter, then in many cases defendants would be deprived entirely of the right to object to the panel of the petit jury from which jurors were to be selected to try them. Because it often occurs that several terms of court intervene between the time of an arraignment and plea on the indictment and the time when the accused is brought to trial. Motions for change of venue and continuance precede the trial of a case and are granted by the court in proper cases. It would be a vain and useless thing for a defendant to have to object to the panel of the petit jury at the beginning of the term and at the time the panel was being organized, when he intended at the same term, in good faith, to present a motion for continuance or change of venue, which he believed would result in postponing the trial to a future term. In such cases, if parties indicted could not object to the panel of the petit jury except before arraignment and plea to the indictment, they would be wholly deprived of the statutory right to challenge the panel of the petit jury, which they were called upon to face at the trial. Such is not the law, and no such procedure is prescribed by statute, State or Federal, and there is no sanction for such procedure in the decisions of the Supreme Court of the United States. An objection to the regular panel of the petit jury on account of illegality or irregularity in selection is not in the nature of a plea in abatement, and it is therefore not one of those motions which is necessary to be made *in limine*. *U. S.* v. *Gale,* 109 U. S. 65.

The same rule does not apply on motion to quash the indictment because of objection made to the grand jury. Such motion is in the nature of a plea in abate-

ment, and must come before the plea in bar. For, as is said in *Tillman* v. *State, supra,* "it should always be borne in mind that the indictment by the grand jury is a mere accusation, and that no person accused of crime is entitled to have the accusation made by any particular jurors, or class of jurors." But a person indicted for crime does have the right, when he is put upon his trial and called upon to face the panel from which the jury is to be selected to try him, to challenge the panel, and he is not called upon or required to make his objection before that time. In *Franklin* v. *State, supra,* the court recognized that a challenge to the panel of the petit jury could be made and filed on the day the case was called for trial. This is in conformity with our statute, which provides for a challenge to the panel of the petit jury when the case is called for trial. Kirby's Digest, §§ 2354-56. The motions to set aside the panel of the petit jury, therefore, at the term when the appellants were put upon their trial and at the time when they were called upon to select a jury for their trials, were in apt time.

The motions to set aside the panel of the petit jury, although embraced in what is designated in the record as "Motion to Quash the Indictment," were nevertheless also distinctively motions to set aside the panel of the petit jury. It must be conclusively presumed that the trial court informed itself of the contents and merits of the motions presented for its consideration by reading same or having such motions read in its hearing, before it ruled upon the merits of such motions. The trial court will not be heard to say that it did not so inform itself and that it was misled by the mere name in designation of a motion upon which it was called to rule. In civil proceedings this court has said that "the name by which a pleader designates his plea is immaterial. The plea should be treated according to its legal effect." *Rinehart & Gore* v. *Rowland,* 139 Ark. 90, 95; *Merritt* v. *School District,* 54 Ark. 468; *Randolph* v. *Nichol,* 74 Ark. 93; *Ryan* v. *Fielder,* 99 Ark. 374.

It is well settled that the rules of pleading in civil and criminal proceedings, where applicable, are the same.

Even in cases of indictment the name of the crime is controlled by the specific acts charged, and an erroneous name does not vitiate the indictment. *Harris* v. *State,* 140 Ark. 46; *Speer* v. *State,* 130 Ark. 457; *Kelly* v. *State,* 102 Ark. 657; *Harrington* v. *State,* 90 Ark. 596-99.

In these cases where human life is involved we feel that it would indeed be "splitting hairs" to say that the paper designated as the "Motion to Quash the Indictment" was not also a motion to set aside the regular panel of the petit jury selected by the jury commissioners. Even if we had the inclination, we do not possess the refinements of reason nor the subtlety of language required for such niceties of distinction. To say that these were motions to quash the indictments, but not also motions to set aside the regular panel of the petit jury, would be to give significance to the mere name and only one portion of the paper called the "Motion to Quash the Indictment," rather than to its contents and legal effect as a whole. This we cannot do.

Therefore, we conclude that, under the decisions of the Supreme Court of the United States above, the discrimination of the jury commissioners against the colored race in the selection of the petit jury, by which negroes were excluded from that jury solely on account of their color, rendered that selection illegal as to the appellants. That sort of discrimination in the selection of both grand and petit juries is in contravention of the Fourteenth Amendment to the Constitution of the United States, and the Civil Rights Act of March 1, 1875, *supra.* A majority of the court is of the opinion that the trial court erred in refusing to hear evidence on the motions to set aside the regular panel of the petit jury and erred in overruling such motions without hearing the evidence. The above errors must cause a reversal in all the cases.

Moreover, in all the cases except that of *Martin* v. *State,* as we have already stated, motions were made to

set aside the sheriff's return on the special *venire facias* issued under the orders of the court on the ground that the sheriff, in summoning talesmen in execution of this order, had discriminated against appellants on account of their race and color by refusing to summon any colored man to serve on the jury, solely because of his color, and praying the court to hear evidence thereon. The court refused such prayer and overruled the motions. We are all of the opinion that, under the above authorities, the court erred in refusing to hear evidence and in overruling the motions to set aside the sheriff's return on the special *venire facias*. This error alone would cause a reversal of all the cases in which the motion was made, towit, all the cases except that of *Martin* v. *State*. See *Whitney* v. *State, supra*.

IV. Various other assignments of error are made in the motions for new trial in these cases. It would unduly extend this opinion to discuss them, and we do not deem it necessary to do so for the reason that the causes for the errors indicated must be reversed and remanded for a new trial, and on a new trial the other errors assigned may not occur at all. Precisely the same questions may not be presented. We therefore do not express an opinion on other assignments of error. We refrain from commenting upon the testimony, because in the new trials the testimony may be different, or there may be still further developments.

For the errors mentioned the judgments are reversed and the causes are remanded for new trials.

McCULLOCH, C. J. (dissenting in the Martin case, concurring in the other cases). In all of these cases, except *Martin* v. *State*, I concur on the sole ground that the court erred in refusing to hear testimony on the motion to quash the sheriff's return of the special venire. We are drawn to that conclusion by decisions of the Supreme Court of the United States, to which we are bound to yield obedience, that court being the final arbiter of the question. I am not willing, however, to go further

than that court has decided for the purpose of reversing the judgments in cases where the record is otherwise free from error.

In the Martin case there was no motion to quash the special venire, and there are two sound reasons, I think, why the judgment in that case should not be reversed, on account of the court's failure to sustain the motion to quash the regular panel of the petit pury. In the first place, a ruling was not asked for on that part of the motion. The question is not whether the court read or should have read that part of the motion which related to the selection of the petit jury,—the question is, did the court rule on the motion adversely to appellant Martin or refuse to rule at all? It has been often decided by this court that a party waives a motion or plea if he goes to trial without insisting on a ruling of the court. There is no reason why this should not apply to criminal cases as well as civil cases. Appellant was represented by counsel of his own selection, who filed this motion for him. In the court's order it was merely recited that the motion to quash the indictment was overruled. Nothing was said in the order about the motion to quash the panel of the petit jury, and it is evident that the court did not rule on that part of the motion.

The motion to quash the regular panel of the petit jury came too late.

In the case of *Carter* v. *Texas,* 177 U. S. 442, this was said about the right to quash an indictment on the ground of discrimination against negroes: "Where the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon this ground may be taken, either by plea in abatement or by motion to quash, before pleading in bar."

The converse of that proposition is that the objection can not be so made if the accused had an opportunity to challenge the grand jury—in other words, if the alleged offense was committed before the grand jury was

impaneled. We so decided in *Tillman* v. *State*, 121 Ark. 322.

Now the same rule ought to apply as to the right to quash the regular panel of the petit jury. The jury is regularly and publicly impaneled as a part of the organization of the court, in the same manner in which the grand jury is impaneled. Kirby's Dig., § 4527. All objections to the panel ought to be made at that time, otherwise objections can only be made to individual jurors as they are selected in particular cases. There is no error in the record of the Martin conviction, and the judgment should be affirmed.

Mr. Justice HUMPHREYS concurs herein.

SCHOOL DISTRICTS NOS. 14 AND 58 *v.* HENDERSON.

Opinion delivered December 6, 1920.

1. SCHOOLS AND SCHOOL DISTRICTS—TRANSFER OF TERRITORY.—Territory may be annexed by the county court to a single school district from a common school district, under Kirby's Digest, § 7695, "when a majority of the legal voters of said territory and the board of directors of said single district shall ask, by petition, that the same shall be done," without giving the notice required by § 7540.
2. SCHOOLS AND SCHOOL DISTRICTS—REMEDY OF DISTRICT FROM WHICH TERRITORY IS TAKEN.—A common school district from which territory is taken for annexation to a single school district, under Kirby's Dig., § 7695, is by the statute made a party to the record, and may contest the proceedings in the county court or appeal from the order of that court, and is not entitled to relief in equity.
3. SCHOOLS AND SCHOOL DISTRICTS—CHANGE OF BOUNDARIES.—In the absence of constitutional provisions to the contrary, the Legislature may enlarge or diminish the powers of school districts, divide their territory into two or more districts or consolidate two or more districts into one, or authorize such consolidation or separation at will, and may accomplish this purpose through subordinate agencies.
4. SCHOOLS AND SCHOOL DISTRICTS—COLLATERAL ATTACK ON COUNTY COURT'S JUDGMENT.—Where, on a petition under Kirby's Digest, § 7695, to transfer territory of a common school district to a single school district, the county court finds that a majority of the

legal voters of the territory petitioned therefor, such finding, however erroneous, can not be collaterally attacked.

5. SCHOOLS AND SCHOOL DISTRICTS—TRANSFER OF TERRITORY—VALIDITY.—The fact that the taking of territory from a common school district and giving it to a single school district will leave the former district without sufficient territory, revenue or children to sustain a sufficient school will not entitle the former district to relief in equity against the order of annexation where the district had the right to appear before the county court and appeal from its order.

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

STATEMENT OF FACTS.

The directors of Common School District No. 14 of Arkansas County, and certain tax payers residing in the common school district, brought this suit in equity against the county superintendent, the county clerk, the county treasurer and Gillett Special School District No. 66 of Arkansas County, to enjoin them from paying any warrants or asserting any right to the funds belonging to Common School District No. 14, and from taking control of any lands or school property within said district for school purposes. They allege that the directors of Gillett Special School District No. 66, without any notice, filed a petition in the county court to transfer a greater part of the land in Common School District No. 14 to said special school district; that the county court made the order prayed for in their petition without notice to the plaintiffs or any one interested in Common School District No. 14.

The complaint further alleges that the order, if enforced, would deprive said common school district of sufficient funds to have a school and would leave said district without any school house or other property and less than thirty-five persons of scholastic age within the district.

The chancery court sustained a demurrer to the complaint on the ground that it was without jurisdiction, and, the plaintiffs having declined to plead further, their

complaint was dismissed. To reverse that decree the plaintiffs have prosecuted this appeal.

The directors and certain tax payers of Common School District No. 58 brought a similar suit against the county clerk, county treasurer, and Gillett Special School District No. 66 of Arkansas County, and its board of directors. Their complaint contains substantially the same allegations as in the complaint of Common School District No. 14 of Arkansas County.

The chancery court sustained a demurrer to the complaint on the ground that it was without jurisdiction, and to reverse the decree entered of record the plaintiffs have prosecuted this appeal.

John W. Moncrief, for appellants.

1. No notice was given or posted, given or published in any manner, and appellant's school districts board and patrons had no information of the orders until after both of them had been made. The orders were void for want of notice and left the districts without sufficient funds to pay its teachers as per contracts, and with less than thirty-five persons of scholastic age as pupils. The county court was without jurisdiction to make the order of annexation. The lower court could not decide that appellee was a school district without any evidence whatever. If the court had jurisdiction, it was its duty to hear evidence as to the questions whether appellee was a single school district and whether the territory described in the complaint is contiguous to appellant school district. The orders in effect amounted to a dissolution of appellant district; the course pursued by appellees was merely on a direct method of destroying and dissolving a common school district without giving the notice and following the procedure required by statute. This is true for the reason that the orders left less than thirty-five pupils in the district; left the district without sufficient funds to maintain a school, employ teachers or acquire school property. This court erred in its decision in 105 Ark. 47-50, and appellees were

attempting to take advantage of the opinion in that case. The court erred in that case, and it should be reconsidered. 123 Ark. 570. The people in the territory sought to be annexed should have had notice of the proposed change. The court had no jurisdiction, and the orders were void, as all judgments are where no notice is given. 116 Ark. 291-4. Notice is required by statute. Kirby's Digest, §§ 7540-5; 123 Ark. 570-4. The orders were void because no notice was given. 119 Ark. 117-20; *Ib.* 149-152; 123 *Id.* 570; 119 *Id.* 592.

2. The Legislature did not mean that a single school district could take the school site and house and territory of a common school district by the use of the words *contiguous territory.* A school district without thirty-five pupils is not contiguous territory within the meaning of the statute. It is not possible that the Legislature meant to allow a single district without noice to take practically all the territory of another district and leave it with less than thirty-five persons of scholastic age by the use of the words "contiguous territory." 25 Am. Rep. 168; 27 Am. St. Rep. 309. See also Black's Law Dict., *verbo, contiguous.* If the facts alleged by appellants be true, there was in effect a dissolution of district 14, and the severance would not leave sufficient property to support a school and left it without funds or income or property. The statute requires notice and the orders were void. 32 Ark. 13-9; 29 *Id.* 340; 32 *Id.* 496; 33 *Id.* 716; 38 *Id.* 271. Such acts constitute a misappropriation of funds, and injunction was the proper remedy. 33 Ark. 704; 53 *Id.* 205; 52 Ark. 541; 35 Cyc. 1049; 93 Ark. 109. The latter case is conclusive as to jurisdiction. 103 Ark. 529-538. The order of January 5, 1920, is void for want of notice and jurisdiction, and injunction was the proper remedy. Act 661, Acts 1919, pp. 457-8, shows the unquestionable intention of the law to require notice to be given of all changes in the boundaries of *school districts,* and *Lewis* v. *Young* and *Rural Dist.* 17 v. *District* 56 overrule the McCray-Cox case. A court of equity having jurisdiction for one purpose, should *grant* full relief and has jurisdic-

tion therefor. *Supra.* 105 Ark. 47 is overruled by 123 Ark. 570. The territory is not contiguous. 16 Atl. 97. The demurrer admits that the territory is not contiguous, and the county court had no jurisdiction and the order was void. 16 Atl. 97.

The school funds involved were transferred without notice, and they belonged to District 58. 63 Ark. 433; 33 *Id.* 716; 38 *Id.* 271; 32 *Id.* 131-9; 29 *Id.* 340; 32 *Id.* 496. The chancery court had jurisdiction to restrain the diversion of these school funds. 93 Ark. 101; 23 Cyc. 993-5.

Botts & O'Daniel, for appellees.

1. The attack upon the orders is a collateral attack upon the judgments of a superior court of record. 136 Ark. 457-9. Such attacks can not be sustained. The court is one of general jurisdiction and its orders can not be collaterally attacked. 94 Ark. 523; 92 *Id.* 616; 74 *Id.* 81. In the case of districts 4 and 84 the order enjoined showed on its face that it was absolutely void. 101 Ark. 391, and this is a collateral attack. *Ib.* 395; 70 Ark. 88; 105 *Id.* 5.

2. No fraud was practiced on the county court in procuring the orders and fraud must be alleged and proved. 140 Ark. 199-202. The burden is on the party alleging fraud to prove it. *Ib.* 469.

3. The law presumes that appellants had notice of the proceedings in the county court. 80 Ark. 304, 308.

The act does not require notice. 114 Ark. 555; 101 *Id.* 395; 61 *Id.* 474; 72 *Id.* 101-107.

4. Appellants had an adequate remedy at law; they should have appealed. Kirby's Digest, §§ 1487, 7614, 7626; 128 Ark. 384.

5. Injunction should not have been granted because no notice was given to appellees. The injunction should not have been granted as there was an adequate remedy at law by appeal.

HART, J. (after stating the facts). Because the same issues are involved in each appeal, the cases were con-

solidated for the purpose of trial in this court, and one opinion will suffice for both cases.

The decision of the chancery court was correct. According to the allegations of the complaint in each case, an election was held for the purpose of annexing the territory in each of the common school districts to Gillett Special School District No. 66, and a majority of the legal voters within the territory voted for the annexation. The election was held, and the order of annexation was made by the county court pursuant to the provisions of section 7695 of Kirby's Digest.

In the case of *McCray* v. *Cox,* 105 Ark. 47, the court in construing this statute held that the county court is authorized to annex contiguous territory to a single school district when a majority of the legal voters of said territory and the board of directors of said single school district ask it by petition.

According to the allegations of the complaint, this section of the statute was complied with in the annexation proceedings. It is insisted, however, that the order of the county court is void because no notice of the annexation was given as required by section 7540 of Kirby's Digest. In the case last cited the court held that where the annexation proceedings were had under section 7695 of Kirby's Digest the notice required by section 7540 of Kirby's Digest was not necessary. The court said that the annexation of the contiguous territory was to be made under the statute when a majority of the legal voters of said territory and the board of directors of the single school district should ask it, and that section 7540 with regard to giving notice did not apply.

In the subsequent case of *School District No.* 44 v. *Rural Special School District No.* 10, 128 Ark. 383, this court held that under section 7695 of Kirby's Digest authorizing the annexation of contiguous property to a special district, the common school district, which includes the territory to be annexed, is by the statute made a party to the record and that the directors of the common school district may resist proceedings to annex a portion

of their property to the special school district. Therefore, it will be seen that the directors of the common school district might have made themselves parties to the annexation proceedings in the county court; or they might have, at any time within six months after the order of annexation was made by the county court, have appealed to the circuit court. Thus it will be seen that the plaintiffs herein had a complete and adequate remedy at law, and there was no necessity for resorting to a court of equity to establish their rights, if any.

Again, it is insisted that the case of *McCrary* v. *Cox, supra,* should be overruled because the county court is vested with a discretion in making the order of annexation, and that for that reason notice to the people living in the territory sought to be annexed should be given as a prerequisite to the right of annexation. The argument that the common school district can not be changed in its boundaries, or a part of its territory added to a single school district except upon notice to the inhabitants of a common school district, is not tenable. The school district is a subordinate public agency doing the work of the State. In the absence of any constitutional provisions to the contrary, the Legislature may enlarge or diminish the powers of school districts, divide their territory into two or more districts, or consolidate two or more districts into one, or authorize such consolidation or separation at will. If the Legislature can change boundaries of a school district for any reason satisfactory to it, it can accomplish this purpose through subordinate agencies. *Norton* v. *Lakeside Special School District,* 97 Ark. 71, and *Krause* v. *Thompson,* 138 Ark. 571, and cases cited. The county court is a court of superior jurisdiction, and it will be presumed that its action in changing the boundaries of school districts was based on a proper reasoning. If not, it was the duty of the directors of the common school district to have taken an appeal to the circuit court from its order annexing a

part of the territory of the common school district to the special district.

It is true that, according to the allegations contained in the amended complaint, a majority of the legal voters of the territory sought to be annexed did not petition the county court for annexation.

Section 7695 of Kirby's Digest provides that the county court shall annex contiguous territory to single school districts when the majority of legal voters of said territory and the board of directors of said single district shall ask by petition that the same shall be done. This section makes the filing of the petition a prerequisite to the exercise of jurisdiction by the county court.

As stated above, however, the county court is a court of superior jurisdiction and it had the right to determine for itself whether or not the jurisdictional facts existed. In other words, the county court had the right to determine whether or not the petition required by the statute had been filed and signed by the requisite number of legal voters, and its determination of this fact is conclusive on collateral attack. If its finding in this respect had been deemed erroneous, an appeal to the circuit court should have been taken to correct it. We must presume that the county court did make inquiry as to its jurisdiction in the premises and found that it had jurisdiction. It was a question of fact whether or not the petition filed in the county court contained the requisite number of legal voters, and the county court had the power to determine that fact. Its decision, however erroneous, would be conclusive except upon direct attack.

Again, it is insisted that to uphold the special school district in this case leaves the common school district without sufficient territory, revenue, or children to maintain a sufficient school.

In *School District No.* 25 v. *Parker,* 123 Ark. 317, the court, in discussing this precise question, said that a hardship worked upon a common school district by the taking of a portion of its property in the formation of

a special school district could not be relieved by the courts, but could only be reached by appropriate action on the part of the Legislature.

In *Curtis* v. *Haynes Special School District H,* 128 Ark. 129, the court held that an order dissolving a school district and apportioning its assets between two districts adjoining it was valid. The reason is that, the legislative power over the formation, separation and division of school districts being full and complete, as a part of that power, it may make provisions for the division of the property and the apportionment of the debts of the districts. *Pass School Dist. of Los Angeles County* v. *Hollywood City School Dist. of Los Angeles County* (Cal.) 26 L. R. A. (N. S.) 485 and case note.

Accepting the allegations of the complaint as true, the common school districts have been injuriously affected by the order of annexation in the respects just named, but we can not assume that an application to the county court for proper school facilities for the inhabitants of the severed territory will not meet with proper and reasonable action on the part of the court. If the common school districts thought the action of the county court was wrong in the first instance, the remedy for the wrong was by appeal to the circuit court.

In *Rural Special School District No.* 17 v. *Special School District No.* 56, 123 Ark. 570, this court held that the county court under section 7695 of Kirby's Digest is given a judicial discretion to determine whether adjoining property should be annexed to a single school district. If the county court abused its discretion in the premises under the authorities above stated and referred to, the common school districts could have obtained relief by appeal to the circuit court. Their remedy at law being adequate and complete, no remedy can be had in chancery. Therefore, the chancery court properly dismissed the complaint in each case, and the decree in each case will be affirmed.

MOIR v. BAILEY.

Opinion delivered December 6, 1920.

1. ADVERSE POSSESSION—INTENTION.—Intention to hold adversely is an indispensable element of adverse possession.
2. ADVERSE POSSESSION—POSSESSION BY GRANTOR.—Where a grantor remains in possession of a portion of the premises conveyed, he is presumed to hold in subordination to the title conveyed unless there is evidence of a contrary intention.
3. ADVERSE POSSESSION—NOTICE OF CLAIM OF OWNERSHIP.—Where a grantor, after conveying to another a lot adjoining his residence, retained a strip on which a well was situated as a part of his inclosure, and continued to use the same as if he owned it, the grantee will be presumed to have notice of his claim of ownership.
4. ADVERSE POSSESSION—WHEN TITLE ACQUIRED.—Where a grantor, after conveying an adjoining lot, retained within his inclosure a small strip from such adjoining lot and continued to use such strip as if he owned it, a finding that he acquired title by adverse possession will be sustained.

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

Victor M. Wade, for appellant.

The possession and holding of the defendant was not *adverse.* The mere retention of the property by the grantor who was in possession at the time of the grant or conveyance for seven years does not constitute a holding adverse to the grantee. 58 Ark. 142; 69 *Id.* 562-6; 84 *Id.* 52; 101 *Id.* 163; 1 R. C. L. 751.

J. B. & J. J. McCaleb, for appellee.

1. The court sitting as a jury, having found that appellee held possession adversely for the statutory period of limitation, is fully sustained by the evidence that is conclusive of this case. 136 Ark. 36; 54 *Id.* 273. The cases cited by appellant (58 Ark. 142-69, *Id.* 562) do not conflict with nor overrule. 54 Ark. 273-283, 84 Ark. 52 is not authority in this case, nor is 101 Ark. 163.

2. The possession and use of the strip of land and well was clearly inconsistent with the right of appellant, and no notice was necessary. The evidence shows that

appellees were holding adversely to their grantee and her title by adverse possession is good.

HART, J. This is an action of ejectment by J. S. Moir against Mary B. Bailey to recover possession of a strip of ground, three feet wide by 150 feet long, in the town of Batesville, Arkansas.

The case was tried before the cricuit court sitting as a jury, and it found that Mrs. Bailey had acquired title to the strip of land in controversy by adverse possession. Judgment was accordingly rendered in her favor, and the plaintiff has appealed.

In 1878, Andrew J. Bailey purchased lots 7 and 8 in block 2, in the town of Batesville, Arkansas. He moved on lot 8 and lived there until his death in 1916. His widow continued to live there and lived there at the time this suit was brought.

The documentary evidence shows that on the 5th day of March, 1912, Andrew J. Bailey and Mary B. Bailey, his wife, granted to Robert M. Ramey lot 7 in block 2, in the town of Batesville. On June 10, 1916, Robert M. Ramey conveyed said lot to Seddie C. Ramey and on the 26th day of April, 1919, Seddie C. Ramey conveyed it to the plaintiff, J. S. Moir.

At the time Andrew J. Bailey purchased lots 7 and 8, there was a division fence between them and also a well situated along the line of the fence. The strip of land in controversy was on the side of the fence on which was situated the residence of Andrew J. Bailey. This fence continued to remain until about two years before this suit was brought, at which time Mary B. Bailey rebuilt the fence.

Evidence was adduced by the paintiff tending to show that the strip of ground in controversy was a part of lot 7, and that the Baileys did not claim it adversely. According to the testimony of Mrs. Bailey, she and her husband had always claimed the strip of land in controversy as a part of the inclosure. From the time they moved on the land in 1878 up to the time of the institu-

tion of this suit, they had always used water from the well and considered that they had the legal right to do so. During all of this time they also used the strip of ground in controversy as a part of their yard and claimed it as their own.

Counsel for the plaintiff seek to reverse the judgment on the authority of *American Building & Loan Association of Little Rock* v. *Warren,* 101 Ark. 163, and cases cited, and *Morgan* v. *McCuin,* 96 Ark. 512. They invoke the rule that where a grantor remains in possession of the land after conveying the land his possession is subservient to the grantee, and that there can be no assertion of an adverse title to the grantee without putting the latter upon notice of his rights.

It is true, intention to hold adversely is an indispensable element of adverse possession, and that where a grantor remains in possession of a portion of the premises conveyed he is presumed to hold in subordination to the title conveyed unless there is evidence of a contrary intention. Each case, however, must depend upon its own facts.

In the present case the strip of ground in controversy was within the inclosure occupied by Mr. and Mrs. Bailey as their residence. They had considered it as a part of their yard for many years before they made the conveyance to Ramey. They continued so to regard it after they had made the conveyance of the adjoining lot to Ramey. They continued to use the well and in all respects acted as if they owned the strip of ground in controversy. Ramey must be presumed under the cirstances to have knowledge of these facts. The Baileys only retained possession of the three-foot strip of ground in controversy, which, as we have already seen, was a part of their inclosure. The remainder of the land conveyed was turned over to Ramey. According to Mrs. Bailey's testimony they thought the three-foot strip was a part of the lot on which their residence was situated and for more than seven years after they made the con-

veyance to Ramey they considered it as a part of their inclosure and occupied it adversely.

Therefore, under her testimony, the circuit court was warranated in finding that the Baileys acquired title to the strip of ground in controversy by adverse possession.

It follows that the judgment will be affirmed.

DE QUEEN & EASTERN RAILROAD COMPANY v. PARK.

Opinion delivered December 6, 1920.

1. ASSOCIATIONS—PARTIES.—Where the authorized agent of a fruit growers' association brought suit, on behalf of himself and the other members of the association, to recover damages from a carrier for failure to furnish cars for shipping purposes, it was not error to refuse to strike from the complaint the names of the other members of the association having an interest in the cause of action.
2. ASSOCIATIONS—SUIT BY AGENT.—The agent of a fruit-growers' association may sue on behalf of himself and the other members of the association on a cause of action against a carrier for failure to furnish cars for shipping.
3. APPEAL AND ERROR—HARMLESS ERROR.—In an action against a railroad company for failure to furnish cars, under Acts 1909, page 698, refusal to require the complaint to be made more definite and certain by alleging the dates on which cars were wanted was harmless where the undisputed evidence showed that defendant had knowledge of such dates.
4. CARRIERS—EVIDENCE—SHIPPER'S CONVERSATION WITH AGENT.—In an action against a railroad company for failure to furnish cars for shipping fruit, under Acts 1909, page 698, where the defense was that there was an unprecedented rush in its business, testimony that plaintiff in advance of the shipping season had talked with the railroad freight agent as to the number of cars needed, and was advised by the agent that the railroad company would take care of the shipments, was admissible to prove that there was no unprecedented demand for cars during such season.
5. CARRIERS—WAIVER OF WRITTEN NOTICE TO SUPPLY CARS.—Where a railroad company was advised as to the number of cars that would be needed during the season at a particular station, and furnished cars daily on the verbal request of the shipper's agent, it will be held to have waived the written notice to supply the cars, required by Acts 1909, page 698.

6. CARRIERS—FAILURE TO FURNISH CARS—LIABILITY.—A railroad company is liable for failure to furnish cars for shipment of cantaloupes under Acts 1909, page 698, though such failure was due to the failure of the refrigerator company to furnish iced cars.

Appeal from Sevier Circuit Court; *C. E. Johnson*, Special Judge; affirmed.

STATEMENT OF FACTS.

T. W. Park on behalf of himself and other persons associated together for the purpose of growing and shipping cantaloupes and peaches, sued the De Queen & Eastern Railroad Company to recover damages for failing to furnish cars whereby their cantaloupes were damaged and lost. The material facts are as follows:

T. W. Park and other farmers living near Lockesburg, Arkansas, on the De Queen & Eastern Railroad formed a voluntary association for the purpose of raising and shipping cantaloupes and peaches. T. W. Park was selected as the agent of the members to ship and sell their products. The manager of the freight department of the railroad company was present at a meeting of 150 or 200 people in Lockesburg and knew that an association was being formed for the purpose of raising and shipping cantaloupes and peaches. He told them that the railroad would build a shed and take care of their shipments. Park notified C. C. Ray, the manager of the freight department of the railroad company, a month or two before the shipping season opened, of the probable number of cars that he would need. He ordered 100 cars for cantaloupes and twelve cars for peaches from the depot agent. The depot agent notified the manager, and the manager made an arrangement with the American Refrigerator Transit Company to furnish iced cars to be used in the shipment of the cantaloupes and peaches. The De Queen & Eastern Railroad Company was only twenty-seven miles long, and Lockesburg was the only station on its line where cantaloupes and peaches were shipped. It connected with the Kansas City Southern Railway Company, and could only

make a contract with the American Refrigerator Transit Company for refrigerator cars, because that company was the only one operating on the line of the Kansas City Southern Railway Company. The defendant railway company furnished Park and others ninety-two cars for cantaloupes and ten cars for peaches. The custom was that Park would notify the agent of the railway company at Lockesburg how many cars he would need for the next shipment. On a certain day he ordered cars for the next shipment, and the cantaloupes were placed in the shed at the depot prepared for that purpose. The railway company failed to furnish the refrigerator cars because the refrigerator company failed to deliver them to it. There was no local market at Lockesburg for the cantaloupes, and they became worthless because they could not be shipped out. Park notified the railroad agent that the cantaloupes were there ready for shipment and urged him to have brought in refrigerator cars for that purpose. When the railroad company failed to bring in the refrigerator cars, Park did not demand a bill of lading because that would not do any good since the cantaloupes could not be shipped except in refrigerator cars. The value of the cantaloupes offered for shipment was proved.

There was a verdict and judgment for the plaintiff, and the defendant has appealed.

Abe Collins and *Lake & Lake,* for appellant.

1. The court erred in refusing to sustain the motion to strike from the complaint the names of all parties having an interest in the cause of action except T. W. Park. 1 Ark. 59; 24 *Id.* 554; 7 *Id.* 34; 80 *Id.* 228; 22 *Id.* 1.

2. The court erred in overruling motion to make the complaint more definite and certain.

3. It was error to admit certain evidence of the witness, T. W. Park. It was irrelevant, immaterial and incompetent, and did not tend to prove or disprove any issue in the case.

4. The court erred in requiring the introduction of the contract between appellant and the A. R. T. Company,

as it unduly incumbered the record, and, further, because section 18 thereof bound appellant to defend all suits for loss or damage to shipments covered by the agreement, and in the event of disagreement to arbitrate, and such information would clearly lead the jury to believe that it had the right to hold appellant responsible for any and all defaults or negligence of the A. R. T. Company contributing to the loss or damage herein.

5. The court erred in giving a peremptory instruction for appellee. The answer and the evidence raised a question of fact for a jury to pass upon. The complaint does not state a cause of action. 79 Ark. 51; 105 *Id.* 415; 89 *Id.* 466.

6. The court erred in its instructions to the jury and in refusing the second, third and fourth for defendants. 12 Mo. App. 599; 154 Fed. 497; 198 *Id.* 998; 237 U. S. 133; Hutch. on Car. (2 ed.), 117.

7. It was error to refuse the appellant's ninth instruction. 33 Mich. 6.

E. K. Edwards and *B. E. Isbell*, for appellee.

1. The motion to strike was properly overruled. 58 Ark. 490; 101 *Id.* 172.

2. The court committed no error in refusing the motion to make more definite the complaint. Defendant was in possession of all the information and had a record of it and would not have been misled or put to disadvantage for lack of the hour, etc. The testimony of defendant's servants admit the demand for the cars.

3. There was no error in admitting the testimony of T. W. Park. Acts 1909, p. 698, act 233, § 3.

4. The peremptory instruction was proper. There was nothing for a jury except the value of the cantaloupes lost, and this was submitted to a jury and it found for plaintiff in a sum less than he sued for. There was no unexpected emergency. Defendant was bound to furnish the needed cars whether it owned them or not. The appeal is for delay only.

HART, J. (after stating the facts). Park brought this suit for himself and others who are named in the complaint.

Counsel for the defendant insist that the court committed prejudicial error in refusing to sustain its motion to strike from the complaint the names of all parties having an interest in the cause of action except T. W. Park. We do not think the court erred in overruling its motion.

According to the allegations of the complaint and the proof introduced at the trial, a number of farmers around Lockesburg associated themselves together for the purpose of growing and shipping cantaloupes and peaches. T. W. Park was selected by them as their agent to sell and ship their products. He acted as agent for them throughout the season in selling and shipping their cantaloupes and peaches, and brought this suit for himself and others who had cantaloupes at the depot for shipment. Therefore, under the rule laid down in *St. Louis, Iron Mountain & Southern Railway Company* v. *Cumbie,* 101 Ark. 172, there was no error in permitting Park to bring the suit in behalf of himself and all others who had employed him to ship and sell their cantaloupes for them.

It is next contended that the court erred in overruling the defendant's motion to make the complaint more definite and certain. Counsel say that the complaint merely charges generally that the railroad company failed to furnish cars for the shipment of cantaloupes of the plaintiff, and that it is defective in not setting out the dates on which said cars were ordered.

The undisputed evidence shows that its line of road was only twenty-seven miles long, and that Lockesburg was the only station on its line at which cantaloupes were shipped. The date of the shipping season was shown and the number of cars that the railroad furnished the shippers at Lockesburg during the season. It also appears from the testimony of the railroad company that it knew of the date in question, and only failed to

furnish the cars because it could not get them from the refrigerator company. Hence it is apparent that no prejudice resulted to the defendant in the action of the court in overruling its motion to make the complaint more definite and certain.

It is next contended that the court erred in permitting T. W. Park to testify that he went to see Mr. Ray and talked with him about the shipping association before the season opened and Mr. Ray told him then that he would take care of the shipping. There was no error in admitting this evidence.

One of the defenses of the railroad company to the action was that it was excused from failing to deliver the cars on account of the unprecedented rush in its business. Ray was the manager of the freight department of the railroad company, and Park represented the shippers. Park and Ray talked over the matter before the shipping season began, in order that the shippers might know whether or not the railroad company could handle the shipments and in order to give the railroad company time to prepare for it. Park told Ray about how many cars of cantaloupes and peaches would be delivered to the railroad company for shipment, and Ray told him that the railroad company would take care of the shipments. There is no dispute about this testimony, and it was competent for the purpose of showing that there was no unprecedented demand for cars during the cantaloupe season.

The suit was brought under act 233 of the Acts of 1909, which had for its object to regulate the transportation of perishable freight by railroads in this State. Acts of 1909, p. 698. Under this act when a shipper makes a written application to a station agent of a railroad company in this State for cars to be loaded with any kind of perishable freight, such as fruit and vegetables, stating the character of freight, the kind of cars wanted and the destination of the freight, the railroad company shall furnish the cars at the place of shipment

within twenty-four hours from 7 o'clock p. m. on the day following such application. The undisputed evidence shows a violation of this act on the part of the railroad company. It knew in advance how many cars would be needed at Lockesburg during the shipping season for cantaloupes. It furnished cars each day upon the verbal request of T. W. Park, the agent of the shippers. The railroad failed to deliver cars demanded for the shipment of the cantaloupes in question because it could not get them from the refrigerator company, and Park gave the order for the cars to the depot agent in the usual way, and the order was accepted by the agent. Hence there was a waiver of the written notice to supply the cars required by the statute.

As above stated, the undisputed evidence shows that there was no unprecedented demand for cars, and the railroad company could not defend on that ground. Neither was it a defense to the action that the refrigerator company failed to furnish iced cars to the defendant railroad company. The undisputed evidence showed liability on the part of the railroad company, and the court was correct in so instructing the jury. *Cumbie* v. *St. L., I. M. & S. Ry. Co.*, 105 Ark. 415. The question of the amount of loss sustained by the shippers was submitted to the jury under proper instructions.

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

ARKANSAS CHILDREN'S HOME SOCIETY *v.* WALKER.

Opinion delivered December 6, 1920.

GUARDIAN AND WARD—RIGHT OF DEPENDENT CHILD TO CHOOSE GUARDIAN.—Where the Arkansas Children's Home Society was appointed guardian of a dependent child under fourteen years old, she was entitled, under Acts 1909, § 9, p. 518, to choose her own guardian when she reached the age of fourteen years.

Certiorari to Boone Chancery Court; *Ben F. McMahan*, Chancellor; affirmed.

G. D. Henderson and *Geo. J. Crump,* for petitioner.

1. The question here has been determined against the decision of the chancellor by this court in *Ex parte* King, 217 S. W. 465. The juvenile act is constitutional. By Kirby's Dig., §§ 3776-7, all jurisdiction was taken from the circuit courts and vested in the probate courts exclusively. 40 Ark. 433; 98 *Id.* 63; 135 S. W. 461.

2. Upon general principles of law and irrespective of the juvenile court act and 217 S. W. 465, the decision of the chancellor was error. 16 Ark. 377; 52 *Id.* 303; 116 *Id.* 365. The custody of the minor belongs rightfully to the petitioner, and it should be so awarded. Juvenile Court Act, § 7.

E. G. Mitchell and *Pace & Worthington,* for respondent.

The decree is correct, because (1) the application for the writ alleges that under act 215, Acts 1911, the juvenile court of Mississippi County appointed petitioner as guardian of Clara Neely and the copy of the court order exhibited with the complaint specifies that "the said Arkansas Children's Home Society be duly appointed guardian of said minor and have her care and custody. No authority is contained in act 215, Acts 1911, for the appointment of a corporation as guardian of a minor. § 7, act 215. The minor was not committed to Arkansas Children's Home Society, but an effort was made by the juvenile court of Mississippi County to appoint this corporation guardian of the minor. If such act does not authorize the appointment of such society as guardian of the person, and it does not, the action of the chancellor in denying the writ is correct. (2) If such society under our general laws may act as guardian, then under the further provisions of the same law, the society shall have all the powers and duties of guardian of the child until she is fourteen years old, when such child shall choose her own guardian. (3) Under Kirby's Dig., § 3772, a child fourteen years old may choose another guardian before the proper court. The case in 217 S.

W. 465 does not settle the question, as it was not involved nor decided.

The Legislature, in the adoption of the act of 1911, clearly recognizes and defines the distinction between the two clsses of children. See section 17. In cases of dependency it is the chief purpose of the law to provide such child a home and family by adoption, while in cases of delinquents, where necessary, such child may be confined in a suitable institution for its advancement and education.

No allegation is made that the child as now situated is not in good and worthy hands and in a comfortable home, with all benefits and advantages of home life and in proper surroundings and with necessary educational facilities.

No showing is made in the record as to how the minor became a resident of Boone County or in the home of respondent. But, be that as it may, she is not, whether petitioner society had relinquished its right to her personal custody, or waived its alleged guardianship, authority, or consented to the child's change of residence, it is certain that no charge is made that the minor has escaped or run away from the school, or that she is confined against her will in the home of respondent, or that she is not in proper surroundings. Under Kirby's Dig., § 3772, the proper court for the appointment of the guardian at the choosing of the minor upon reaching fourteen years is in the county of the minor's *residence* at the time of the choosing and not the legal domicile of such child. The terms *"residence"* and *"domicile"* are not synonymous nor convertible. 54 So. Rep. 400, and the New York court holds that where an orphan has been placed by a society in a home of a resident of a school district under an arrangement whereby the society paid its board, clothing, etc., the child was entitled to school privileges as a resident, etc. 104 N. Y. Supp. 122. For numerous cases, distinguishing the words "residence" and "domicile," see 2 Words & Phrases (Second Series), p. 135.

SMITH, J. Appellant filed a petition to recover the custody of Clara Neeley from the respondent. From the pleadings and exhibits thereto it appears that on December 11, 1917, Clara Neeley, who was then thirteen years of age, was a resident of Mississippi County, Arkansas, and on that date the county judge, as judge of the juvenile court of that county, made an order appointing appellant guardian for said minor. That order recited that the minor had no one to care for her, and adjudged "that the said Clara Neeley be taken from its said custodian (whose name does not appear in the order), and that the said Arkansas Children's Home Society be appointed guardian of the said minor, and shall have the care and custody of said minor, with full authority to appear in court in any proceeding for the adoption of said child, and to consent to such adoption." This order was made under the authority of act 215 of the Public Acts of 1911 (page 166), creating juvenile courts in the several counties of the State.

In some manner, which does not appear from the briefs, Clara Neeley became a resident of Boone County, and on April 5, 1920, filed a petition in the probate court of that county, in which she recited that both her parents were dead; that she was 15 years, 10 months and 22 days old; that she had been furnished a good home by respondent and his wife, and she prayed that she be allowed to name respondent as her guardian pursuant to her right under the statute (§ 3772, Kirby's Digest) to select her own guardian. The probate court made the order prayed for, and thereafter this proceeding was commenced.

The chancery court found that Clara Neeley was a resident of Boone County; that she was over fourteen years old, and had been permitted by the probate court of that county to exercise her statutory right to select a guardian; and dismissed the petition for *habeas corpus,* and this appeal is from that order.

It is first insisted for respondent that the order of the juvenile court of Mississippi County appointing peti-

tioner guardian was void, for the lack of authority under the act creating the juvenile court to appoint as guardian a corporation. But we pretermit a discussion of that question.

It is insisted, for petitioner, that the juvenile court act should be read in connection with act No. 170 of the Acts of 1909 (page 518), in which last named act authority is given to appoint as guardian the Arkansas Humane Society, or other similar society incorporated under the laws of this State. But, if this be true, it is also true that in section 9 of the act of 1909 it is provided that "when appointed guardian of any such children, the said society shall have all the powers and duties of guardian of the persons of said children until they reach the age of fourteen years, when they shall be permitted to choose their guardian for themselves, subject to the approval of the court."

It will be observed that Clara Neeley is not a delinquent child, but was a dependent one, and there is no allegation that the juvenile court committed her to the Arkansas Children's Home Society. Upon the contrary, that society was named guardian, just as some individual might have been. There is no allegation that the child escaped, or fled from the custody of the society, or that she is now being held against her will by respondent, or that her present surroundings are objectionable.

It is insisted for appellant that the decision of this court in the case of *Ex parte King,* 141 Ark. 213, is decisive of the instant case, and calls for the reversal of the order of the chancery court. Counsel quote the statement from that opinion that the provisions of the Constitution vesting in probate courts original, exclusive jurisdiction in matters relating to guardians refer to the private guardianship of the person and estate of minors, that is, the guardianship as it affects the person and estate of the individual minor, and not the interests of the public, and that the jurisdiction over infants, so far as their conduct and condi-

tion might affect, not only themselves, but also the welfare of the communities in which they reside, was vested in some other tribunal. The minor in that case, who sought release by habeas corpus, had been adjudged a delinquent by the juvenile court of Independence County, and had been committed as a delinquent to the State's Industrial School for Girls. The point there decided was that it was competent for the General Assembly to confer on the county court the jurisdiction there given to the juvenile courts, and it was therefore held that the confinement of the petitioner was not illegal.

But here we have no adjudication of delinquency, nor order of confinement. An ordinary guardian has been appointed, which (if it has authority to act) is subject to the control or order of removal by the probate court as other guardians would be.

It is quite obvious that the act creating juvenile courts makes a distinction between a dependent and a delinquent child. Section 17 of the act, in defining the purpose of the act, emphasizes this difference. It is there declared to be the purpose of the act, in all cases of dependency, when it can be done, to have the dependent child placed in an approved home, to there become a member of the family by adoption, or otherwise; whereas, in cases of delinquency, the child may, if it is found necessary, be placed in a suitable institution for detention.

It is apparent, from the record before us, that Clara Neeley was never delinquent, and is no longer dependent; that she is past fourteen, and has been permitted by the probate court to select her own guardian; the result of all of which is to promote the declared purpose of the act creating the juvenile court. The court was correct, therefore, in dismissing the petition for the writ of habeas corpus, and that order is therefore affirmed.

NELSON v. NELSON.

Opinion delivered December 6, 1920.

1. DIVORCE—PETITION FOR CHANGE OF CHILDREN'S CUSTODY—EVIDENCE.—On a petition by a wife asking for custody of children awarded to the husband by a decree of divorce, the change will not be ordered, in the absence of a showing that it would be for the best interest of the children to make the change.
2. DIVORCE—LIABILITY OF FATHER FOR CHILDREN'S SUPPORT.—Where a decree of divorce awarded custody of children to the father, but the children left the father and lived with the mother, the mother could not recover from the father expenses in furnishing a home for the children, since in doing so she was a mere volunteer.
3. DIVORCE—RIGHT TO ATTORNEY'S FEES.—A divorced wife, petitioning for change in the custody of children after rendition of a final decree of divorce, is not entitled to attorney's fees.

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

Pryor & Miles, for appellant.

1. The court erred in changing the former decree and awarding the children to appellee. The children are minors, and, by statute as well as common law, the father (unless incompetent or unfit) is the natural guardian and entitled to the custody and care, etc., of the minor children. 22 Ark. 96; 95 *Id.* 355; 21 Enc. Law 1036-7; 124 Ark. 579. The original decree was a final adjudication awarding the children to the father, and there is no testimony is the choice of the children. The proof is that the husband and father was fit and competent and able to properly care for them. 124 Ark. 579.

2. The court erred in awarding appellee judgment for the board and lodging of the children for the period she voluntarily kept them between the time of the original decree and the decree in this case. 42 Ark. 495.

3. It was error to award appellee judgment for $100 attorneys' fees. Kirby's Dig., § 2679; 7 R. C. L. 792.

Ira D. Oglesby, for appellee.

1. There was no error in changing the former decree and awarding the custody of the children to appel-

lee. Chancery courts have power to award the custody of children of divorced parents and to change the award when expedient. 64 Ark. 518; 85 *Id.* 471. Where the capabilities of the parents are equal, and the children of mature age, their wishes as to which parent they desire to live with are decisive. 63 N. Y. Supp. 1113; 2 Strange 982; 78 N. Y. Supp. 175; 82 Pac. 177; 23 Ill. App. 196; 166 Ala. 351; 52 So. Rep. 310; 17 S. E. 308; 65 N. W. 555. The testimony of the children is sufficient and clear that the mother was their choice, and that she was amply able and willing to care for them.

2. There was no error in awarding appellee judgment for the expense of board and lodging for the children for the period she voluntarily kept them. 42 Ark. 495; 88 Am. Dec. 652. Divorce does not relieve the father of his duties to support, care for and educate the children. There is no evidence that the mother in any way tried to persuade the children to disregard the decree of the court. On the contrary, the evidence of both children is to the effect that their mother in no way tried to persuade them to come and live with her. 42 Ark. 495 does not sustain appellants' contention nor is it applicable here.

2. There was no error in awarding $100 attorneys' fees. It was a part of her alimony. Kirby's Dig., § 2679.

SMITH, J. The parties to this litigation were husband and wife until October 25, 1919. On that date an absolute divorce was granted Mrs. Nelson, the wife. The decree in the case allowed her $7,500 alimony, which was paid by Mr. Nelson. There were four children, and of these the court awarded to the father the custody of Paul, a son 18, J. T., Jr., a son 17, and Virginia, a daughter, age 15. The custody of the remaining child, a daughter, eight years old, named Geraldine, was awarded to the mother. In regard to this last child the order of the court was that "the mother shall support and maintain the child Geraldine while it remains with her, and if at any time it is with the defendant, its father, he shall

support and maintain it." The decree contained the recital that "for the purpose of guarding the welfare of these children jurisdiction of this cause is retained by the court."

Some time later the wife filed a petition, in which she alleged that J. T., Jr., and Virginia had declined to live with their father, and were making their home with her, and she alleged that she had incurred an expense of a thousand dollars in procuring a suitable home for herself and the children, and that she had no income except that derived from her alimony, which she alleged was insufficient to support herself and the children. She alleged that she had two brothers living in the State of Wyoming, who were willing and able to assist in rearing the children, and she prayed that the custody of the children be awarded to her, and that she be given permission to take them to that State. In addition, she prayed that the court require Mr. Nelson to reimburse her for the support of J. T., Jr., and Virginia since the date of the decree, and that he be required to make fixed contributions to their support.

The prayer of the petition was resisted, and at the hearing the court declined to allow Mrs. Nelson to take the children to Wyoming, but did award their custody to her, and, in addition, allowed her $180 for the care of J. T., Jr., and Virginia for the six months which they had been with her since the original decree, and directed that he pay Mrs. Nelson $50 per month for their care, until the further orders of the court, and that he pay her attorney a fee of $100, and this appeal is from that decree.

It appears that Paul, the oldest son, had entered the navy, and there is no controversy about his custody.

Mrs. Nelson testified that, after obtaining the decree, she prepared a home for herself and Geraldine at a cost of a thousand dollars, and that soon thereafter J. T., Jr., and Virginia came to live with her, and had since made their home with her. She denied that she had en-

ticed or induced the children to leave their father. She testified that Mr. Nelson desired to send the son to the State University and the daughter to a convent, but neither was willing to go, and neither went.

It is undisputed that the original decree made what was intended to be a final allowance of alimony to the wife; and it is admitted that the sum awarded was arrived at by conference and agreement. Later Mrs. Nelson claimed that she was entitled to certain household goods in addition to the alimony allowed her, and she and Mr. Nelson entered into an agreement which recited that it was "in full settlement of all claims" by Mrs. Nelson. This agreement allowed Mrs. Nelson to remove the household articles there mentioned, and, according to Mr. Nelson, required him to practically refurnish his home.

J. T., Jr., testified that his father protested against his leaving home, and had invited him to return, but he had declined to do so, that he loved his father, but preferred to live with his mother, and considered that his duty. He admitted that he was unemployed, and had declined to accept employment from his father. Virginia testified that at the time of the divorce she thought she would live with her father, but had changed her mind and now desired to live with her mother.

Mr. Nelson testified that he refurnished his home, and had induced his sister to keep house for him. That he loved his children, and felt they were all he had, but both had declined to accept his offer to go off to school. His friends advised him that his son was spending his time in idleness, and that he frequented a pool-hall and ten-pin alley; and his son admitted that he did visit these places; that he offered his son employment at $5 per week to stay in his office afternoons and on Saturdays, and that he did this to have the boy near him and under his influence; but this offer had been declined, and the boy had secured no other employment.

The case presents a domestic tragedy for which the law has no adequate remedy. We can only order what appears to be best, or, rather, least harmful, for the children. Unfortunately, they can not have, simultaneously, the father's protection and the mother's care.

In the original decree the court awarded to the father the custody of all the children except the youngest child. That decree appears to have conformed, not only to the agreement of the parties, but to numerous decisions of this court announcing the rule to be that, by statute as well as at common law, the father, unless incompetent or unfit, is the natural guardian of his minor children and entitled to have their custody and the care of their education. In the case of *Weatherton* v. *Taylor,* 124 Ark. 579, we held that a decree granting a divorce and awarding the custody of the child to the father is a final adjudication that the father, and not the mother, is the proper custodian of the child, and that, before an order changing the custody can be made, there should be proof showing a justification for the change.

We think the proof here does not meet that requirement. It is certainly highly advantageous that the boy should go to school, and that he should have some employment; and we have concluded from the testimony in the case that he is more likely to be subjected to this discipline at the hands of his father than at those of his mother. And we think no sufficient showing was made to change the original decree in regard to the daughter. It is true the original decree recited that jurisdiction of the cause was retained for the purpose of guarding the welfare of the children. But that recital did not prevent the decree from being a final one, nor render it unnecessary to affirmatively show that a proper disposition had not been made of the children, and the necessary showing has not been made.

We think it follows that Mrs. Nelson was a mere volunteer in furnishing a home for the children. Mr. Nelson was the parent authorized by the order of the

court to render that service, and he was prepared to do so, and desired to do so.

This view of the matter reverses also the order of the court directing Mr. Nelson to pay Mrs. Nelson $50 per month for the future care of the children.

It follows also that the allowance of attorney's fees must be reversed. At section 49 of the article on Alimony in 1 R. C. L., at page 902, the law is announced as follows: "As a general rule, an action for alimony can not be brought after the rendition of a judgment for divorce, even though the decree is silent on the matter; for, as the question of alimony might, and should, have been litigated therein, such decree operates as *res judicata* as to the question of alimony." See, also, 7 R. C. L., page 792.

The original decree undertakes to settle, and did adjudicate, the marital rights of the parties. The divorce granted was an absolute one, and terminated the husband's liability for his wife's obligations. He would thereafter be no more liable for her lawyer's fees than he would be for any other contractual obligation which she had incurred.

The decree will, therefore, be reversed, and the cause remanded with directions to dismiss the supplemental complaint.

HINES v. PATTERSON.

Opinion delivered December 6, 1920.

1. EVIDENCE—RES GESTAE.—In an action for damages by one who fell while alighting from a train, evidence that a bystander made a statement to the conductor of the train shortly after the alleged injury that plaintiff had fainted was inadmissible where it does not appear that the bystander was present at the time of the occurrence, since he may have received the information that she fainted from others.
2. EVIDENCE—ADMISSIONS FROM SILENCE.—In an action for damages for injuries suffered from a fall while descending from a train, a statement by a bystander in plaintiff's presence after the acci-

dent, to the effect that plaintiff had fainted was not admissible by reason of her failure to deny it, since she was then screaming and suffering, and the remark was not addressed to her, and did not impugn her motives or character.

3. EVIDENCE—OPINION OF PHYSICIAN.—In an action for personal injuries, a physician who treated plaintiff during her resulting illness was properly permitted to testify his opinion that plaintiff was injured internally, though there were no external evidences of injury, and no examination was made for internal injuries.

4. DAMAGES—PERSONAL INJURIES—EVIDENCE.—In an action for personal injuries, plaintiff was properly permitted to testify that she had the promise of a summer school from the directors of the school she had been teaching, though no definite arrangement had been made, being reasonably certain employment, out of which she would necessarily profit.

5. CARRIERS—NEGLIGENCE IN FAILING TO ASSIST PASSENGER.—Where the evidence tended to prove that defendant's brakeman knew of plaintiff's condition, and that he was expected to assist her in alighting, and that he was negligent in doing so, it was not error to refuse to direct a verdict for defendant.

6. RAILROADS—FEDERAL CONTROL.—It was not error to render judgment against a railroad company for personal injuries received by a passenger in alighting from a train while the railroad was being operated by the Director General of Railroads.

7. DAMAGES—EXCESSIVENESS.—Where plaintiff received internal injuries while alighting from a train, where the resulting pain was so intense that she screamed, and her nerves were shocked, where she was confined to her bed for three weeks, was prevented from teaching for several months and incurred a large indebtedness to her attending physician, a verdict of $750 was not excessive.

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

James B. McDonough, for appellant.

1. The court erred in excluding the evidence of the conductor, J. J. Myers. 80 Ark. 528. It was a statement made in the presence of the plaintiff, her uncle and physician, and was not denied by either of them. It was a statement directly in conflict with the rights and contentions of the plaintiff, and no response was made by her, and such statements are competent and admissible. 1 Elliott on Evidence, § 221; 47 So. Rep. 279; 181 Ill. App. 30; 182 S. W. 495.

2. The court should have directed a verdict for defendants, as there was no evidence that the brakeman was negligent, and no substantial evidence to sustain the verdict. She alleged negligence, and the burden was on her to prove it.

3. The case should be reversed as to the Kansas City Southern Railway Company and the Texas & Fort Scott Railway Company. The accident happened in 1919 while the railroads were operated by the United States Transportation Act of 1920. It was a Federal question, and under the Federal court rulings there was no liability against the corporations.

4. The verdict is excessive. The testimony shows that she was ill at the time of injury not able to work for any considerable length of time, and fails to show that she lost any time by reason of the slight fall. The verdict for $750 is unreasonable and an outrage, clearly the result of passion or prejudice.

5. It was error to permit Doctor Chase to testify that plaintiff was injured internally. It was inadmissible, as he could find no physical evidence of any injury. 3 Elliott on Ev., § 1992; 55 Ark. 249.

6. It was error to permit plaintiff to testify as to her alleged school contract to teach school. Her testimony showed she had no such contract. 108 Ark. 452.

7. It was error to refuse to give instruction No. 4 for defendant. There was evidence that plaintiff was subject to sudden attacks of illness and there was nothing to show that the employees of the railroad had knowledge of this, and hence nothing to show that the brakeman should have used extraordinary care or unusual care in assisting plaintiff down the steps. Notice or knowledge was necessary. 50 S. W. 843; 102 Ky. 600; 113 Mo. 570; 18 L. R. A. 599.

8. It was error to refuse instruction No. 5 for defendant. There was evidence upon which to base it. It was also error to refuse No. 1 for defendant. See *supra*.

9. It was error to give plaintiff's request Nos. 2 and 3, as there was no evidence upon which to base them.

154 N. Y. 90; 136 *Id.* 423; 64 Kan. 553; 74 Iowa 348; 179 U. S. 658.

A. D. Dulaney, A. P. Steel and *John J. Dulaney,* for appellee.

1. There was no error in rejecting the testimony of Myers, the conductor, *in re* the remarks of some bystander, because (1) the statement was no part of the *res gestae,* and Myers was not present at the time when appellee fell from the train. 105 Ark. 619; 57 *Id.* 287; 100 *Id.* 269; 79 *Id.* 85; 66 *Id.* 494. The declarations must accompany or be connected with the event and explain the injury and must be said and done at the time the event occurred and not thereafter. *Ib.* (2) Myers did not ask what had happened or the cause of the accident of appellee or her witnesses. (3) Myers was not corroborated by any other witness. (4) The bystander was not identified or known. It was the duty of the brakeman to use the highest degree of care in assisting appellee from the train as he knew the impaired condition of appellee; the jury by their verdict said he was negligent and appellants were liable. There is no evidence that appellee was subject to sudden attacks of illness, such as fainting or swooning spells, during her usual condition of health before her operation. (5) The bystander was not a party to the suit in any manner. 50 Ark. 397; 83 *Id.* 591. The declaration of the bystander was "hearsay," and clearly inadmissible. (7) The proof is not clear as to what the declaration was. (8) The declaration, if made, was not related to the main issue and immaterial and irrelevant; the error if any was cured by instructions 2 and 3, given for appellants. In the face of these instructions the jury found against appellants. If any error was committed in excluding said testimony it was not prejudicial. (9) There is no proof that appellee and her uncle and her physician heard the declaration of the bystander and had a chance to contradict it. The case in 80 Ark. 528 cited is not in point.

2. The court did not err in refusing to direct a verdict for appellants. There was ample legal evidence to support the allegation that the brakeman was negligent in permitting appellee to fall. 216 S. W. 1; 97 Ark. 486; 99 *Id.* 69. The issues were properly submitted to a jury, and there was no error in refusing a peremptory instruction as the evidence on the material issue the negligence of the brakeman was conflicting. Where the evidence is conflicting, it is not error to refuse to direct a verdict. 101 Ark. 376; 89 *Id.* 368; 118 *Id.* 389.

3. The case should not be reversed because the Kansas City Southern Railway Company and the Texas & Fort Scott Railway Company are indirectly involved. Suits against the Director General of Railroad Companies have often been upheld. 221 S. W. 861; 222 S. W. 725; 216 *Id.* 3, and cases cited.

4. The verdict is not excessive under the proof. 217 S. W. 810; 218 *Id.* 851; 219 *Id.* 1014; 222 *Id.* 28; 93 Ark. 120; 98 *Id.* 425; 219 S. W. 779.

5. There was no error in permitting Doctor Chase to testify that appellee was injured internally. It was expert testimony of a competent physician, duly qualified. 120 Ark. 1; 103 *Id.* 187. It was based upon his specific knowledge of appellee's physical condition. 95 Ark. 310. It was based upon appellee's actions and expressions. 118 Ark. 215. It was competent testimony. *Ib.;* 118 Ark. 55. There was a conflict in the evidence, and the verdict settles the issue as to the extent of the injuries. 113 Ark. 598.

6. There was no error in admitting testimony relative to appellee's contract to teach a school. Evidence of profits reasonably certain to have been made is admissible. 80 Ark. 228; 97 *Id.* 522; 113 *Id.* 556; 113 *Id.* 556; 97 *Id.* 538.

7. There was no error in refusing the instructions asked for appellants. There was no evidence to support them. 88 Ark. 594; 85 *Id.* 390; 119 *Id.* 530. Instruction No. 4 asked singled out a particular immaterial fact on which there was no definite proof and assumed it to be

controlling. It would have been error to give it. 75 Ark. 76; 114 *Id.* 398. It was argumentative and inconsistent with the facts and misleading. 87 Ark. 243; 104 *Id.* 59; 74 *Id.* 468. It was irrelevant and irresponsive to the issues. 90 Ark. 78; *Ib.* 108. See, also, 60 Ark. 76; 85 *Id.* 45. The court had already given another instruction covering the matter. 88 Ark. 12; 101 *Id.* 120, 569.

8. No. 5 was properly refused, as there was no evidence upon which to base it. 221 S. W. (*Pittman* v. *Hines*); 98 Ark. 362; 92 *Id.* 434.

9. The peremptory instruction was properly refused, as the testimony was conflicting. 96 Ark. 151; 118 *Id.* 389; 218 S. W. 851.

10. There really was no error in giving or refusing instructions. 98 Ark. 362; 105 *Id.* 533; 69 *Id.* 442; 111 Ark. 38; 119 *Id.* 152; 110 *Id.* 182.

HUMPHREYS, J. Appellee instituted suit against appellants in the Miller Circuit Court to recover damages in the sum of $2,950 on account of an injury received while alighting from appellant's passenger train at Wilton, Arkansas, resulting from the alleged negligence of its employees in failing to render proper assistance.

Appellants filed answer, denying the injury or any negligence on the part of its employees in failing to render assistance to appellee in alighting from the train.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment against appellants for $750, from which judgment an appeal has been duly prosecuted to this court.

The facts necessary to a determination of the questions involved in the appeal are, in substance, as follows: Appellee's appendix was removed in Texarkana on January 18, 1919. She remained in the hospital where the operation was performed until February 2, 1919, at which time she was permitted to return to her home town of Wilton, a station twenty-five miles north of Texarkana on the Kansas City Southern Railroad. She was accom-

panied on the trip home by her uncle, T. W. McCall, who had gone to get her, and her family physician, Dr. J. B. Chase, who had gone to Texarkana to have his hand, which had been poisoned, treated. After purchasing a railroad ticket for appellee, the party boarded the train. Dr. Chase informed the train auditor that appellee had been operated upon, and the brakeman, C. A. Lindsey, of her weakened condition on account of an operation, and requested the latter's assistance in getting appellee off the train at Wilton. When the train reached Wilson, her uncle took the baggage and walked out immediately in front of them. She followed, being assisted by Dr. Chase, who held her arm with his well hand, the other being disabled and tied up in a white dressing. As appellee was about to alight from the train, she screamed, fell forward and caught her uncle around the neck, who, with the assistance of the physician, laid her on a coat, which had been spread on the ground for that purpose. She complained of pain and screamed again when the train started. Immediately after the occurrence, the conductor, J. J. Myers, who had not seen appellee fall, walked up to the crowd which had gathered around her and asked, immediately in the presence and hearing of the uncle of appellee, and appellee and Dr. Chase, what had happened, and some one, in their presence and hearing and in his presence and hearing stated that Miss Patterson had fainted or swooned. Offer was also made to show there was no contradiction of that statement from Dr. Chase, Miss Patterson or her uncle. This testimony was objected to by appellee and excluded by the court. Appellants saved an exception to the ruling of the court in this regard and preserved the exception in its motion for a new trial. Appellee was immediately thereafter carried to Dr. Chase's home on a mattress where she was confined to her bed for a week, and afterward removed on a cot to her uncle's home and was there confined to her bed about three weeks. During all this time she was treated by her physician and suffered consid-

erable pain. On account of the injury, she was unable to complete her winter term of school, which lasted about three months, or to teach a school the following summer, which had been offered her by the directors. She received a salary of $45 a month for teaching school prior to the operation. Dr. Chase, appellee's attending physician, in response to a question, expressed the opinion that appellee was injured internally by the fall. Attorneys for appellant entered an objection to the admission of the physician's opinion, which was overruled by the court. To the ruling of the court, appellants excepted and preserved their exception in their motion for a new trial.

T. W. McCall testified that, as they came out of the coach, Dr. Chase had appellee by the arm; that, after he stepped off, he turned, appellee screamed and caught him around the neck with both arms; that the brakeman was standing down by the side of the steps and did not have hold of appellee; that he held appellee up from the ground, then he and others laid her down on a coat; that appellee was complaining with pain.

Dr. J. B. Chase testified that, when they reached Wilton, McCall picked up appellee's suitcase and his overcoat and walked out in front; that he walked behind and held appellee's right arm; that he assisted appellee down pretty well to the bottom of the steps, and, when the brakeman reached for her and nodded his head, witness turned appellee loose; that the brakeman was standing in his position at the bottom of the steps; that appellee then fell; that he could not tell whether appellee just relaxed or missed the stool, but that she fell forward; that he could not tell whether the brakeman took hold of her or not; that appellee was in a falling position when she caught McCall; that plaintiff screamed when she fell, and when the train started, and complained of pain during the interim; that he did not treat her while on the ground, but, later, gave her a hypodermic of morphine because she was nervous and her pulse excited; that he treated plaintiff for some time after that, and his

charges including services from the first of the year, amounted to $115; that appellee's nervous condition continued for quite a while, but that she grew better.

Concerning the injury, appellee testified: "My uncle was just ahead of me and Dr. Chase just behind, holding my arm, and as we started down, I believe we had reached the bottom step—and the brakeman held up his hand, motioned for Dr. Chase to let me go, and Dr. Chase let go, and I reached for his hand, and I don't think he took hold of my arm, and as I started to step and him not holding my arm, of course I fell.' Concerning the extent of her injury she said that she suffered with pains in her abdomen and was confined to her bed on that account for four weeks; that, at the time of the trial, she still suffered in the same way occasionally.

E. C. Cook testified that appellee fell from the bottom step and her uncle caught her—could not tell whether she slipped on footstool or where.

C. H. Gray testified that appellee screamed and fell over from stepbox on Mr. McCall; that, while leaning on McCall, her feet were on the stepbox.

Joel Mills testified that appellee came down as though she were sinking; that her feet were on the ground and she was trying to support herself on Mr. McCall's shoulder; that she seemed to be in pain; that the brakeman was standing to one side, like they always stand to let passengers out.

G. W. Bell testified that as appellee came down on second step she fell and caught with her hands to McCall's shoulder; that the brakeman was at his post as appellee started out.

C. A. Lindsay testified that he had been requested by Dr. Chase to assist in getting appellee off the train on account of weakness due to an operation; that, as she came down the steps, she first handed him her hand; that he said "Let me get hold of your arm" so he could hold her better; that he got hold of her arm and she caught hold of his, and, just as she got her last foot on the step

box, she fainted, screamed and fell from him onto somebody who held her up; that the person laid her down on a coat spread on the ground for the purpose; that, had he known she was going to fall, he could have done more; that he was assisting her as nicely as he could, just like he would assist any one who had been operated on; that he was standing on the ground to the right coming out and had one hand holding to the grab iron.

There was evidence tending to show that appellee was given to fainting or sinking spells, and evidence tending to show the contrary.

Appellant first insists that the court erred in excluding the evidence of the conductor, J. J. Myers, concerning the statement of a bystander to the effect that appellee fainted, for the reason, first, that it was a part of the *res gestae,* and, second, that it contradicted the evidence of appellee, her uncle and family physician, that she was injured.

(1) There was no showing that the bystander saw appellee faint or that he was present at the time of the occurrence. For aught that appears, he may have received the information that she fainted from others. The evidence was not therefore admissible as a part of the *res gestae.*

(2) Appellee could not be bound by a failure of her witnesses to contradict the statement made in their presence, and, in view of the fact that she was screaming and suffering, that the remark was not addressed to her, and did not impugn her motives or character, she was not called upon then and there to speak; so her silence could not be used as tending to contradict any statement she might subsequently make concerning the injury or the manner in which it occurred. It is only where one is required to speak and refuses that his silence can be treated as a contradiction of his subsequent statements.

Again, appellants insist that the court erred in permitting Dr. Chase to testify that appellee was injured internally. The reasons urged as to the incompetency

of the evidence are that there were no physical evidences of an injury of any kind and no examination was made for internal injuries. Appellee screamed and suffered pain when she fell. There were no external evidences of injury. She continued to suffer and was confined to her bed for four weeks on account of nervousness and pain, resulting from the fall. At the time of the trial, she was still suffering in her abdomen at times. Dr. Chase treated her during her illness. She remained in his house one week immediately after the injury. He heard her complaints and screams and had every opportunity to observe her conduct. He was an expert and qualified to express an opinion as to the character and extent of her injury. This court said, in the case of *Kansas City Southern Railway Company* v. *Cobb,* 118 Ark. 569, on page 575, that "There can be no question about a physician, an expert in the treatment of diseases, being permitted to testify as to the apparent condition of the patient whom he treats." Under the rule announced in that case, the evidence was admissible.

Appellants also insist that it was error to permit appellee to testify that the school directors, of the school which she was teaching before she became ill, had promised her the school the succeeding summer. It is true definite arrangements had not been made for salary, etc., and that the promise to give her the school was not a legal obligation on the part of the school district, but it was a promise of reasonably certain employment, out of which she would necessarily profit. *A. L. Clark Lumber Co.* v. *St. Coner,* 97 Ark. 358.

Appellants also insist that the court erred in refusing to instruct a verdict for them. We think not. There was substantial evidence tending to show that the injury was the direct result of the failure of the brakeman to exercise the proper care in assisting appellee off the train. The brakeman knew that appellee was weak on account of an operation, for he had been so informed. He knew that she and her attendants were depending on

him to help her off the train, because his assistance had been requested. According to some of the witnesses, the assistance rendered, if any, was very slight. Only one of his hands was employed in rendering such assistance as he offered. The fact that appellee fell forward and away from him and was caught and supported by another, instead of him, indicates indifferent assistance. Under the circumstances, the jury might well have concluded that the brakeman owed the duty, in the exercise of proper care, to use both hands and securely take hold of and assist appellee safely to the ground, even if she were in a fainting condition. The evidence, viewed in the most favorable light to appellee, is sufficient to sustain the verdict and judgment.

Appellants also insist that it was error to render judgment against the railroad corporation because at the time the injury occurred the railroads were being operated by the Director General. This question was decided adversely to the contention of appellants in the case of *Mo. Pac. Rd. Co.* v. *Ault,* 140 Ark. 572. The ruling in that case was recently adhered to in the cases of *Kansas City So. Ry. Co.* v. *Rogers, ante* p. 232, and *Hines* v. *Mauldin, ante* p. 170.

Appellants also insist that the verdict is excessive. The pain resulting from the injury was so intense that appellant screamed and complained. Her nerves were so shocked and her pulse so excited that it became necessary later to administer a hypodermic of morphine. As a result of the injury, it was necessary to carry her on a mattress from the station to Dr. Chase's home where she was confined to her bed for a week, and from his home on a cot to her uncle's home where she was confined to her bed for three weeks. The attention of a physician was required until the following April. She was prevented from teaching school three months during the winter and a summer school the following summer. She lost $45 a month during the three winter months and such salary as might have been agreed upon for

teaching the summer school. She became indebted for a substantial amount to her attending physician. Under the facts in the case, we do not think the verdict excessive.

A number of exceptions to instructions given and refused are urged by appellants as ground for reversal of the judgment. We have carefully considered the exceptions and think none of them are well taken. We think the case was sent to the jury under correct instructions which fully covered every phase of the case.

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

WEAVER v. EMERSON-BRANTINGHAM IMPLEMENT COMPANY.

Opinion delivered December 6, 1920.

1. CONTRACTS—NOVATION.—Parties to a written contract may, subsequent to its execution, rescind it in part or *in toto* and substitute a new oral agreement therefor.
2. COMPROMISE AND SETTLEMENT—CONSIDERATION.—The settlement of a controversy growing out of a written contract is a sufficient consideration for a verbal compromise.

Appeal from Arkansas Chancery Court, Northern District; *John M. Elliott,* Chancellor; reversed.

Young & Elms, for appellant.

1. The first contract was modified by the new agreement to the extent of releasing appellant from any obligation to pay the purchase price unless the machinery would meet the requirements of the guaranty. The new agreement took the place of the old one. 112 Ark. 227; *Ib.* 165; 6 R. C. L. 308; 112 Ark. 223. After a sufficient test both parties were satisfied that the machinery would not do the work it was represented to do, and the manager of appellee abandoned hope of ever getting it to do the work satisfactorily. The testimony shows that the machinery was given a fair test, and it failed to meet the conditions required before appellant was under any obligation to accept.

2. There was no acceptance by appellant as the testimony fully shows.

3. The great preponderance of the evidence is for the appellant. The defenses of appellant were fully sustained and call for a reversal.

John L. Ingram, for appellee.

1. A mere agreement to rescind a contract performed on one side, either by substitution, modification, waiver or cancellation, would be without consideration and void. 14 Mich. 266; 41 Miss. 197; 75 Ala. 452; 50 N. J. Eq. 500; 104 Iowa 487; 76 Minn. 183; 9 Cyc. 593; Clark on Cont. 698.

2. The original contract was complete, and expressly stated that the machinery was not warranted but was second-hand, and no matter what the letters and telegrams said, nor whether they constituted a modification or rescission, there was no consideration for it, and appellant had never agreed to do anything more than he had already agreed to do, and which he was bound to do under the original contract.

3. Appellant accepted the machinery, and it was delivered to him. Appellee fulfilled his part of the contract. The shipment was made according to appellant's directions and was delivered and accepted. No fraud is charged and no rescission asked, and the decree is right.

HUMPHREYS, J. Appellee instituted suit against appellant in the Arkansas Chancery Court, Northern District, to recover $800 and interest, the alleged purchase price of a tractor and engine and to foreclose a vendor's lien for said sum on said machinery. It was alleged that the machinery was shipped by appellee to appellant as provided for in the following written contract:

"ORDER FOR SECOND-HAND MACHINERY.

"Stuttgart, Ark., January 14, 1916.

"Emerson-Brantingham Implement Co. (Inc.), Rockford, Illinois:

"You will please ship for the undersigned purchasers at Stuttgart, Ark., in care of yourselves, at Stutt-

gart, Ark., by the route you think best and cheapest, if possible, on or about as soon as possible, the following described second-hand machinery. One Model L tractor No. 20019. Also one No. 12 Engine triple gang plow.

"In consideration whereof the undersigned agrees to receive the same on its arrival, pay freight and charges thereon from Charleston, Mo., and also agrees to pay to your order at the time and place of delivery, the sum of eight hundred dollars and other chattels, said cash and notes as follows: $200 cash on delivery, 1916. Note for $300 due May 1, 1916. Note for $300 due December 1, 1916. Notes to be payable to the order of Emerson-Brantingham Implement Company, and its blanks shall be used and made payable at First National Bank in Stuttgart, Ark. Said notes to bear the highest legal rate of interest from date until maturity, and the highest legal rate of interest from maturity until paid. The title to the above machinery shall remain in Emerson-Brantingham Implement Company until complete settlement is made, provided for herein, and until cash is paid in full or notes and mortgages are executed and delivered and mortgages placed upon record. Said notes are to be accompanied by approved security and a first mortgage on the above named machinery and on the following other property, towit:

"As a condition hereof, it is fully understood and agreed that said machinery is purchased as second-hand, must be settled for at the time and place of delivery and is not warranted either as to condition, size or rating, or in any manner whatsoever; that the rated horsepower of engine herein ordered (if any) is merely presumed and not known, and no verbal promise or agreement shall be valid as against or in addition to any of the conditions herein specified.

"Emerson-Brantingham Implement Company assumes no liability for nonshipment, delay in shipment or transportation, and acceptance by purchaser is a full waiver of any claim for delays in filling this order, aris-

ing from any cause. And, failing to receive said machinery or to pay said money or to execute and deliver said notes, this order shall stand as the purchaser's written obligation, and have the same force and effect as notes for all sums not paid in cash.

"Upon default in payment at its maturity of any part of the purchase price stipulated in this order, the whole amount of the purchase price shall thereupon at the option of said company, without notice, become due and payable.

"This order is taken subject to approval by the company at Rockford, Illinois, or by its branch house manager for the territory in which this order is given, and notice of such approval and acceptance is hereby expressly waived by the purchaser, Stuttgart, Ark.

"C. A. Weaver."

Appellant filed answer, denying the indebtedness and alleging that the contract was not to become effective until it was satisfactorily demonstrated upon the farm of appellant that the machinery in question would plow four to six inches deep under fair conditions; that the machinery was shipped to appellee's order, and, when it reached Stuttgart, a controversy arose between appellant and appellee concerning the necessity for a demonstration; that, in settlement of the controversy, a subsequent modified agreement was entered into between appellant and appellee to the effect that $200 should be deposited in the First National Bank of Stuttgart by appellant, together with his two promissory notes in the sum of $300 each, secured by a chattel mortgage upon the machinery aforesaid to be delivered to appellee when appellee demonstrated upon appellant's farm that the machinery would plow four to six inches deep under fair conditions; that thereupon appellant paid the freight charges on the machinery with the understanding that it would be refunded if the machinery failed to perform the work; that a test was made and the machinery failed to work satisfactorily or pull the plows

at the depth agreed upon; that, after the test, appellant refused to accept the machinery and demanded a refund of $65.10, with interest at six per cent. per annum from February 28, 1916, on account of freight advanced and oil and gasoline furnished to make the test, for which amount he prayed judgment, as well as a dismissal of appellee's bill for want of equity.

Appellee filed a reply to the answer and cross-bill, denying that it entered into any subsequent contract or agreement warranting the machinery to do the work specified in the answer and cross-bill, and alleging that the original contract made the basis of this suit was the only contract entered into by it with appellant.

The cause was submitted to the court upon the pleadings, the original written contract, certain telegrams, letters and oral evidence, which resulted in a finding that appellant was bound by the original written contract; that, in compliance therewith, appellee shipped the machinery to Stuttgart, Arkansas, and that same was accepted by appellant; that appellant had failed to pay the purchase price agreed upon for the machinery and was indebted to appellee in the sum of $992, including interest to that date; that appellee was entitled to a vendor's lien on the machinery. The court rendered a decree in accordance with the finding, from which an appeal has been duly prosecuted to this court.

The facts are that appellee had a second-hand tractor and gang plow at Charleston, Missouri, and, through its agent, George A. Mattingly, negotiated a sale thereof to appellant, who signed the order for it, heretofore set out in this opinion, on January 14, 1916. The machinery was shipped to Stuttgart by appellee to itself, and the unexecuted notes and chattel mortgage upon the machinery were sent to the First National Bank in Stuttgart, with bill of lading attached, to be delivered to appellant upon the payment of $200 in cash and the execution of the notes and mortgage aforesaid and delivery of same to said bank for appellee. Appellant claimed that he

was not to make the cash payment and execute the notes and mortgage until appellee demonstrated on his farm that the machinery would satisfactorily plow to the depth of four to six inches, and refused to execute the papers, make the cash payment or advance the freight until such test was made. The First National Bank of Stuttgart conveyed this information to appellee. Appellee thereupon wired George A. Mattingly, who negotiated the original sale, as follows: "If Weaver will put money and settlement in bank to our order subject to plowing four to six inches deep under fair conditions accept, otherwise use your best judgment." On the following day, appellee wired the bank as follows: "Wired Mattingly, our agent, yesterday. He will arrange equitably." These telegrams were shown appellant, and Mattingly agreed that appellee would demonstrate upon appellant's farm that the tractor and plows would plow satisfactorily to a depth of four to six inches if he, appellant, would advance the freight upon the machinery, amounting to $57.60, the expenses of oil and gasoline necessary for the demonstration, amounting to $7.50, deposit $200 in cash in the bank and execute the notes and mortgage and place same in the bank to be delivered to appellee if the demonstration established that the machinery would do the work aforesaid. In furtherance of the agreement, George A. Mattingly wrote and signed the following statement across the telegram received by him from appellees: "Subject to refund of freight charges in case tractor is not taken," and signed the following statement on the telegram sent by appellee to the First National Bank of Stuttgart: "Cash and papers to be held by the First National Bank until tractor is accepted by C. A. Weaver. If tractor is not accepted, C. A. Weaver to be reimbursed for freight charges advanced." Under the agreement that appellant should not be required to accept the machinery unless the test established that it would plow satisfactorily four to six inches deep, he placed the required settlement in the bank, paid

the freight charges upon the machinery and it was removed to his farm for the test. The first test was made early in March and proved a failure. Later in the same month, a test was made by George A. Mattingly in the presence of appellant, J. W. Kinross, the manager of appellee, and others. It took an entire afternoon to plow one round on a fifteen-acre tract. The next morning another attempt was made, and it took the whole forenoon to plow another round. The engine failed to pull the plows at the depth agreed, and the manager stated that his conscience would not permit him to ask appellant to pay for a tractor that was not doing better work, or coming nearer filling the guaranty, than this one was. The manager, Mr. Kinross, then tried to get appellant to wait and give them further time to make the test. Appellant refused to do so and purchased another tractor which gave satisfaction.

Appellant contends that the first contract was modified by the new agreement to the extent of releasing him from any obligation to pay the purchase price on the machinery unless on test it would meet the requirements of the guaranty to the effect that it would plow four to six inches deep in a satisfactory manner. This court is committed to the doctrine that parties to a written contract may, subsequent to its execution, orally rescind it in part or *in toto* and substitute a new oral agreement therefor. *Ozark & Cherokee Cent. Ry. Co.* v. *Ferguson,* 92 Ark. 254; *Murray* v. *Miller,* 112 Ark. 227; R. C. L., vol. 6, p. 308. Appellee insists, however, that there was no consideration for such new agreement, and that the subsequent agreement, if made, therefore did not release appellant from his undertaking in the original contract. Appellant had refused in good faith to accept the machinery from the carrier until it was established on test that it would plow four to six inches in a satisfactory manner. In order to induce appellant to advance the freight, deposit $200 in cash in the bank and execute the notes and mortgage and deposit same in the bank, it

authorized its agent to guarantee upon test that the machinery would plow from four to six inches in a satisfactory manner. This was a compromise of the controversy existing between the parties as to whether the original contract was induced by the promise to demonstrate on appellant's farm that the machinery would do this work. The settlement of this difference between the parties in this manner was sufficient consideration to support the new agreement. *Capitol Food Co.* v. *Mode & Clayton,* 112 Ark. 165. The court was therefore in error in rendering a judgment against appellant in any sum, but should have rendered judgment against appellee in favor of appellant for $65.10, on account of freight advanced and oil and gasoline furnished to make the test.

For the error indicated, the decree is reversed and judgment will be entered here in favor of appellant against appellee in the sum of $65.10 with interest at the rate of six per cent. per annum from February 28, 1916, to this date.

DOZIER *v.* UNION BANK & TRUST COMPANY.

Opinion delivered December 6, 1920.

1. VENDOR AND PURCHASER—DUTY OF PURCHASER TO POINT OUT DEFECTS IN ABSTRACT.—Where a contract for sale of land provided for payment within 30 days provided complete abstracts were furnished and for an extension for a reasonable time to perfect the title, the purchaser, if he disapproved the abstracts tendered, should point out the defects and allow the vendor a reasonable time within which to correct them.
2. VENDOR AND PURCHASER—ABANDONMENT OF CONTRACT—PLEADING.—In a purchaser's action to recover a forfeit payment made by him, an allegation in the vendor's answer that plaintiff had refused to comply with the contract was in effect an allegation that he had abandoned it.
3. VENDOR AND PURCHASER—RECOVERY OF FORFEIT—BURDEN OF PROOF.—Where a purchaser under a land contract sued to recover a sum deposited with a bank as a forfeit, and the vendor intervened, claiming the deposit, the burden of proof is on the plaintiff.

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

W. K. Ruddell, for appellant.

1. It was error to instruct the jury that the burden of proof was upon plaintiff. The interpleader asked to be made a party to the suit and claimed that he had fulfilled his part of the contract. He then was entitled to open and close the argument, and the burden of proof was upon him. 128 Ark. 25-7.

The interpleader, Presley, must show that he has tendered a deed and demanded the purchase money and also that he was willing to accept the Dozier deed to the land, and until he did he was not entitled to demand a forfeiture as he claimed he had complied with the contract. 7 Ark. 207.

2. When plaintiff proved that he notified Presley of the defect of title, he did not have to prove that Presley had an opportunity to correct same. Plaintiff did not have to give an opportunity to correct abstract. Plaintiff did not have to point out any defects where a contract is that an abstract must be furnished "satisfactory to her attorney," the abstract must be so or appellee is not bound to pay the purchase price. 119 Ark. 418, 428; 94 *Id.* 263-8. A satisfactory abstract of title must be furnished showing *satisfactory* title to the vendee. The vendee must be satisfied. 18 L. R. A. (N. S.) 74. There is no proof that Dozier was acting in bad faith. Presley's objection to Dozier's title was in good faith.

3. The court erred in its interpretation of the contract as reflected by the instructions. No. 1 was erroneous, as abandonment of contract was not pleaded and relief can not be based on a fact not put in issue by the pleadings. Written pleadings were filed in the justice's court and the parties are bound by them. 46 Ark. 152; 1 Crawford's Digest, 4049.

4. It was error to instruct the jury as to abandonment of contract. The objectionable words should have

been stricken out. 119 Ark. 418; 18 L. R. A. (N. S.) 741; 94 Ark. 263-8.

5. The court should have given the plaintiff a peremptory instruction for a verdict. The title was defective, and there were many irregularities in it. Adverse possession would not constitute a merchantable title for part of the land, as it is not shown how the parties came into possession or what they did with it. 121 Ark. 482; 120 *Id.* 69.

6. The court erred in refusing to give instruction No. 1 for plaintiff that Dozier was the party to be satisfied and that they must find that Presley furnished a satisfactory title. 128 Ark. 25-7; 119 *Id.* 418; 94 *Id.* 263; 18 L. R. A. (N. S.) 741.

7. It was error to refuse instructions Nos. 2, 3 and 4 for plaintiff. The burden was on the intervener, and the court should have so instructed.

Victor Wade and *Samuel M. Casey,* for appellee.

1. The facts in the record show that Dozier did not act in good faith in claiming that there were defects in the title to the land, but his failure to carry out his contract was due to other reasons not the fault of Presley, and, if so, then he should forfeit the $300 he put up as the contract stipulated. The instructions state the law correctly. 119 Ark. 418; 94 *Id.* 263.

2. There is absolutely no testimony showing any defect in the title.

3. The burden of proof was properly placed on the plaintiff. No prejudice resulted from the instructions given or refused and this court will not reverse for errors not prejudicial. 121 Ark. 439; *Ib.* 570; 69 *Id.* 632.

HUMPHREYS, J. Appellant institutes suit against the Union Bank & Trust Company in the Independence Circuit Court to recover $300 which he had deposited in the bank as a forfeit payment to appellant in a land deal entered into between appellant and appellee J. H. Presley. The written contract for the sale and purchase of

the land in question, containing the forfeit clause, is as follows:

This writing witnesseth: That J. W. Dozier, hereinafter known as the party of the first part, has agreed to purchase from J. H. Presley, hereinafter known as the party of the second part, his farm of 232 acres, near Jamestown, Ark., adjoining the J. C. Hubble farm. The consideration price is $9,300.00 (nine thousand three hundred dollars), three hundred dollars to be paid down in cash and deposited in the Union Bank & Trust Company as a forfeit payment by Dozier, same to be held by said bank until the completion and delivery of the necessary deeds and abstract of title for approval of said Dozier. The other payments agreed consist of a farm of Dozier's of 361 acres, near Calico Rock, Ark., which Presley agrees to accept in part payment at a value of $3,000 (three thousand dollars), upon furnishing abstract of title and warranty deed approved by party of the second part. The remainder of the purchase price, or $6,000.00, is agreed to be paid within 30 days, provided satisfactory title is furnished by party of the second part, consisting of complete abstracts and warranty deeds. The 30-day limit is mentioned simply in case the party of the first part falls down or refuses to carry out his part of this agrement, in which event the $300 forfeit money referred to shall revert to the party of the second part. If, however, there is any reasonable excuse for the extension of this agreement by reason of unusual necessities to perfect the title, this agreement shall hold good for a reasonable time which is required to carry out the purpose of this agreement as long as same is being done in good faith. Signed in triplicate this October 24, 1919."

The Union Bank & Trust Company filed answer, stating that it held the money as a depository under the forfeit provision in the land sale contract between J. W. Dozier and J. H. Presley, and requested that the interested party, J. H. Presley, be made party defendant. It

also asked permission to pay the money into court for award to the party entitled thereto under the terms of the sale and purchase contract.

J. H. Presley intervened and filed an answer, denying appellant's right to the fund, claiming same himself under the forfeit clause in the contract, on account of the refusal of appellant to comply with the terms thereof.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment for appellee.

The evidence disclosed that Presley delivered an abstract of title to his farm to Dozier within ten days after the execution of the contract; that Dozier failed to procure a loan of $6,000, on account of insufficient security, to make the final payment; that on the 25th day of November, 1919, thirty-one days after the contract was signed, Dozier applied to Presley for additional time within which to consummate the deal, and obtained an extension of fifteen days; that on December 15, 1919, after the expiration of the time extension, Dozier served the following notice upon appellee:

"To J. H. Presley and Union Bank & Trust Company: This will notify you that I have examined the abstract of title to the land, which I was to buy from J. H. Presley, and that I find the same unsatisfactory, and that I hereby demand the $300 which was placed in the Union Bank & Trust Company.

"Witness my hand this 15th day of December, 1920.

"J. W. Dozier"

Presley testified that this was the first intimation he or the bank received to the effect that Dozier entertained objections to the abstract. On December 18th, following, Ward & Wade, attorneys for Presley, wrote a letter to appellant requesting him to specifically point out his objections to the title, assuring him that Presley would make an effort to correct any defects. Ward testified that no answer was received to the letter. Dozier testified that he answered the letter, referring Ward

to Mr. Ruddell, his attorney, who would point out the defects in the title. He also testified that, before receiving the letter, he saw Ward in person and told him in the presence of Presley, that, according to the abstract, the following defects existed in the title: A patent had never been issued by the government for 120 acres of the land; three deeds of trust had not been satisfied; one break existed in the chain of title; and one conveyance only purported to convey dower and homestead rights of the grantor. Ward testified that Dozier came to his office and expressed dissatisfaction with the abstract, but refused to point out any defects in the title for correction, insisting that, under the terms of the contract, it was the duty of Presley to furnish an abstract in the first instance without defects; that appellant did not refer him to his attorney, Ruddell, until after the trouble came up. J. C. Hubble testified that Dozier told him he was thinking of losing the forfeit he put up in the land deal and asked his opinion concerning it; that he told Dozier he would be likely to lose it.

The court submitted the cause to the jury upon the theory that, before appellant could claim the return of the forfeit money, he must show by a preponderance of the evidence that the abstract furnished by appellee Presley was defective, and that he pointed out the defects and gave Presley reasonable time thereafter within which to perfect the title and abstract; and that appellant was ready and willing to carry out the contract on his part upon the fulfilment of the contract by appellee Presley within a reasonable time after being apprised of defects in the title.

Appellant insists that the court erred in the interpretation of the contract, as reflected by the instructions embodying the foregoing theory. We think the court construed the contract correctly. The contract provided that appellee Presley should furnish appellant an abstract within thirty days, showing satisfactory title, with the right to additional time, if neccessity required, to

perfect the title. This conferred the right upon appellant, if ready and willing himself to perform the contract, to disapprove the abstract of title tendered, if actually defective, after extending a reasonable time to appellee Presley to correct the defect, or defects.

Appellant's request for a peremptory instruction upon the theory that it was not his duty, under the contract, to point out the defects, if any, in the abstract, and to give appellee a reasonable time to correct them, and his request for instructions carrying the idea that no such duty rested upon him, or that appellee Presley had no right to reasonable additional time to correct defects in the abstract, were properly refused. Unless the duty rested upon appellant under the contract to point out any defects in the title tendered, which rendered it unsatisfactory, and unless appellee Presley was privileged to correct them within a reasonable time, the following clause in the contract was meaningless:

"If, however, there is any reasonable excuse for the extension of this agreement by reason of unusual necessities to perfect the title, this agreement shall hold good for a reasonable time which is required to carry out the purposes of this agreement as long as it is being done in good faith."

Appellant contends that the court committed reversible error by reference in the instructions given to an abandonment of the contract by appellant, because that fact was not put in issue by the pleadings. Appellee Presley's answer alleged a refusal by appellant to comply with the terms of the contract, which was, in fact, an allegation of the abandonment of the contract by him. So there is no foundation for the contention made by appellant in this respect.

Lastly, appellant contends that the court erred in placing the burden of proof upon him, for the reason that appellee Presley was an intervener in the case and filed an interplea, contending that the burden rested upon an interpleader to establish his case. Appellant cites

the case of *Webber* v. *Rodgers,* 128 Ark. 25, in support of this position. That was an attachment suit in which a third party intervened and claimed the attached property. In that character of case, the interplea presents an issue independent of the attachment, and the burden of proof rests upon the interpleader, who, for that reason, is entitled to the opening and closing argument. *Excelsior Manufacturing Co.* v. *Owens,* 58 Ark. 556. In the case at bar, the so-called "interpleader" was strictly a defendant, being the party of the second part in the contract and the only interested party in the litigation, except the plaintiff. Appellant being the plaintiff and appellee the only interested defendant, the court did not err in instructing that the burden in the whole case was upon appellant.

The judgment is therefore affirmed.

SECURITY LIFE INSURANCE COMPANY *v.* INGRAM.

Opinion delivered December 13, 1920.

1. WITNESS—CORROBORATION.—Plaintiff, suing on a life insurance policy, can not corroborate his own testimony that he had received a certain letter from defendant's president by testifying that he had so advised defendant's local agent.
2. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.—In an action on a life insurance policy, the erroneous admission of plaintiff's statement to the general agent of defendant concerning the receipt of a letter from the defendant's president, having the effect to corroborate plaintiff's testimony, was prejudicial to the defendant.

Appeal from Yell Circuit Court, Danville District; *George R. Haynie,* Special Judge; reversed.

T. E. Helm, for appellant.

1. The statement of appellee to Majors concerning the correspondence with Johnson, the president of the company, was incompetent and it was error to admit it, as it was prejudicial. It was not within the issues presented by the complaint but directly refuted them; it did

not sustain the theory of *payment* set up in the complaint but established the *nonpayment* and sought to show a reason for same. Proof that a person has *told* another a certain thing has been *is no proof that the thing has actually been done.* This error was perpetuated by the court in its instructions.

2. As a matter of fairness and justice, the motion for continuance should have been granted for surprise. 55 Ark. 567; 99 *Id.* 547. The latter case is conclusive of this. 99 *Id.* 553; 71 *Id.* 198; 9 Cyc. 129-130; 13 C. J. 174; 6 R. C. L. 554-5; 48 L. R. A. (N. S.) 224; 11 C. J. 176-7. The issue and cause upon which plaintiff relied was not set out in the pleadings, and up to the trial defendant had no notice and was surprised.

Ratterree & Cochran and *J. E. Chambers,* for appellee.

1. There was no abuse of discretion by the court in refusing a continuance. 55 Ark. 567; 82 *Id.* 105; 18 *Id.* 574. Motions for continuance are always addressed to the sound discretion of the court trying the case, and, unless there is a clear case of abuse of discretion, this court will not interfere. 103 Ark. 543.

2. There was no error in permitting Ingram and Howard to testify as to the conversation in January, 1919, and statement to Majors concerning the correspondence with Johnson, the president. The objections thereto are not well taken, as on cross-examination the attorney for defendant questioned Howard and Ingram at length concerning the same matter. A verdict will not be disturbed if supported by any evidence, however slight. 25 Ark. 474; 23 *Id.* 131; 49 *Id.* 122.

3. The verdict is supported by the evidence, and there is no error in the instructions.

McCULLOCH, C. J. This is an action to recover on an insurance policy issued by appellant March 20, 1917, on the life of appellee's wife, Lucinda A. Ingram, of Danville, Ark., the amount being payable to appellee. Ap-

pellant defended on the ground that the policy had lapsed on the failure to pay the premium.

When the policy was issued, the first annual premium was paid which carried the policy in force to March 20, 1918, and on that date at the request of the assured the premium installments were changed from annual to quarterly payments, being payable on the twentieth days of March, June, September and December, respectively. The payments due on the twentieth days of March, June and September, 1918, were paid, but the installment due on December 20, 1918, was never paid. The policy allowed thirty-one days of grace, which expired on January 20, 1919. Mrs. Ingram died on January 22, 1919.

On the trial of the cause appellee testified, as tending to show that there was no default in the payment of the installment of premium, that F. D. Majors of Danville was the general agent of appellant company at that place, and that, in a conversation with Majors, in regard to the payment, before the time expired, Majors told him that appellant company invariably sent him blank receipts for delivery to the policy holders and assured him that the receipts would come and would be presented to him before the time expired for paying that installment. Appellee also testified that he wrote to appellant company a letter making inquiry about the method of paying premiums, and that Mr. Johnson, the president of the company, wrote to him in reply stating that receipts would be in the hands of Mr. Majors, the agent, and instructed him to call on Mr. Majors and pay the premium, instead of forwarding the same to the home office of the company. He also testified, over the objections of appellant, that, after the receipt of the letter from Johnson, the president of the company, he told Majors he had received the letter from Johnson. Appellee was also permitted to prove by witness Howard, over appellant's objection, that on or about January 7, 1919, Howard and Majors called at appelle's house, and that the latter stated to Majors in Howard's presence that he had re-

ceived a letter from the insurance company stating that he could pay the premium to Majors.

Mr. Majors was introduced as a witness by appellant, and he testified that he was the agent of the company, with authority to solicit insurance, deliver policies, collect first premiums and also to collect other premiums when furnished receipts countersigned by the company, but that he had no authority to collect premiums until he had in his possession the countersigned receipts. Witness denied that appellee ever told him about receiving a letter from Johnson, the president of the company, or that he had ever had any conversation with appellee in regard to the payment of the last premium due.

After the close of the testimony and after the instructions had been delivered by the court, appellant's attorney moved for a continuance of the cause until the next term of the court on the ground of surprise at the testimony of appellee in stating that he had received a letter from Johnson telling him to pay the premium to Majors.

The statement of appellee to Majors concerning the correspondence with Johnson, the president of the company, was clearly incompetent, and the court erred in admitting it. The court allowed it to go to the jury "for the purpose of determining whether or not the agent here was advised by the plaintiff in this case that he had received such a letter." The fact that appellee informed Majors that he had received such a letter was not material, and the only effect this testimony could have had was to corroborate appellee in his statement that he had received the letter. This was not the proper method of corroboration, as appellee should not have been permitted to support his testimony to the effect that he had received the letter from Johnson by showing that on the occasion named he had so stated to Majors. This would be a mere corroboration of the witness by his own statement. It would have been competent for appellee to testify that, after receiving the letter from Johnson, the

president of the company, authorizing him to pay the premiums to Majors, he had tendered the amount of the premium to Majors, but appellee did not so testify, and his statement to Majors about receiving the letter did not have that effect. The error of the court in admitting this testimony was prejudicial, for the reason that the jury might not have accepted as true the testimony of appellee in the absence of the corroborating statement related by Howard as to what was said by appellee to Majors.

It is unnecessary to determine whether or not the court erred in refusing to postpone the trial of the case on account of the surprise caused by appellee's testimony in regard to the correspondence with the president of the company.

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

CAMPBELL v. LUX.

Opinion delivered December 13, 1920.

1. DEEDS—COMPETENCY OF GRANTOR—GROSS INADEQUACY OF PRICE.—Gross inadequacy of the price paid for land, though not controlling, is a circumstance to be given much weight in determining whether the seller was competent to convey.
2. DEEDS—COMPETENCY OF GRANTOR—AGE AND FEEBLENESS.—The fact that a grantor of land was old and in feeble health is a strong circumstance to be considered in weighing the conflicting testimony bearing on the question of his mental capacity.
3. DEEDS—COMPETENCY OF GRANTOR—EVIDENCE.—In a suit by the heirs of a grantor of land to set aside his conveyance for his incapacity, the chancellor's finding that the grantor was incapable of conveying *held* supported by a preponderance of the testimony.

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

Prickett & Pipkin, for appellant.

1. The consideration for the deed from Brock was adequate. Mere inadequacy of consideration is not suf-

ficient to set aside the deed, unless so gross as to shock the conscience and amount to fraud. 13 C. J. 366. See 239-b. In the light of the evidence the consideration was not grossly inadequate.

2. The transaction was neither unreasonable or improvident. Mental incapacity of Brock was not shown by the testimony, nor does it show imbecility or incapability.

3. The transaction was not unconscionable. There was absolutely no evidence of fraud or undue influence, and the decision of the chancellor is against the clear preponderance of the testimony. 2 Ark. 92; 78 *Id.* 420; 15 *Id.* 555; 49 *Id.* 367. The consideration was adequate; there was no relation of trust or confidence between appellant and Brock, and no false or fraudulent representations or conduct upon the part of appellant. If Brock was of weak intellect, no advantage was taken of it by appellant, but plenty of time was given for friends and relatives to advise and intervene. The old man knew what he was doing and appreciated fully the effect and consequences of the transaction, as the evidence abundantly indicates.

Lake & Lake, for appellees.

1. The evidence fully sustains the findings of the chancellor. The clear preponderance of the testimony shows that Brock had become imbecile and was incapable of exercising a reasonable judgment in regard to the matter involved in the conveyance, and the finding is supported by a clear preponderance of the testimony. 15 Ark. 555; 84 *Id.* 490.

2. The consideration was wholly inadequate, and the other suspicious facts and circumstances raise a conclusive presumption that the mental weakness of Brock was wrought upon by Campbell to obtain the deed for an inadequate consideration and the transaction was unfair, inequitable and unjust. 115 Ark. 430.

3. The transaction was unreasonable and improvident, and Brock was a mental wreck. 115 Ark. 430. The

decree is supported by the great preponderance of the evidence. 84 Ark. 490; 105 *Id.* 44; 115 *Id.* 430.

McCULLOCH, C. J. Lawrence Brock, an aged man, residing in Polk County, owned a tract of land in that county containing 300 acres, and on February 12, 1917, he conveyed the land to appellant by deed reciting consideration of $100 paid in cash and $20 to be paid each month as long as Brock should live. Brock died on January 7, 1918, intestate, unmarried and without issue, and on August 11, 1919, appellees, who are the collateral heirs of Brock, instituted this action in the chancery court of Polk County against appellant to cancel said conveyance on the alleged ground that it was obtained by fraud and undue influence and that at the time of said conveyance Brock did not possess sufficient mental capacity to intelligently transact business. It was also alleged that the consideration for the conveyance was grossly inadequate. The answer of appellant contained denials of each of the allegations of the complaint with respect to fraud and undue influence and mental incapacity of said grantor. On the trial appellees rested their case on the charge of gross inadequacy of consideration for the conveyance and the mental incapacity of the grantor, and the chancery court rendered a decree in favor of appellees on those grounds. Appellant had paid all of the monthly installments of the consideration up to the death of Brock and had also voluntarily erected a monument at Brock's grave at an expense of $200, and a lien on the land was decreed in his favor for the consideration paid, for the amount of taxes paid and for the cost of the monument.

There is conflict in the testimony on the issues involved, but as to many important facts the testimony is undisputed.

Brock was seventy-seven years of age, and for many years had been and was then afflicted with chronic diarrhea and bladder trouble which impaired his physical health and strength to a very considerable extent. His

mental faculties were also impaired—the testimony being conflicting as to the extent.

The testimony varied as to the market value of the land—the estimates of witnesses ranging from $1,500 to $5,000 valuation. There were fifty or sixty acres of the land fenced and in cultivation, the improvements being poor and somewhat out of repair, and the annual rental value was about two hundred dollars. The testimony warrants a finding that the land was worth three thousand dollars.

Many witnesses gave testimony concerning the habits and mental capacity of the old man. They told of his peculiarities and idiosyncracies. He was, according to the testimony, childish and had hallucinations. He was constantly obsessed with the belief that he was in danger of being poisoned and of being robbed and killed. His conversation was generally incoherent and disconnected, and he was forgetful—would start to relate some incident in his life and then forget what he was relating. A few days after he executed the deed to appellant he went to Texas to visit two of his nephews and was gone about three weeks. When he returned home and got off the train, he stopped near the coach, and, on being cautioned by the conductor of his position of danger, he replied that the train could not run over him. He related, as an incident of his journey, that he had been accompanied by a band of Indians who protected him from assaults and fought for him until the last one of them was killed in defending him. He spoke of visiting relatives at sawmills in Polk County where they were residing—said that the train carried him around through the mountains to each of the mills.

Mr. Parker, a witness, who was engaged in the real estate business, testified that Brock listed the land with him for sale and kept it so listed up to the time of his death; that Brock declined an offer of $3,000 for the land about five years before he conveyed it to appellant; and that some months after Brock executed the deed to ap-

pellant he talked to witness about selling the land, but said nothing about having conveyed it to appellant. The witness testified that Brock was decidedly lacking in mental capacity. On the other hand, many witnesses testified that Brock was, though feeble in health and strength, of sound mind and was capable of transacting business intelligently—such transactions as he was interested in.

The deed to appellant was written by Mr. Ragland, who resides in Mena and is engaged in the business of abstracting land titles. He was introduced as a witness by appellant, and was a very candid and apparently truthful witness. He testified about the execution of the deed and related all of the circumstances of the transaction. He testified that he had no previous acquaintance with Brock, but met him by accident in the bank of which appellant was cashier, and was asked by Brock to prepare the deed; that he prepared the deed according to Brock's direction and took the latter's acknowledgment, and that Brock seemed to fully understand the details of the transaction. He stated that Brock was old and appeared to be "cranky," but that he saw nothing in his conduct to indicate that he was lacking in mental capacity to transact business or was not in full comprehension of the transaction he was then conducting.

Appellant testified in his own behalf, giving all of the details of his purchase of the land from Brock. He testified that Brock did his banking business there at the bank of which he (appellant) was cashier, and mentioned one day his desire to sell the land; that he (appellant) offered to buy it and pay $50 cash and $20 per month as long as Brock lived, and that Brock replied that it was a "funny kind of a trade," but that if appellant would give $100 cash and $20 per month, he might make the deal; that he told Brock to "go off and study about it" and that Brock came back several times to talk about the trade and finally came in and accepted the terms proposed and the deal was closed. He testified that Brock gave no indications of not fully understanding the details

of the transaction and was mentally capable of conducting the transaction.

The terms of the sale of the land by Brock to appellant were unusual and were undoubtedly improvident—such as a man of reasonable judgment would not ordinarily have accepted. Brock was old and very feeble—his affliction was grievous, and he could not reasonably have expected to live but a few years. He had no other means of support, and there appears to have been nothing in the relationship between the parties to justify the belief that Brock desired to extend a gratuity to appellant or to make a sale of the land to appellant on terms extremely disadvantageous to himself. In other words, it is difficult to find a reason for the improvident sale except the fact that Brock was mentally incapable of taking care of his own interests in the transaction. For a small and grossly inadequate consideration he was tempted to part with all the property he owned. This being true, the really difficult question to decide is whether or not the mental incapacity of Brock extended to the point that at the time he executed the deed he did not comprehend the nature and importance of the act so as to justify a court of equity in cancelling the conveyance. The gross inadequacy of the price paid for the land—a fact well established by the testimony—though not controlling, is a circumstance to be given much weight in deciding an issue of this kind. *Kelly's Heirs* v. *McGuire,* 15 Ark. 555; *McEvoy* v. *Tucker,* 115 Ark. 430.

The fact that the grantor was indisputably old and in feeble health is another strong circumstance in weighing the conflicting testimony bearing on the question of his mental capacity. The testimony of Mr. Ragland as to the apparent intelligence of Brock at the time he executed the deed is persuasive, but it can not be given controlling weight when considered in view of the fact that the witness had no previous acquaintance with Brock and saw nothing of him afterward, and when weighed in the light of the testimony of many other witnesses

who were much better acquainted with Brock and had better opportunities to judge of his mental capacity. We can not reach the conclusion that the findings of the chancellor were against the clear preponderance of the testimony.

The decree is therefore affirmed.

HARRIS v. IRBY.

Opinion delivered December 13, 1920.

1. GOOD WILL—AGREEMENT NOT TO RE-ENGAGE IN BUSINESS.—In an action for breach of a contract not to re-engage in the undertaking business, evidence that the business was advertised as belonging to defendant's brother, and that the goods were purchased and shipped in his brother's name, though the business was conducted by defendant, who was employed by his brother, *held* to sustain a verdict that defendant was not proprietor of the business.
2. APPEAL AND ERROR—HARMLESS ERROR.—In an action for breach of a contract not to re-engage in the undertaking business, where the jury found upon sufficient evidence that defendant was not interested in the new business, it was not prejudicial error to refuse to direct a verdict for plaintiffs; there being no evidence that defendant injured plaintiffs by holding himself out as the proprietor of the new business.

Appeal from Clay Circuit Court, Eastern District; *R. H. Dudley,* Judge; affirmed.

Davis, Costen & Harrison, for appellants.

1. The undisputed evidence shows that appellee was guilty of a violation of his contract. He admits that he had the exclusive management and control of the "*Irby, Undertaker,*" business. He was the *buyer* and *paymaster* and funeral director; he was in all things the same *Irby, Undertaker,* who sold his business to appellants, and there was a breach of the contract. 20 L. R. A. (N. S.), 769, and note; 6 R. C. L. 1018, 1019; 54 Ark. 216. If no *actual* damages were proven yet nominal damages were recoverable, 61 Ark. 613, and the court erred in refusing plaintiff's request No. 1, and the verdict is in con-

flict with the court's instruction No. 7 and contrary to the undisputed facts.

W. E. Spence, for appellee.

This court in 54 Ark. 216 stated the rule governing the measure of damages in this kind of a case. The instructions here cover this case in all its phases and the evidence fully sustains the verdict.

McCULLOCH, C. J. Defendant, W. H. Irby, was engaged in business as an undertaker in the town of Rector, and on September 26, 1918, sold his business and stock in trade and hearse to the plaintiffs. There was a written contract of sale which contained the following provisions:

"Party of the first part agrees as a further consideration that he will not enter into said undertaking business in the city of Rector for the period of one year from the date hereof, unless parties of the second part have discontinued said business."

About four or five months after the execution of this contract a new business in the undertaking line was established in Rector and was operated by the defendant. The present action was instituted to recover damages under the charge that defendant broke the contract by entering into business in violation of the terms of the contract. The charge in the complaint is that defendant was the proprietor of the new business, but the latter in his answer denied that he was proprietor and stated that his brother, W. F. Irby, was the proprietor, and that he was an employee of his brother in operating the business. There was a trial of the issues before a jury which resulted in a verdict in favor of the defendant and the plaintiffs have appealed.

The testimony established the fact that the new business operated by the defendant was carried on with a sign over the door reading "Irby, Undertaker," but that the business was advertised in a local newspaper as being the business of W. F. Irby, defendant's brother. The testimony tends to show that at that time W. F. Irby was

a farmer and a school teacher living away from Rector, and that the management of the business was entirely in the hands of the defendant; that the defendant gave his personal attention to the business, was in attendance at the place of business, purchased the stock and materials, attended to sales and to the burial of the dead and assisted in embalming the dead; that he made collections and drew checks in the payment of bills.

Defendant testified himself that he was not interested in the business, but was employed by his brother at a salary of $100 per month, and that he looked after the business under his brother's direction and frequently consulted the latter. He testified also that the goods were purchased and shipped in his brother's name and that the business was carried on in his brother's name.

The facts of this case fall within the rules of law announced by the court in the case of *Daniels* v. *Brodie,* 54 Ark. 216, as follows: "If the defendant was the sole or a joint proprietor in such business, he would be liable to the extent of the loss occasioned to the plaintiff by that business; but if he was not such proprietor and only caused it to be believed that he was, the plaintiff's damage would cover only the loss to him occasioned by that belief, and would not include any loss caused by the competing business, independent of that belief."

The court's charge was in conformity with the law thus announced. The plaintiffs requested the court to give an instruction telling the jury peremptorily that defendant was guilty of a breach of the contract, and that the verdict should be for the plaintiffs.

It is insisted now that, according to the undisputed evidence, the relationship of the defendant to the new business was such as to induce in the minds of the public the belief that he was the proprietor, and that the court erred in refusing to give the peremptory instruction. There was certainly an issue of fact for the determination of the jury as to whether or not the defendant was the proprietor of the business. That issue was properly

submitted to the jury, and the verdict is conclusive as to that.

We deem it unnecessary to decide whether or not, according to the undisputed testimony, defendant held himself out as the proprietor for the reason that no damages have been proved on that issue. Plaintiffs directed the whole of the proof in the effort to show damages from the competing business itself, and there is no proof that damages resulted independently of the competing business on account of the belief in the minds of the public that defendant was interested as proprietor, and such was the state of the proof in *Daniels* v. *Brodie, supra,* and the court there held that there was no prejudice in the erroneous instruction, and the court refused to reverse the judgment on that ground. The same result must follow from the state of the record in this case, for, as no damage was proved, there was no prejudicial error in refusing to give the peremptory instruction.

Affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* ROBERTSON.

Opinion delivered December 13, 1920.

1. MASTER AND SERVANT—BURDEN OF PROOF.—An injured employee who alleges that a benefit fund committee has made a false and fraudulent finding as to his injuries for the purpose of depriving him of payments justly due him from the benefit fund has the burden of proving that fact.
2. MASTER AND SERVANT—RELEASE.—A written agreement by which an employee released claims against the employer for personal injuries in consideration of participating in disability benefits is valid and binding upon both parties.
3. MASTER AND SERVANT—CONCLUSIVENESS OF BENEFIT FUND COMMITTEE'S FINDING.—Where an injured employee agreed that the benefit fund committee's findings as to questions of fact should be conclusive, the committee's finding that his injuries were not permanent, thereby terminating benefit payments to him, is conclusive, even though the committee was honestly mistaken as to the facts.

4. MASTER AND SERVANT—FRAUD IN FINDING OF BENEFIT FUND COMMITTEE.—A finding of a benefit committee that an employee had not been permanently injured *held* not fraudulent where made in good faith according to the customary methods and the regulation of the plan, though the employee was not notified that the committee was making the investigation nor given an opportunity to protest personally against such finding.

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

H. C. Mechem and *John W. & Jos. M. Stayton*, for appellant.

1. The plan for employees' pensions, benefits, insurance, etc., was a voluntary step upon appellant's part. It was something given to employees over and above the regular schedule of wages to provide a source of income in case of accident, sickness or death. 171 Pac. 392. Appellee's right to recover is controlled by the regulations; the plan and regulations therein are an offer and appellee's release was an acceptance thereof, and under the regulations the committee was the arbiter of all questions of fact, and its decision is binding on appellant and appellee. 118 N. E. 348; 53 N. Y. Supp. 98; 167 N. Y. 530. The committee passed upon appellee's claim, making him certain allowances in full and his benefits ceased. 167 N. Y. 530; 171 Pac. 392. The action of the committee is final, and all payments ceased. 118 N. E. 348. The failure of the committee to call appellee before it is not evidence of bad faith. 118 N. E. 348; 215 Mass. 425. See, also, 106 Mass. 389; 85 Me. 68; 57 Conn. 105; 83 N. Y. 909; 187 Fed. 730; 116 Ky. 287; 165 Mo. App. 30; 220 Ill. 436. Under these decisions the peremptory instruction for defendant should have been given, because the failure of the committee to have appellee before it in person was not evidence of fraud or bad faith, and appellee did actually appear twice before investigators of the committee and submit to physical examination, offering the best evidence he could possibly have presented.

2. It was error to strike from the deposition of Fred T. Albert the matter objected to by appellee. The evidence was admissible. 27 Utah 66; 74 Pac. 427; 83 Oregon 528; 163 Pac. 600; 17 Pa. Co. 1555.

3. It was error to refuse instruction No. 5 and to modify it; also in giving instruction No. 1 for appellee. It was also error to give No. 2 asked for by appellee. They assume that the wages earned by appellee were $3.50 per day and were small wages. That was a matter for the jury to determine, and not for the court.

Chas. F. Cole and *S. M. Bone,* for appellee.

1. There was no error in giving instructions Nos. 1 and 5. 118 S. W. 268; 49 Ark. 417; Kerr on Ins., §§ 385-6; 4 Joyce on Ins., § 3031.

2. There was absolutely no evidence from which the jury could find that appellee was "able to earn a livelihood in an employment suited to his capacity," and appellant was not, under the proof, entitled to an instruction submitting that question to a jury but appellant was given the advantage of it in other instructions. The court properly instructed the jury, and the evidence sustains the verdict.

WOOD, J. The appellee, while working for appellant, on the 10th day of February, 1916, was injured by an accident. The appellant inaugurated what is designated "Plan for Employees' Pensions, Disability Benefits and Insurance." The plan, among other things, provided:

"Section 6. (1) All employees of the company on January 1, 1913, and thereafter shall be qualified to receive payments under the regulations on account of physical inabilities to work by reason of accidental injury during employment while in the performance of work for the company. Such payments are hereafter referred to in these regulations as accident disability benefits.

"(2) Payments while disabled by accident received during employment occurring in and due to the performance of work for the company shall be:

"(a) Total disability—full pay for thirteen weeks and half pay for remainder of disability, not exceeding six years in all.

"(b) Partial or temporary disability—full pay for thirteen weeks and half pay until able to earn a livelihood, not exceeding six years in all.

"(c) If the injury is of a permanent character, benefits will cease when the employee shall be declared by the committee to be able to earn a livelihood in an employment suited to his capacity.

"Section 9 (Subsection 33). Question of fact arising in the administration of these regulations shall be determined conclusively for all parties by the committee."

On April 11, 1916, appellee accepted the benefits of the "Plan" in a writing designated "Acceptance of Benefits Under Plan," which he duly signed and acknowledged, and which was witnessed by two witnesses. This writing, among other things, recites:

"Whereas, the undersigned has been injured while in the employ of the said Western Union Telegraph Company and has elected to accept the benefits of said Plan on the conditions provided thereby.

"Now, therefore, in consideration of the benefits of said Plan which I have read and with which I am familiar, a copy of which is attached hereto and made a part hereof and marked 'Exhibit A,' and for other good and valuable considerations, the receipt whereof is hereby acknowledged, I have remised, released, and forever discharged, and by these presents do for myself, my heirs, executors and administrators, remise, release, and forever discharge the said Western Union Telegraph Company * * * of and from all manner of action and actions, cause and causes of action, suits, debts, damages, judgments, costs, claims and demands whatsoever, in law or in equity, which, against the said Western Un-

ion Telegraph Company, I ever had, now have, or which my heirs, executors, or administrators hereafter can, shall or may have, for, upon or by reason of anything which has heretofore occurred and particularly by reason of personal injuries sustained by me on or about the 10th day of February, 1916, at or near Calico Rock, in the State of Arkansas, while in the employ of the said telegraph comapany."

Appellee instituted this action against the appellant. In his complaint he alleged his injury as above stated and averred that ever since executing the release he had been and was still unable to earn a livelihood, and that he would so continue for the full period of six years; that at the time of the injury he was earning the sum of $90 per month and that appellant had paid him the sum of $356.59, the amount due him under the Plan up to September 19, 1916, and had refused to make further payments. He set up the above contract, and alleged that the appellant had breached the same to his damage in the sum of $2,910, with interest, for which he prayed judgment. The appellant answered, admitting the allegation of the complaint as to the amount of wages that appellee had earned, and that appellant had paid him the sum of $356.59 in full of said benefits to September 17, 1916, and that it had not paid him anything since. The appellant denied specifically the other allegations of the complaint, and denied that the appellee was due any further sums under the Plan. Appellant also set up the Plan, and alleged that the administration of such Plan was imposed upon the "Employees' Benefit Fund Committee;" that this committee had investigated appellee's claim, and on May 8, 1916, found that appellee's disability was a total one and made an award in his favor of full pay for thirteen weeks and half pay thereafter as long as such disability should continue, not exceeding six years in all; that such benefits were paid to appellee for a period ending September 17, 1916; that on September 27, 1916, the committee investigated the facts relative to appellee's

disability and found that on September 17, 1916, such disability had ceased to be total, and that appellee was then able to earn a livelihood and directed that the claim be discontinued as of September 17, 1916; that appellant then ceased to make further payments under the Plan and had paid to appellee all sums to which he was entitled under the regulations governing the administration of said Plan by the committee. Appellant set up the acceptance of the Plan by the appellee and the release of the appellant thereunder by compliance as alleged with the terms of the contract on its part.

The appellee in reply denied the allegations of appellant's answer and alleged that if the committee made a finding that appellee's disabilities had ceased to be total on the 17th day of September, 1916, and that he was on said date able to earn a livelihood, such finding was without investigation as to the facts—was false and fraudulently made for the purpose of depriving appellee of the payments justly due him from the Benefit Fund. The appellant denied that the finding of the committee was made without investigation as to the facts, and also denied that it was falsely and fraudulently made to deprive appellee of the payments justly due from the Benefit Fund, but alleged that the report of the committee was in accordance with the facts.

The testimony on behalf of appellee was to the effect that he was in appellant's employ as a lineman and was injured while engaged at such work. After describing his injuries and the treatment given him for his injuries by the physician at the sanitarium and the effect of the injuries on his health and his general physical condition, he stated that he had not been able to earn a livelihood since receiving the injury and was not able to do so at the time of the trial. He stated that he executed the release containing the plan of settlement, but did not understand what the paper contained, but didn't repudiate it. He was receiving the sum of $90 per month at the time of his injury

and was paid something like $350 under the settlement. He stated he had been out of work a year. He then described the character of work that he had since been engaged in. He had managed a certain plumbing business from January 1, 1919, till October, 1919; got $12 a week. After that he worked at the plumbers' trade at $3.50 a day for the days he worked. Beginning about the middle of September, 1918, he worked for the light plant until June, 1919. He received $65 per month. He had a wife and five children. The children were from three to nineteen years old. He couldn't say whether his injuries were permanent or not; hoped that they were not. He went back to work for appellant the last of September, 1917, and worked about a month, and the appellant's foreman said he wasn't of any service and called him out.

Other witnesses on behalf of appellee testified as to his physical condition and the manner in which he performed his work while he was working at the light plant. Their testimony showed that his physical condition was not good and that he could not do his work effectively on that account.

Testimony on behalf of the appellant tended to show that its telegraph system covered the United States of America and the maritime provinces of Canada; that in 1916, at the time appellee was injured, appellant had 38,800 employees in its service and operated 1,505,849.24 miles of wire. It was not practicable for the committee administering the Plan to investigate personally all the claims that came before it. There had been presented to the committee about 7,900 claims for accident benefits and 14,700 claims for sick benefits since the inauguration of the Plan. It was the custom to have the facts regarding accidents furnished on printed blanks by the employee in charge of the work at the time the accident occurred. The nearest physician is usually called, and he fills out a certificate, and, where continued treatment is necessary, makes periodic reports to the committee.

Medical reports are examined by the company's medical director, whose opinion controls the action of the committee. Where the medical director is not satisfied with the reports of an attending physician, an examination by a physician or surgeon selected by the medical director is ordered, and the reports from the attending physician, the company's medical representative and the medical director are used in considering the merits of the case. The system adopted by the committee to obtain information on the merits of claims had been very satisfactory to the claimants and to the company. Appellee's claim for accident disability benefits was presented to the committee, and the committee made its investigation according to the methods above outlined. The committee ordered an examination of appellee by the company's physician, Dr. O. K. Judd, at Little Rock, who found symptoms of a nerve injury and indications of a fracture of the third metacarpal bone of the right hand. He referred the case to Dr. George Fletcher, a neurologist, who rendered a long written report. This report was to the effect that there was no permanent injury to the nervous system and no organic involvement. Appellant's division plant superintendent, after investigation, made a report recommending that payments to appellee under the Benefit Fund cease as of September 17, 1916. Up to that time appellee had received payments under the plan in the sum of $356.59, and in addition $170 had been paid for medicine and doctor's bills.

The appellee was not notified of the investigation and was given no opportunity to appear personally before the Benefit Fund Committee to present his claim. He testified that he was not given an opportunity to make a showing of his physical condition. An employee had the right to appeal from the decisions of the committee either directly to the committee itself, or indirectly through his superior in the line of organization, or, as commonly understood by all of the employees, to the president of the company. No such appeal was made

by the appellee. If this had been done, another examination would have been ordered, and, if the examiner's report warranted, the case would have been reopened and continued. That was the customary practice. After the committee had heard all the evidence presented to it in the above manner, it took action as follows: "Approved recommendation of the division plant superintendent at Dallas, that benefits in the case of C. N. Robertson, lineman, be discontinued as of September 17, 1916."

The appellant presented, among others, the following prayers for instructions: "No. 1. You are instructed to find for the defendant." The court refused this prayer, to which ruling the appellant duly excepted. "No. 5. You are instructed that, under the terms of said Plan, the said committee had the right to decide all questions of fact bearing upon the right of the plaintiff to share in said benefits, and its decision thereof made in good faith is binding upon the plaintiff, even though said committee honestly reached a wrong conclusion in regard to the merits of plaintiff's claim." The court, over the objection of appellant, added to this prayer between the words "faith" and "is" the following: "After full and fair investigation of the facts." The appellant objected to this modification of its prayer and duly excepted to the ruling of the court in modifying and giving the instruction as modified. Other prayers for instructions were granted and refused, but, in the view we have taken of the contract and the undisputed evidence, it is unnecessary to set them out. There was a judgment in favor of the appellee in the sum of $3,025.20, from which is this appeal.

The pleadings raised the issue as to whether the finding of the Employees' Benefit Fund Committee "was falsely and fraudulently made for the purpose of depriving appellee of payments justly due him from the Benefit Fund." The burden on this issue was upon the appellee. The "Plan for Employees' Pensions, Disability Benefits and Insurance," inaugurated by the appel-

lant and accepted by the appellee, constituted a written contract between the appellant and the appellee, which was free from fraud, based upon a valid consideration, and binding upon the appellant and the appellee. *McLemore* v. *Western Union Telegraph Co.,* 171 Pac. (Ore.) 390. Section 9, subdivision 33, of the coutract provides: "Questions of fact arising in the administration of these regulations shall be determined conclusively for all parties by the committee." As we view the record, there is no testimony to warrant the jury in finding that the report of the committee was false and fraudulently made. The court erred in submitting that issue to the jury. The court also erred in submitting to the jury the issue as to whether or not there was a full and fair investigation of the facts by the committee. The undisputed testimony shows that there was a full and fair investigation of the facts, and the finding of the committee in the absence of fraud under section 9, subdivision 33, *supra,* was binding upon the appellee. Under section 6, subdivision 6, of the regulations, under which the disbursements to the injured employees were made, it is provided: "If injury is of a permanent character, benefits will cease when the employee shall be declared by the committee to be able to earn a livelihood in an employment suited to his capacity." The appellee, after describing his injuries and their effect upon him, in answer to questions, stated that he didn't know whether they were permanent or not. He was asked if he had any reason to think that he would recover, and answered that he didn't know that he had a reason to, but thought he would recover and hoped that he would. The reports of the physicians who examined the appellee and of the company's foremen, under some of whom the appellee worked after his injury, tended to show that appellee's injuries were not permanent. Therefore, the committee, under section 6, above, was not called upon to declare, as a condition precedent to discontinuing the payment of benefits, that the appellee was able to earn a livelihood in an employ-

ment suited to his capacity. Since the undisputed evidence did not show that the appellee's injuries were permanent, it was in the power of the committee under section 9, *supra, to* pass upon the facts. And, finding that appellee's injuries were not permanent, it was within the province of the committee to order that the payment of benefits be discontinued without declaring that the appellee was able to earn a livelihood in an employment suited to his capacity. The determination of the committee is conclusive, even though it were mistaken as to the facts and erred in its judgment.

The Benefit Plan of the appellant was open to all of its employees on and after January 1, 1913, who were unable to work on account of accidental injuries received while in the performance of work for appellant. On account of the great number of employees and the numerous claims presented under the Plan, the appellant had adopted the only practical methods for investigating and laying before the administrative committee the facts for its determination. The customary methods were pursued in appellee's case. The regulations of the Plan were followed. These regulations did not require that the appellee be notified and that he be present when they were making the investigation. The fact that he was not notified by the committee that they were making the investigation and was not given the opportunity to personally protest against the findings of the committee was no evidence of fraud in such findings. Therefore, the court erred in submitting to the jury the issue as to whether or not the committee had made its report "in good faith after a full and fair investigation of the facts." The testimony as to the manner and methods of investigation was undisputed. It was therefore a matter of law as to whether the investigation was full and fair and the report made in good faith. The jury should not have been permitted to erect in their own minds different standards for making the investigation from that prescribed in the Plan which was accepted by the appellee and uniformly

followed by the appellant. This, under the instruction as modified, the jury could have done.

In *Clark* v. *New England Tel. & Tel. Co.,* 118 N. E. (Mass.) 348, a similar contract was under review. In that case the court said: "The methods of investigation of claims and general principles followed by the committee in the performance of their duties must be fair and reasonable, but there is nothing in this record to disclose anything objectionable in this regard. * * * It is no ground for setting aside the finding of the committee merely because they reached honestly a wrong conclusion. * * *"

In the above case the court held that it was no evidence of bad faith "that the committee relied entirely upon the report of the investigator and did not notify the plaintiff to appear before them and give him a hearing." That case is well reasoned and is an able and exhaustive review of the authorities. The case at bar, on the facts, can not be differentiated in principle from the doctrine of that case. The conclusion there reached was that "there was no evidence of bad faith on the part of the committee." That conclusion is sound and is controlling here. It follows that the court erred in refusing appellant's prayer for instruction No. 1, and also in refusing to give appellant's prayer for instruction No. 5 without modification. For the errors indicated the judgment is reversed, and, inasmuch as the cause seems to have been fully developed, it will be dismissed.

SIMPSON v. REINMAN.

Opinion delivered December 13, 1920.

1. ACTION—PROCEEDINGS IN REM AND QUASI IN REM DISTINGUISHED.—A proceeding *"in rem"* is a proceeding against the property, while a proceeding *"quasi in rem"* is a proceeding against a person in respect to the property.
2. TAXATION—VALIDITY OF TAX SALES.—Tax sales are made exclusively under statutory power, and, in order to divest the owner

of his property, every substantial requisite of the statute must be complied with.

3. HIGHWAYS—COLLECTION OF ASSESSMENTS—PROCEEDING QUASI IN REM.—Under Acts 1909, p. 1163, § 20, providing that proceedings to enforce road district assessments shall be in the nature of proceedings *in rem,* and it shall be immaterial that the ownership of lands proceeded against be incorrectly alleged in said proceedings, and that notice of said proceedings shall be given to the "supposed" owner by publication, "each supposed owner having been set opposite his, her, or its property," etc., *held* that a proceeding and judgment against a "supposed owner" who had and claimed no interest in the land was not binding on the true owner of the land, who was not named, and was in actual possession of the land by a tenant.

4. HIGHWAYS—COLLECTION OF ASSESSMENTS—DESIGNATION OF SUPPOSED OWNER.—Under Acts 1909, p. 1163, § 20, requiring the commissioners to give notice by publication to the "supposed owner" of delinquent land of a proceeding to collect delinquent assessments, the statute is not complied with by naming as "supposed owner" a person having no claim of interest in the land, where such land was in the actual possession of the true owner, or his tenant.

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

STATEMENT OF FACTS.

George G. Worthen, Louis Reinman and Louis Wolfort brought an action of unlawful detainer in the circuit court against Tillman Green to recover possession of about ninety acres of land.

Dr. R. A. Simpson filed what he calls an "intervention" in which he states that he is the owner and in possession of the lands involved in this suit; that the plaintiffs are claiming title by virtue of a tax deed issued to them by a commissioner under proceedings by a road district to foreclose the lien for unpaid road taxes. It is alleged that the lands are worth $5,000, and that they were purchased at the tax foreclosure proceedings for the sum of $112. Other allegations of the intervention will appear in the statement of facts.

The prayer of the intervener is that he be made a party to the suit; that the cause be transferred to equity;

that the tax deed be canceled, and that the interest of the plaintiffs be divested out of them, and that the title to the land be forever quieted in him.

Without objection, the cause was transferred to equity and heard upon substantially the following facts: The lands in question comprise about ninety acres and are situated on the banks of the Arkansas River in Pulaski County, Arkansas, within the boundaries of Road Improvement District No. 3 of Pulaski County, Arkansas. On August 25, 1913, Improvement District No. 3 of Pulaski County filed a proceeding under the statute for the collection of the delinquent road taxes due on the lands. In the complaint filed in the action in the Pulaski Chancery Court, the lands involved in this action are described and the style of the suit is against the lands to collect the delinquent taxes and A. E. Adams, "ostensible owner," is also made defendant. The body of the complaint also describes the lands in controversy, and alleges that one A. E. Adams is the ostensible owner of them. The complaint alleges that no part of the road taxes for the years 1910, 1911 and 1912 had been paid. For the years 1910 and 1911, the taxes are $22.25 for each year and $11.13 for the year 1912, making a total of $69.54 as the amount of the unpaid taxes for the three years.

The notice with regard to the suit was published in the Argenta Times, a weekly newspaper published in North Little Rock, or Argenta as it was then called, in Pulaski County, Arkansas. The first publication was made on the 30th day of September, 1913, the publication being inserted weekly for four consecutive weeks. The notice is in the form prescribed by the statute. A decree of foreclosure for the unpaid taxes was entered of record in the chancery court on the 21st day of October, 1913, and a commissioner was appointed to sell the lands in satisfaction of the unpaid taxes and costs unless payment was made within thirty days from the date of the decree. The lands were duly advertised and sold by the

commissioner to George G. Worthen, Louis Reinman and Louis Wolfort for the sum of $112.75. The sale was duly confirmed by the court, and a commissioner's deed was executed to the purchasers under orders of the court.

The present suit was instituted on January 4, 1917. Tillman Green first rented the land for the year 1912, from J. C. Budd, who then owned it. On the 1st day of January, 1913, Tillman Green entered into a written lease with J. C. Budd for the lands for five years for $250 for the first year and $300 for each subsequent year. Green went into possession of the lands under this lease and was in possession of them at the time plaintiffs commenced suit against him for the possession of the lands. Subsequently the lands were sold in an attachment proceeding against J. C. Budd. Dr. R. A. Simpson became the purchaser at the sale. Subsequently J. C. Budd executed to him a quitclaim deed for said lands. Doctor Simpson has owned and been in possession of the lands through his tenant, Tillman Green, ever since he purchased them. At the time the tax proceedings above set forth were had, J. C. Budd had the legal title to the lands, and was in possession of them through his tenant, Tillman Green.

R. A. Simpson tendered to the plaintiffs the amount of taxes, penalties and costs due upon the lands, being the amount paid by them in the purchase of the lands.

The chancellor found the issues in favor of the plaintiffs, and the intervention of Dr. R. A. Simpson was dismissed for want of equity. To reverse that decree, R. A. Simpson has duly prosecuted an appeal to this court.

S. W. Leslie, for appellant.

1. The proceedings on which plaintiffs base their title and ownership are so defective and irregular as to make the commissioner's deed based thereon void. The name of the defendant is not given in the caption of the complaint and only forty acres of land is given in the caption as defendant and A. E. Adams is given as the

ostensible owner, not the supposed owner, and the land is given as in Pulaski County, Arkansas. In the body of the complaint, and in all subsequent proceedings, all that part of the land attempted to be described as in the southeast quarter of section 36 is described as "fractional north part fractional southwest quarter and southeast quarter (fractional) of section 36. In the publication of the notice upon which the court must base jurisdiction there is no attempt to notify any defendant given in the complaint. No owner, ostensible or supposed, is given. The notice is only directed to "Delinquent Lands." The description is unintelligible. It was alleged and shown at the trial that A. E. Adams had parted with his title to said lands and that J. C. Budd was the owner. Act 502, Acts 1909, provides that the notice and proceedings must be against the supposed owner of the lands. This proceeding is not against the supposed owner but the ostensible owner. This act of 1909 is a special act and should be construed as such and in contravention of article 5 of the amendment to the Constitution of the United States and of the Constitution of Arkansas. Any process is not "due process of law." 96 U. S. 97, 620. Section 21 of the act provides that neither an attorney *ad litem* or guardian *ad litem* shall be appointed, nor any other provision of Kirby's Digest, § 5164, shall be required. An attorney *ad litem* is very important and more effectual than the publication. The question as to due process of law was raised or passed upon in 74 Ark. 178. Under the provision of this act, while it is termed a proceeding *in rem,* it can not be contended that it is a suit against land alone. The process here was not directed against the owner, the ostensible owner, the supposed owner or the owner as appears of record. 74 Ark. 174, does not apply. The description was fatally defective, and the special act of 1909 should not be held to deprive a person of his land without notice. These irregular defective proceedings should not be held to support the jurisdiction of the

courts. 118 Ark. 448; 124 *Id.* 278. Our statutes provide for notice to the owner of lands and he shall be made a defendant if known; if not known, that fact shall be stated in the complaint and the suit shall proceed *in rem.* Kirby's Digest, §§ 5691-6. Possession or occupation is sufficient to put on inquiry every person seeking adversary interest in the property and is constructive notice of such title as the occupant or possessor has. 16 Ark. 340; 90 *Id.* 149; 118 S. W. 414. Where the owner is known, a proceeding against the unknown owner avoids a rule thereunder. 58 Ala. 46.

2. Even if this is a collateral attack, the decision is wrong. Kirby's Dig., § 4431; 166 S. W. 250; 101 Ark. 142; 141 S. W. 501; 79 Ark. 289. The allegation and proof of the relation of landlord and tenant between plaintiff and Tillman Green must defeat plaintiff's action. 105 Ark. 630. The transfer to chancery does not dispense with this rule. Equity follows the law. Either in law or equity, the intervener is entitled to a decree. The offer to reimburse plaintiffs is more than fair.

Reid, Burrow & McDonnell, for appellees.

1. Act 402, Acts 1909, is constitutional, and the proceedings under which appellees acquired title were in accordance with the act. The lands were sufficiently described. 117 Ark. 151. The notice follows the act and is sufficient. 66 Ark. 422. If the description was defective, it was cured by the sale and confirmation. 90 Ark. 166. A decree in chancery can not be collaterally attacked for mere errors or irregularities. 118 Ark. 488. There is nothing in the contention concerning the words "ostensible" and "supposed" owner of the land. The act expressly provides that the proceedings shall be against the land shall be in the nature of a proceeding *in rem,* and it is immaterial if the ownership of the land is incorrectly alleged.

2. This act is constitutional. 74 Ark. 174; 4 Wallace (U. S.) 217; 187 U. S. 51; 193 *Id.* 79; 204 *Id.* 241. This is a collateral attack on a decree of a court of supe-

perior jurisdiction for mere errors or irregularities. 118 Ark. 449; 94 Ark. 588; 118 *Id.* 449; 124 *Id.* 278. These cases are conclusive against appellant's contentions.

HART, J. (after stating the facts). The decision of this case depends upon the construction of the statute under which the tax foreclosure proceedings were had. The Legislature of 1909 passed an act for the creation of road improvement districts. Acts of 1909, page 1151. Section 20 of the act provides that, if the taxes due on the assessments made are not paid within sixty days, a penalty of 25 per cent. shall attach for such delinquencies, and the board of directors shall enforce the collection thereof by proceedings in the chancery court of the proper county, and that the court shall give judgment against the lands for the amount of taxes, penalty and costs. The section continues as follows: "Said proceedings and judgment shall be in the nature of a proceeding *in rem,* and it shall be immaterial that the ownership of said lands be incorrectly alleged in said proceeding, and said judgment shall be enforced wholly against said lands and not against any other property of said defendant. All or any part of said delinquent lands or real property within the district may be included in one suit instituted for the collection of said delinquent taxes, penalty and costs, as aforesaid; and notice of the pendency of such suit shall be given by publication weekly for four weeks before a judgment is entered for the sale of said lands, in some newspaper published in the county of said district, which published notice may be in the following form:

"NOTICE.

Board of Directors of Road Improvement District No. ..... of the County of.....

vs.

Delinquent Lands.

"All persons, firms or corporations having or claiming any interest in any of the following described lands,

or real property, are hereby notified that suit is pending in the chancery court of..... county, Arkansas, to enforce the collection of certain road improvement district taxes on the subjoined list of lands and real property, each supposed owner having been set opposite his, her or its property, together with the amount severally due from each, towit: (Then shall follow a list of supposed owners with a descriptive list of said delinquent lands and the amount due thereon respectively as aforesaid), and such published list may continue in the following form: All persons, firms and corporations, interested in the said property, are hereby notified that they are required by law to appear within four weeks and make defense to said suit, or the same will be taken for confessed, and final judgment will be entered directing the sale of said lands, for the purpose of collecting said taxes, together with all of the interest, penalty and costs allowed by law."

It is contended that the decree of the chancellor should be upheld under the authority of *Cassady* v. *Norris,* 118 Ark. 449, which was followed in the subsequent case of *Cabell* v. *Board of Imp. of Imp. Dist. No.* 10 *of Texarkana,* 124 Ark. 278. In those cases the court had under consideration foreclosure proceedings by a board of commissioners of an improvement district in a city when section 5694 of Kirby's Digest was in force. That section says that the owner of the property assessed shall be made a defendant if he is known; if he is not known, that fact shall be stated in the complaint, and the suit shall proceed as a proceeding *in rem* against the property assessed. In each of those cases the owner of the property was in possession of it and had no knowledge that foreclosure proceedings had been instituted against his property for unpaid assessments. The owner did not even know that the improvement district had been formed and that his property was within its boundaries. The complaint in each case stated that the owner was unknown, and the general notice authorized by the statute in

proceedings of this kind was given. The court held that the suit was a proceeding *in rem,* and that the general notice required by the statute concluded the owner and that the purchaser at the sale under the statute acquired the legal title. It was there contended that the proceeding was a fraud on the court, and for that reason the decree should be set aside.

The court held that the allegations in the complaint that the owner was unknown were sufficient to give the court jurisdiction, and that, although the allegations were untrue, the court had the power to inquire into its own jurisdiction and to determine whether or not the allegation was true. The court then said that on collateral attack it must presume that the court made inquiry as to its jurisdiction to proceed against the property and found facts sufficient to justify its action.

We do not think the decision in *Cassady* v. *Norris, supra,* concludes the present case. When the complaint in that case alleged that the owner was unknown, the statute in express terms provided that the suit should proceed as a proceeding *in rem* against the property assessed, and the owner was concluded because the general notice required by the statute was given. The present statute is essentially different. It provides for notice against the "supposed owner" and provides that the action shall be in the nature of a proceeding *in rem.* That is to say, it is a proceeding "*quasi in rem.*" A proceeding *in rem* has been defined to be a proceeding against the property, while a proceeding *quasi in rem* is a proceeding against the person in respect to the property.

Tax sales are made exclusively under statutory power, and in order to divest the owner of his property every substantial requisite of the statute must be complied with. On this question Judge Cooley said: "Defects in the conditions to a statutory authority can not be aided by the courts; if they have not been observed, the courts can not dispense with them, and thus bring into existence a power which the statute only permits

when the conditions have been fully complied with. Neither, as a general rule, can the courts aid the defective execution of a statutory power; they may do this when the power has been created by the owner himself, and when such action would presumptively be in furtherance of his purpose in creating it; but a statutory power must be executed according to the statutory directions, and presumptively any other execution is opposed to the legislative will, instead of in furtherance of it. It is therefore accepted as an axiom, when tax sales are under consideration, that a fundamental condition to their validity is that there should have been a substantial compliance with the law in all the proceedings of which the sale was the culmination. This would be the general rule in all cases in which a man is to be divested of his freehold by adversary proceedings; but special reasons make it peculiarly applicable to the case of tax sales." Cooley on Taxation (3 ed.), vol. 2, pp. 912-913.

As we have just seen, the statute requires the notice to be given to the supposed owner. The dictionary meaning of "supposed" is, "accepted as true, or believed." Then the statute requires notice to be given to the person believed by the commissioners to be the owner. At the time the foreclosure proceedings were had by the commissioners in the chancery court A. E. Adams was named as the supposed owner. At that time J. C. Budd was the owner of the property and in possession of it. The property was a valuable farm of ninety acres situated on the bank of the Arkansas River and worth about $5,000.

We think the facts presented by the record bring the case within the rule announced in *Farmers & Merchants Bank* v. *Layson Lumber Co.*, 87 Ark. 607. In that case the commissioners of an improvement district in a city commenced proceedings against J. E. Eubanks as the owner of a lot to enforce the payment of the unpaid assessment. There was a sale of the property under the proceedings, and a deed was executed by the commissioner to the Farmers & Merchants Bank as the pur-

chaser at the sale, which was approved by the court. Eubanks did not own the lot at the time the foreclosure proceedings were had, but had conveyed it to another. The court held that the decree in the suit against Eubanks did not affect the owner of the lot and those holding under him, they not being parties to the suit, and the suit not being *in rem*. Therefore, it was held that a proceeding against Eubanks to collect an assessment of a local improvement district under Kirby's Digest, section 5694, is notice only to him, and that the decree affects only his interest in the lands, and that no one else is bound by it. It seems that the holding in that case applies here. As we have already seen, the foreclosure proceedings were under the statute. It will be borne in mind that the statute does not designate the suit to foreclose as a proceeding *in rem* as in the case of an unknown owner, but it in express terms provides that the proceedings and judgment shall be of the nature of a proceeding *in rem*. It further provides that notice shall be given to the "supposed owner."

Where the proceedings are strictly *in rem* under the statute, all persons who have an interest in the property are bound because the land itself is brought before the court. The reason is that no persons are made parties to the suit, but the land itself is brought before the courts, and its status ascertained. In cases where the owners, real or supposed, are made parties under the statute, no one else is concluded except the party who is made a party to the proceedings.

This brings us to the question of whether A. E. Adams could be sued as the "supposed owner." It is not shown that he ever had any title to the property or that he was in possession of it, or made any claim thereto at the time the foreclosure proceedings were had. J. C. Budd at that time had the paper title to the property and was in possession of it through his tenant. He was no more bound by proceedings against A. E. Adams as the "supposed owner" than the real owner was in the

case last referred to by the proceedings against Eubanks as owner, who had disposed of the property before the foreclosure proceedings were commenced. But it is claimed that such holding ignores that portion of the statute which provides that it shall be immaterial that the ownership of the lands be incorrectly alleged in the proceedings. We do not think so. If there had been any grounds for suing A. E. Adams as the supposed owner of the property, it would have been immaterial that his name was not correctly stated in the notice, or that he was not the actual owner of the property. It is true that the statute provides for a general notice to all persons interested in the property to appear within four weeks and make defense to the suit. But this does not make the suit strictly a proceeding *in rem,* so that all parties shall be bound by the proceedings. The reason is that the statute also provides that the "supposed owner" or the person believed to be the owner shall be a party to the proceedings. If the "supposed owner" is not made a party to the proceedings, then to take the property away from the owner without attempting to comply with this provision of the statute would be to deny him "due process of law." The proceeding did not comply with the statutory requirements, and for that reason does not constitute "due process of law" and therefore has no binding effect on Simpson, who has the record title by a quitclaim deed from Budd.

In *Gilbreath* v. *Teufel,* 15 N. Dak. 153, the Supreme Court of North Dakota held: "In an action to determine adverse claims to real property, although the proceedings may in all things comply in form with the provisions of the statute relative to the manner of obtaining jurisdiction, it is nevertheless an abuse of the statutory provisions, and is in effect a fraud upon the court and the adverse claimants to not disclose, and name as defendant, all adverse claimants whose names and places of residence could be readily ascertained."

In *Scales* v. *Wren,* 127 S. W. 164, the Supreme Court of Texas held that in a suit to quiet title where plaintiff's deed was on record, and gave his residence as in a certain county of the State, a judgment for taxes against the "unknown owner" did not conclude plaintiff's title, since he was entitled to service of citation if within the jurisdiction of the court, and, not being an unknown owner, he was not a party to the proceedings.

In *Evans* v. *Robberson,* 1 Am. St. Rep. 701, the Supreme Court of Missouri held that a tax sale, under the Missouri statute, in order to bind the interests of the owner, must show that he was made a party, if known, and, if not known, and not made a party, then his interest can only be affected by making the party appearing by the record to be the owner a party to the suit.

But it is insisted that these decisions should have not control because they are contrary to the decision in the case of *Cassady* v. *Norris, supra.* If they would hold that a proceeding under a state of facts similar to the one in the case at bar was not "due process of law" in a proceeding strictly *in rem,* and that therefore the owner was not concluded by the judgment, it is readily apparent that the decisions would apply with greater force in a case where service is required to be had against the real or supposed owner, and in the proceedings no attempt is made to serve such person, but a party who has no interest in the land whatever was designated as the "supposed owner," or the man believed to be the owner. The time for redemption in the statute under consideration was one year, and it is readily seen how that time would soon pass away and that the land owner who was not familiar with land numbers would be lulled to sleep by his lands being advertised as belonging to some one who had no interest in them, and in this way his farm, however valuable, would be sold to pay a small amount of improvement taxes, as was done in the case at bar.

We do not impute any bad faith in the matter to the commissioners. They had no authority to institute pro-

ceedings to sell the lands except under the statute. The statute required that the "supposed owner" be made a party to the proceedings. This the commissioners did not do, but instituted proceedings against another person whom the record shows had no interest whatever in the lands, and made no claim to them, and on that account made no defense to the action.

It follows that the chancery court erred in not setting aside the sale, as it was asked to do by the petition filed by the owner in the case. Such was the relief granted in the case of *Farmers & Merchants Bank* v. *Layson Lumber Co.*, 87 Ark. 607.

Therefore, the decree will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

HART, J. (on rehearing). It is earnestly insisted by counsel for appellee that the decision of the court is contrary to the principles of law decided in *Ballard* v. *Hunter*, 74 Ark. 174; *Pattison* v. *Smith*, 94 Ark. 588, and *Crittenden Lumber Co.* v. *McDougal*, 101 Ark. 390.

We do not agree with counsel in this contention. In each of those cases the court had under consideration the act of 1895, regulating the aale of lands for nonpayment of levee taxes in the St. Francis Levee District.

The statute under consideration required constructive notice to be given nonresidents of the county in which the lands were situated and to unknown owners, and for personal service upon residents of the county, and in all cases where the lands are occupied.

In each of the cases above recited the court was dealing with the lands of nonresidents which were not occupied. It is true that the notice required to be given them was essentially the same as the notice required under the present statute, but the question here presented for review was not discussed or decided in either of those cases.

In the first two cases the court held that it was not necessary to name the true owner, either in the complaint,

or in the notice, and that the decree entered upon such notice was not open to collateral attack by reason of the failure to name the true owner in the notice, or to make him a party to the suit.

In the last mentioned case the land in controversy was set out and described in the notice, with the supposed owner noted as Sweet Brothers. Personal service was also had upon Sweet Brothers as the supposed owners of the land. The court said that the mere fact that Sweet Brothers were noted as the supposed owners of the land would not alter the holding of the court, because, by the provisions of the statute, the proceeding is in the nature of a proceeding *in rem,* and that it is immaterial that the ownership of the land is incorrectly alleged in any of the proceedings.

It is claimed that this language is conclusive of the present case, and that it became immaterial that Adams was noted as the "supposed owner." The language used in any opinion must be construed with reference to the facts as well as the law under discussion. To make a tax sale valid, observance of every safeguard to the owner created by the statute is imperatively necessary, and it is generally held that a notice giving the name of the owner incorrectly invalidates the sale. *Marx* v. *Hanthorn,* 148 U. S. 172. In recognition of this rule, the Legislature provided that it should be immaterial that the ownership of the land should be incorrectly alleged in the proceedings. The object of the statute was to prevent the sale from being invalid, because the name of the owner of the land was incorrectly given in any of the proceedings. Sweet Brothers were noted as the supposed owners, both in the complaint and in the notice. Personal service was also had upon them by the commissioners. This indicated that the commissioners believed that they were the owners. The lands were wild and unoccupied, and there was nothing to put the commissioners on notice that Sweet Brothers were not the owners. Hence the court correctly held, under the facts of that case, that the sale was not invalid, because the ownership

of the land had been incorrectly alleged in the proceedings.

In the instant case the facts are essentially different, and we are asked by a refinement of reasoning to extend the rule there announced to cases where the ownership of the land was incorrectly alleged in the notice as the result of gross carelessness on the part of the commissioners, and the majority of the court declines to do so.

It has been well said that the well being of every community requires that the title to real estate shall be secure, and that no principle is more vital to the administration of justice than that no man shall be condemned in his person, or property, without notice and an opportunity to make his defense. Sales of land for the nonpayment of taxes are made in execution of statutory powers, and, to render them valid, there must be a rigid adherence to the directions and the forms of the statute.

This rule was recognized by this court in the case of *Van Etten* v. *Daugherty,* 83 Ark. 534. It was a proceeding for the collection of levee taxes under the St. Francis Levee Act as amended by the act of 1895, above referred to. In that case the court held that, if there is an occupant upon the land, a judgment against a delinquent taxpayer, based upon constructive service by publication, is void on collatreal attack where the defendant was a resident of the county, or where there was, at the time the notice was published, an occupant upon the land. The reason given was that the statute required personal service in such cases, and that the mode of obtaining jurisdiction prescribed by the statute must be strictly pursued. The court said that the proceedings derived their only sanction from the statute, and that the courts must see that its provisions as to jurisdiction are complied with, or their judgment will be utterly void and subject to collateral attack.

Under the provisions of the present act there is no provision for personal service. The proceedings are upon constructive service, whether the owners are residents or nonresidents either of the county, or of the

State, and whether the lands are occupied, or unoccupied. The statute expressly declares that the proceedings shall be in the nature of a proceeding *in rem,* and that it is immaterial that the ownership of the lands shall be incorrectly alleged in the proceedings.

The statute also provides that the notice shall contain a description of the lands, together with a list of the supposed owners. The object of constructive notice is to put the owner in possession of such facts as will lead to actual notice and thereby enable him to make his defense. Hence the difference between a proceeding strictly *in rem* and a proceeding *quasi in rem,* or, what amounts to the same thing, a proceeding in the nature of a proceeding *in rem,* is vital. As we pointed out, there is a good reason for requiring the supposed owner to be named in the notice. If the former be named in the notice, there will be more likelihood of actual notice being received by the owner. The notice will inform him of what is alleged against him in the complaint. Hence the necessity for the commissioners, in good faith, to carry out the provisions of the statute.

As we have already seen, while the statute requires them to designate the supposed owners, it relieves them from the consequences of mistakes on their part by providing that a mistake in the allegations of the ownership of the land shall not be material. In other words, it does away with the rule that the giving of the name of the owner incorrectly invalidates the sale, but the Legislature did not intend to bind the owner where the commissioners named a person as the "supposed owner" whom they knew had no interest whatever in the land or when they acted with gross carelessness in the matter.

As pointed out in our original opinion, the use of the words, "supposed owner," was put in the statute for a useful purpose. It relieved the commissioners from deciding between adverse claimants and from going to unnecessary trouble to trace the title of the true owner, but the commissioners were not entirely relieved from responsibility in the matter. The "supposed

owner," according to the dictionary meaning, would be the person believed to the owner. Here the commissioners had charge of constructing the road. It was made their duty to supervise the assessment of benefits upon the lands within the district. The land in question was a valuable farm, and was occupied by its true owner through his tenant. The person who was designated as the "supposed owner" had no interest whatever in the land, and, so far as the record discloses, did not claim to have any.

Under the circumstances, the commissioners should be charged with knowledge that the land belonged to the person in possession of it, and were guilty of gross carelessness in naming another person as the "supposed owner."

Therefore, the commissioners did not comply with the statute with regard to the notice, and the owner is not bound by the proceedings, any more than he would be bound by a mistake with regard to his own name where the statute contained no provision that it should be immaterial that the ownership of the lands should be incorrectly stated in the proceedings. In short, a majority of the court is of the opinion that the designation by the commissioners, under the statute, of the person as the "supposed owner," whom by the exercise of the slightest care they could have known was not such owner, is not a compliance with the statute, and that notice to such person is not notice to the "supposed owner," or the person they believed to be the owner as required and the sale is therefore invalid.

The rule laid down in *Cassidy* v. *Norris,* 118 Ark. 449, is not applicable for the reason pointed out in the original opinion. There the proceeding was strictly *in rem,* and it was the duty of the court, as a prerequisite of the exercise of jurisdiction in the premises, to determine whether or not the owner was unknown.

Here the statute proceeds against the "supposed owner," and it is, therefore, a proceeding against a person in respect to the *res.* Therefore, as above stated, a

majority of the court is of the opinion that notice to one who is not the "supposed owner" is not the notice required by the statute. The owner would be no more bound by constructive notice under the circumstances than he would be bound by constructive services against the nonresident owner under the St. Francis Levee Act as amended by the Acts of 1895, where the lands of such nonresident were occupied.

This is not a case where there was a mistake in the ownership of the land alleged in the proceedings, but it is a case where the statute required the "supposed owner" to be constructively summoned, and some other person than the "supposed owner" was named in the notice. If the statute had required the proceedings to be against the person in whom the record title last appears, it could not be said that the owner of the land would be bound by a proceeding against some other person than the one in whom the record title last appears. So here, the statute requires the supposed owner to be named in the notice, and it is not a compliance with the statute to proceed against some other person. To sum up: the lands in question constitute a valuable farm which was in possession of the owner through his tenant at the time the proceedings were had; the duties of the commissioners required them to become familiar with the lands of the district, and they are charged with notice of the owner's possession. There is nothing in the record to show that they believed Adams to be the "supposed owner," and to hold the sale valid would be contrary to the principles of natural justice and the case is one manifestly calling for the interposition of a court of equity. The proceedings were not in compliance with the statute, and did not constitute in form, much less in spirit, due process of law.

It follows that the motion for rehearing will be denied.

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

McCULLOCH, C. J. (dissenting). The decision in this case is, it seems to me, of very great moment, for I think it is in conflict with many cases decided by this court which may have become established rules of property. The statute under which the proceedings relating to the sale of this property were maintained is identical, so far as affects the questions now under consideration, with the act of April 2, 1895 (Acts 1895, p. 88), prescribing the method of foreclosing the lien of the St. Francis Levee District for unpaid assessments on lands in that district. A comparison of the two statutes shows that the person who prepared the later statute which governs in the present case had the former statute before him and followed it almost word for word, except in certain particulars not important to notice in the present case.

The St. Francis Levee District statute provides, the same as this one, that the proceedings and judgment "shall be in the nature of proceedings *in rem,* and it shall be immaterial that the ownership of said lands may be incorrectly alleged in said proceeding, and such judgment shall be enforced wholly against said lands and not against any other property or estate of said defendant." It provides, the same as in the present statute, that in the published notice there shall be "a list of supposed owners with a descriptive list of said delinquent lands and the amounts due thereon respectively as aforseaid." In fact, there is no difference whatever between that statute and the present one, so far as it affects the present case.

This court, in construing the statute in the case of *Ballard* v. *Hunter,* 74 Ark. 174, held that the fact that the owner, Mrs. Ballard, was not made a party defendant to the suit to enforce the collection of the taxes did not affect the validity of the decree and sale, and based its conclusion on the language of the statute which provided that the suit should be in the nature of proceedings *in rem,* and that "it shall be immaterial that the ownership of the lands may be incorrectly alleged in said proceedings." That decision has been directly followed by

this court in deciding other cases under that statute. *Pattison* v. *Smith,* 94 Ark. 588; *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390. The last case cited is peculiarly applicable to the present case in view of the fact that the same mistake was made in that case as in the present case, the land being owned by the Crittenden Lumber Company, the appellant in that case, but was listed in the published notice in the proceedings and sold as the property of Sweet Brothers. This court held that that mistake was covered by the provision of the statute to the effect that "it shall be immaterial that the ownership of said lands be incorrectly alleged in said proceedings," and that the sale under which the decree was made was not open to collateral attack on that ground.

The case of *Ballard* v. *Hunter, supra,* was taken to the Supreme Court of the United States on a writ of error and the judgment was there affirmed. 204 U. S. 241. The Supreme Court of the United States in disposing of the case said: "The statutes of the State, under which the taxes were levied, virtually made the land a party to the suit to collect the taxes. It is from the lands alone, and not from their owner, that the taxes are to be satisfied, and each acre bears its part. The burden of taxation could have been easily and definitely assigned by the court. Mistakes in ascribing the ownership of the lands did not increase the taxation or cast that which should have been paid by one tract of land upon another tract."

Again that court said: "The complaint showed that Ballard was the owner of the lands, and that he was a nonresident of the county. It is said, however, that Josephine Ballard was not made a defendant in the suit, though the records of the county showed that she was an owner thereof. But the statute provided against such an omission. It provided that the proceedings and judgment should be in the nature of proceedings *in rem,* and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement, or

what was done under it. It is manifest that any criticism of either is answered by the cases we have cited. The proceedings were appropriate to the nature of the case."

I am entirely unable to understand how the majority can treat the proceedings under this statute as being "against the person in respect to the property" in the face of the statute which expressly provides that "it shall be immaterial that the ownership of said lands may be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against said lands and not against any other property or estate of said defendant." Nor am I able to see the force of the application made by the majority to the case of *Farmers & Merchants Bank* v. *Layson Lumber Co.,* 87 Ark. 607. The statute under consideration in that case provided that the proceedings should be personal against the owner, but that where the owner was unknown, and it was so stated in the complaint, the proceedings should be *in rem.* The suit under which the sale was made was not a proceeding *in rem,* but was a personal suit against one Eubanks, who was not the owner of the property, and this court decided that the real owner was not bound by the decree. That was not a proceeding *in rem* or in the nature of a proceeding *in rem,* and therefore did not bind any person except the one who was a party to the record. The proceeding involved in the case now before us was one under the statute which declared it to be in the nature of a proceeding *in rem,* and the property itself was bound, irrespective of any mistake as to the name of the supposed owner. The majority disclaim any intention to overrule the case of *Cassady* v. *Norris,* 118 Ark. 449. They undertake to distinguish the two cases, but I am unable to see the force of the distinction.

MORRIS v. GRIFFIN.

Opinion delivered December 13, 1920.

1. RELIGIOUS SOCIETIES—JURISDICTION TO RESTORE CHURCH PROPERTY.—Courts may properly assume jurisdiction of a dispute between different factions of a church organization where property rights are involved, and in the exercise of such jurisdiction a chancery court will restore the possession of church property to the duly constituted church authorities, and will restrain those who are in rebellion from using it.
2. RELIGIOUS SOCIETIES—TITLE OF CHURCH PROPERTY.—In an action against an assistant pastor of the Catholic Church by the bishop who had built the church and leased it to the pastor of the church, defendant having been suspended from the ministry, it was no defense that the church was by mistake erected on the property of a third person, not a party to the suit, and not on property deeded to the bishop for that purpose.

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

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellee to obtain the right to the custody of a Catholic church house and cemetery in Little River County, Arkansas, and to restrain appellee from the further use thereof. The material facts are as follows:

On November 1, 1919, the parties whose names appear in the body thereof signed a contract which is as follows:

"Memorandum of agreement between the Right Rev. John B. Morris, D. D., as lessor, and Rev. Thomas Martin, as lessee, entered into on this the 1st day of November, 1919.

"The said lessor hereby leases to lessee the following property situated in the southwest quarter of the northwest quarter of section 27, township 12 south, range 32 west, towit: That part of said land upon which is located the Catholic Church, the cemetery and such ground adjacent thereto as in the judgment of the said lessee may be needed for church services and burial ground, it being intended to lease the said Rev. Thomas

Martin such portion of said land as is not now occupied and being used by M. W. O'Connell.

"This lease shall begin November 1, 1919, and expire November 1, 1924, the compensation and consideration therefor having been duly paid by the lessee, the receipt whereof is hereby acknowledged.

"It is further agreed that the lessee shall not commit or permit to be committed any waste upon said premises and to turn the same over at the expiration of this lease in as good condition as they are in at present, the usual wear and tear and damage from the elements excepted, notice to quit being hereby expressly waived."

The title to the property in the Catholic Church is in its bishops, and the church and cemetery in question were erected by a bishop of the Catholic Church, and it was thought to have been erected on the property described in the lease. The bishops of the Catholic Church have been in possession of the property in controversy for about fifty years. After this controversy arose a survey was made, and it was ascertained that the Catholic Church house and the Catholic cemetery were not situated on the land described in above contract, but that they were situated on an adjoining tract of land belonging to a Mrs. Taaffey, who is not a party to this suit.

T. J. Griffin was an assistant pastor in the Catholic Church, and as such was entitled to the use and possession of the church house and the cemetery.

According to the testimony of Bishop Morris, T. J. Griffin was duly suspended, and since that time, under the laws of the Catholic Church, Griffin has no facilities of jurisdiction or right to use the church property at all. Griffin has been attempting to use the building in question for services since his suspension. He has no right to use it for Catholic services since his suspension, and his use of it has been against the will of Bishop Morris, who has the right to it.

The chancellor was of the opinion that the appellant had not established his ownership of the church build-

ing because it was not situated on the land deeded to the bishop of the Catholic Church, and for that reason the complaint was dismissed for want of equity. The case is here on appeal.

Hendricks & Snodgress, for appellants.

1. It makes no difference for the purpose of this decision whether appellee Griffin was suspended or not. If he can occupy church property where he was placed by the bishop on property occupied by the church for more than thirty years, he can not set up as a defense that the bishop does not own the property. Appellee could not by his own act change the character of his tenure. He has no interest in the premises, and one can not go into possession of land and dispute the right of the one under whom he holds and enjoys possession. 24 Cyc. 942-3. The tenant is estopped to deny his landlord's title. 16 R. C. L. 651.

2. If such a tenant wishes to contest the landlord's title, he must surrender possession and then bring his action. 28 Ark. 154; 9 *Id.* 333; 35 *Id.* 548; 24 Cyc. 934, 936-7, 948. It follows that Griffin is estopped. 15 N. E. 536; 27 Ark. 527; 35 *Id.* 540; 33 *Id.* 195.

Shaver & Locke, for appellee.

The only question argued by appellant is that Griffin, being a tenant of Bishop Morris, is estopped to question or deny his title, but appellee was not a tenant nor was he a mere trespasser. The case was tried below that Griffin was a trespasser without right or authority, and the question of appellee being a tenant was not raised nor put in issue, and can not be raised here for the first time. This is not ejectment nor unlawful detainer, and if the bishop did not own the land and the real owner, Mrs. Taaffey, was not a party, Griffin had a right to hold services in the church if the members so decreed, and the chancellor properly dismissed the complaint.

HART, J. (after stating the facts). The decision of the chancellor was wrong. In *Monk* v. *Little,* 122 Ark.

7, it was held that courts may properly assume jurisdiction of a dispute between different factions of a church organization where property rights are involved, and that in the exercise of such jurisdiction a chancery court will restore the possession of such property to the duly constituted church authorities and will restrain those who are in rebellion to the constituted authorities from using it. This seems to have been recognized as the law by the chancellor, but he seems to have denied relief to appellant on the ground that he had not established his ownership to the church house and cemetery.

The record shows that the bishop of the Catholic Church holds the title to the church property and is entitled to the possession of it. It is true that the church house and cemetery in question are not situated on the property that was deeded to the Bishop, but are on an adjoining tract of land, the record title to which is in a person not a party to this suit. The record shows, however, that the church house was built by the Catholic Church and that it was thought to have been erected on the property of the church. It has been used as church property for more than fifty years. The lease contract shows that it was the intention of the bishop to lease the church house and cemetery to the pastor for church purposes, and it does not make any difference whether or not the land on which the church house and cemetery are situated belong to the bishop. It is sufficient that the title to the land is not in the lessee, or in Griffin, who was the assistant pastor until he was suspended by the bishop. Griffin was only entitled under the contract with Martin, the pastor, to the use of the church property by virtue of being an assistant pastor. He only had a right to use the property for church purposes, and after he was suspended he had no right to or any further use of the property. Therefore the chancellor should have granted the injunction prayed for in the complaint. Mrs. Taaffey, who holds the record title to the land on which the church house and cemetery are situated, is not a party

to the suit, and of course her rights are not in any manner concluded. It is sufficient to say that appellee had no right to question appellant's title to the property and the use thereof. *Washington* v. *Moore,* 84 Ark. 220, and *Dunlap* v. *Moose,* 98 Ark. 235.

It follows that the decree will be reversed and the cause remanded with directions to grant the relief prayed for in the complaint.

KING v. STEVENS.

Opinion delivered December 13, 1920.

1. COURTS—JURISDICTION OF PROBATE COURTS.—A probate court has no jurisdiction of a contest between an executor and others over property rights; its jurisdiction being confined to the administration of the assets which come under its control.
2. COURTS—JURISDICTION OF PROBATE COURTS.—While the jurisdiction of the probate court is confined to the administration of the assets that come under its control, in settling the account of an executor it has jurisdiction to ascertain the title to any legacy, to the end that the executor may pay it as directed by the will.
3. COURTS—PROBATE JURISDICTION.—Where a will gave a life estate in testator's personal property to his wife for her life and directed that at her death the residue should go to his daughter, the probate court had jurisdiction, upon exceptions to the executor's settlement, to determine whether money in the executor's hands, upon the wife's death, should go to his wife's estate or to his daughter.
4. REMAINDERS—PERSONAL PROPERTY.—At common law, an estate for life may be created in personal property of a durable nature, with remainder over, and in such cases the property remaining at the life-tenant's death is to be distributed to the remainderman.

Appeal from Columbia Circuit Court; *C. W. Smith,* Judge; affirmed.

STATEMENT OF FACTS.

Mrs. Mary King, administratrix of the estate of Mrs. Virginia Smith, deceased, commenced this proceeding in the probate court by filing exceptions to the final account current of Henry Stevens, as the executor of the will of

R. D. Smith, deceased. The judgment of the probate court was in favor of the execution, and the administratrix appealed to the circuit court.

The facts are as follows: R. D. Smith died testate in Columbia County, Arkansas, leaving surviving him his widow, Mrs. Virginia Smith, and his daughter, Mrs. Ida Dixon. That part of the will which is material to the issues in this case is as follows:

"Third. I give and devise to my beloved wife, Virginia Smith, all the remainder of my property, both real, personal and mixed, which I may own at my death, to have and to hold during her natural life. At the death of my beloved wife aforesaid, I desire that the residue of my personal property go to my daughter, Ida Dixon, as her property.

"Fourth. At the death of my beloved wife aforesaid, I give and bequeath to my daughter aforesaid, and to her for her natural life, all the real estate which I may own at my death, and at her death I devise same to go to her children then living, in fee simple, share and share alike."

Henry Stevens duly qualified as executor under the will and took charge of the decedent's property. He mailed to Mrs. Virginia Smith, the widow of R. D. Smith, deceased, a check for money which had belonged to R. D. Smith, deceased, but she died on the 25th day of December, 1916, before she received the check. Stevens then notified the bank not to pay the check and kept the money in his possession.

Subsequently he filed his final account current and in it accounted for the money and other personal property of R. D. Smith, deceased, to Ida Dixon as legatee under the will. Mary King, who had become administratrix of the estate of Virginia Smith, deceased, filed exceptions to the account current of Henry Stevens as executor of the will of R. D. Smith, deceased. She claimed that her intestate took the personal property absolutely under the will, and that Ida Dixon was not enti-

tled to it upon the death of Virginia Smith, her mother.

The judgment of the circuit court was in favor of Henry Stevens as executor as aforesaid, and Mrs. Mary King as administratrix, as aforesaid, has duly prosecuted an appeal to this court.

McKay & Smith, for appellant.

1. The court had jurisdiction, and it was error to sustain the demurrer.

2. The personal property was left under the will absolutely to Mrs. Virginia Smith, and it should be delivered to the administratrix. Kirby's Dig., §§ 141-3. The probate court could not hear the exceptions, as they involved the construction of a will, but where a court has jurisdiction for one purpose, it will settle all matters in controversy. 99 Ark. 339; 172 S. W. 875. Where the question arises collaterally as a necessary incident to deciding other matters, the court has a right to settle the matter. 15 C. J. 1017; 69 Neb. 356; 5 Ann. Cas. 191; 132 N. Y. S. 268; 128 Ark. 42. Under the will the personal property was absolutely vested in Mrs. Virginia Smith. The intent of the testator must be proved and the court erred in sustaining the demurrer.

Stevens & Stevens, for appellee.

1. The probate court had no jurisdiction to construe the will. 1 Woerner, Adm. (2 ed.), § 155; 41 L. R. A. 207; 40 Cyc. 1842.

2. The probate court has no jurisdiction to determine title to real estate. 120 S. W. 635. See also a like case in 82 S. W. 771.

3. In the absence of a statute, probate courts have no jurisdiction to try disputed claims against an estate. 18 Cyc. 523; 116 Ark. 352; 111 *Id.* 357; 110 *Id.* 117; 55 *Id.* 222.

4. The property here goes to the remainderman. 16 Cyc. 618; 7 L. R. A. 836; 98 S. W. 104; 51 Ark. 61.

HART, J. (after stating the facts). It is first sought to uphold the judgment on the ground that the probate

court had no jurisdiction. It is true, as held in *Shane* v. *Dickson,* 111 Ark. 353, that the probate court has no jurisdiction of a contest between an executor and others over property rights, and that its jurisdiction is confined to the administration of the assets which come under its control.

It is equally well settled, however, that where the question of title to property arises collaterally as a necessary incident to the determination of other matters, which are within the court's jurisdiction, then the court can determine the question of title to the property. 15 C. J. 1017 and cases cited, and *Youngson* v. *Bond* (Neb.), 5 Ann. Cas. 191. While the jurisdiction of the probate court was confined to the administration of the assets that came under its control in settling the account of the executor under the will of R. D. Smith, deceased, it was necessary for the executor to pay the legacies to the legatees, and the probate court had jurisdiction on a judicial accounting to ascertain the title to any legacy, to the end that the executor might pay it as directed by the will.

The exceptions filed by the administratrix put in issue in the probate court the validity of the bequest of the personal property in the will of said R. D. Smith, and it was necessary for the probate court to determine the question in order to settle the account of the executor. Hence the probate court had jurisdiction to pass on the exceptions filed, and the circuit court acquired such jurisdiction on appeal.

This brings us to a consideration of the case on its merits, and this is determined by the construction to be placed upon the third section of the will. The section is set out in our statement of facts and need not be repeated here.

It is claimed by counsel for appellant that at common law and under the decision of this court in *Patty* v. *Goolsby,* 51 Ark. 61, life estates can not be created in personal property. Hence they contend that under section 3 of the will that the personal property went to Virginia Smith absolutely. We can not agree with counsel

in this contention. Under the plain language of the will the testator gave his personal property to his wife, Virginia Smith, for her natural life and at her death the remainder of his personal property went to his daughter, Ida Dixon. There is nothing decided to the contrary in *Patty* v. *Goolsby, supra.* In that case the court was talking about perishable personal property, or such articles as are consumed in the using. Besides that, the court in express terms said that the construction of the will as to the personal estate was not in issue. At common law it is well settled that an estate for life may be created in personal property of a durable nature with remainder over, and in such cases the property remaining is to be distributed to the remainderman. 2 Kent's Com. (14 ed.), p. 352; 2 Lewis' Blackstone's Com., p. 398; *Griggs* v. *Dodge,* 2 Day (Conn.), 28; *Taber* v. *Packwood,* 2 Day (Conn.), 52; *McCall* v. *Lee* (Ill.), 11 N. E. 522.

In *Wescott* v. *Cady,* 5 Johns. Ch. 334, Chancellor Kent said: "The law is too well settled to be drawn into question at this late day that a limitation of personal goods and chattels or money in remainder after a bequest for life is good." It may be said in passing that numerous decisions which sustain the text are cited by the author in 40 Cyc., p. 1614, to the same effect.

It follows that Ida Dixon was entitled to the remainder of the personal property of R. D. Smith after the death of his widow, Virginia Smith, and that Henry Stevens as executor under his will properly accounted to Ida Dixon for the same. Hence the circuit court correctly held that the exceptions to his account current should not be sustained and was right in confirming the same. Therefore, the judgment will be affirmed.

TERRY DAIRY COMPANY v. NALLEY.

Opinion delivered December 13, 1920.

1. CONSTITUTIONAL LAW — STATUTE REGULATING EMPLOYMENT OF CHILDREN.—Acts 1915, p. 1505, regulating the employment of children under certain ages, is a valid exercise of the State's police power, and is not invalid as abridging their freedom of contract.
2. MASTER AND SERVANT — NEGLIGENCE — EMPLOYMENT OF MINOR.—The employment of a child under 14 years of age contrary to Acts 1915, p. 1505, is negligence *per se*.
3. NEGLIGENCE—VIOLATION OF STATUTE.—The violation of a statute which is negligence *per se* will not support a recovery unless it was the proximate cause of the injury complained of.
4. MASTER AND SERVANT—NEGLIGENCE—VIOLATION OF CHILD LABOR LAW.—The employment of a boy under 14, in violation of the Child Labor Law (Acts 1915, p. 1505), being negligence *per se*, is the proximate cause of an injury received by him in the course of his employment, since his employer should have anticipated some injury as the natural or probable result of his employment.
5. MASTER AND SERVANT—VIOLATION OF CHILD LABOR LAW—DEFENSE.—In the case of a boy under 14 employed to drive a delivery wagon in violation of Acts 1915, p. 1505, and injured while so employed, it was no defense to recovery against the master that the negligence of another contributed to the injury, so that it was not error to refuse to allow defendant to prove that the wagon the boy was driving was struck by a street car.
6. MASTER AND SERVANT—DEFENSES OF ASSUMED RISK AND CONTRIBUTORY NEGLIGENCE.—In an action against a master for negligence in employing a child under 14 years of age, in violation of Acts 1915, p. 1505, § 1, the defenses of assumed risk and contributory negligence are not available.
7. MASTER AND SERVANT—EMPLOYMENT OF MINOR—MISREPRESENTATION AS TO AGE.—In an action against a master for injuries to a child under 14 years, it is no defense that the plaintiff misrepresented to the master that he was of age or that the master in good faith believed him to be of age; the master must at its peril ascertain that the boys it employs are above the age of 14 years.
8. EVIDENCE—STATEMENT AS TO AGE.—Where the parent of a child testified that the child was under 14, it was competent to prove, in contradiction, that when the child applied to defendant for employment he stated that he was over 16.

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

STATEMENT OF FACTS.

Charles Nalley, a minor, by his father and next friend, W. A. Nalley, brought this action against the Terry Dairy Company to recover damages for personal injuries alleged to have been caused by the defendant's negligence.

The Terry Dairy Company is a corporation engaged in the retail and wholesale ice cream business and in the general dairy business in the city of Little Rock, Ark. In August, 1919, the company employed Charles Nalley for $5 per week, to drive one of its delivery wagons drawn by a mule. On the 30th day of August, 1919, while Charles Nalley was driving the delivery wagon west on West Ninth street for the purpose of making deliveries of ice cream and milk, he was thrown from the wagon by a sudden lunge forward of the mule hitched to the wagon, and his right foot and leg were caught in the spokes of the wheel, thereby causing his leg to be broken.

According to Charles Nalley's own testimony, something came up behind the delivery wagon which he was driving, and he fell off of the wagon. He did not know whether the approaching vehicle hit his wagon or not, but when they picked him up he looked around and saw a street car just behind his wagon.

Another witness said that he thought the boy got overbalanced by striking at the mule with the lines. He said that the boy hit at the mule, missed him, and then fell off of the wagon, catching his legs in the wheel.

Charles Nalley denied that any one at the Terry Dairy Company asked him how old he was when he was employed, and denied that he told any of the employees of the Terry Dairy Company that he was sixteen years of age at the time he was employed. He said that nothing was asked him with regard to his age.

W. A. Nalley, the father of Charles Nalley, testified that the boy was born on December 10, 1905. On cross-examination he stated that he did not know that the boy

was working for the Terry Dairy Company until about a week before he was hurt, and said that he did not notify the Terry Dairy Company how old the boy was.

The defendant offered to prove that Charles Nalley had stated to the witness that the street car hit him and bumped him off of the wagon. The court refused to permit the defendant to prove this, and the defendant duly saved its exceptions. The defendant also offered to prove that its agent who employed the boy asked him how old he was before he was employed, and the boy stated that he was over sixteen years of age; that the company believed this statement to be true, and but for this statement would not have employed the boy.

The defendant duly excepted to the ruling of the court in refusing to allow it to prove these facts.

Evidence was adduced in favor of the plaintiff tending to show the character and extent of his injuries.

The court directed the jury to find for the plaintiff, but submitted to the jury the question of the amount of damages to be recovered.

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

Hendricks & Snodgress and *Carmichael & Brooks*, for appellant.

1. The misrepresentations of the boy as to his age bar a recovery. 15 L. R. A. (N. S.) 443; 66 Iowa 346; 23 N. W. 736; 81 Pac. 869, 870; 47 N. W. 1037.

2. Act No. 1, Acts 1915, p. 1505, does not create civil liability. 58 Hun. 381, 12 N. Y. Supp. 188; 62 Ark. 235; 62 *Id.* 245. Contributory negligence bars a recovery. *Ib.;* 9 L. R. A. (N. S.) 339. Mere employment in violation of a statute does not constitute sufficient negligence to warrant a recovery. The act of negligence in employment must contribute to cause the injury and must not be casually incident thereto. The act does not create a civil cause of action but only fixes a penalty for the doing of the thing. 20 R. C. L., § 37. The violation of the stat-

ute would not be continuing nor supply negligence otherwise wanting. 13 Ill. 548; 56 Am. Dec. 471; 21 L. R. A. 723 and note; 18 R. C. L., § 65; 20 L. R. A. (N. S.) 881; 48 *Id.* 660; 14 *Id.* 609; 67 N. W. 729; 7 L. R. A. (N. S.) 336 and note; 61 L. R. A. 811. See, also, 31 L. R. A. (N. S.) 506; 56 Ark. 216; 18 R. C. L., § 65; 19 L. R. A. (N. S.) 783; 106 N. Y. Supp. 443; 148 Fed. 482. Under these cases the court erred in refusing to submit the question of liability to the jury and in refusing to permit defendant's witnesses to testify as to what investigation they made and what statements plaintiff made as to his age. The evidence shows that defendant was not guilty of any negligence. The evidence tending to show that a street car hit the wagon was competent and the court erred in excluding the testimony.

3. The act is not constitutional. It is not authenticated properly. Its title involves several questions and is in no way descriptive of the act. *Berry* v. *Majestic Milling Co.,* 223 S. W. 738.

Mehaffy, Donham & Mehaffy, for appellee.

1. Misrepresentations of the boy as to his age do not bar recovery. Cases cited by appellant are not in point. Representations of the boy as to his age were immaterial. The employer must *know* that the boy employed was over the prohibited age. There was no question for a jury on this point, and the evidence of the boy's representations as to his age was properly excluded. There was no question for a jury. 115 Pac. 843; 73 N. E. 766; 68 *Id.* 754; 70 *Id.* 669; 87 *Id.* 229. One employing a child must ascertain at his peril whether the child is of age. 156 N. W. 971; 67 Atl. 642; 60 So. Rep. 583; 116 N. W. 1107; 95 N. E. 204. Misstatement of age by a minor is no defense. 5 Labatt on Master and S., § 1903.

2. The act itself creates civil liability. 112 Pac. 145; 48 L. R. A. (N. S.) 657 and note; 87 N. E. 358; 79 S. E. 836; 26 Cyc. 1091; 5 Labatt, M. and S., § 1899; 26 Cyc. 1080.

3. Contributory negligence is no defense where the injured is a minor. 87 N. E. 358; 73 *Id.* 766; 66 *Id.* 572; 60 So. 587. See, also, 18 R. C. L. 554, § 65.

4. Violation of a statute forbidding the employment of a minor child is negligence *per se.* 87 N. E. 229; 61 S. E. 525; 17 L. R. A. (N. S.) 602; 65 S. E. 399; 32 S. W. 460; 115 Pac. 843; 18 R. C. L. 551.

5. The act is constitutional. 117 Ark. 465. It is within the scope of the police power of the State. Labatt on M. and S. (2 ed.), § 2338.

HART, J. (after stating the facts). Under the facts stated in the abstract, the court directed a verdict in favor of the plaintiff on the question of the liability of the defendant. This suit was brought under Initiative Act No. 1, providing for the health, safety and welfare of minors by forbidding their employment altogether under a certain age, and by forbidding their employment in certain occupations under a certain specified age, and the issues raised by the appeal involved the construction of this act. See Acts of Arkansas, 1915, p. 1505.

Section 1 of the act reads as follows: "No child under the age of fourteen shall be employed or permitted to work in any remunerative occupation in this State, except that during school vacation children under fourteen years may be employed by their parents or guardians in occupations owned or controlled by them."

Sections Nos. 2 and 3 provide that no child under sixteen shall be employed or permitted to work in certain specified occupations. Sections Nos. 7 and 8 provide for the issuance of employment certificates in certain instances allowing children under the age of sixteen years to work in certain establishments, or occupations. Section 13 makes it a misdemeanor to violate the provisions of the act.

It is first contended by counsel for the defendant that the judgment should be reversed because the act under which the suit was brought is unconstitutional. Child labor laws have been enacted in most of the States

and in Canada. They have been uniformly upheld as being within the police power of the State, and it has been said that the legislative judgment in regard to such regulations will not be interfered with by the court. It is specially insisted that the present act is unconstitutional because it prohibits children under fourteen years of age from engaging in any occupation, except that during the school vacation, children under fourteen years may be employed by their parents or guardians in occupations owned or controlled by them. The constitutional guaranty of the liberty of contract does not apply to children of tender years, nor prevent legislation for their protection.

In discussing the question, Mr. Tiedeman says: "The constitutional guaranty of the liberty of contract does not, therefore, necessarily cover their cases, and prevent such legislation for their protection. So far as such regulations control and limit the powers of minors to contract for labor, there has never been, and never can be, any question as to their constitutionality. Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the State." Tiedeman on State and Federal Control of Persons and Property, vol. 1, p. 335.

Again, the learned author said: "But children under ages, stated in and varying with the provisions of the different States, are in some States prohibited altogether from working outside of their homes, while in others they are only prohibited from engaging in certain kinds of work. The total prohibition is designed to aid in the enforcement of the attendance upon the school, and both the total and partial prohibitions of child labor are designed to promote their physical and mental growth, by the removal of all strains, which may be caused by excessive labor. *Ib.*, vol. 1, pp. 240, 241.

Professor Freund says, that the constitutionality of legislation for the protection of children is rarely questioned, and that the Legislature is conceded a wide

discretion in creating restraints. Continuing, he said: "But even the courts which take a very liberal view of individual liberty and are inclined to condemn paternal legislation would concede that such paternal control may be exercised over children, so especially in the choice of occupations, hours of labor, payment of wages, and everything pertaining to education, and in these matters a wide and constantly expanding legislative activity is exercised. While different grades in the age of minority have not been constantly fixed, it is a reasonable principle which in practice is observed, that the exercise of control must decrease as the age advances." Freund on Police Power, section 259; see also, *Starnes* v. *Albion Mfg. Co.* (N. C.), 17 L. R. A. (N. S.) 602, and cases cited and *Re Spencer* (Cal), 117 Am. St. Rep. 137. Therefore we are of the opinion that the statute is not unconstitutional.

It is next contended that the trial court erred in holding that the employment of a minor under fourteen years of age is contrary to the provisions of section 1 of the act and constituted negligence *per se*. The authorities on this point are in decided conflict. It has been said that the violation of a statute forbidding the employment of children under a certain age, or their employment at certain kinds of work or without complying with certain conditions, is held by the weight of authority to be negligence as a matter of law, in an action by the child for injuries received during the course of the employment. See case note to 7 L. R. A. (N. S.) 335 and 48 L. R. A. (N. S.) 657. Numerous cases from the various courts of last resort of the several States where child labor laws have been adopted are cited in support of each view. A leading case supporting what is termed the minority rule or the rule that the unlawful employment is only evidence of negligence, is the case of *Berdos* v. *Tremont and Suffolk Mills* (Mass.), Ann. Cas. 1912 B, p. 797. The case of *Elk Cotton Mills* v. *Grant* (Ga.), 48 L. R. A. (N. S.) 656, is a leading case

holding that the employment of a minor under the prescribed age in a factory, in disobedience of a statute forbidding such employment, is negligence *per se;* and if the injury to such child proximately results from the employment, a right of action in its favor arises. Many decisions are cited in the case note in support of the rule.

In Thompson on Negligence, section 10, it is said that "the general conception of the courts, and the only one that is reconcilable with reason, is that the failure to do the act commanded, or the doing of the act prohibited, is negligence as a mere matter of law."

In the next section the learned author says that it is to be regretted that some courts have fallen into the aberration of holding that the violation of said statutes does not establish negligence *per se,* but is merely evidence of negligence; that is to say, competent, but not conclusive, evidence to be submitted to the jury on the question of negligence or no negligence. Continuing, he said, that it seems to have escaped the attention of the judges who have laid down this rule that it has the effect of clothing juries with the power to set aside acts of the Legislature. We think that the view that the unlawful employment is negligence *per se* is in accord with the better reasoning on the subject, and we adopt it.

In this connection we must consider the question of whether the violation of the statute by the defendant was the proximate cause of the injury to the child. If the negligence, whether *per se* or otherwise, does not proximately cause the injury, there can be no recovery on account of it. This brings us to the question of whether there was any casual connection between the disobedience of the statute and the injury. In short, was there any intervening cause? In the present case the undisputed evidence shows that the child was injured while in the course of his employment, and the court properly took the question of proximate cause from the jury. The employment of a minor in violation of the statute being negligence *per se* and the injury being

caused by reason of the employment, such negligence is the proximate cause of the injury. The negligence of the master was shown by the employment of the child contrary to the provisions of the statute, and the injury to the child occurred as a result of that act. The only other element necessary to complete the chain of proximate cause is the fact that some injury to the child should have been reasonably anticipated by the defendant as the natural or probable result from hiring him to drive one of its delivery wagons contrary to the provisions of the statute, and this necessary element is held to be conclusively established by the law itself.

It is insisted by counsel for the defendant in this connection that the court erred in refusing to allow it to prove that a street car struck the delivery wagon which the boy was driving and caused him to fall out of the wagon and thus receive the injuries complained of. This proof would not relieve the defendant from liability. The object of the statute was to prevent boys under fourteen years of age from obtaining employment of any kind. Doubtless the Legislature had in view that boys under that age might seek employment of the kind in question in which they would be subject to dangers in driving about the streets and delivering goods which their immaturity could not guard against. The danger of the delivery wagon driven by the boy coming into collision with other vehicles and street cars was ever present while he was delivering goods; and if the defendant could be relieved of liability because of the negligence of some third person, in this respect the purpose of the statute in a large measure would be defeated. Of course, there would be no casual connection if the boy had got sick and died as the result of his sickness. For instance: if he had a weak heart and this caused him to fall from the wagon and thereby become injured in the manner he was injured, there would be no liability on the part of the defendant.

Again, it is insisted that the judgment should be reversed because the defenses of assumption of risk and of contributory negligence are still open to the defendant, and that on this account the court erred in directing a verdict for the plaintiff. There is great conflict in the authorities on these points, but we are inclined to the view that the defenses of assumption of risk and of contributory negligence are not available to the defendant.

As we have already seen, the evident purpose of the statute is to protect the lives and limbs of children by prohibiting their employment altogether under a certain age and by prohibiting their employment in certain occupations under another prescribed age and in regulating their employment in other occupations under a designated age. If the defenses of assumed risk and contributory negligence were still available to the defendant, the purpose of the statute would in a large measure be defeated. In discussing this question in *Louisville, H. & St. L. R. Co.* v. *Lyons,* 48 L. R. A. (N. S.) 666, the Kentucky Court of Appeals said: "There are many employers who engage the services of children because their labor can be obtained at less cost than the labor of adults. There are also parents who do not seem to care how dangerous the employment in which their children are engaged, and so, between the unconcern of the employer and the indifference of the parent, it was a common thing to find children of tender years working at occupations in which they were liable at any moment to be crippled or killed. The child, thoughtless, forgetful, and careless, as the majority of them are, was thus subjected to continual danger. Confronted by this distressing condition existing in many places, the Legislature endeavored to remedy it by the enactment of this statute prohibiting the employment of children in certain occupations. The Legislature knew from observation and experience that one way to accomplish the desired result would be to impose a direct penalty on the employer, as the law does. But the imposition of a small penalty on

the employer was not all the Legislature intended to do in its efforts to save children from being crippled or killed in dangerous occupations, or the only burden it was intended the employer should assume if he violated the statute. To so construe it would be to lose sight of the rights of the child, who should receive the fullest measure of compensation if injured while working in a forbidden employment. If the child is to assume the risk of danger that follows his thoughtlessness or want of care, or is to be charged with negligence because of his immature judgment and youthful habits caused the accident, then in many cases on the child, and not the employer, would be put the consequences of the unlawful act of the employer. The child, in accepting employment, does not knowingly violate any law or purposely do any wrong, but the employer does; and, between the two, the employer, for the benefit of the child, should bear all the burden, and the child none. In other words, the employer should be required, so far as compensation can do it, to put the child in the same condition as he would have been, except for the wrongful employment which caused his injury."

On the same question in the case of *Lenahan* v. *Pittston Coal Mining Co.,* 12 L. R. A. (N. S.) 461, 218 Pa. 311, 67 Atl. 642, the Supreme Court of Pennsylvania said: "After full consideration, we are unanimously of the opinion that the Legislature, under its police power, could fix an age limit below which boys should not be employed, and, when the age limit was so fixed, an employer who violates the act by engaging a boy under the statutory age does so at his own risk, and, if the boy is injured while engaged in the performance of the prohibited duties for which he was employed, his employer will be liable in damages for injuries thus sustained. This rule is founded on the principle that when the Legislature definitely established an age limit under which children should not be employed, as it had the power to do, the intention was to declare that a child so employed

did not have the mature judgment, experience, and discretion necessary to engage in that dangerous kind of work. A boy employed in violation of the statute is not chargeable with contributory negligence or with having assumed the risks of employment in such occupation."

Counsel for the defendant invoke the rule that the violation of a statutory duty by the employer does not abolish the defenses of assumption of risk and contributory negligence, in the absence of a statute to that effect. For example, in the cases of *Patterson Coal Co.* v. *Poe,* 81 Ark. 343, and *Mammoth Vein Coal Co.* v. *Bubliss,* 83 Ark. 567, the court had under consideration a statute requiring the defendant company to furnish props to the miners under certain conditions. The court held that the failure to furnish the props as required by the statute constituted negligence on the part of the company, but that the defenses of assumed risk and contributory negligence were available to the defendant because those defenses were not abolished by the statute. That statute, however, while it increased the liability of the mine owner, did not decrease the obligation of the miner to exercise due care for his own safety. The employment of miners was not prohibited. The distinction is that in those cases the employment was lawful. In the instant case the employment of the child was prohibited. The injury resulted from the unlawful employment, and while the child was engaged in doing the precise thing that it was hired to do. *American Car & Foundry Co.* v. *Armentraut,* 214 Ill. 509, 73 N. E. 766; *Rolin* v. *R. J. Reynolds,* 7 L. R. A. (N. S.) 335, and *Louisville, Henderson & St. Louis Ry. Co.* v. *McKinley Lyons,* 48 L. R. A. (N. S.) 667 and case note.

It is next contended by counsel for the defendant that it offered to prove that the plaintiff misrepresented his age to the defendant at the time he was employed and that such testimony was competent. They contend that the representation of the plaintiff that he was over the prescribed age would absolve the defendant from

liability while the child was at work for it. The authorities on this point are in conflict, and we refer to case notes in 20 L. R. A. (N. S.) 500, 25 L. R. A. (N. S.) 708 and 42 L. R. A. (N. S.) 624 for a collection of the authorities on both sides of the question. We take the view that the right of the child to maintain an action for injuries under the statute is not affected by the fact that he obtained employment by misrepresenting his age. Section 1 of the act under which the case at bar was brought contains an absolute prohibition against the employment of children under fourteen years of age. They were considered by the Legislature as being too young and inexperienced to work for any one except their parents and guardians during the vacation. The prohibition extends to all children within the prescribed age. The good faith of the employer or his knowledge of the age of the child is not material. The defendant was by the statute permitted to employ only children above the age of fourteen years. It must ascertain at its peril that the boys that it employs are of the class that it may lawfully employ. In this connection we refer to the reasoning of the Supreme Court of Pennsylvania in the case of *Lenahan* v. *Pittston Coal Mining Co.*, 12 L. R. A. (N. S.) 461, which is copied above. This court has held that, under the statute prohibiting the sale of intoxicating liquors to minors, it is no excuse or justification of the one selling the liquor to the minor without the consent of the parent or guardian that both he and the minor believed at the time that the latter was of age. *Edgar* v. *State,* 37 Ark. 219, and *Harper* v. *State,* 91 Ark. 422.

For another reason, however, the judgment must be reversed and the cause remanded for a new trial. The defendant offered to prove that the plaintiff represented to it that he was sixteen years of age at the time he was employed, and that it would not have employed him unless it had thought he was over fourteen years of age. This testimony was competent. The plaintiff's right to recover depended upon the fact that he was under four-

teen years of age. His father testified as to his age, and it was competent for the defendant to introduce in evidence his declaration as to his age.

In *Edgar* v. *State,* 37 Ark. 219, and *Pounders* v. *State,* 37 Ark. 399, it was held that a minor to whom liquor was sold was a competent witness to prove his own age, and that there could be no objection to his stating that he derived his knowledge from an entry of his birth in a family Bible or from other source of information. Prof. Greenleaf says, that while a person's belief as to his own age rests upon hearsay only and not on actual observation and recollection, such belief, sufficient as it is for action in the practical affairs of life, ought also to be admissible in judicial inquiries, and such is the view generally accepted. Greenleaf on Evidence (16 ed.), vol. 1, § 430k. The same author says that a person's appearance may be evidence of his age, at least, within broad limits. *Ib.,* § 14 L.

In *Commonwealth* v. *Hollis,* 49 N. E. 632, the defendant was charged with carnal knowledge of a female under sixteen years of age, and the Supreme Court of Massachusetts held that her testimony as to her age would have been competent, and that it was also competent for the jury to consider her appearance in determining her age. Of course, the value of such testimony is for the jury.

Therefore, we are of the opinion that the excluded evidence would have tended to contradict the evidence adduced by the plaintiff at the trial as to his age. The age of the plaintiff was material, and the exclusion of testimony which tended to contradict the evidence adduced by him on that point was necessarily prejudicial. *Koester* v. *Rochester Candy Works,* 19 L. R. A. (N. S.) (N. Y. Ct. of Appeals) 783 and cases cited.

For the error in excluding the evidence offered by the defendant as to the plaintiff's age, the judgment must be reversed and the cause will be remanded for a new trial.

WOOTEN & COMPANY v. BAIN-ADAMS COMPANY.

Opinion delivered December 13, 1920.

1. APPEAL AND ERROR—JUDGMENT ON DIRECTED VERDICT.—On an appeal from a judgment on a directed verdict, the evidence will be viewed in the light most favorable to appellant's contention.
2. SALES—DELIVERY.—In an action against a purchaser for failure to receive cotton, delivery or tender of the cotton pursuant to the usual custom of the trade is sufficient, where there was no stipulation or agreement that the delivery should be made at any special time.
3. WITNESSES — IMPEACHMENT BY CONTRADICTORY STATEMENT.—Where the purchaser's agent testified concerning the transaction, it was competent to impeach him by proving a telephone conversation between him and the purchaser which occurred on the day the sale was made and in regard to the same subject-matter, and which would have tended to contradict his testimony.
4. SALES—QUESTION FOR JURY.—It was error to direct a verdict for the seller upon the theory that the undisputed testimony showed an offer to comply with a contract for sale of cotton on the part of the sellers and a refusal to comply on the part of the purchasers, where the latter's testimony tended to prove that the cotton tendered was not of the grade required by the contract.
5. SALES—INSTALLMENT CONTRACT.—Where delivery of cotton under a contract was to be made in installments, it was the buyers' duty to accept all the cotton conforming to the contract, and they could not accept a portion and reject the balance, nor could they accept the first shipment, even though it did not conform to the contract, and thereafter refuse on that account to accept other shipments which did conform to the contract; but the fact that they accepted a shipment which did not comply with the contract did not require them to accept other shipments which did not meet the requirements of the contract.

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

Moore & Vineyard, for appellants.

1. The alleged confirmation paper by J. R. Woods was not a confirmation of the contract of September 28, and plaintiffs must fail in their action because the proof wholly fails to bear out the confirmation. 137 S. W. 827; 96 S. W. 386.

2. It was error to instruct a verdict. The case upon the evidence was one for a jury. *Ib.;* 89 *Id.* 368; 106 *Id.* 482. Where there is any evidence tending to support the issue, it is error to take the case from the jury. 103 Ark. 401; 104 *Id.* 267; 120 *Id.* 206; 132 *Id.* 441. An agent who is only empowered by his principal to solicit orders for, or make sale of goods, has no implied authority to receive payment therefor or to modify, cancel or rescind the sale. 100 Ark. 363; 92 *Id.* 315; 94 *Id.* 301. The authority of an agent must be shown by positive proof or by circumstances showing satisfaction or assent to the sale or contract. 132 Ark. 155. Parties dealing with a special agent must look to his authority. 23 *Id.* 411; 74 *Id.* 557; 104 *Id.* 150; 132 *Id.* 155; 105 *Id.* 111. There was evidence for a jury and it was error to direct a verdict.

Rowell & Alexander, for appellees.

The court properly instructed a verdict, as under the evidence no case for a jury was made. The undisputed evidence fixed the amount of the verdict and there was no evidence to establish an issue for the appellants. 95 Ark. 488; 2 C. J. 570; 219 S. W. 319; 55 Ark. 627; 122 *Id.* 357. The principal is bound by the authority given to his agent and by the authority which a third person dealing with him has a right to believe has been given to him. 103 Ark. 79-86; 96 *Id.* 456. If the agent's authority is limited, the burden is on the principal to show that the third person had notice of same. 103 Ark. 79-86 See, also, 100 Ark. 240. Woods was instructed by appellants to buy this cotton and they are liable to appellees. 87 Ark. 374. The general rule of agency is correctly stated in 21 R. C. L. 837-8-844. Where an agent is acting for his principal, he will be presumed to be a general agent in the absence of notice to the contrary. 112 Ark. 63-8. The measure of damages was the market value of the cotton at the place of delivery at the time Wooten Company breached the contract. 134 Ark. 300. There was nothing for a jury to pass upon, and an instructed verdict was proper.

SMITH, J. This appeal comes from a judgment pronounced upon a verdict returned under the direction of the court, after the jury trying the cause had been unable to agree. As the verdict was directed against appellants, we must view the testimony in the light most favorable to their contention, and the case may be stated as follows: Appellants compose a copartnership engaged in buying cotton, with their principal office at Helena, Arkansas. Appellees compose a copartnership, and are merchants and cotton buyers, with their place of business at Portland, Arkansas. J. R. Woods was the agent of appellants, and bought cotton for them in the territory adjacent to Portland, and on September 28, 1918, bought from appellees two hundred bales of cotton for the account of appellants. Woods bought on orders given him daily by appellants, and made a report in writing at the close of each day, showing what he had bought. Appellants declined to accept certain cotton tendered in discharge of this contract, and appellee brought this suit to recover damages on that account.

At the trial from which this appeal comes Adams, who was one of the partners composing the Bain-Adams Company, testified in behalf of appellees, as did Woods. According to Adams, the sale to Woods included certain specific cotton, and all of the cotton tendered conformed to the specifications of the contract. In stating his contract with Woods, Adams testified that there was nothing said about the staple of the cotton, "only it was to be Portland." He explained that it was the early part of the season, and that the grade of all the cotton in controversy was practically the same. The testimony shows that Portland cotton classed along with what was called bayou cotton, and that this staple averaged 1 1-16 inches in length. The staple of other cotton grown in the same county, but away from Bayou Bartholomew, averaged less than that, and was less valuable. Woods gave testimony substantially corroborating that of Adams. He admitted that on September 29th he had wired appel-

lants, "Bought 300 bales of bayous at price named Friday night," and he identified a written report made by him on the 28th reciting that he had bought that date from appellees at Portland 200 bales of cotton at 35 cents per pound, to be shipped at once. This report also showed the purchase of 102 bales of cotton, made on the same day, from other persons, some of which had been bought as low as 32½ cents per pound.

After the controversy arose, which terminated in this lawsuit, Woods gave appellees the following writing:

"Hamburg, Ark., September 28, 1918.

"The Bain-Adams Company, Portland, Ark. Gentlemen: I hereby confirm purchase from you over 'phone of 200 B/C for account of Messrs. C. A. Wooten & Company of Helena, Ark., at 35 cents per lb. As per conversation, we will accept the sixty-four B/C, A. P. McCombs from Thebes, also the sixty B/C from W. L. Blanks at Parkdale, and you are to ship the remainder from Portland, or cotton fully equal Portland cotton in staple and grade.

"Yours truly,

"J. R. Woods.

"This confirmation given on this November 1, 1918, is as I would have given it on September 28, the date of purchase.

"J. R. Woods."

Nothing more is claimed for this writing than that it evidences the contract made on September 28th, and Adams testified that Woods had seen the cotton therein mentioned, and had agreed to accept it under the contract, and that he was proceeding in the usual and customary way to deliver the cotton, when appellants refused to receive and pay for it.

The first shipment made consisted of 33 bales. Bills of lading covering this shipment were attached to a draft drawn on appellants, and the draft was paid on presentation. Two additional shipments were made in a similar

way, but the drafts accompanying the bills of lading were dishonored.

C. A. Wooten, a member of the appellant firm, testified that the first draft was paid prematurely and inadvertently by his cashier, and should not have been paid at all, as the cotton did not meet the requirements of the contract; that these drafts were not payable until samples of the cotton had been received and examined, and this first payment was made before the arrival of the samples. Wooten further testified that he bought this cotton to fill a special order, which required its delivery in New Orleans by the end of October, and that delivery of the cotton was not made promptly by appellees as required by the contract, and, as we understand his testimony, the first shipment had gone on to New Orleans before the discovery that the cotton did not meet the requirements of the contract. He further testified that the second and third shipments were refused because they were not made in time, and because the shipments were made from points which indicated that the cotton would not be of the required grade. These last shipments covered in part the cotton mentioned in the written confirmation given by Woods on November 1st, but the Blanks cotton there mentioned was never shipped. According to both Woods and Adams, the McCombs cotton, which was embraced in the last shipment, had been inspected and accepted by Woods at the time the contract was made.

After buying the cotton Woods reported the details of the trade to appellants over the telephone, and Wooten offered to testify as to what Woods then told him. This testimony was excluded by the court upon the ground that it made no difference what Woods told Wooten, as the only question in the case was what contract was made between Woods and Adams.

It is insisted, for the reversal of the judgment, that the cotton was not tendered in time to answer the purpose for which it was bought. But it does not appear

that Woods advised Adams that the cotton was being bought for delivery at any special time, and, in the absence of some stipulation to that effect, it would have been sufficient to have made a delivery, or a tender, of the cotton pursuant to the usual and ordinary custom of the trade.

We think the court should have allowed Wooten to detail the conversation which he had with Woods. The court was correct in the view that appellants were bound by what occurred between Woods and Adams, but Woods had been called by, and had testified in behalf of, appellees, and the proffered testimony was admissible for the purpose of contradicting Woods. The conversation with Adams, and the one with Wooten, occurred on the same day, and in regard to the same subject-matter, and the excluded testimony would have tended to contradict that offered by Woods at the trial.

We think it can not be said that the undisputed testimony shows an offer to comply on the part of appellees and a refusal to comply on the part of appellants. According to Wooten, he had bought cotton for many years in the territory in which appellees operated, and he knew the grade of the cotton by the points from which it came, and that the cotton which he received, and other cotton which was tendered to him, did not conform to the contract.

If the cotton tendered conformed to the contract, it was appellants' duty to accept it; while, if Woods did not buy specific lots of cotton, appellants had the right to reject any cotton which did not class as Portland or bayou cotton.

The contract was an entire one, although the delivery was to be made in installments, and it was, therefore, appellants' duty to accept all the cotton conforming to the contract. They had no right to accept a portion and to reject the balance. *Ward Furniture Mfg. Co.* v. *Isbell,* 81 Ark. 549.

Appellants could not accept the first shipment, even though it did not conform to the contract, and thereafter refuse, on that account, to accept other shipments, which did conform to the contract. *Foster* v. *Bradney,* 143 Ark. 319; *Thomas* v. *Gray,* 94 Ark. 9; *Guernsey* v. *West Coast Lumber Co.,* 25 Pac. 414; *Miller* v. *Moore,* 10 S. E. 360, 6 L. R. A. 374; *McFadden* v. *Wetherbee,* 29 N. W. 881.

On the other hand, the fact that they had accepted a consignment of cotton falling short of the requirements of the contract did not require them to accept other consignments which did not meet the requirements of the contract. *Cahen* v. *Platt,* 25 Am. Rep. 203, 69 N. Y. 348; *Reed* v. *Randall,* 29 N. Y. 358, 86 Am. Dec. 305. See, also, cases cited in note to *Jackson* v. *Rotax Motor Co.,* 20 A. & E. Ann. Cas. 528; Mechem on Sales, vol. 2, sec. 1398.

A general statement of the law applicable to the facts of the case is found at section 267 of the article on Sales, 23 R. C. L., page 1443. It reads as follows:

"Acceptance of Part.—If the buyer, on receiving a part of the goods, finds they are not of the kind or quality which his contract entitles him to, he is not at liberty to retain such part, and claim damages for the nondelivery of the entire quantity, nor can he require the delivery of the residue, retaining a claim for damages; he must either receive the article as it is, or he must return the portion delivered, and then enforce his claim for damages, and if the balance when tendered is of the quality required by the contract, the inferior quality of that theretofore accepted by him affords no excuse for his refusal to accept such balance. The acceptance, however, of a part does not preclude the buyer from requiring that the balance, when tendered by the buyer, shall be of the quality required by the contract; and if such balance, when tendered, is not of the quality required, he may reject the same without incurring any liability as for a breach of contract on his part. In an

executory contract for the sale of goods, the purchaser may, if the contract be severable in respect to the delivery, accept and use any portions as delivered without waiving any right which may arise from a deficiency in the amount ultimately delivered. It is otherwise when the contract is entire and all the goods are to be delivered at one time. Where a contract for the sale of several articles is entire and all are sent to the buyer, he has no right to accept part and reject the others, and his acceptance of part will be binding upon him as an acceptance of all; but where the contract for the sale of a number of articles is several as to each article, the buyer may accept and retain those which conform to the requirements of the contract and reject those which do not."

Of course, if Woods bought a specific lot of cotton, and there was no fraud or misrepresentation concerning its grade or quality, then appellants were obligated to take that cotton in partial fulfillment of the contract. But the duty to accept specific bales of cotton did not compel appellants to accept other cotton which did not grade as high as Portland or bayou cotton.

The record presents these questions of fact which should have been submitted to the jury, and for the failure so to do the judgment is reversed and the cause remanded for a new trial.

LEWIS v. OWEN.

Opinion delivered December 13, 1920.

MANDAMUS — DETERMINATION OF LAND COMMISSIONER.—Under Acts 1917, p. 1468, authorizing the Commissioner of State Lands to dispose of islands in the navigable streams of the State, and providing that his determination of facts should be final, in the absence of fraud or collusion, *held* that the commissioner's decision that the land which petitioner sought to buy was not an island can not be corrected or controlled by mandamus.

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

T. J. Wear and *James B. McDonough,* for appellants.

1. The complaint states a cause of action entitling plaintiff to mandamus. Acts 1917, p. 1468.

2. The duty of the commissioner is ministerial, purely. If he had any *discretion,* he could not *arbitrarily* refuse to issue the deed. 62 S. E. 695; 22 L. R. A. (N. S.) 735; 57 S. E. 1099; 80 S. W. 1158; L. R. A. 1916, p. 1148. The land was an island and belonged to the State. 73 Ark. 199; 53 *Id.* 314; 61 Mo. 345; 117 *Id.* 33; 137 *Id.* 271; 100 Ark. 28; 17 A. & E. Enc. Law 530; 67 Pac. 564; 84 N. W. 950. The act of 1917 was upheld in 219 S. W. 11. The of 1917 was not repealed by any subsequent act. There is no express repeal and no conflict. 28 Ark. 317; 29 *Id.* 225; 92 *Id.* 600; 101 *Id.* 238; 112 *Id.* 437; 123 *Id.* 184; 131 Ark. 227, 481; 76 *Id.* 443; 92 *Id.* 660; 132 *Id.* 450.

3. Mandamus was the remedy. 80 S. W. 1158; 39 A. & E. Ann. Cases 1148; 18 R. C. L., § 39, p. 126. See, also, 18 R. C. L., p. 293, § 226, § 228, p. 294. The court erred in sustaining the demurrer.

John D. Arbuckle, Attorney General, and *Pryor & Miles,* for appellee.

1. The finding of the commissioner is conclusive. Acts 1917, vol. 2, p. 1468. No fraud or collusion is shown and mandamus will not lie. 14 Ark. 687. 20 Ark. 337 is not similar. If an island, it would belong to the State, but the final determination of this question is for the Land Commissioner; but the matter is for his discretion and can not be controlled by mandamus. 26 Ark. 482; 76 N. W. 482; 25 Cyc. 155; 94 Ark. 423.

2. Act 344, Acts 1919, repealed act 282, Acts 1917. 82 Ark. 302; 88 *Id.* 324; 92 *Id.* 79; 107 *Id.* 381.

SMITH, J. This proceeding was brought by appellants under act 282 of the Acts of 1917, vol. 2, p. 1468. The prayer of the complaint was that a writ of mandamus issue, directing the Commissioner of State Lands

to issue appellants a deed or muniment of title to a certain island containing 131.85 acres, surveyed and platted under the directions of such Commissioner by Fulton Patterson, a land surveyor, and described by his field notes as being in sections 20, 21, 29 and 28, township 9 north, range 32 west, the same being an island in the Arkansas River. The complaint recites numerous demands on the Commissioner for his deed to said island, but that the Commissioner had informed appellants "that he had decided that said land was not an island, and was not subject to sale by the State of Arkansas, and he would, therefore, positively refuse to sell said lands to plaintiffs." A demurrer to this complaint was sustained, and this appeal is from the order dismissing it.

The order of the court below is defended upon two grounds, (1) that the finding of the Commissioner is conclusive, and (2) that the act of 1917 was repealed by act No. 344 of the Acts of 1919 (General Acts 1919, p. 256). We find the first contention well taken, and do not, therefore, consider the second one.

The Legislature constituted the Commissioner of State Lands as the agent of the State in disposing of islands in the navigable streams of the State, and by section 5 of the act of 1917 he was given a discretion in the discharge of his duties. This was done because it was necessarily contemplated that there might be conflicting applications to buy the same island, and that there might be questions of fact for the Commissioner to decide. This section 5 gives the Commissioner the right, and imposes upon him the duty, of establishing rules and regulations by which these conflicts may be determined and questions of fact decided, and provides that "the determination of the said Commissioner, in the absence of fraud or collusion, shall be final."

There is no allegation of fraud or collusion on the part of the Commissioner, but the complaint does allege that the Commissioner "arbitrarily refused to sell plaintiffs said island without any good and lawful excuse

for his said refusal." But the act confers on the Commissioner the authority only to sell islands which have formed, or may form, in the navigable streams of the State, and the complaint contains the recital that the Commissioner has announced his decision to be that the land which appellants desire to buy is not an island.

There is, therefore, no refusal of the Commissioner to act on appellants' application. It has been passed upon, and denied. The Commissioner's decision may have been erroneous, but it can not be corrected or controlled by mandamus. *Garland Power Co.* v. *State Board, etc.,* 94 Ark. 423; *Ouachita Power Co.* v. *Donaghey,* 106 Ark. 48; *Patterson* v. *Collison,* 135 Ark. 108.

Judgment affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* FROST.

Opinion delivered December 13, 1920.

1. VENDOR AND PURCHASER—WAIVER OF FORFEITURE.—The right to a forfeiture of a contract of sale of land for failure of the purchaser to make payments is waived where the seller institutes a suit to foreclose his vendor's lien reserved in the contract.
2. VENDOR AND PURCHASER—EFFECT OF VENDOR TAKING POSSESSION.—Where land was purchased from a railroad company, and the purchaser died before making payment, and his administrator turned the land over to the vendor, and the vendor subsequently brought suit to foreclose a vendor's lien reserved in the contract of sale, the attitude of the railroad company was that of a mortgagee in possession, and as such it was responsible, not only for the rents it received, but the rental value of the land.

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

C. M. Walser, for appellants.

The court erred in overruling the demurrer. The land belonged to the plaintiffs, and it is immaterial what rent they received or what they might have received. Interest was charged at the highest contract rate. Even if appellants were chargeable with rents at all, they

should only account for rents actually received, and the court erred in its calculation of interest on the annual credits for rent and allowed as payments on the notes; the purchaser of the land forfeited all rights under his purchase by cutting standing timber.

The demurrer should have been sustained. 21 Ill. 227; 60 Me. 246; 72 Ia. 317; 82 Cal. 122; Williams on Vendor and Purchaser, 520. The purchaser had possession of the land from the date of the contract and under the time payment plan had the use of same to help make the payments. The purchaser violated the express terms of the contract, resulting in default to pay. Appellants were in no wise responsible for the conditions and the demurrer should have been sustained. Cases *supra.* 21 Ill. 227; 60 Me. 246.

Hays & Ward, for appellees.

1. Appellant is not the owner of the land and should be treated as a mortgagee. 66 Ark. 167; 13 *Id.* 523; 34 Ill. 227; 60 Me. 246, etc.

2. Appellant is chargeable with rents which it could or should have received. Appellees had a homestead right in the lands (84 Ark. 169), and had the right of possession until foreclosure of suit brought. 36 Ark. 29. The finding of the court was correct upon the law. 36 Ark. 17. It should not be disturbed, as it is sustained by a clear preponderance of the evidence. 138 Ark. 403. The calculation as to interest was correct. 49 Ark. 508.

SMITH, J. On March 1, 1909, G. S. C. Frost contracted to buy, from the St. Louis, Iron Mountain & Southern Railway Company, a forty-acre tract of land, for the sum of $280, of which one-fourth was paid in cash and the balance made payable in one, two and three years. Frost died on February 26, 1911, without having completed his payments. The Missouri Pacific Railway Company succeeded to the interests of the St. Louis, Iron Mountain & Southern Railway Company in these

lands, and brought this suit to foreclose the vendor's lien reserved in the contract of sale to Frost.

An administrator of the estate was appointed, and, being without funds to pay the balance due the railway company, he "turned the land over" to the company. Frost had cleared 3.85 acres of the land. The railway company leased the land for the year 1914 for $12.50, and for the years 1915, 1916, 1917, 1918 and 1919 leased it for the annual rental of $10. The total rent collected by the railroad company was $62.50. The tenants who paid the rent and certain other witnesses testified that the rent collected by the railway company was a fair rental for the land. Other witnesses placed the rental at $25 per year, and the court, in stating the account, fixed the rental value at $20 per year. The balance found due was declared a lien on the land and a sale ordered, if found necessary. But within the time limited by the decree the heirs of Frost—who were minors, but had been made defendants—tendered the sum found due to appellant.

It is insisted that the contract between Frost and the railway company made time of the essence of the contract and provided for a forfeiture of the right to purchase upon the failure to make the payments as they matured. But, if this be true, the right to claim the forfeiture was waived by the institution of this suit. The suit was brought to enforce a vendor's lien, and the court granted the relief prayed. It remains, therefore, only to determine whether the court correctly found the balance due.

The testimony is conflicting as to the rental value of the land; and we are unable to say that the court's finding on that subject is clearly against the preponderance of the evidence.

The land in question adjoined another tract of land owned by Frost at the time of his death, and the two tracts constituted his homestead. *Stubbs* v. *Pitts*, 84 Ark. 160. The heirs, therefore, were entitled to the land

and the rents derived from it up to the time of the institution of this suit. The attitude of the railway company was that of a mortgagee in possession, and as such it was responsible, not merely for the rent it received, but for the rental value of the land. *Greer* v. *Turner*, 36 Ark. 17.

The court allowed appellant ten per cent. interest on its debt from its maturity until the date of the decree, and made the same order in regard to the taxes paid by appellant. The court then allowed appellees ten per cent. per annum on the annual rents collected from the date when due. It is true there was no contract to pay interest on these rents, but the interest was calculated at the same rate at which interest on the debt and the taxes was calculated, and the result is the same as if tere had been annual rests in the calculations.

Decree affirmed.

FORT SMITH RIM & BOW COMPANY *v.* QUALLS.

Opinion delivered December 13, 1920.

1. MASTER AND SERVANT—ILLEGAL EMPLOYMENT OF MINOR AS NEGGENCE.—The employment of a minor under 16 in violation of Acts 1915, p. 1505, is negligence *per se;* and if injury results to the minor, the defenses of assumed risk and contributory negligence are not available to the master.
2. APPEAL AND ERROR—CONFLICTING INSTRUCTIONS—HARMLESS ERROR.—In an action for injuries to a minor employed in violation of Acts 1915, p. 1505, the giving of instructions which authorized recovery regardless of assumed risk and contributory negligence was not prejudicial, though the court also instructed the jury that assumed risk and contributory negligence would be good defenses.
3. MASTER AND SERVANT—AGE OF MINOR.—Under the Child Labor Act (Acts 1915, p. 1505), a child is under 16 until he reaches his sixteenth birthday.
4. TRIAL—INSTRUCTION—ASSUMPTION OF CONTROVERTED FACT.—In an action for injury to a minor, where plaintiff's evidence tended to prove that he was directed to do work which it was unlawful for the master to require of him, it was not error to refuse to

instruct that defendant had the right to employ a minor at the work at which plaintiff was employed.

Appeal from Sebastian Circuit Court, Fort Smith District; *John Brizzolara,* Judge; affirmed.

James B. McDonough, for appellant.

1. Under initiative act No. 1, Acts 1915, p. 1505, there was no liability, as the boy was not under sixteen years of age. 1 A. & E. Enc. Law, p. 927. The evidence does not warrant a finding that plaintiff was employed to work at adjusting any belt to any machine. As to meaning of the word "employ," see 90 Pac. 259; 210 Mass. 387. All the authorities on the subject indicate that defendant did not employ the plaintiff to adjust a belt and did not violate the law. If an employee of defendant, without authority, employed plaintiff to adjust a belt, that would not make defendant liable; in other words, if Rickman, who was operating the ripsaw, without authority directed plaintiff to adjust a belt on the machine, that act would not render the defendant liable. It would render Rickman liable, but not defendant. Before an employee of a corporation can impose a liability upon the corporation for the acts of its servants, the latter must act with the authority of the corporation and within the scope of that authority. If an employee of a corporation acts beyond the limit of his authority, such acts do not render the corporation liable. 40 Ark. 298; 93 *Id.* 397; 87 *Id.* 540. If Rickman had some authority to give directions as to the off-bearing by plaintiff, that did not give him authority or justify the inference that Rickman had authority to direct plaintiff contrary to the law and defendant's rules to place a belt on the machine. 65 Ark. 145; 101 *Id.* 586; 79 *Id.* 85; 115 *Id.* 288. The evidence is undisputed that Rickman did not have authority to request plaintiff to do anything with the belt, and there was no violation of the statute. Plaintiff was not "operating or assisting in operating" a circular or band saw. He was only directed to off-bear from the ripsaw. No person representing the corporation had au-

thorized him to do anything with the belt. Rickman alone was employed to operate the saw. "Operate" means to put into or continue in activity. It means to direct and control the activities of a machine. 37 N. E. 858; 75 Mo. 653; 78 Mich. 426; 179 N. Y. 588. Plaintiff was not employed to adjust any belt to a machine, and as matter of law the statute was not violated, and the court should have so advised the jury by instructing a verdict for defendant.

2. It was error to give instruction No. 1 for plaintiff. It declared as matter of law that defendant was guilty of the acts of negligence alleged in the complaint, and it was error to submit to the jury the six acts of negligence set up in the complaint, also a grave error in submitting to the jury the question of whether plaintiff *assisted* in the operation of the circular saw. There was no proof upon which that allegation of negligence could be submitted. There was no evidence to show that Rickman had any power to employ or request or direct plaintiff to assist in the operation of the saw. It was also error to submit to the jury the question of whether defendant was guilty of negligence in permitting plaintiff to assist in the operation of a circular ripsaw "without guard or shield to protect plaintiff." There was not sufficient evidence to submit to the jury the question of *the guard or the shield.* It was not shown that the absence of the guard or shield was the proximate cause of the injury. It was also grave error to submit to the jury an alleged act of negligence "that defendant allowed and permitted said circular ripsaw to be used by the plaintiff." There was no evidence that defendant permitted plaintiff to use the circular saw. It was also error to admit in evidence the belt on the ripsaw. As a matter of fact, it was not on the saw and had nothing to do with the movement of the saw. Instructions should not submit to a jury acts of negligence not supported by the testimony. Citations are unnecessary, as it is well settled. Rickman was the operator of the circular saw, and the

evidence was wholly inadmissible to sustain the allegation as to plaintiff being allowed to *assist* in operating the saw. 87 S. W. 349; 111 N. Y. S. 557.

3. It was error to give plaintiff's request No. 2. It assumes that the acts of negligence were committed by servants and agents of defendants who were acting within the scope of their employment. This was palpable error.

4. It was error to give Nos. 3 and 4 for plaintiff. They take away a just defense of defendant.

5. It was error to give Nos. 6 and 8 and 9 for plaintiff. The negligence complained of was not the proximate cause of the injury. 4 Crawford's Digest, §§ 26 to 31 D on "Negligence."

6. It was also error to give Nos. 10, 11, 12, 13, 14, 15, 17, 20 and 21, for plaintiff.

7. It was error to refuse the peremptory instruction for defendant.

J. F. Omelia, for appellee.

1. The evidence clearly shows a violation of the act of 1915 by allowing a child under sixteen years of age to adjust a belt on a circular ripsaw. Acts 1915, p. 1505.

2 and 3. There was no error in the instructions, and the evidence sustains the verdict. 73 Ark. 595; 90 *Id.* 407; 3 Crawford's Digest, p. 3400. Defendant had a fair trial and the judgment should be affirmed.

SMITH, J. Samuel Qualls, sued by his father as next friend, to recover damages for an injury sustained by him while in the employment of appellant company. The first application made by the father for employment was refused on account of his age. Thereafter the boy secured a permit from the Department of Labor, authorizing appellant to employ the boy. The boy was placed at work at what is known as off-bearing from a circular rip-saw, and according to appellant the boy had no duties except to carry away pieces of timber after

they had come through the saw, and it was denied that the boy had anything whatever to do with the operation of the saw.

The testimony shows that, while engaged in adjusting the belt under the circular rip-saw machine, the boy's right hand came into contact with the moving teeth of the rip-saw, which cut off all four of his fingers and the thumb of the right hand and the palm of that hand.

According to the testimony offered on behalf of the plaintiff, the boy was placed under the control of Rickman, the operator of the saw, and told to do what Rickman directed, and pursuant to Rickman's direction he was engaged in adjusting the belt at the time of his injury.

The injury occurred on July 24, 1919, and the boy was sixteen years old on January 5, 1920. As his sixteenth was his nearest birthday, the contention is made that he was not under sixteen years of age within the meaning of the act of the Legislature under which this suit was brought.

There was a verdict and judgment for the plaintiff, from which is this appeal.

The instructions in the case were numerous and in some respects conflicting. This conflict grows out of the fact that some of the instructions declared the common-law liability of the master to an inexperienced servant, while other instructions were evidently based upon Initiative Act No. 1, declared effective by the proclamation of the Governor dated October 13, 1914, and found in the Acts of 1915 at page 1505. In other words, a recovery was sought under the Initiative Act, yet it was not solely relied upon. The result of this action is that certain instructions submitted the defenses of assumption of risk and contribuory negligence, while other instructions excluded those defenses.

It was error to do this, but no prejudice resulted therefrom. We have, in the opinion handed down this day in the case of *Terry Dairy Co.* v. *Nalley, ante* p. 448, con-

strued the Initiative Act, and under the construction there given it we have held that the employment of a minor in violation of the statute is, itself, negligence *per se,* and if injury results to the minor the defenses of assumption of risk and contributory negligence are not available. If, therefore, the boy's injury occurred while appellant was violating the statute, no prejudice resulted from the fact that some of the instructions submitted the defenses of contributory negligence, and others that of assumption of risk, because those instructions were more favorable to appellant than they should have been. It was not error to make all the instructions more favorable than they should have been because some of them were, and if appellant was not entitled to these defenses there was no error in giving instructions which eliminated them.

It is undisputed that the boy had not attained his sixteenth birthday, and appellant is mistaken in its contention that the act is not applicable because the boy's nearest birthday was his sixteenth. One is under sixteen until he reaches his sixteenth birthday. In the case of *Gibson* v. *People,* 99 Pac. 333, the Supreme Court of Colorado had occasion to define the phrase, "sixteen years of age and under," and held that these words excludes children who have passed beyond their sixteenth birthday, as a child is sixteen years of age on the sixteenth anniversary of his birth, and that thereafter the child is over sixteen years of age, and that one could not be convicted of contributing to the delinquency of a child who had passed his sixteenth birthday under a statute using that phrase. See, also, 1 A. & E. Enc. of Law, 927, and cases there cited.

At the request of appellant the court gave the following instructions:

"3. If the plaintiff was injured solely because of his leaving his regular work, and because of his effort to put a belt on the saw, and if the plaintiff had sufficient knowledge to realize the dangers in doing that work, and if he was not employed to do that work, and if that was the sole cause of his injury, then he can not recover.

"3-A. If the plaintiff, Samuel Qualls, was employed by the defendant to off-bear timbers from the rip-saw, and if he was not employed to assist in the operation of the rip-saw, and had nothing whatever to do with its bands and belts, and the setting of the same, and if he voluntarily and without being so directed to do, by the foreman, or any one over him, attempted to place the belt on the pulley and was injured thereby, then he can not recover on the ground that his injury was due to any violation of the law.

"4. If the plaintiff was not employed to work at the rip-saw, and was not employed to work at the belts by some one having authority to employ him, and if he was not employed in violation of law, then the question arises, if the facts warrant it, as to whether the plaintiff assumed the risk. If he was a boy of ordinary intelligence, and if he understood the dangers incident to the work which he was doing, and if he voluntarily, and without being told to do so, attempted to change a belt and place it on the pulley, and if he understood the nature of the machinery and the work and in attempting to place said belt on the pulley knowing the dangers, and was cut, and if he understood its dangers, then he can not recover."

Under the interpretation of the Initiative Act given by us in the case of *Terry Dairy Co.* v. *Nalley, supra,* appellant could not have asked instructions more favorable. The instructions set out above were all the instructions requested by appellant except instructions numbered 1 and 2. Instruction number 1 directed a verdict in favor of appellant. Instruction numbered 2 substantially declared the law as stated in instructions 3, 3-A and 4, set out above, except that it contains the statement that "under the laws of Arkansas in force at the time the plaintiff was hurt, towit, on July 24, 1919, the defendant had the right to employ a minor under the age of sixteen years of age at the work at which said minor was employed." It would have been proper to

refuse this instruction because of this statement. It assumed, as a fact, one of the disputed questions in the case, that is, that the boy had no duty to perform about the saw, or the belts, while the evidence on that question is sharply conflicting.

The testimony on behalf of the boy shows that he was employed with directions to obey orders received from Rickman, and that he was injured while adjusting the belt pursuant to Rickman's order, and if this be true a case of liability under the statute was made.

No error appearing the judgment is affirmed.

MOSBY-DENNISON COMPANY *v.* MAXWELL.

Opinion delivered December 13, 1920.

EXECUTION—SHERIFF'S DEED—DESCRIPTION.—A sheriff's deed conveying a fractional section except the fractional northeast quarter, containing 106.66 acres, and 49.26 acres off north side of the northwest quarter, claimed as a homestead *held* a definite description.

Appeal from Arkansas Chancery Court, Southern District; *John M. Elliott,* Chancellor; reversed in part.

Lee & Moore, J. D. Mosby and *Moore & Vineyard,* for appellants.

1. The burden was on plaintiffs to show (1) that the lands from which the timber was cut belonged to plaintiffs; (2) that the timber was cut from plaintiff's lands without right, and (3) the value and quantity of the timber cut. Plaintiffs are not entitled to recover unless they show title in themselves or Maxwell as trustee for the bank; the burden was on them and they can not rely on the weakness or want of title in defendants. 117 Ark. 153; 76 *Id.* 428; 104 *Id.* 154; 95 *Id.* 209. Mere color of title is not sufficient. *Ib.* The quantity and value of the timber cut must be proved by plaintiffs. 92 Ark. 298; 101 *Id.* 34. The proof is insufficient as to when the tim-

ber was cut, where it was cut or its value. An examination of the various plats and surveys filed with the proof will show that the description of the lands is not sufficient to locate or identify them. 56 Ark. 161; 60 *Id.* 489; 76 *Id.* 460; 17 Cyc. 1345; 10 R. C. L. 146.

2. If the court should hold the deed did convey the title by proper description to that part of section 36 not excepted from the description to O. P. Maxwell, trustee, it could only follow that the purchaser, Maxwell, took only the lands in section 36. A sheriff's sale of real estate only passes such title as is in the execution-creditor. 7 Ark. 434. One who buys at execution sale is not an innocent purchaser without notice and he takes subject to all the equities existing at the time of the purchase. 31 Ark. 253; 36 *Id.* 369; 42 *Id.* 450. Bare proof that some of the timber was cut by some of appellant's men is not sufficient to charge it with responsibility for all the timber missing from the land. The testimony brings this case within 92 Ark. 297; 75 *Id.* 429.

3. Under the proof the plea of estoppel is well founded, and that J. H. Martin is the real party in interest and not the Bank of Gillette of which he is president; and as J. H. Martin and his cotenants pointed out the lines as set out in defendants' answer and cross-complaint, the plaintiff is estopped.

4. A purchaser at execution sale in his own favor takes the property charged with all rights and equities existing against the defendant in execution. 58 Ark. 252; 71 *Id.* 318; 81 *Id.* 279.

5. The testimony of witnesses show that for many years the south boundary line of section 36 was recognized and treated as the south boundary line of the property owned by White. It appears further that at one time Anderson owned the lands now owned by appellants, while at the same time White owned fractional section 36, and that Anderson cut three trees on section 36 by mistake in the boundary and had to pay White for them, and that White showed him the boundary line

which was just a short distance north of the commissary. It also appears that at another time when Anderson was cutting timber for Jones on White's land he was cautioned not to go south of the south boundary line of section 36 and if he did he would be cutting timber on his own land. Where adjoining owners are in dispute as to a dividing line, their oral agreement establishing the line, followed by possession with reference thereto, is valid and binding upon the parties, and does not operate as a conveyance so as to pass title from one to another. 219 S. W. 348; 96 Ark. 168; 110 *Id.* 197; 102 *Id.* 542. The rule of *caveat emptor* applies to execution sales and a purchaser takes subject to all prior equities of other parties. 128 Ark. 462; 131 *Id.* 492; 136 *Id.* 204; 215 S. W. 611. The sheriff could sell no land not specifically levied on and carried no accretions. 76 Ark. 43. The burden was on appellees to establish the fact that the land in controversy was an accretion to section 36. If not an accretion to 36, under no circumstances can appellees prevail.

Appellees can not recover, because (1) there was no levy of execution nor sale or conveyance by the sheriff to O. P. Maxwell, trustee, of the land in controversy; (2) sheriff's deed is void for want of proper description. (3) Appellees are estopped from the fact that Anthony White, the execution-debtor, claimed only to north line of the tract in controversy or the south boundary of section 36 and the purchaser at sheriff's sale could take no more than White owned or claimed. (4) There is a total want of testimony as to the value and quantity of timber cut or the location of the land from which it was cut, and the court had nothing before it upon which to base its findings as to the value of timber cut. (5) The proof does not show the quantity of timber cut from the lands admittedly owned by appellants. (6) The burden of proof was on appellees to show that the Bank of Gillette was the real party in interest, and they have failed. (7) Under the proof the lands are accretions to sections 26 and 27. (8) There was an agreed boundary line between

Anthony White, the owner of section 36, and the owner of sections 26 and 27, under which the accretions were not claimed by White. (9) The burden was at all times on appellees to establish the facts necessary to recover, none of which were established by them.

T. J. Moher and *John L. Ingram,* for appellees.

1. The burden of proof was not on appellees, but, if so, the deeds and actual possession vested a good title in them to section 36 and the accretions thereto.

2. The description is sufficiently definite. The sheriff's deed sufficiently describes the lands. The accretion was part of the section conveyed. There was no contention that there was a mistake in the deed.

3. The proof shows that Maxwell was trustee for the bank and not for Martin.

4. Neither Martin and Collier nor Champion pointed out the lands as appellants contend. The burden was on appellants to show that Maxwell was trustee for Martain, instead of the bank, and it is immaterial what Collier and his associates said or did about the lines at the time of the sale of sections 26 and 27.

5. The evidence shows that the timber was cut on the land in controversy. The answer does not deny that appellants cut 200,000 feet of timber from the lands and the evidence shows it.

6. The value of the timber cut was proved by the testimony clearly.

7. The land was an accretion to section 36, to which appellees had title. 29 Cyc. 348; 53 Ark. 314. The court so found, and the law and the testimony sustain the finding.

HUMPHREYS, J. This is an appeal from a decree of the Arkansas Chancery Court quieting and confirming the title in appellees to the following described land in Arkansas County, State of Arkansas, towit: Frl. section 36, township 7 south, range 4 west (except frl. northeast quarter of said section and except 49.26 acres off the north side of said frl. northwest quarter of said

section), and said accretion thereto, towit: All of said land bounded on the west and south by the Arkansas River and on the east by Old River and on the north by said section 36; and the rendition of a judgment in favor of appellees against appellants in the total sum of $1,214 for timber alleged to have been cut and removed by appellants from said lands without the permission of appellees. The issues to be determined on this appeal, as presented by the pleadings as finally made up and the evidence adduced, are as follows:

First. Whether or not appellees owned any part of fractional section 36, township 7 south, range 4 west.

Second. Whether the land immediately south of said section and bounded on the west and south by the Arkansas River and on the east by Old River was an accretion to said section 36 or an accretion to sections 26 and 27 in township 7 south, range 4 west, in said county and State.

Third. Whether appellants cut 200,000 feet of timber on the accreted lands aforesaid, and the value thereof.

(1) Appellees' chain of title to fractional section 36 aforesaid consisted in a sheriff's deed from T. F. Hudson, sheriff of Arkansas County, to O. P. Maxwell, trustee, executed in January, 1911, pursuant to an execution sale under a judgment in favor of J. H. Martin against Anthony White, and mesne conveyances back to and including a patent from the United States Government. The immediate grantors of Anthony White were W. A. Gage and wife, who conveyed all of said section 36 to him on January 25, 1901. The description contained in the conveyance aforesaid from the sheriff to Maxwell, as trustee, describes the land as "All Frl. Sec. 36, Twp. 7 S., R. 4 W., 448 acres, except Frl. NE¼ Sec. 36, Twp. 7 S., R. 4 W. 106.66 acres; and off north side Frl. NW¼ Sec. 36, Twp. 7 S., R. 4 W., 49.26 acres claimed as homestead by defendant, Anthony White." Appellants contend that appellees obtained no title to any

part of said section 36 under this deed, because the description is insufficient to identify any particular land. It is said the shape and location of the exceptions in the description are not designated, and, for that reason, the whole description is so indefinite and uncertain that a surveyor could not take the sheriff's deed and locate the land. The sheriff's deed includes all of said fractional section 36 with two exceptions. The first exception is the fractional northeast quarter of said section, containing 106.66 acres, which is definite, for it necessarily means that all of the northeast quarter of the section is excepted. The second exception is 49.26 acres off of the north side of the fractional northwest quarter of said section. According to the government survey, fractional section 36 is bounded on the north by a straight line which divides it from fractional section 25. The line dividing the northeast and the northwest fractional quarters of said fractional section 36 is also a straight line running north and south. A part of the north and all the west side of said northwest fractional quarter is bounded by the Arkansas River, the contour thereof being circular. This court has held that a certain number of acres off of either side of a tract of land not fractional is a definite description because such description necessarily means a tract of land in the form of a parallelogram laid off on the side designated so as to contain the specified number of acres. *Watson* v. *Crutcher,* 56 Ark. 44. By the same process of reasoning, the second exception in the sheriff's deed may be definitely located by dropping south a sufficient distance so that, by running a line parallel to the straight line on the north, the boundaries would contain the acreage designated. The exceptions being definite and valid, the title to the balance of said section 36 passed by the deed to appellees. Appellants also assail the title on the ground that Anthony White, the execution-debtor, only claimed to the south boundary of the original land and laid no claim to the accretions on the south, comprising the land

in dispute. This issue of fact was in sharp conflict and decided adversely to appellants by the chancery court. After a careful analysis of the evidence responsive to this particular issue, we are unable to say the finding of the chancery court was contrary to a clear preponderance of the evidence. Appellants also assail the title of appellee O. P. Maxwell, as trustee for the Bank of Gillett, on the ground that in point of fact O. P. Maxwell acted as trustee in the purchase at the execution sale for J. H. Martin and not the Bank of Gillett, and that J. H. Martin, and not the bank, owns the beneficial interest in the land. Three witnesses testified on this point. It will only be attempted to set out the substance of their testimony. J. H. Martin said that he and the bank each had a judgment against Anthony White; that his lien was prior to the lien of the bank; that the bank, through its trustee, O. P. Maxwell, purchased at his execution sale in order to protect itself; that he has no beneficial interest in the land except as a stockholder in the bank; that the bank is the beneficiary in the sheriff's deed. J. W. Denison, one of the appellants, said that when he went to see O. P. Maxwell about this suit, O. P. Maxwell told him the Bank of Gillett had no interest in the matter; that, in the purchase of the land, he was acting as trustee for J. H. Martin and directed that he go to Martin; that he went to see Martin and could get no satisfaction out of him. J. M. Thompson, who succeeded O. P. Maxwell as cashier of the Bank of Gillett, was introduced by appellants and said that the records of the bank since 1908 were in existence and would likely show the transaction in relation to the purchase of the land, but he had made no investigation of them because he dreaded the undertaking, although informed by J. H. Martin several days before that appellants would probably want to know what the records of the bank would show. He said on cross-examination that the bank had paid the taxes on the land.

It can not be said that the unsworn statement of Maxwell and the omission of his successor in office to examine the record are of greater weight than the sworn statement of J. H. Martin, coupled with the payment of taxes by the bank. This brings us to a consideration of the second question presented on this appeal, which is whether the land in dispute is an accretion to section 36 or to sections 26 and 27. The major part of the evidence adduced on the trial had relation to this issue. To incorporate even the substance of the testimony of each witness on the point in this opinion would extend it to an unusual length, for the record is very voluminous. On behalf of appellees, the evidence tends to show that the land in dispute is an accretion to section 36. On behalf of appellants, it tends to show that it is an accretion to sections 26 and 27. After a very careful reading and consideration of the evidence, we are convinced that upon this point it preponderates in favor of the finding of the trial court to the effect that the land is an accretion to section 36. We are to some extent influenced in reaching this conclusion by the following physical facts, fairly well established by the witnesses, and various plats representative of said sections and the accretions in question: Fractional section 36, generally known as Thetford's Island, and the accretions in dispute south of the original land comprising the island are bounded on the west and south by the new channel of the Arkansas River and on the east by the old channel of the Arkansas River, in which is what is known as the "blue hole" which is quite a large hole of water. During certain portions of the year, considerable water flows through the old channel of the river. Sections 26 and 27 lie to the east of the old channel of the river and the accretions in question are separated from said sections by a part of the blue hole of water and the old channel of the river. The largest timber which was removed was found on the north side of the accretions, or just south of the original land comprising Thetford's Island,

or said section 36. On farther south the timber grew smaller, and the southern boundary of the accretions tapered off in a sandbar. As above stated, these physical facts indicate to our minds that the accretions in question were an imperceptible increase of fractional section 36 through the operation of natural causes, and tended to strongly corroborate the evidence of the witnesses testifying on behalf of appellees that the land in dispute was an accretion to said section.

(3) The last question presented for determination is whether appellants cut as much as 200,000 feet of timber off of the accreted lands in dispute, and, if so, the value thereof. The only witnesses introduced whose testimony tended to establish the quantity of timber cut, the place cut and its value, were C. C. McAllister and H. W. Mosby. C. C. McAllister was the party who cut the timber. He testified, in substance, that he cut something like 238,000 or 239,000 feet of cottonwood timber near the north line of the accretion in question and from the north line on down and from the blue hole to the Arkansas River, and that the timber, including the haul, was sold for $7 a thousand; that he delivered this timber to appellants. H. W. Mosby testified that they cut 250,000 feet on the entire land, but it was not all cut on the accreted land in dispute. He was unable to say just what part was cut on the lands in question, and did not testify concerning the value of the timber cut. We think it quite evident from this evidence that at least 200,000 feet of timber was cut on the accreted lands in question, but are of opinion that the evidence is insufficient to establish its stumpage value. The insistence of appellees that the allegation of $4 per thousand in the complaint was not sufficiently denied in the answer of appellants is not sound. We think the language of the answer effectually put this question in issue.

The decree confirming the title to the accreted lands in question in appellees is affirmed, but the judgment rendered against appellants for the value of the timber

is reversed and remanded for a new trial with direction to hear additional proof as to the value of the timber.

HAWKEYE TIRE & RUBBER COMPANY v. MCFARLIN.

Opinion delivered December 13, 1920.

1. JUDGMENT—POWER OF COURTS TO VACATE.—Courts of general jurisdiction have inherent power, during the term at which judgments or orders are rendered, to set aside, vacate and annul them.
2. APPEAL AND ERROR—ORDER VACATING JUDGMENT NOT APPEALABLE.—An order vacating a default judgment at the term during which it was rendered is not a final or appealable order, nor does Kirby's Digest, § 1188, relating to appeals from orders granting new trials, apply to such an order.
3. STIPULATIONS—AGREEMENT TO ABIDE BY DECISION.—Kirby's Digest, § 1188, providing that appeals from orders granting new trials shall not be effectual unless appellants consent that judgment absolute may be rendered against them if the orders are affirmed, is not applicable to orders vacating default judgments, and such stipulations are not binding.

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

Carmichael & Brooks, for appellant.

1. The court had the right to set aside the default judgment, regularly and properly entered, without any showing whatever. 102 Ark. 255; 90 Ark. 86-7; 123 *Id.* 446.

2. The court has the inherent power and discretion to set aside a judgment on its own motion. Kirby's Digest, § 1188.

3. An order setting aside a default judgment is a final judgment from which an appeal lies. 104 Ark. 45; 105 *Id.* 324; 27 Ark. 296; 107 *Id.* 422; 122 *Id.* 262; 131 *Id.* 90.

4. If the court has inherent power to set aside judgments by default they would be of no value whatever. Here no meritorious defense was shown. When appellant files a stipulation under § 1188, Kirby's Digest, the

judgment setting aside the default judgment is final and here there was no showing made that justified the court in setting aside the default judgment.

Hendricks & Snodgress, for appellee.

An order from the circuit court setting aside a default judgment during the term is not appealable, even though appellant complies with Kirby's Digest, § 1188. 105 Ark. 324. The court has plenary power in setting aside judgments during the term. 23 Cyc. 901; 15 R. C. L. 690; 27 Ark. 296; 6 *Id.* 100; 107 *Id.* 421; 129 *Id.* 304; 105 *Id.* 326. The appeal should be dismissed.

HUMPHREYS, J. This is an appeal from a judgment rendered on the 8th day of May, 1920, in the Second Division of the Pulaski Circuit Court, setting aside a default judgment rendered on April 7, 1920, which was a regular day of the same term of court, wherein appellant was plaintiff and appellee was defendant. The suit was commenced by appellant against appellee in the Second Division of the Municipal Court of Little Rock by filing an itemized account in the total sum of $142.57 for automobile tires ordered by, and shipped to, appellee. Appellee made a defense in the municipal court and the cause was adjudged in his favor, from which judgment appellant duly prosecuted an appeal to the circuit court of Pulaski County. It is recited in the transcript of the proceedings in the municipal court, at the time of certification thereof, an unfiled paper was found among the papers in the case, stating, in effect, that appellant failed to fill the order for the tires as given, and, in the absence of appellee, delivered a bunch of worthless tires to his place of business; that the tires appellant delivered were absolutely worthless. This paper carried the style of the case and was signed by attorneys for appellee. The cause was set down for hearing, and, upon the regular call on the calendar, a default judgment was rendered on April 7, 1920, for $142.57 in favor of appellant against appellee. Thereafter, on

April 17, 1920, appellee filed a motion to set aside the default judgment and have the case reinstated for trial, stating that he had a legal and just defense to the claim which he believed would be sustained on a proper hearing and that his excuse for not appearing on the day the case was set was that he had no notice of it himself and was relying on his attorney who had represented him in the municipal court, but who was absent from the city on the day default judgment was rendered. On a subsequent day of the same term of court, the motion was sustained and the case reinstated.

The first and determining question presented by this appeal is whether a judgment of a court of record, setting aside a default judgment rendered at the same term, is a final order or judgment from which an appeal may be taken. Preliminary to a determination of this question, it may be said that this court is committed to the doctrine that courts of general jurisdiction have inherent power, during the term at which judgments or orders are rendered, to set aside, vacate and annul them. *Wells Fargo & Co.* v. *Baker Lbr. Co.,* 107 Ark. 415; *Midyett* v. *Kerby,* 129 Ark. 301. A motion to set aside a default judgment at the judgment term is not an independent action, and, when set aside, does not determine the rights of the parties. It leaves the case in the condition it was before the default judgment was rendered, with an opportunity to try the case upon its merits. This rule would not obtain had the court refused to set the judgment aside because such an order would have precluded the rights of the judgment-debtor to try the case upon its merits. In that event the judgment would have been final, and the judgment-debtor could have appealed from it. Neither would the rule obtain, had the court adjourned before a motion was filed to set the default judgment aside, for, in that event, the setting aside of the judgment would have been a determination of the vested right of the judgment-creditor in the judgment, and, in that sense, final and appealable. This court said,

in the case of *Ayres* v. *Anderson-Tully Co.*, 89 Ark. 160, on page 162, that "It is only from final judgments and decrees which conclude the rights of the parties with respect to the subject-matter of the controversy that appeals may be taken to this court." Appellant contends, however, that it became an appealable order under the provisions of the second subdivision of section 1188 of Kirby's Digest, with which it complied. The portion of the section referred to is as follows: "But no appeal to the Supreme Court from an order granting a new trial, in a case made or bill of exceptions, shall be effectual for any purpose, unless the notice of appeal contains an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant." This portion of subdivision 2 of section 1188 aforesaid has no application to vacating default judgments. It relates to new trials in cases made, which necessarily refers to trials on the merits. In passing, it may be said that appellant's agreement to abide by the judgment of the Supreme Court does not bind it because the statute authorizing such agreement has no application to default judgments.

The appeal in this case is premature and is therefore dismissed.

DRAINAGE DISTRICT No. 5 OF LONOKE COUNTY *v.* KOCHTITZKY.

Opinion delivered December 20, 1920.

1. DRAINS—JURISDICTION OF EQUITY TO RESTRAIN EXPENDITURE OF FUNDS.—A complaint against a drainage district by a contractor alleging that the limited funds of the district were deposited in a bank, that the plaintiff had a lien on them, and that the commissioners of the district were about to expend the funds in payment of other obligations of the district, with prayer that the commissioners be restrained from paying out such funds, and that a lien be declared in plaintiff's favor for the amount of his debt, *held* to state a cause of action in equity.

2. DRAINS — COMPENSATION OF CONTRACTOR — CHANGE OF PLANS.— Where a contract for construction of certain drainage ditches was plain and unambiguous, and no authority was given to change the plans as to the width of a lateral ditch, because such a change could not be accommodated to the capacity of the machine which the contractor had provided, the district had no authority to make such a change; and where it undertook to do so, and the contractor constructed the ditch according to the original plans, he was entitled to compensation accordingly.

3. DRAINS — EFFECT OF CONTRACTOR CONSENTING TO CHANGE.—The fact that a ditch contractor consented to certain other changes in the original ditch plans will not preclude him from recovering compensation for opening up a ditch to the width originally stipulated, though the commissioners undertook to reduce the width of a lateral ditch from twenty to sixteen feet, with which he could not comply on account of the width of his dredge boat.

4. DRAINS—AUTHORITY OF ENGINEER TO CHANGE SPECIFICATIONS.— Where a contract for the digging of a ditch stipulated that the engineer should be the sole arbitrator to determine the meaning of the contract and the sufficiency of its performance, the engineer was not authorized to change the contract by interpretatations or otherwise.

5. COMPROMISE AND SETTLEMENT—EFFECT OF ACCEPTING CHECK.— Where a ditch contractor accepted a check for the amount admitted to be due him, with the express understanding that its acceptance should not bar his right to assert a claim for further compensation, such settlement was not final so as to debar him from asserting claim for an additional amount due him.

Appeal from Lonoke Chancery Court; *J. E. Martineau,* Chancellor; affirmed.

Chas. A. Walls, for appellant.

1. It was error to overrule the motion to transfer the cause to the law court, as the chancery court was without jurisdiction. The cause of action did not involve a long or complicated account, but a simple question of fact easily settled in a court of law by a few simple instructions. No fraud was alleged in obtaining a final settlement nor mistake. Plaintiff had a complete and adequate remedy at law and the question of fact should have been properly submitted to a jury. It is not true that there was no other way than a chancery action to reach the funds. No allegation was made that the dis-

trict was insolvent, or that it had insufficient funds, or that its uncollected assessment of benefits had been pledged or exhausted, and a court of law could have reached the funds on hand to the credit of the district in due time in the same manner as the chancery court. The court should have sustained the motion to transfer the case to the law court in order that the question of facts should be tried by a jury.

2. The acceptance of the checks by the appellee was a full settlement between the district and appellee, and he is estopped from claiming a larger sum under the terms of the contract. These checks and the written statements attached to the final estimate of the engineer bear the marks of finality and were intended as a final and complete settlement between the parties. In addition, a release in writing was given by the board of commissioners wherein it was recited that the contract had been wholly performed by appellee and he and his sureties were released from all liabilities and the bond given fully discharged. Accepting the checks, executing the receipts in full payment of final estimate and obtaining the release, show conclusively that the contract was treated as finally terminated. The checks and receipts and releases were all introduced by appellant and relied on by them and there was no attempt by appellee to prove fraud or mistake, and they were conclusive evidence of what their purport was on their face, a final settlement. 93 Ark. 389; 83 *Id.* 368; 96 *Id.* 408. The *release* was final and conclusive except for fraud or mistake. 21 Ark. 357.

3. No fraud or mistake is alleged to have been made in the settlement by appellee, and the receipts and vouchers are *prima facie* correct, and parol testimony was incompetent to vary or contradict them. 79 Ark. 256; 93 *Id.* 388; 88 *Id.* 371. The receipts and releases show a complete and final settlement.

4. Appellee waived any right he might have had to recover for excessive yardage by agreeing to the changes submitted by the engineer and by performing his contract

in accordance with the changes made, and the right to change the form of the ditch by the engineer is expressly reserved in the contract by section 8. The court erred in its finding as to the material facts of the case, as the engineer was the final arbiter as to all disputes and misunderstandings. Section 22 of the contract. 27 Ark. 271 is not in point.

5. The undisputed proof shows that the changes made in the ditch were for the benefit of the contractor.

6. There is no evidence to sustain the finding that any extra machinery was put on or that appellee was forced to change the design of his boat to construct lateral C, and the theory upon which the court allowed plaintiff to recover was erroneous.

7. If the contractor should have been allowed anything for extra excavation, then the district should have credit for lowering the grade line of the lateral for which the contractor was paid $840.

Trimble & Trimble, for appellee.

1. It was not error to overrule the motion to transfer to law. Plaintiff alleges, and it is not denied, that the district had no other funds than those on deposit in the bank and plaintiff had no adequate remedy at law. 143 Ark. 446.

2. Appellee accepted the check in full payment of the amount due him; the final estimates were paid, and he drew down the 20 per cent. retained percentage on the contract, and obtained a release and discharge of his official bondsmen, treating the contract as terminated, and he is bound by his actions. Appellant is estopped from pleading the check paid as a final settlement. 188 S. W. 573.

3. Under the evidence it was not incumbent on appellee to plead fraud or estoppel. 54 Ark. 289; 62 *Id.* 262; 76 *Id.* 551; 75 *Id.* 181; 62 *Id.* 431. He who seeks equity must do equity.

4. There is nothing to show where appellee reaped any advantage by reason of the release, and there is

nothing to show that appellant made any concession by reason of appellee's protest, and there is no claim on the part of appellant that it did not owe at least the full amount that was paid appellee at the time of the execution of the check, the disputed items being left to be determined by the court.

5. Appellant accepted and agreed to the changes in the contract. The check, receipt and release were a final settlement, and the decree is correct.

McCULLOCH, C. J. Appellant is, as its name implies, a drainage district organized under general statutes for the purpose of constructing certain drains or ditches in Lonoke County, and a contract was duly entered into with appellee to construct the improvement. It consisted of an extensive system of drains in a large area in Lonoke County. After the completion of the improvement appellee instituted this action to recover a sum of money alleged to be due and unpaid on a part of the construction work.

The contract to do the work was let to appellee on the yardage price, that is to say, at a price per cubic yard for the dirt removed in constructing the ditches, which varied in size from sixteen to forty feet at the bottom. There was a main ditch and a number of laterals designated on the plans and specifications by letters of the alphabet. The present controversy relates to a change in lateral B, which, according to the original plans and specifications, was to be twenty feet in width at the bottom. During the progress of the work the engineer of the district changed the plans so as to provide for a ditch of only sixteen feet in width along lateral B. Authority to make this change is claimed on behalf of appellant under a clause in the contract which reads as follows:

"The right is reserved by the board to change the form of the ditch, if the engineer shall so decide, to accommodate any machine which it is desired to be used on

the job, provided no change is made which would lessen the efficiency of the ditches."

The contention of appellee, which forms the basis of this suit, is that his machinery in operation at the time this change was made was adapted to the construction of ditches not less than twenty feet in width at the bottom, and that there was no authority on the part of the engineer or the board of commissioners of the district to make the change under the clause of the contract quoted above. Appellee alleged in his complaint, and introduced proof which tended to show, that at the time this change was made by the engineer the construction of the ditch along lateral B was then in process, and that it was expensive to change his equipment so as to provide dredging machinery which would operate in a 16-foot channel, and that he was therefore compelled, notwithstanding the attempted change in the contract, to continue with the construction of a 20-foot ditch according to the minimum capacity of his machine. The excess yardage of dirt taken from the 20-foot ditch over and above the 16-foot ditch was approximately 13,000 cubic feet, and appellee sues for the price on this amount for which he has received no compensation. Suit was instituted in the chancery court, and was tried in that court and resulted in a decree in appellee's favor awarding him compensation at the contract price for the removal of 11,500 cubic feet of dirt, amounting to the sum of $1,115.50.

Appellee moved to transfer the cause to the circuit court, but this was overruled, and it is contended now that the chancellor was without jurisdiction and should have transferred the cause to the circuit court. The complaint contains appropriate allegations to the effect that the limited amount of funds of the district was deposited in a certain bank, that appellee has a lien on said funds and that the commissioners were about to expend the sum in payment of other obligations of the district and the prayer of the complaint was that the board of com-

missioners be restrained from paying out said funds and that a lien be declared in appellee's favor for the amount of his debt. Under a recent decision of the court upon similar state of facts, this was sufficient to give the chancery court jurisdiction. *Bayou Meto Drainage Dist.* v. *Chapline,* 143 Ark. 446.

It is also contended that the court erred in its finding as to the material facts of the case. The chancellor heard the cause on the testimony of the appellee and of the engineer of the district, who both testified with the plans and specifications and a map of the district before them. There are slight conflicts in the testimony of the two witnesses, but many of the material facts are undisputed. The contract contemplated that the construction work should be done by dredge boats and the contract called for two of these boats to be furnished by appellee. The ditches were, as before stated, of various widths, and the testimony showed that appellee provided two boats, one for use in constructing the extra width ditches and the other in constructing the narrower ditches. The minimum capacity of the smaller boat of the two was, as before stated, a 20-foot ditch and some of the lateral ditches were to be constructed only sixteen feet wide, but appellee testified that he proceeded to construct the ditches twenty feet wide according to the minimum capacity of his dredge boat, and only claimed compensation for the amount named in the contract.

There were certain changes made in the contract with appellee's consent, or rather without any objection on his part, but his testimony is sufficient to establish the fact that he made objections to the change in regard to lateral B. The contract is plain and unambiguous with respect to the power to change the contract, and under the facts, as established by the testimony of appellee, there was no authority to change the plans as to the width of lateral B, for the reason that such a change could not be accommodated to the capacity of the machine which appellant had provided to do the work. The

court was correct, therefore, in finding that the facts with respect to the size of the boat were such that appellant had no authority under the contract to change the plans and that appellee was entitled to compensation for the construction of the ditch according to the original plans. Appellee had no other means of complying with the contract according to the proof adduced, except by using the boat which had been provided for that purpose, and it would have cost more to furnish the additional equipment than the price of the excess yardage would amount to. Appellee was required by the exigencies of the situation to continue the performance of the contract, and, since he was thus compelled by those circumstances to make the ditch of the width specified in the original contract, he is entitled to compensation on that basis, notwithstanding the fact that the engineer changed the plans from a 20-foot ditch to a 16-foot ditch.

It is argued that appellee is not entitled to this compensation for the reason that certain changes in the construction of the ditches were made for the benefit of appellee, and that he is more than compensated for the excess yardage in the construction of lateral B by an increase of the amount of excavation caused by changes in other parts of the improvement. The testimony does not show that the various changes were made at the same time or were dependent upon each other. Those that appellee consented to, or rather acquiesced in, were made independently of the change in the width of the ditch along lateral B, and the fact that appellee consented to the other changes does not afford grounds for denying him the compensation which he is entitled to under the original contract. In other words, each of the changes in the contract must stand alone, and, since appellee did not consent to the change of the plans in regard to lateral B and was forced under the circumstances to dig the ditch according to the original plans, he is entitled to that compensation, notwithstanding the fact that the other changes might have rendered it less

burdensome to him. It is not within the province of the court to balance up the benefits and detriments by reason of the various changes which were made in the contract independently of each other. Appellee testified that none of the changes were made at his suggestion or for his benefit, but that he merely acquiesced in certain changes against which he did not care to protest. There is testimony to the effect that the grade line of lateral B was changed so that it increased appellee's compensation which it is contended should reduce to that extent the amount of the price of the extra yardage. There is, however, no substantial dispute as to the amount of excess yardage for which the chancellor allowed compensation, and, that being true, appellee is entitled to this regardless of any other changes in the contract either to his detriment or to his benefit.

The contract contains the following clause with respect to the power of the engineer:

"It is mutually covenanted and agreed by and between the said parties hereto that, to prevent disputes or misunderstandings between them in relation to the stipulations and provisions contained in this agreement, or as to the true intent and meaning thereof, and of the plans and specifications hereunto attached, and of the other plans pertaining thereto, or as to the performance of said contract by either of said parties and for the speedy settlement of such disputes as may occur, the engineer personally, who may be such at the time shall be, and he is hereby made, constituted and appointed sole arbitrator to finally decide all such questions and matters."

It is contended that this clause of the contract gave the engineer the authority to interpret the contract and to decide all questions thereunder which would be conclusive upon the parties, and that the decision of the engineer has been against appellee's contention in regard to his price for the excess yardage. The contract is plain and unambiguous concerning the power to change

the plans, and, as before stated, the testimony clearly establishes the fact that the change with respect to lateral B did not conform to the capacity of the equipment then in operation. The engineer had the authority to settle disputed questions of fact arising under the contract or to interpret ambiguities in the contract which were dependent upon issues of fact, but he was not clothed with authority to change the contract except in the particulars mentioned, and therefore could not change it by interpretations. The rights of the parties were fixed by the contract, and not by the decisions of the engineer. *Williams* v. *Carden's Bottom Levee Dist.*, 100 Ark. 166. There is a distinction between the power of the engineer with respect to interpretation of the plans and specifications and as to the contract itself. The former is supposed to be the work of the engineer, and it is proper in case of dispute to refer such interpretation to him, but, as before stated, the rights of the parties are fixed by the contract itself, and it is a question for the courts, and not for the engineer, to determine what those rights are, except to the extent that the parties may leave to the engineer the settlement of questions of fact relating to the quantity, quality or manner of the construction of the work to be done under the contract.

Lastly, it is insisted that there was a final settlement between the parties, which was accepted by appellee, and is binding on him. The testimony discloses the fact that when the parties came together for the final settlement the compensation for excess yardage in the construction of lateral B was denied by the board of commissioners, and a check was drawn for the amount of the balance due to appellee exclusive of the price of this yardage, and that he received the check into his possession and kept it about a half an hour, but returned to the meeting of the commissioners, and an agreement was made that the acceptance and collection of the check should not bar his right to assert claim for the price of the excess yardage. This agreement between the par-

ties prevented the final settlement from becoming binding on appellee, so as to bar him from asserting a claim for the additional amount.

The decree is correct, and the same is affirmed.

LEE v. STRAUGHAN.

Opinion delivered December 20, 1920.

1. TENANCY IN COMMON—LEASE BY ONE COTENANT.—A coparcener or tenant in common is bound by an oil and gas lease executed by him so far as it covers lands subsequently allotted to him in partition, though the other heirs are not bound by such lease as to lands allotted to them, not having authorized same.
2. DOWER—VALIDITY OF LEASE OF DOWER AND HOMESTEAD LAND BY WIDOW.—An oil and gas lease of homestead and dower lands executed by the widow is invalid as against the heirs at law who are owners of the remainder after expiration of her life estate.
3. TENANCY IN COMMON—POWERS OF LESSEE OF COTENANT.—A lessee of a tenant in common can not exhaust the supply of minerals in the undivided lands to the detriment of the rights of the other tenants.

Appeal from Ouachita Chancery Court; *J. M. Barker,* Chancellor; reversed in part.

Thos. W. Hardy and *Rose, Hemingway, Cantrell & Loughborough,* for appellants.

1. Under the law, Lawrence Lee's estate, including mineral rights, descended to his heirs at law as tenants in common, subject only to the widow's unassigned dower and homestead rights. His estate included all oil, gas and mineral rights, and the heirs had full right to partition the lands including such mineral rights. Had Lawrence Lee during his lifetime conveyed the mineral rights in the land to Straughan then the heirs could not have partitioned the oil and gas rights as against Straughan. 23 S. E. 664; 30 Cyc. 180 (b). But Lawrence Lee made no grant of oil and gas rights during his life and his ownership in these rights became vested in his children upon his death. *Ib.* A partition of the lands among his chil-

dren necessarily included a partition of all individual mineral rights held by them as tenants in common. Thornton on Law of Oil and Gas, par. 277, p. 300; *Ib.*, par. 18, p. 31; 53 Penn. St. 229, 249. On partition by decree of court among the heirs each heir's part becomes subject to liens existing against his moiety preceding partition. 30 Cyc. 156, par. 3. And all other heirs' moieties are freed from such liens. 30 Cyc. 166, par. 2. The court below conceived the idea that a grant of the mineral rights in the entire tract by Mrs. Lee and one of the heirs amounted to the same thing as a grant of such rights by Lawrence Lee, and the decree is based on an erroneous theory.

Straughan was a proper party defendant in partition proceedings, as he held a lease of the mineral rights owned by J. W. Lee. 30 Cyc. 211, par. (f).

2. The decree of partition was a final decree which settled the rights of the parties and became *res adjudicata* as to claims made by Straughan, and he took no appeal as he had a right to do. 52 Ark. 227; 80 *Id.* 516; 109 *Id.* 598; 130 *Id.* 307; 6 Howard 201; 13 Peters 15; 7 Wall. 342; 92 Fed. 780; 230 *Id.* 570.

The decree operated as an estoppel against Straughan and it became binding on him as he took no appeal and the subsequent decree adjudging that his lease extended to all the land was erroneous and void. 20 Ark. 85; 107 *Id.* 46; 94 U. S. 351; 55 Fed. 690; 107 *Id.* 328; 112 *Id.* 44.

3. Mrs. Lee could not convey to Straughan any right to open up new oil and gas wells. 92 Ark. 261. See, also, 93 Ark. 353; 129 *Id.* 245; 76 N. E. 525; 162 Fed. 332; 39 S. W. 444; 36 Atl. 201; 189 S. W. 192; 190 *Id.* 408; 95 N. E. 225; 27 S. E. 411; Tiedeman on Real Property, par. 75; Thornton on Oil and Gas, par. 262-3, 270.

4. J. W. Lee's lease to Straughan should be limited to the tract partitioned to him. The case is fully developed, and there is no controversy as to the facts, and the decree should be reversed and a final decree en-

tered here canceling the pretended lease by Mrs. Lee and clearing the title of the other heirs as to the lease made by J. W. Lee.

McCULLOCH, C. J. Lawrence Lee owned certain lands in Ouachita County containing 500 acres, and he died in the year 1912, leaving his widow and twelve children who are the plaintiffs in this action. On February 15, 1919, Fannie L. Lee, the widow, and J. W. Lee, one of the heirs at law of Lawrence Lee, deceased, executed to the defendant, M. H. Straughan, a lease granting to him for a certain period of time the right to explore the lands for gas and oil and to develop the same as an oil producing territory. The lease covered the whole of the lands, but the other heirs at law of Lawrence Lee did not join in the lease and did not authorize its execution.

This action was instituted by plaintiffs in which the widow and all the heirs at law joined in the prayer for partition and for the setting aside to the widow of her homestead and dower. The lessee, M. H. Straughan, was made defendant in the cause, and the prayer of the complaint against him is that the lease be canceled as a cloud on the title of plaintiffs. Pursuant to the prayer of the complaint, the chancery court decreed a partition of the lands and appointed commissioners to set aside to the widow the homestead and dower and to divide the remainder of the land equally between the heirs at law. The commissioners made partition in accordance with the directions of the court and reported the same to the court, the report being confirmed and a decree allotting the land in severalty in accordance with the report being entered.

In the controversy between the plaintiffs and the defendant concerning the validity of the lease the chancery court decided that the widow and J. W. Lee were not authorized by the heirs at law to enter into this lease and that the contract was not valid as against the other heirs as to their share of the land allotted to them in severalty, but that the lease was valid as to the homestead and

dower of the widow and the land allotted to plaintiff, J. W. Lee. All of the plaintiffs have appealed to this court.

The court was correct, of course, in holding that J. W. Lee was bound by the lease, so far as it covered the lands allotted to him in the partition, and in holding that the other heirs at law were not bound by the lease as to the lands allotted to them respectively. This leaves for determination on this appeal whether or not the lease is valid as to the lands allotted to the widow as homestead and dower. In other words, whether or not the lease contract executed by the widow is valid as to the homestead and dower so as to conclude the heirs at law as owners of the remainder after the expiration of the widow's estate. That question seems to be decided in favor of the rights of the heirs in the case of *Cherokee Construction Co.* v. *Harris,* 92 Ark. 260.

In that case there was involved the right of the widow to open a coal mine on the homestead, and this court announced the rule that, while the widow was entitled, as against the reversioner, to the benefit of the operation of an existing coal mine, even to exhaustion, she had no right to open and work new mines not in operation at the time of the creation of the estate, and that she was guilty of waste by attempting to do so. In disposing of the matter the court said: "The offense of waste consists in the first penetration and opening of the soil. And so it has been held that a mine which was opened at the vesting of the life estate or estate for years may be worked by the tenant, even to exhaustion. * * * But tenants for life or for years are guilty of waste in opening and working new mines and which were unopened at the time of the vesting of the estate. * * * They may use the premises as they may see fit, provided it does not injure the inheritance. They may work old mines already opened when they obtained the estate; but they can not open new mines."

That rule applies to gas and oil as well as to coal. Those substances are classified as minerals. Thornton

on the law Relating to Oil and Gas, p. 31. *Burke* v. *South Pac. Rd. Co.,* 234 U. S. 669; *Isom* v. *Oil Co.,* 147 Cal. 659; *Carroll* v. *Bell,* 237 Ill. 332; *Barker* v. *Campbell-Ratcliff Land Co.* (Okla.), 167 Pac. 468, L. R. A. 1918 A. 487; *Hudson* v. *McGuire,* (Ky.), 223 S. W. 1101.

The lease of the homestead and dower land is invalid as against the heirs at law who are the owners of the remainder after the expiration of the widow's estate.

The case cited above (92 Ark. 260) related to the homestead lands, but there can be no distinction, so far as the rights of the widow are concerned, between homestead and dower; *i. e.,* so far as concerns her right to open new mines or wells for the production of coal, oil or gas. The rule announced in that case applies to all persons whose estate in the land do not exceed that of a life-tenant. The defendant therefore gets nothing from his lease from the widow.

It is only necessary to add, so far as concerns appellant's right under the lease from J. W. Lee, that he can assert no claim as long as the homestead and dower lands remain undivided between the heirs, for a lessee of one of the tenants in common can not exhaust the supply of mineral in the undivided lands to the detriment of the rights of the other tenants. If the time of the lease reaches beyond the expiration of the widow's estate, the question will then arise, and not before, as to the right of the defendant to have a division so as to give him the opportunity to enjoy his rights under the lease from J. W. Lee of the latter's share in the homestead and dower lands.

The decree is therefore affirmed as to the separate lands of J. W. Lee, but the decree is reversed as to the operation of the lease on the dower and homestead lands, and the cause is remanded with directions to enter a decree canceling the lease to that extent.

KELLEY v. STATE.

Opinion delivered December 20, 1920.

1. HOMICIDE—EVIDENCE—DECEASED'S GENERAL REPUTATION.—Where, in a murder case, the defendant had introduced evidence tending to prove, in support of his plea of self-defense, that deceased had been having illicit intercourse with his wife, that he had been warned to stay away from defendant's home, and that at the time of the killing he had ignored the warning and was attempting to invade defendant's home, it was not competent for the State to prove that in the community where deceased resided his general reputation for morality was good.
2. HOMICIDE—INSTRUCTION AS TO INSANITY.—An instruction in a murder case that if "at the moment that defendant fired the fatal shot his reason was so dethroned that he did not know right from wrong, was incapable of controlling his actions, and this mental derangement arose from anger, fury or malice, he is guilty of an unlawful homicide," *held* erroneous.
3. CRIMINAL LAW—MEDICAL EXPERTS.—Medical experts, where duly qualified as such, are competent witnesses on the issue of insanity, and their opinions, expressed in answer to correct hypothetical questions embracing data which the evidence tends to prove, are relevant testimony.
4. CRIMINAL LAW—FORM OF HYPOTHETICAL QUESTIONS.—Hypothetical questions must contain all the undisputed facts essential to the issue.
5. CRIMINAL LAW—HYPOTHETICAL FACTS.—Where there is a dispute about the existence of the facts stated in a hypothetical question, it is the exclusive province of the jury to determine whether such facts do exist.
6. CRIMINAL LAW—OPINION BASED ON HYPOTHETICAL FACTS.—Since an expert's opinion is based upon the assumption of the truth of the hypothetical questions put to him, if the jury finds that any fact stated in the hypothetical question is untrue, the jury must disregard the expert opinion based on such question; but if the jury finds that all the data stated in the hypothetical question are true, they must consider the opinion of the expert in connection with all the other evidence in the case.
7. CRIMINAL LAW—WEIGHT OF EVIDENCE.—The rule that the jury is the sole judge of the credibility of witnesses and of the weight to be given their testimony applies to the opinions of experts.

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

John P. Roberts and Evans & Evans, for appellant.

1. The court erred in refusing a new trial because of improper and prejudicial influences to which the jury was subjected. The jury were permitted to separate during the periods of adjournment of court before and after the case was submitted to them and were never put in charge of a bailiff as required by statute. If the jury were subjected to improper influences while permitted to separate, this, on its face, impeaches the integrity of the verdict. 57 Ark. 1; 44 *Id.* 115; 62 *Id.* 554.

2. The court erred in its instructions in regard to the testimony of experts. 49 Ark. 147, 439; 50 *Id.* 511.

3. The court erred in permitting the State to prove by witnesses that the general reputation of deceased for morality was good. Underhill on Cr. Ev., § 325; 76 Ark. 493; under Cr. Ev., § 234; 75 Ark. 297; Bishop's New Cr. Proc., vol. 3, § 612; 21 Cyc. 908. The general rule in homicide cases is that it is not competent to introduce evidence for the purpose of proving the good character of deceased until his character is assailed. 96 Ky. 212; 28 S. W. 500; 90 Ala. 602; 8 So. Rep. 858; 94 N. C. 987; 1 Tenn. Cases 505; 103 Va. 816; 171 S. W. 149. See, also, 99 S. E. 874; 172 Pac. 189; 190 S. W. 290; 21 Cyc. 908.

4. The court erred in its instruction defining insanity. 50 Ark. 511; 101 *Id.* 586; 54 *Id.* 588; 120 *Id.* 553; 54 *Id.* 588.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. The mere fact that an attempt, either directly or indirectly, was made to influence the verdict of the jury for or against the appellant, would not of itself be a prejudicial influence. 130 Ark. 189. Where it appears that the juror was not influenced, a new trial will not be granted. 102 Ark. 525; 130 *Id.* 189. No prejudice was shown, and it was a matter within the discretion of the court. 102 Ark. 525.

2. The instruction in regard to the testimony of experts correctly states the law, and no specific objection an issue in the case. *Bloomer* v. *State,* 75 Ark. 297. See, 530, 595. Specific objection should have been made and the court's attention specifically called to any defect or ambiguity or error. 96 Ark. 531; 98 *Id.* 227; 97 *Id.* 108. The instruction is not a charge upon the weight of the evidence. 50 Ark. 511.

3. The question as to the character of the deceased was not raised by the State but by appellants in questions asked witnesses by the defense. 3 Enc. of Ev., p. 28. See, also, *Ib.,* p. 14. 13 Kan. 414.

The exceptions were too general. 74 Ark. 355; 48 *Id.* 177; 66 *Id.* 264.

4. The court's instruction as to or definition of insanity is a correct statement of the law.

WOOD, J. The appellant was indicted for the crime of murder in the first degree in the shooting and killing of one Abe Quinalty. He was tried and convicted of murder in the second degree and by judgment of the court sentenced to ten years in the State penitentiary. He appeals.

The testimony on behalf of the State was sufficient to sustain the verdict. The appellant set up self-defense and also insanity, and the testimony in his behalf warranted the submission of these issues to the jury. There was testimony on behalf of appellant tending to prove that Quinalty, for several months prior to the killing, had been having illicit relations with the wife of appellant; that appellant had knowledge of this fact and had remonstrated with Quinalty and forbade his coming to appellant's home. Several witnesses testified for the defendant that his general reputation in the community where he lived for being a peaceable and law-abiding citizen up to the time of the killing was good. These witnesses, on cross-examination, were asked if they were acquainted with the general reputation of Quinalty for morality in the community where he resided. They were

permitted over the objection of appellant to answer in the affirmative, and that his reputation was good. Appellant objected, and the court directed his counsel to save his exceptions.

The questions propounded by the State on cross-examination were not responsive to any questions that had been asked by the appellant in the direct examination. The testimony elicited by the questions was therefore in the nature of primary evidence offered by the State of the good moral character of the deceased when the same had not been put in issue by the appellant. True, the appellant had introduced testimony tending to prove that the deceased had been having illicit relations with appellant's wife, but these specific acts of the deceased did not tend to prove that he had the general reputation of being a lecherous and licentious man. In exculpation or mitigation of the charge, it was competent for the appellant to show the circumstances connected with the killing. It was competent for him to prove that Quinalty had been having illicit intercourse with his wife, and that on this account he had been warned to stay away from appellant's home, and that at the time of the killing he had ignored the warning and was attempting to invade appellant's home. But it was not competent for the appellant to prove that Quinalty had the general reputation in the community where he lived of being a man of bad moral character. The most that appellant under the circumstances could have proved was that the deceased had the general reputation of being a violent and dangerous man. If the appellant had done this, it would have been competent for the State to have introduced evidence in rebuttal showing that Quinalty's general reputation was that of a peaceable and law-abiding citizen. But, on the issue as to whether or not the deceased, Quinalty, was guilty of improper intimacy with appellant's wife, it was not competent for the State to prove that in the community where Quinalty resided his general reputation for morality was good. Under the

defenses set up by appellant, the general reputation of Quinalty for morality was not and could not have been an issue in the case. *Bloomer* v. *State,* 75 Ark. 297. See, also, *Long* v. *State,* 76 Ark. 493; Bishop's New Criminal Procedure, vol. 3, § 312; *Childers* v. *Commonwealth,* 171 S. W. (Ky.) 149; *Parker* v. *Commonwealth,* 96 Ark. 212; 21 Cyc. 908; *State* v. *Johnson,* 172 Pa. 189; *Kennedy* v. *State,* 37 Sou. (Ala.) 90; *State* v. *Dickson,* 190 S. W. (Mo.) 290; *Phillips* v. *State,* 99 S. E. (Ga.) 874.

The manifest purpose of the above testimony was to lead the jury to believe that, since Quinalty was shown to be a man of good moral character, it was not probable that he would have been guilty of adultery with appellant's wife, to which appellant testified, and which the testimony of Mrs. Ella Bird and Mrs. Laura May tended to prove. Thus the prosecution was permitted by the above testimony to impeach and contradict in an indirect manner the testimony of appellant and his witnesses. At least such was the probable effect of the testimony. This method of impeaching witnesses is not authorized by statute or sanctioned by any rules of evidence. Kirby's Digest, § 3138. The testimony was incompetent and prejudicial.

II. There was testimony tending to prove that the appellant at the time of the killing was insane. Among others, the court gave the following instructions on the defense of insanity:

"No. 19. The defendant interposes the defense of insanity. Insanity is a disease of the mind, and is not a defense to a criminal charge unless it arises out of some disease of the mind, and at the time of the commission of the offense charged renders the defendant incapable of knowing right from wrong, or if he did know right from wrong incapable of controlling his actions. One's reason may be dethroned to such an extent as to render him incapable of knowing right from wrong, incapable of controlling his actions, by fury, anger or malice, but this is not in law, insanity, nor does proof

of such condition of the mind at the time of the commission of an offense constitute any defense, if it grows out of anger or malice and not out of a diseased condition of the mind.

In other words, in this case, if the defendant was, at the time he fired the fatal shot at deceased, insane to such an extent that he did not know right from wrong or, knowing right from wrong, was incapable of controlling his actions, and this insanity arose from some disease of the mind, he is entitled to an acquittal; but, if, on the other hand, at the moment that he fired the fatal shot his reason was so dethroned that he did not know right from wrong, was incapable of controlling his actions, and this mental derangement arose from anger, fury, or malice, he is guilty of an unlawful homicide, and you should so find and fix the degree in accordance with the definitions of homicide which have been given you by the court.

"No. 20. As to whether or not defendant knew the difference between right and wrong and the nature and consequence of his act, or was able to avoid killing the deceased at the time the alleged offense was committed, is a question for the jury to determine from all the facts and circumstances and testimony before you in the case."

The court made the responsibility of the defendant for the alleged crime depend upon whether or not the defendant was incapable of knowing right from wrong, or incapable of controlling his actions. In the recent cases of *Bell* v. *State,* 120 Ark. 530, and *Hankins* v. *State,* 133 Ark. 38, after reviewing the doctrine of our own cases and the authorities generally on the defense of insanity, we announced the law as follows:

"Where one is on trial for murder in the first degree, and the State proves the killing under circumstances that would constitute murder in the first degree if the homicide was committed by some sane person, then, if the killing is admitted and insanity is interposed as a defense, such defense can not avail unless it appears

from a preponderance of the evidence, first, that at the time of the killing the defendant was under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or, second, if he did know it, that he did not know that he was doing what was wrong; or, third, if he knew the nature and quality of the act, and knew that it was wrong, that he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist the doing of the wrong act which was the result solely of his mental disease."

"But it must be remembered that one who is otherwise sane will not be excused from a crime he has committed while his reason is temporarily dethroned, not by disease, but by anger, jealousy or other passion, nor will he be excused because he has become so morally depraved that his conscience ceases to control or influence his actions." *Bell* v. *State, supra,* pp. 553, 555.

The instructions given by the court do not conform to the law as announced in the above cases. In those cases the whole subject was gone into as thoroughly as could be done by the writer, who voiced the opinions of the court. We deem it unnecessary here to do more than call the attention of court and counsel to those cases which must have been overlooked in the framing of the charge to the jury.

III. Medical experts, when duly qualified as such, are competent witnesses on the issue of insanity. Their opinions expressed in answer to correct hypothetical questions embracing data which the evidence tends to prove, are relevant testimony. Hypothetical questions must contain all the undisputed facts essential to the issue. Where there is a dispute about the existence of the facts stated in the hypothetical question, it is the exclusive province of the jury to determine whether such facts do exist. The truth or existence of each and every fact included in the hypothetical question is assumed.

The opinions of the experts are built upon this assumption; and if this foundation falls, the superstructure goes with it. Therefore, if the jury finds that any fact stated in the hypothetical question is untrue, does not exist, the jury must then disregard the opinion of the experts. But, on the other hand, if the jury finds that all the data stated in the hypothetical question exist, are true, then the jury must consider the opinion of the experts in connection with all the other evidence in the case. The jury is the sole judge of the credibility of the witnesses, that is, of the weight to be given their testimony. This applies to the opinions of the experts as well as to the testimony of the other witnesses. Under the guidance of instructions given it by the trial court, the jury is the sole and final arbiter of the issues of fact as to the sanity or insanity of the accused. In determining that issue, the jury may give to the opinion of the experts, as well as to the testimony of any other witness, just such weight as the jury, under all the circumstances, believes it deserves. On the propositions of law announced in part III, see *Taylor* v. *McClintock,* 87 Ark. 243; *Ford* v. *Ford,* 100 Ark. 518; *Williams* v. *Fulkes,* 103 Ark. 196; *Williams* v. *State,* 50 Ark. 511; *Ark. S. W. Ry. Co.* v. *Wingfield,* 94 Ark. 75; *Green* v. *State,* 64 Ark. 532; Lawson, Expert and Opinion Evidence, pp. 64, 162-64-77-260-282; Rogers, Expert Testimony 79, §§ 27, 32, 44; *Turnbull* v. *Richardson,* 69 Mich. 400-420; *People* v. *Foley,* 64 Mich. 148, 156. See, also, *Quinn* v. *Higgins,* 63 Wis. 664; 1 Greenleaf on Ev., pp. 561-62; 2 Jones, Com. on Evidence, § 371 (373) pp. 901 *et seq.,* 906 and cases cited in note on page 906.

The instruction given by the court concerning the testimony of the medical experts was in the main correct, and, in the absence of any specific objection to it, we would not have reversed the judgment on account of the ruling of the court in giving this instruction. However, we could not approve the instruction in the form given, as a precedent, and hence we do not set it out, but

instead have announced the rules of law upon the subject as above.

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

CHENEY v. AUTO FEDAN HAY PRESS COMPANY.

Opinion delivered December 20, 1920.

1. BILLS AND NOTES—BURDEN OF PROOF OF PAYMENT.—Where defendant, sued on his note, admitted the execution of the note and pleaded payment and a counterclaim, the burden was upon him to show payment and to establish the allegations of his counterclaim.
2. BILLS AND NOTES—POSSESSION AS PRESUMPTIVE OF NONPAYMENT.—Plaintiff's possession of defendant's note raises a presumption of nonpayment.

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

Cooper Thweatt, for appellant.

1. As to the $200 item claimed by way of cross-complaint for rice straw claimed to have been sold to appellee, the evidence seems to be evenly balanced, and we will not discuss it.

2. The court erred in not allowing the $171.75 credit claimed by appellant for hay furnished appellee through its agent, Patterson, and in not allowing the $7.70 for repairs to put the hay press in first-class condition.

As to the $171.75 credit, this was a payment on the note, and should have been allowed as a credit on the note. As to the hay transaction, appellant's testimony is absolutely uncontradicted.

3. The finding of the chancellor is against the clear preponderance of the evidence and should be reversed. 83 Ark. 340; 102 *Id.* 383; 98 *Id.* 459.

Offers made in an effort to compromise can not be proved as admissions. 1 Enc. of Ev. 596; 85 Ark. 345; 22 C. J. 308. The court should purge the evidence and reach a conclusion supported by competent and credible

evidence (43 Ark. 319), and appellant should be credited with the $171.75 and the $7.70 for necessary repairs.

Gregory & Holtzendorff, for appellee.

The appellant not only failed to show by a preponderance of the evidence that the note was paid, but the clear preponderance of the testimony shows that the note was not paid, as the chancellor found.

WOOD, J. This action was begun by the appellee against the appellant in the circuit court of Prairie County on a promissory note. The appellee alleged that the appellant executed and delivered to it on March 27, 1912, his promissory note in the sum of $255.08, payable on October 1, 1912, at 8 per cent. interest; that the note with interest to January 1, 1916, was due and unpaid, and prayed judgment for same. The appellant answered admitting the execution of the note and pleaded that there had been a payment thereon of $171.75 in hay sold by the appellant to the appellee and in repairs of $7.70, making a total of $179.45. The appellant also set up that he had sold to the appellee through its agent, Roy Shirkey, fifty tons of pressed rice straw, which appellee, through no fault of appellant, neglected and failed to take, to appellant's loss in the sum of $200. The appellant prayed that the note be credited with the $179.45, that the remainder be off-set by his counterclaim in the sum of $200, and that he have judgment for the balance, and that the note be canceled and surrendered to the appellant. The case, on motion of the appellant, was without objection transferred to the chancery court. The appellee answered denying all the allegations of the answer and cross-complaint.

The appellant testified that the note in suit was executed in renewal of original notes, and that when the note was given he had sold to one Patterson, appellee's agent, three car loads of hay to be credited on the note. The appellee was also to give appellant credit for a repair bill. He claimed that he had a memorandum of the

repairs made and also of the hay that was shipped to the appellee, amounting in the aggregate to the sum claimed in his answer; that he sold to appellee's agent, Shirkey, who had the note for collection, fifty tons of rice straw; that this straw was to be loaded at the station of Mesa where Shirkey was to furnish the car and give shipping instructions; that he afterward notified Shirkey when the straw was ready, but Shirkey never furnished the car or gave shipping instructions, and consequently the appellant did not realize more than $100 on the straw. Shirkey was to pay $5 per ton for the straw and the amount was to be credited on the note and the balance to be paid appellant in cash.

Shirkey testified on behalf of the appellee. He agreed to take thirty-six tons of straw from the appellant and stated that he gave shipping instructions to Cheney at the time and told him to notify witness and to give him the number and initials of the car when he had loaded the same. He saw Cheney after that at different places, but nothing was said about the straw.

Appellee introduced certain correspondence with its agents in regard to the account, some of which we do not regard as competent and none of sufficient importance to set forth. One of the exhibits, however, was a letter from appellant to appellee in which the appellant stated that he noticed that appellee had brought suit against him for the hay press and in which he stated that he only had the hay press to give to appellee, and that, if appellee would look up the records to see what was against appellant, appellant thought appellee would be glad to settle that way, and stating that if appellee would not take the press that it could go ahead and get what it could out of it. In this letter appellant stated that he had paid the first note and concluded his letter by saying that he had nothing and could not borrow $5 if he had to be hung. The court entered a decree in favor of the appellee, from which is this appeal.

The appellant, having admitted the execution of the note and tendered an answer pleading payment and counterclaim, the burden was upon him to show payment and establish the allegations of his counterclaim. *Hamby* v. *Brooks,* 86 Ark. 448; *Continental Gin Co.* v. *Benton,* 104 Ark. 367, and other cases cited in 4 Crawford's Digest, page 3955, § 76. The appellee had possession of the note, which raised a presumption of nonpayment. *Davis* v. *Gaines,* 28 Ark. 440. The appellant did not show by a preponderance of the evidence that the note had been paid. On the contrary, we are convinced from a preponderance of the evidence that the note was not paid. The decree of the chancery court is therefore correct, and it is affirmed.

GROSCHNER *v.* WINTON.

Opinion delivered December 20, 1920.

1. EXECUTORS AND ADMINISTRATORS—CONFIRMATION OF APPOINTMENT BY CLERK.—The appointment of an administrator by the clerk in vacation is subject to confirmation or rejection by the probate court, under Kirby's Digest, § 1.
2. EXECUTORS AND ADMINISTRATORS—VENUE OF APPOINTMENT.—Under Kirby's Digest, § 2, where a deceased person neither had a residence nor died in the county in which an administrator was appointed by the clerk in vacation, but not confirmed by the court, the appointment was void, and a judgment obtained by the administrator against a person or corporation wrongfully causing intestate's death was properly set aside.
3. JUDGMENT—COLLATERAL ATTACK.—A motion to vacate a judgment of the circuit court in favor of an administrator is not a collateral attack upon his appointment by the probate court if his appointment by the clerk in vacation was never approved by the probate court.
4. JUDGMENT—FRAUD IN PROCURING JUDGMENT.—Evidence upon motion to set aside a judgment in favor of an administrator *held* sufficient to show collusion and fraud between the administrator and the defendant in the judgment in procuring the judgment.

Appeal from Sebastian Circuit Court, Fort Smith District; *John Brizzolara,* Judge; affirmed.

Pryor & Miles, for appellant.

1. Appellant had the right, under the laws of Arkansas and Oklahoma, to qualify as administrator of his son's estate. Rev. Laws of Okla. Ann., § 6245; Kirby's Digest, §§ 6289-90.

2. An action for death by wrongful act can be maintained in the name of the administrator. Rev. Laws Okla. Ann., § 5281. Appellant as administrator of Gilbert, the son, appointed by the probate court of Sebastian County, could have maintained this action in the courts of Oklahoma. 16 Kan. 568. No collateral attack can be made upon the appointment. 177 Pac. 593; 52 Ark. 341; 12 S. W. 703; 20 Am. St. Rep. 183; 157 Pac. 1144; 54 Okla. 96; 156 Pac. 815.

3. There was not sufficient proof of fraud to justify the court in setting aside the former judgment and dismissing the case. 127 Ark. 211.

Ira D. Oglesby, for appellees.

1. The appointment of appellant as administrator of the estate of Gilbert Groschner was absolutely void. Kirby's Digest, § 2. The probate court had no jurisdiction. 71 Ark. 218; 123 *Id.* 383. The appointment was void and the order or judgment may be collaterally attacked. 52 Ark. 341; 8 *Id.* 318; 177 Pac. 593.

2. The lower court found that there was fraud in the procurement of the judgment, and that finding must stand as correct until clearly shown to be otherwise. On appeal every presumption is indulged in favor of the judgment below if there is substantial evidence to sustain it. 70 Ark. 512; 84 *Id.* 429; 85 *Id.* 616; 63 *Id.* 513; 97 *Id.* 13; 100 *Id.* 552; 112 *Id.* 47.

3. This court will not disturb the findings of the trial court where the evidence is conflicting; the finding is conclusive on appeal. 104 Ark. 154; 100 *Id.* 166; 4 Crawford's Dig., p. 75.

4. The proof of fraud and bad faith is conclusively shown by the evidence. The appointment of appellant was wrong, not only for lack of jurisdiction of the pro-

bate court and for failure to confirm the appintment by the clerk in vacation, but also for the fraud which called for a vacation of the judgment.

WOOD, J. The facts in this case are substantially as follows: On the 28th day of March, 1899, Mary Winton and Fred Groschner were married and four children were born to them, one of whom was Gilbert Groschner. On the 13th of December, 1907, Mrs Groschner obtained a divorce from her husband and was awarded the custody of their minor children, and since that time and while the children were of tender years their care, education and maintenance devolved entirely upon Mrs. Groschner. In June, 1915, Mary Winton, formerly Mrs. Groschner, moved with her children from Arkansas to Oklahoma where she and her children have resided ever since. Soon after she moved to Oklahoma her son, Gilbert, went to work and contributed all of his earnings to the support of his mother and the younger children. He enlisted in the United States army during the war and served for a period of eighteen months, during which time he allotted to his mother $25 per month. After he was discharged from the army and for about a year before his death he contributed to the support of his mother and the younger children the sum of $80 per month. On the 2d of January, 1920, while employed as a driver in a coal mine of the Whitehead Coal & Mining Company (hereafter called coal company), in the city of Henrietta, Oklahoma, he was killed by coming in contact with an uninsulated electric wire in the mine. His body was brought to Sebastian County, Arkansas, for burial. Soon thereafter Mary Winton, his mother, informed the coal company of the facts as above stated. The coal company carried life insurance for its employees with T. H. Mastin & Company of Kansas City, Missouri. After the coal company was informed of the death of Gilbert Groschner and the facts as above stated, a representative of that company entered into negotiations with Fred Groschner, Gilbert's father, who lived

at Mansfield in Sebastian County, Arkansas, as a result of which Fred Groschner took out letters of administration on the estate of Gilbert Groschner, deceased, and filed a friendly suit in the Sebastian Circuit Court against the coal company for damages for the alleged negligent killing of Gilbert Groschner.

The attorney representing the coal company, who also represented the insurance company, filed an answer for the coal company, and Fred Groschner and the coal company agreed upon a consent judgment in favor of Fred Groschner as administrator of the estate of Gilbert Groschner, deceased, and against the coal company in the sum of $1,791, of which $1,500 was to be paid Fred Groschner as administrator, after deducting the sum of $291, which was retained by the coal company to reimburse it for the amount paid by it for the funeral expenses of Gilbert Groschner. At the time of his death Gilbert Groschner was still under the control and custody of his mother, Mary Winton, and his residence was in Oklahoma where he was killed. He owned no property in Arkansas. Judgment was entered on the 5th day of March, 1920. On the 9th of March, 1920, at the same term of the court, Mary Winton filed her motion asking to be made a party and to appear for the special purpose of setting aside the judgment. In her petition she alleged substantially the facts as above and further alleged that soon after informing the coal company of the death of her son she received a communication from the insurance company offering her the sum of $1,500 in settlement of her claim on account of the death of her son, Gilbert, which she declined to accept. Whereupon, the coal company fraudulently and illegally procured the appointment of Fred Groschner as administrator of the estate of Gilbert Groschner, deceased, for the fraudulent and illegal purpose of unlawfully settling with Fred Groschner as administrator for the damages, and for the purpose of defrauding her of her rights. She further alleged that, in pursuance of this fraudulent purpose, the

suit for damages was begun in the Sebastian Circuit Court, which resulted in the consent judgment as above set out. She alleged that the appointment of Fred Groschner as administrator of the estate of Gilbert Groschner, deceased, by the clerk of the probate court for the Greenwood District of Sebastian County, and the bringing of the suit was all done and procured through fraudulent collusion between the coal company, the insurance company, and Fred Groschner. She prayed that the judgment be set aside and for all proper relief.

Fred Groschner, administrator, answered, setting up that he was the father of Gilbert Groschner, deceased, and that he was duly appointed administrator of his estate. He alleged that Gilbert Groschner always regarded Sebastian County as his home. He admitted that Gilbert was killed while working for the coal company as alleged, but averred that it was the contention of the coal company that he was killed without any negligence on its part, and that his death was brought about by his own contributory negligence, and that he had assumed the risk; that he, as administrator, and the coal company had agreed upon a settlement in the sum of $1,791 for the damages, and that in pursuance of this arrangement suit was brought by him against the coal company for that sum, and that it entered its appearance and confessed judgment. He alleged, however, that this was all done in good faith and that he regarded the settlement as a good settlement of the controverted claim. He denied specifically all the allegations of fraud.

The court heard the testimony and found the facts substantially as above set forth and also found that the attorney, Mr. J. B. McDonough, was free from fraud, which finding we expressly approve. The court therefore entered a judgment vacating the judgment rendered at a former day and striking the case of Fred Groschner as administrator of the estate of Gilbert Groschner, deceased, against the coal company from its docket. From that judgment is this appeal.

The judgment of the court was correct for two reasons. First, the appellant was appointed administrator of the estate of his son, Gilbert Groschner, deceased, by the clerk of the probate court in vacation. This appointment was subject to the confirmation or rejection of the probate court. Section 1, Kirby's Digest. It is not alleged or proved by the appellant that the appointment of the clerk was confirmed by the probate court before the institution of the action against the coal company in the circuit court and before that court rendered its judgment in his favor. It appears, therefore, from the allegation of the appellee's petition to vacate and her testimony, which is the same as the allegations in her petition, that the administrator had been appointed in vacation by the clerk of the probate court, and that the action was instituted by him after such appointment.

Section 2 of Kirby's Digest provides that "letters testamentary and of administration shall be granted in the county in which the testator or intestate resided; * * * and, if the deceased had no such place of residence and no lands, such letters may be granted in the county in which the testator or intestate died * * *." The undisputed facts show that Gilbert Groschner neither resided nor died in Sebastian County. Therefore, under the above statute, the appointment of appellant as his administrator by the clerk of the probate court was absolutely void. The action to vacate the judgment was not a collateral attack upon the appointment of the administrator by the probate court of Sebastian County, for that court never made or approved such appointment. The question, therefore, does not arise as to whether the action to vacate the judgemnt of the circuit court was a collateral attack upon the judgment of the probate court.

Second, the court was correct in finding that the judgment in favor of the appellant as administrator against the coal company in the circuit court was procured by the collusion and fraud of Fred Groschner as

administrator and the agent of the coal company. If the circuit court had been advised of the facts, which the testimony tended to prove were purposely withheld from the court for the purpose of procuring the consent judgment, that court undoubtedly would not have rendered the judgment in the first place. Being convinced that fraud had been practiced upon it, as the court found, its ruling in vacating such judgment and dismissing the cause was in all things correct. The judgment is therefore affirmed.

HOLT v. CALAWAY.

Opinion delivered December 20, 1920.

1. BROKERS—RIGHT TO COMMISSION FOR PROCURING PURCHASER OF LAND.—In an action by brokers to recover a commission for procuring a purchaser of land, evidence *held* to make it a jury question whether defendant had prevented plaintiffs from making the sale and earning the commission.
2. BROKERS—INSTRUCTIONS.—Where an instruction placed the burden on brokers to prove a contract for a commission if certain persons bought the land, regardless of whether plaintiffs made the sale, it was error not to submit also the issue made by the testimony as to whether or not the owner prevented the brokers from making the sale.

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

Earl D. Casey and *W. K. Ruddell,* for appellants.

The court erred in refusing to give instructions 1 and 2 asked by plaintiffs. Appellants did all the work toward the sale of the land, while Case and partners did nothing, and it would be rank injustice under all the evidence if they could not collect the commission fairly earned, or at least have the question of the unfairness of defendant Calaway submitted to the jury. 112 Ark. 227, 235.

Samuel M. Casey and *John B. & J. J. McCaleb,* for appellees.

1. The requested instructions are abstract; there was no evidence to support either of them. 82 Ark. 424; 2 *Id.* 360; *Ib.* 133; 9 *Id.* 212; 76 *Id.* 599; 85 *Id.* 390; 89 *Id.* 24; 95 *Id.* 597; 104 *Id.* 59.

2. They are not responsive to the issue. 23 Ark. 289; 52 *Id.* 120; 78 *Id.* 553; 83 *Id.* 205, 395; 88 *Id.* 12; 89 *Id.* 147.

3. They were ambiguous and misleading. 5 Ark. 651; 18 *Id.* 521; 83 *Id.* 395; 74 *Id.* 468.

WOOD, J. The appellants brought this action against the appellees. Appellants alleged that they had a contract with appellees to sell for them a certain tract of land; that appellants were to sell the land for the sum of $8,100, and appellees agreed to pay them a five per cent. commission; that appellants showed R. W. Webster and A. L. Webster, his wife, prospective purchasers, the property. While the Websters were on the ground looking at the land, the appellees raised the price from $8,100 to $8,500 and informed the appellants that if the Websters bought the land appellants would receive their commission; that the Websters did buy the land, but that the appellees had refused to pay the appellants their commission. Appellants therefore prayed judgment in the sum of $425.

Appellees answered denying the contract set up in appellant's complaint, but admitted that they did agree to pay appellants five per cent. on the sale of the lands, provided appellants sold the same. They alleged that they had a like contract with one Junius R. Case, a real estate agent in the city of Batesville; that Case was the agent for the buyer and assured the appellees that he had succeeded in making the sale, and upon said assurances they paid Case the commission of five per cent. They stated that, if it were determined that appellants were entitled to the commission, appellees would have to pay a double commission, which was never the intention

of the parties. They alleged that they had always been ready and willing to pay the five per cent. commission to the agent who sold the land, and that, if it should be determined that Case was not entitled to the commission, appellees were entitled to recover from Case, so they prayed that he be made a party. The court overruled the motion to make Case a party, to which appellees excepted.

The appellant, Holt, testified that he was in the real estate business; that W. H. Calaway, in connection with his son, W. L. Calaway, told witness that he could sell the York place; that he would take $25 an acre for it all around and would pay witness five per cent. commission for selling it. Appellant Halfacre brought Webster and his wife, the prospective buyers, to witness' office. Witness 'phoned Calaway to meet them on the farm. Calaway replied, all right, that he would be there in less than an hour. They met on the farm and walked over it. The Websters were very much pleased with the place. Witness had made the Websters a price at $25 per acre. There were 325 acres. After they got on the place Calaway raised the price to $8,500. Halfacre asked Calaway if he and Holt were to get $500 after Calaway had raised the price to $8,500. Calaway replied, "No, if the parties buy the farm, I will pay you all five per cent. commission." The Websters bought the farm. Halfacre and witness were not partners, but were equally interested in the deal. Halfacre brought the prospective purchasers to witness, and therefore witness agreed that they would divide the commission. Witness knew that Case & McLean, who were in the real estate business, also had a contract to sell the land. After witness had carried the Websters over the farm, Webster said that he guessed he would take it. Witness did not close the deal with him. Witness understood from Mr. Calaway, while they were talking there on the farm, that if the Websters bought the land, no matter at what price, or whom they bought it from, witness and Halfacre were to get their commission. Witness knew that $8,500 was more

than Calaway had ever asked for the place before, and when witness objected to the raise, then Calaway made the remark, "If these parties buy this farm, I will pay you five per cent. out of it."

The testimony of appellant Halfacre was in essential particulars the same as that of appellant Holt. He testified, among other things, that the Websters said that they liked the place witness had shown them better than any other, but stated that they had promised to look over some farms of Mr. Case, being the Bud Wilkins and the Erwin McGuire places. The Websters did not say, when they were looking over the farm, that Mr. Case had mentioned this farm to them. Witness didn't think that Case had mentioned the Calaway farm, but didn't know.

Junius Case testified that he was in the real estate business; that the Websters came to his office on the 23d day of December, and asked where they could find the county demonstrator, and Webster stated that he was looking for a farm, but would not buy anything unless the demonstrator would recommend it. Witness told Webster that he had a farm known as the Calaway place, which he would sell for $25 per acre. Witness called the county demonstrator, and he recommended the place at the price named. Witness offered to go and show the place, but the Websters stated that they had agreed to look at a place that Halfacre would show them, and they had agreed to go with him that morning. The Websters agreed to go with witness in the afternoon. Witness and his partner described the place and Webster stated that he thought the place was just what he wanted. When the Websters came back in the afternoon, witness learned that the place they had been to see was the Calaway farm and witness informed them that that was the place he had described to them that morning and had priced to them at $25 per acre, and they agreed to close the deal for the 324 acres at $8,100. Witness then notified Calaway, and he made the deed and paid witness his commis-

sion. Witness had had the Calaway farm listed since August 6, 1919, and the time would not expire until February 6, 1920. He had advertised the place for sale. Under the contract with Calaway, they were to sell the farm for $8,000 and were to receive five per cent. commission. His firm had made efforts to sell it. Witness had never been over the place with the Websters until after he sold the place to them. Witness presumed that the main reason the Websters bought the land from witness was that they could buy it for $8,100, whereas the others had made a price at $8,500. Witness had given a bond to Calaway to protect him in the commission.

The county demonstrator testified that Case mentioned the Calaway place, and he told the Websters that they couldn't beat the place at the price. The only place mentioned by Case that witness would recommend was the Calaway place.

Calaway testified that he had made the contract with McLean to sell the York place at $25 per acre for six months. Some time later he told Holt that if he sold the York farm before McLean he would give him a commission. He told him that it was already listed to McLean, but he thought the time had expired. He told Holt and Halfacre that the price would be $8,500 and that he would pay the commission to the man who sold the place. The next morning he went into Case's office and Case informed him that he had sold the place to the Websters. Witness asked at what price, and Case replied, "At $8,100, or $25 an acre." Witness replied that he didn't see how Case had the right to do that when witness had taken it off the market at that price. Case replied that it was the same price at which it was listed, and their time was not out. Witness saw that he was right about it and made the deed. Case claimed the commission, and witness told Case that Holt also claimed that he had sold the farm and claimed the commission. Witness told Case that he wanted to pay the commission to the right man, but didn't know who that was. Case proposed

to make a bond against all costs, damages and judgments so that witness would be protected, and witness agreed to that and the bond was made and the commission paid to Case. Witness never agreed to pay more than one commission.

Mrs. Webster testified that they bought the Calaway farm from Case. Halfacre told them that Calaway had raised the price of the place to $8,500 and witness said that they did not want to buy the place at that price; that they went to see Case, and Case told them that they could have the land for $25 per acre, so they bought it from him. The only time they saw the place was when Holt showed it to them. Holt told them that Calaway had raised the price to $8,500, and they decided not to take it at that figure, but bought it from Case at $25. Case said he could sell the place to them at $25 an acre, and that was the reason they bought it from him.

The court instructed the jury that to entitle the plaintiffs to recover they must show by a preponderance of the evidence that they had a contract with the defendant, Calaway, by which they would receive a commission of five per cent. if the Websters bought the land in question, regardless of whether or not they, the plaintiffs, made the sale. The appellants asked the court to instruct the jury as follows: "If you find from the evidence that Calaway acted unfairly toward the plaintiffs or interfered with them in their negotiations for the sale of the land and that said unfairness and interference kept the plaintiffs from making said sale, then your verdict should be for the plaintiffs." The court refused this prayer for instruction, and appellants objected and duly excepted to the ruling. From a judgment in favor of the appellees is this appeal.

The prayer of appellants for the instruction above was not abstract. There was testimony from which the jury could have found that if W. H. Calaway had not raised the price of the land after appellants had shown the same to the Websters and had priced it to them at

$25 per acre, the Websters would have purchased the same from the appellants and not from Case; that the appellee had told appellants that they could sell the land at $25 per acre, and that they should receive a commission of five per cent. for making such sale; that, after appellants had procured a purchaser ready and able to buy at the price named, Calaway raised the price, and, after doing so, permitted Case to sell the land at the same price he had told appellant they might sell the land for. The testimony tending to prove these facts made it an issue for the jury as to whether or not the appellee, Calaway, had prevented the appellants from making the sale and thus earning their commission. Since the court told the jury that the burden was on appellants to prove that they had a contract with the appellee for a five per cent. commission if the Websters bought the land, regardless of whether or not the appellants made the sale, the court should have submitted to the jury the issue as to whether the conduct of appellee, Calaway, interfered with and prevented the appellants from making the sale. For the error in not granting appellant's prayer for instruction the judgment is reversed and the cause is remanded for a new trial.

BEATTIE v. SMITH.

Opinion delivered December 20, 1920.

1. FRAUDS, STATUTE OF—PART PERFORMANCE.—Where the vendor of standing timber received payment and the purchaser entered into possession, this took the contract out of the statute of frauds, though it was oral.
2. LOGS AND LOGGING—TIME FOR REMOVAL OF TIMBER—JURY QUESTION.—In an action for damages for selling to third persons timber previously sold to plaintiffs, the issue whether defendant had limited the right of removal to six months, being raised by the pleadings, was properly submitted to the jury.
3. LOGS AND LOGGING—REASONABLE TIME FOR REMOVING TIMBER.—In determining what is a reasonable time for removing timber where no time is specified in the contract of sale, the criterion

is not the facilities which the purchasers had for removing the timber, but those which in the exercise of ordinary care they could and should have had to enable them to cut and remove the timber within a reasonable time.

4. LOGS AND LOGGING—REASONABLE TIME FOR REMOVING TIMBER.—In determining the question of a reasonable time for removing timber, it is proper to take into consideration the location of the land, its accessibility, the character and quantity of timber thereon, the reasonableness of the weather, the facilities obtainable for cutting and removing the timber, and all other conditions and circumstances which might affect the cutting and removing thereof.

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

Rudolph Isom, for appellant.

1. The court erred in its instructions to the jury. Nos. 1, 2 and 3 are erroneous, but No. 4 is especially objectionable and prejudicial. So is No. 10. An erroneous instruction is presumed to be prejudicial. 70 Ark. 79; 110 *Id.* 557; 64 *Id.* 505; 72 *Id.* 31. The instructions were contradictory. 83 Ark. 202. Plaintiff should have removed the timber within a reasonable time, and in that connection the "facilities" which he might have for performing the contract could not justly be taken into consideration by the jury as instructed by the court. Inconvenience or cost of compliance do not excuse aparty from performing a contract that is possible and lawful. 6 R. C. L. 997.

2. A definite time was specified in which to cut and remove the timber. 93 Ark. 10, par. 3; *Ib.* 447. The court had no right to instruct the jury that they could take into account the question of labor in determining whether or not the timber was cut in a reasonable time. Where there is no time specified for the removal of timber, then such right only continues for a reasonable time. 77 Ark. 117, 408; 84 *Id.* 603; 91 *Id.* 292; 93 *Id.* 5. See, especially, 99 Ark. 112-16.

3. The court also erred in refusing a continuance when it developed that two other persons were interested in the litigation.

4. It was error to give instruction No. 10. The burden of proof is on the party holding the affirmative of the issue. 27 Ark. 500.

5. A verdict should have been directed for defendant at the conclusion of plaintiff's testimony. The testimony discloses the uncontradicted fact that eight or nine weeks was a reasonable time in which to cut and remove the timber from the land and there is no evidence showing the description of the timber.

L. C. Going, for appellee.

There is no error in the instructions 1, 2 and 3, and No. 4 was not prejudicial. The jury were extremely lenient with appellant in the matter of damages. There was no error in giving No. 10.

Only a question of fact was raised by the testimony whether or not appellee had a reasonable time within which to remove the timber. The issues were decided against the appellant, and the verdict is conclusive on appeal.

WOOD, J. On July 23, 1918, appellant sold to one Whittington, who was a partner of the appellees, Smith and Weaver, all the timber situated on a certain brake north of the town of Earle, in Crittenden County, for the sum of $225. Under the direction of Whittington, appellant told appellee, Smith, of the sale, and at appellant's request, Smith gave appellant a check for $225, the purchase price of the timber. On the check were written the words: "For timber in brake north side of Earle." Appellant cashed the check, and in a few days thereafter appellee took possession of the brake and began cutting and moving the timber. He continued to do so until about the first of October and removed between twenty and fifty thousand feet of timber before he stopped work. The following January the appellant sold the timber to Wallin & Watson for $1,000 without notifying Whittington or the other appellees. In August, 1919, appellee, Smith, not knowing the timber had been

sold by appellant, sent a force of employees to continue the operation of cutting and removing the timber. Appellant forbade them. On April 3, 1920, the appellee Smith brought this action against appellant for damages for breach of the contract. He alleged his purchase of the timber as above set forth, his payment of the purchase price and taking possession of the same as above mentioned. He alleged further that no particular time had been fixed for the removal of the timber, and under the contract he had a reasonable time within which to remove the timber, and that appellant by selling the timber to the other parties had violated his contract with appellee, Smith, to the latter's damage in the sum of $5,000, for which he asked judgment.

The appellant answered and admitted all the allegations of the complaint except that he denied that no time had been fixed for the removal of timber, and alleged that he had given appellee six months in which to cut and remove same; that the time given had expired, and appellant therefore had the right to sell the timber to other parties. The appellee, Smith, testified that he, Whittington and Weaver were partners in the timber business, and they had bought this timber from appellant. When the fact was developed that Whittington and Weaver were partners of appellee Smith, appellant moved to make Whittington and Weaver parties plaintiff, which motion was granted. Continuing his testimony, Smith described the timber, and stated that there were between 75 and 100 acres which came up to the corporation line of the town of Earle. He testified that nothing was said as to the time for the removal of the timber except when he gave appellant the check, he told appellant that he absolutely would not be in appellant's way. With that exception the timber was to be appellee's until they got it off. There were three or four hundred thousand feet of timber on the land. They cut between 20,000 and 50,000 feet which they hauled to Balch's sawmill. The timber was only about 400 yards

from corporate limits. They bought the timber July 23, and it was dry weather from that time on until about October 1, when it began to rain. Witness had two teams equipped for hauling and also an outfit rented from Whittington. It would have taken five or six months working time with no delays and working four teams to remove the timber. They didn't work every day because they couldn't get the sawyers.

Whittington testified that the appellant did not fix any time in which they were to get the timber out, and that he and Smith and Weaver were partners in the timber business.

Wallin testified that he bought timber from appellant in January, 1919, and paid him $1,000 for it. He estimated the timber on the brake at 200,000 feet. The logging conditions were good in July, August and September of 1918. Two or three teams ought to have removed the timber in two months' time. Witness worked for a week or ten days in February, 1920, and got out about 40,000 feet.

Another witness by the name of Johnson testified to the same effect as to weather conditions and as to the time required for the removing of the timber with two teams; that a reasonable time for the removal of the timber was eight or nine weeks, and same could have been done in 1918. The timber was not over a mile from the mill. After Wallin bought the timber, witness worked in the brake four weeks practically every day, cutting timber, and during that time neither Smith, Whittington or Weaver ever came over there. The timber was so close to town it could have been seen falling. Neither of the appellees ever said anything to witness about cutting timber down. Appellees could have hauled the timber out in July. They could have got the timber from the 1st of July until the 15th of November, when it set in raining.

Appellee Smith, recalled, stated he did not know when Johnson was cutting timber on the land, but saw

appellant a week or so later and said something to him about it. Appellant replied that the time had expired and he did not consider he had sold the timber to him (Smith); that he had sold it to Whittington. He further stated that nothing was said by appellant about giving six months' time to get the timber off. No time limit was fixed.

The appellant testified he had sold the timber to Whittington, and at the time Whittington bought the timber he told him he would have six months in which to remove the same, and he said, "All right." It was a bad brake. It was dry weather, August, September and October, 1918. There were 200,000 feet of timber in the brake. Witness sold the timber to Whittington on July 23, 1918, and witness didn't cut any timber from the land thereafter until August 30, 1919. Witness sold the timber to Wallin January 28, 1920. When witness received the check, there was nothing on it showing what it was given for.

Among others, the court gave the following instruction, over the objection of the appellant:

"No. 4. If the jury finds there was no time agreed upon within which to cut and remove the timber, then the plaintiffs would have a reasonable time after July 23, 1918, within which to cut and remove the timber. And by reasonable time is meant such time as a man of ordinary care and prudence would be allowed to take under the circumstances; and in determining that you ought to take into consideration all the facts and circumstances, the character of the ground, the character and quantity of timber, the facilities of the plaintiffs for cutting and removing it, and all the facts and circumstances in evidence in determining what is a reasonable time, and whether or not plaintiffs should have gotten the timber out within that time."

The jury returned a verdict in favor of appellees for the sum of $1,000. Judgment was entered for them in that sum, from which is this appeal.

The appellant did not deny that he had sold to Whittington the tract of timber land in controversy. On the contrary, he admitted that Whittington had paid the purchase money and had taken possession of the land pursuant to the contract. This testimony was sufficient to take the contract out of the statute of frauds, and the court did not err in submitting to the jury the issue as to whether or not the appellant had limited appellee's right to remove the timber in a period of six months. This issue was expressly raised by the pleadings. The court erred in telling the jury that, in determining whether or not the plaintiffs had cut and removed the timber within a reasonable time, "the facilities of the plaintiffs" for cutting and removing it should be taken into consideration. The appellees did not prove that appellant knew what facilities were possessed by the appellees for the removal of the timber at the time the same was sold, nor that the sale was made in contemplation that appellees would use only the facilities they then possessed. The evidence shows that the plaintiffs had only three teams at work in removing the timber, and appellee Smith testified that, with no delays and four teams, it would have taken five or six months working the whole time to remove the timber; that working with the facilities the plaintiffs had during over two months of good weather, they had got out about 50,000 feet of timber. On the other hand, after the timber was sold to Wallin, he worked during the month of February, 1920, and got out 40,000 feet. This plainly shows that the facilities of the plaintiffs was not a proper criterion to be taken into consideration. The appellees did not show that by the exercise of ordinary care they could not have provided themselves with better facilities than they had. Such was their duty if they could have done so by the exercise of reasonable diligence. The appellees had no right to prolong the time by failing to exercise ordinary care and prudence to provide themselves with the necessary facilities to remove the timber in a reasonable time, consider-

ing all the circumstances and conditions affecting the removal of the timber. It was not the facilities which the appellees had, but those which in the exercise of ordinary care they could and should have had to enable them to cut and remove the timber within a reasonable time.

In *Burbridge* v. *Ark. Lumber Co.*, 118 Ark. 94-109, we said: "In determining the question of reasonable time, it was proper to take into consideration the location of the land, its accessibility, the character and quantity of timber thereon, the seasonableness of the weather, and the facilities for cutting and removing the timber, and all other conditions and circumstances which might affect the removal thereof." Citing *Earl* v. *Harris*, 99 Ark. 112; *Liston* v. *Chapman & Dewey Land Co.*, 77 Ark. 116; also *Fletcher* v. *Lyon*, 93 Ark. 10; *Ingham Lumber Co.* v. *Ingersoll*, 93 Ark. 447; 6 R. C. L. 997, and other cases cited in appellant's brief.

We find no other reversible error in the record. For the error indicated, the judgment is reversed and the cause is remanded for a new trial.

BECKER PROVISION COMPANY v. PARKER HARDWARE COMPANY.

Opinion delivered December 20, 1920.

1. CONTRACTS—VERBAL CONTRACT.—Where the terms of an oral contract were fully agreed upon, and the contract became effective, it is immaterial that they subsequently agreed to reduce it to writing, if they did not do so.
2. FRAUDS, STATUTE OF—AGREEMENT TO PAY ANOTHER'S DEBT.—A parol promise to pay the debt of another is not within the statute of frauds when it arises from some new and original consideration of benefit or harm moving between the newly contracting parties, as where the promisee waived a right to a materialman's lien in consideration of the promisor agreeing to pay the amount of the claim.
3. CORPORATIONS — ULTRA VIRES CONTRACTS.—Where a corporation was authorized to buy, own, sell and lease real estate, its agreement to pay a debt of a contractor employed by it to paint a

building it was occupying to prevent a materialman from filing a lien was not *ultra vires*.

4. CORPORATIONS — ULTRA VIRES CONTRACTS — WHEN ENFORCED.— When an *ultra vires* contract entered into by a corporation has been fully performed by the other party, and the corporation has had the benefit thereof, the contract is binding on the corporation.

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

Richard M. Mann, for appellant.

1. The verdict of the jury was contrary to the evidence, and appellant's requested peremptory instruction should have been given. The testimony shows that there was no oral understanding on any different terms than that disclosed by the correspondence; the lien was not waived on account of any oral understanding and the court properly instructed the jury in No. 4 that the agreement must be in writing. This was an exclusion of testimony of an oral understanding. Correspondence evidencing a meeting of minds does not constitute a contract. 166 S. W. 533; 112 Ark. 380. If we concede that the correspondence constituted a contract to guarantee the payment of any amount, it was only such an amount as could "be established against Harrison for material furnished on your job," or, in other words, for such an amount as could be proved a lien on the building. There is no proof that any of the material charged in the account of G. W. Harrison was delivered to or used in the work on the building. 84 Ark. 560; 105 S. W. 583. If there was any agreement, it was to guarantee the payment of a *valid* not a void *lien*. 222 S. W. 365.

Unless a valid claim was established against G. W. Harrison, appellant would not be liable. 126 Ark. 307. Appellant was a corporation, and has no authority to indorse paper or guaranty accounts except where some benefit accrues to the corporation; the waiver of a void lien is no benefit. 95 Ark. 368; 130 S. W. 162.

2. Appellant's motion to make G. W. Harrison defendant should have been sustained. The original contractor is a necessary party for the establishment of a mechanic's lien. 114 Ark. 464; 122 *Id.* 141.

3. The court erred in giving plaintiff's instruction No. 1, as (a) there was no testimony showing delivery at the premises; (b) mere proof of delivery of material without proof of the improvement by the use of material of a kind similar to that delivered would not authorize a verdict for plaintiff as directed in this instruction. It was in fact a peremptory instruction and should not have been given.

4. It was error to give plaintiff's instruction No. 2. It assumes as a fact that said material was used on the building and it is in conflict with appellant's instruction No. 4.

5. The court erred in modifying defendant's requested instructions 3½ and 5.

Owens & Ehrman, for appellees.

The verdict and judgment were correct. (1) There was a binding contract for appellees' forbearance, and (2) no material error was committed by the court. The promise was an original undertaking and in no sense a guaranty. 134 Ark. 543; 204 S. W. 418. There was a new and original consideration. 45 Ark. 67; 102 *Id.* 407. It was not within the statute of frauds, and was binding, though not in writing. 110 Ark. 325. A waiver of a legal right is sufficient consideration to support the promise of another. 106 Ark. 1; 151 S. W. 1001; 134 Ark. 543. See, also, 215 S. W. 653. The evidence clearly shows a promise, a definite sum in consideration of appellees' forbearance, and the instructions were most favorable to appellant, and the evidence fully sustains the verdict.

WOOD, J. Appellant employed one G. W. Harrison, a painting contractor, to do certain painting on its building where it conducted its business in the city of Little Rock. Harrison purchased the painting material from

the appellees, the bill amounting in the aggregate to $154.95. The last item of the account was furnished on June 17, 1918. The appellees contemplated filing a lien for the material furnished on the building occupied by appellant and through their attorney on the 7th of September, 1918, wrote the owner of the property to that effect. The owner on that day requested the appellees not to file the lien, stating that he would get behind it and see that it was paid. The lien was prepared to be filed and on the 12th day of September the president of appellant requested the attorney for the appellees, who had prepared the papers for filing the lien, not to file the same, saying that he would pay the account. After that conversation appellees' attorney advised appellees of what the president of appellant had said, and thereafter on the same day wrote appellant and in the letter referred to the conversation and requested appellant to write a letter stating that it would guaranty the payment of appellees' claim. In reply to this letter, on the 13th, appellant wrote stating it would pay its part of the bill and would try to make Harrison come over with the money as soon as possible, that is, when he got his receipts and accounts adjusted with the appellees. In reply to this letter, on the 14th of September, appellees' attorney wrote that it would be satisfactory if appellant would guaranty the payment of the Parker claim, or whatever amount thereof may be established against Harrison. Appellant's president also called up over the telephone and said that he was sorry that he had not been as explicit as he should have been; that what he meant to say was that Becker Provision Company would pay every dollar that was owing for material on the job. The president of appellant in this conversation requested the appellees' attorney to undertake to collect the money for appellees from the contractor, Harrison. As a result of the promise made by the appellant to appellees' attorney, appellees refrained from filing the lien. At the time this promise was made appellees had five days remain-

ing in which to file the lien. The attorney for the appellees had notified the president of appellant in a conversation with him that appellees had the right to file a lien on the property and that the time had not expired, and he (the president) had agreed to pay the account before the 18th of September.

On the 18th of September the appellees' attorney wrote the appellant, and, among other things, stated that he would be glad to assist appellant in any possible way in collecting from Harrison and concluded the letter by saying, "On the strength of your agreement guaranteeing our claim, which amounts to $151.50, I am advising my client not to file any lien, and I trust that it will be agreeable to get the matter closed up within a reasonable length of time." In answer to this letter the appellant, on September 19, wrote as follows: "Referring to your letter of September 18, I will be very glad if you would take the matter up with Mr. Harrison and Mr. Mick regarding the Parker account and see what you can do with it."

The president of the appellant testified that during the progress of the work by Harrison, he called up the appellees and inquired if it would be all right to pay Harrison the money due him, and appellees said it was all right. Witness then paid Harrison on June 15, 1918. He heard no more about it until September. Witness did not have any reason to believe that the appellees would make any claim against the appellant. Witness agreed with appellees' attorney that, if the lien was not filed, witness would pay the account to an extent. Witness did not think he ever told appellees' attorney that he would pay the account in any sense different from the letters. Witness only agreed to see that it was settled. Witness agreed to guaranty the account. He asked the appellees' attorney not to file any lien and stated to him that he would see that the account was settled. The articles of incorporation of the appellant showed that it was au-

thorized, among other things, "to buy, own, sell and lease real estate."

The appellee instituted this action in the municipal court at Little Rock against the appellant and alleged in its complaint that it had a materialman's lien upon the property occupied by the appellant, and that on the 12th of September, 1918, the appellant agreed that if appellees would not file the lien upon the property occupied by appellant they would pay appellees' claim; that appellees relied upon appellant's agreement to pay the account, and as a result of such agreement did not file their lien and was prevented from doing so by virtue of the agreement; that the agreement was an original undertaking upon the appellant's part and that by reason of the agreement appellees had waived their legal right to file a lien. Appellees prayed judgment for the sum of $151.50. Judgment was rendered in favor of the appellees, plaintiffs below, in the municipal court, and the cause was appealed to the circuit court. In the circuit court the appellant moved to dismiss on the ground that G. W. Harrison, who, on motion of the defendant below, appellant here, had been made a party defendant, had obtained a judgment in his favor dismissing the cause of action as to him, from which the plaintiffs below, appellees here, had not appealed; that if any debt was due the appellees it was due primarily from G. W. Harrison, and that, since the municipal court had rendered judgment in his favor, from which the appellees had not appealed, there could be no liability against the appellant. The court overruled the motion to dismiss.

Testimony was adduced which developed the facts substantially as above set forth. The cause was submitted to the jury upon instructions, which we deem it unnecessary to set forth. The jury returned a verdict in favor of the appellees, and the court rendered a judgment in their favor, from which is this appeal.

The undisputed testimony shows that before the correspondence between the appellant and the appellees, be-

ginning with the letter of September 12, 1918, and ending with the letter of September 19, 1918, an oral contract was entered into between the appellees and the appellant by which appellant agreed that if the appellees would not file the lien which their attorney had prepared and was intending to file on the building occupied by the appellant, the latter would pay the account for which the lien was claimed. The amount originally claimed by the appellees was $154.95. There was some controversy as to the correctness of this, and the amount finally agreed upon was $151.50, for which the verdict and judgment were rendered.

That this is the correct view of the case is clearly shown by the testimony of the attorney for the appellees, which is not disputed by the president of the appellant, with whom the contract was made. The attorney for the appellees testified that such was the contract, and the president of the appellant testified in answer to questions concerning this, as follows:

"Q. Well, the understanding was between you and myself that we would not file the lien?

"A. Yes, sir; that was our agreement.

"Q. And that you would pay the account?

"A. Yes, sir.

"Q. That was the understanding then?

"A. Yes, sir.

"Q. And you haven't understood it in any other way since that time, have you?

"A. No.

"Q. I will ask you if, at that time, if you recall definitely the amount of the account, $151.50?

"A. Yes, sir.

"Q. We perhaps took off for a brush; $151.50 was the amount we agreed on when you were in my office, was it not?

"A. Yes, sir; that is it."

The above testimony settles this controversy in favor of the appellees. The undisputed testimony shows that

the appellant was claiming an account of $154.95 against Harrison, the contractor, and the right to file a lien on the building occupied by appellant for such amount; that appellant objected to having the lien filed, and, in consideration of the forbearance or waiver upon the part of appellees of their right to file the lien, appellant agreed to pay the amount which was definitely fixed at $151.50. The time for filing the lien had not expired. The terms of the oral contract were thus agreed upon and became effective, and, even if it be conceded that such was the fact, it was immaterial that the parties afterward agreed to have the terms of the oral contract reduced to writing, which was never done. See *J. D. Kilgore Lumber Co.* v. *Halley,* 215 S. W. 653, 140 Ark. 448, and cases there cited.

In *Jonesboro Hardware Co.* v. *Western Tie & Timber Co.,* 134 Ark. 543-546, we held that "a parol promise to pay the debt of another is not within the statute of frauds when it arises from some new and original consideration of benefit or harm moving between the newly contracting parties." We also held that "a waiver of a legal right is a sufficient consideration to support a promise to pay the debt of another." The contract was not one of guaranty or suretyship but an original undertaking on the part of appellant. The contract to prevent a lien being filed on the property in which appellant had an interest, and which it occupied, was not *ultra vires.* But, if it were, appellant would be estopped from setting up such a defense because the appellees had performed the contract on their part, of which the appellant had received the benefit. *Richeson* v. *National Bank of Mena,* 96 Ark. 594.

The judgment is in all things correct, and it is therefore affirmed.

THRASH v. STATE.

Opinion delivered December 20, 1920.

1. WITNESSES—OBJECTION TO MENTAL INCOMPETENCY.—If a party knows before trial that a witness is mentally incompetent to be a witness, the objection must be made before the witness testifies; but if the objection appears at the trial, it must be interposed as soon as known.
2. WITNESSES—IMPEACHMENT.—Testimony that a witness is subject to insane delusions, or that his mind and memory have become impaired by disease or other causes, is admissible to affect his credibilty.
3. CRIMINAL LAW—SELF-SERVING DECLARATION.—In a prosecution for assault to kill, it was not error to exclude the testimony of defendant's brother that a few days before the shooting defendant asked witness to go to the person afterward assaulted and try to settle the trouble; such testimony not being admissible as part of *res gestae,* but being a self-serving declaration.

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

W. S. Coblentz, for appellant.

1. The court erred in refusing to let Hassie Self express her opinion of the condition of her mother's mind after having testified as to what she had said and done upon which she based her opinion. 11 R. C. L. 601; 97 Ark. 457.

2. The court erred in excluding from the jury the evidence of Buster Thrash and the evidence of Bud Ray. Defendant was convicted of assault with intent to kill, and the intent is a material element in this crime. Both of their statements showed that it was the purpose of defendant to avoid trouble. The statements made by defendant were part of the *res gestae* and show that defendant had no malice against the prosecuting witness. 12 Ark. 782; 98 *Id.* 430; 43 *Id.* 99; 33 *Id.* 557.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. The trial court laid down the correct rule for impeaching, on account of insanity, the testimony of a

witness. A proper foundation must be laid, and this was not done. 61 Ark. 421. Furthermore, no objection was made on the ground of mental incompetency at the time she testified. 103 Ark. 197.

2. There was no error in excluding the testimony of Buster Thrash and Ed. Ray. The record is conclusive against appellant's contentions and it was no part of the *res gestate* and was immaterial and of no force and effect at all, and was not prejudicial.

HART, J. John Thrash was indicted, tried and convicted of the crime of assault with the intent to kill, charged to have been committed by shooting John Conway, and his punishment was fixed by the jury at one year in the State penitentiary.

From the judgment of conviction the defendant has duly prosecuted an appeal to this court.

John Conway was a witness for the State. According to his testimony, John Thrash shot him on the 8th day of January, 1920, just after dark in front of the house of Edgar Ray, in Pike County, Arkansas. Conway was on his way home, riding a mule, and when he got in front of Ray's house the defendant called to him from the door of the house, which was probably twenty-five feet from the gate. The defendant came out of the house and picked up his gun near the gate and came out into the road where Conway was sitting on his mule. He asked Conway to go a little ways in the dark with him. Conway refused, and the defendant began to curse and abuse him. Finally the defendant raised his gun and shot Conway. Conway was unarmed and did not do anything at the time to cause the defendant to shoot him. The testimony of Conway was corroborated in all essential respects by that of Edgar Ray in front of whose house the shooting occurred.

The defendant was a witness for himself. According to his testimony he and Conway had had trouble about a road. Conway had cursed him about the matter. The defendant had tried to get one or more persons to talk

with Conway for the purpose of adjusting their differences. He went to Edgar Ray's house on the evening he shot Conway for the purpose of getting him to talk with Conway about the matter and try to get him to settle their differences amicably. Conway came by Ray's house and began the difficulty with the defendant. Conway tried to shoot the defendant, and the defendant shot Conway in his necessary self-defense.

Other evidence was adduced by the defendant tending to corroborate his testimony and to show that Conway's reputation for truth and morality was bad.

The evidence adduced in behalf of the State was sufficient to warrant the jury in convicting the defendant. No error is assigned on this account by the defendant. A reversal of the judgment is asked on the ground that the court erred in refusing certain testimony which the defendant offered to introduce before the jury.

The mother of the defendant was a witness for the State and testified that she heard the defendant say that he would kill John Conway, and that he had a pistol at the time he made the threat. Conway had married a sister of the defendant.

It is insisted that the court erred in not allowing another sister of the defendant to testify with regard to the mental condition of her mother. No objection was made to Mrs. Thrash testifying, on the ground that she was mentally incompetent to be a witness. If a party knows before the trial that a witness is incompetent on account of his mental condition, the objection must be made before the witness has given any testimony, and if the objection appears at the trial it must be interposed as soon as it becomes known. *Mell* v. *State,* 133 Ark. 197. It is admissible, however, in order to affect the credibility of the witness, to prove that he is subject to insane delusions or that his mind and memory have become impaired by disease or other causes. *Mell* v. *State, supra.*

As above stated, no objection was made to Mrs. Thrash testifying in the case. Her daughter was per-

mitted to testify about the delusions of her mother. She testified that her mother would do anything that John Conway wanted her to do, and that Conway had turned their mother against every one of the children except his wife. She was also permitted to testify that her mother would require the doors to be fastened at night, saying that if they were not fastened the bogie man would catch her; that her mother would make her look under the bed to be sure that there was not anything there; that her mother would say that the bogie man would get her before morning; that her mother was afraid to stay by herself in the daytime; that her mother was always against the other children when she stayed at Conway's house, and that when she left there and stayed with the other children awhile she would get in a good humor with them. Hence it will be seen that the court permitted the witness to testify as to all the matters that came under her knowledge with reference to the delusions of her mother or the influence of Conway over her.

It is also contended that the court erred in not permitting a brother of the defendant to testify that a few days before the shooting the defendant came to him seemingly in great trouble, and asked him to go to Conway and try and settle the trouble between them. There was no error in refusing this testimony. It was not a part of the *res gestae* as contended by counsel for the defendant, but on the contrary was a self-serving declaration.

Counsel for the defendant relies upon the case of *Carr* v. *State,* 43 Ark. 99, to sustain his contention that the testimony was admissible as a part of the *res gestae.* In that case Wyatt came to his death at the hands of a mob of which Carr was the leader. The persons composing the mob had had a meeting at a church on the night before the killing, and the court said that evidence of what was done and said at the church was admissible, providing any connection was shown between the proceedings there and the subsequent homicide.

In the instant case the excluded testimony was the narrative of a past transaction. It was not connected in any way with the difficulty at the time Conway was shot by the defendant. The declarations must stand in immediate causal relation to the act itself and become a part either of the action immediately preceding it, or of the action which it immediately precedes in order to become a part of the *res gestae.* *McCoy* v. *State,* 46 Ark. 141; *Plunkett* v. *State,* 72 Ark. 409; *Littlejohn* v. *State,* 76 Ark. 481, and *Mallory* v. *State,* 141 Ark. 496, 217 S. W. 482.

Again, it is contended that the court erred in refusing to permit Edgar Ray to testify that when the defendant came to his house on the evening in question he told Ray that a boy had told him that he had better change his boarding place, that something bad was going to happen, and asked Ray if he would not talk to Conway about the difficulty. What the defendant said to Ray about what the boy had told him would have been hearsay only and clearly inadmissible. The fact that the defendant asked Ray to talk with Conway about their difficulty was not material. Ray did not talk with Conway, and the fact that the defendant had asked him to do so a few minutes before he shot Conway could amount to no more than a self-serving declaration.

No other assignments of error are urged for a reversal of the judgment, and it will therefore be affirmed.

WHITE RIVER LUMBER COMPANY *v.* ELLIOTT.

Opinion delivered December 20, 1920.

1. TAXATION—DISCRIMINATION AGAINST NONRESIDENTS.—Acts 1917, vol. 2, p. 2173, § 2, as amended by Special Acts 1919, p. 180, § 2, providing for an acreage tax upon nonresidents' land in Arkansas County for the purpose of working roads, is unconstitutional as violating Const. 1874, art. 16, § 5, providing that all property shall be taxed according to its value, making the taxes equal and uniform throughout the State.

2. TAXATION—PAYMENT UNDER PROTEST—RECOVERY.—Where the tax collector could have sold lands for nonpayment of taxes which would have constituted a cloud on the owner's title, the latter may recover taxes paid by him under protest when levied under an unconstitutional statute.

Appeal from Arkansas Circuit Court, Southern District; *W. B. Sorrells,* Judge; reversed.

STATEMENT OF FACTS.

The White River Lumber Company, a nonresident corporation, brought this suit against R. H. Elliott, sheriff and collector of Arkansas County, Arkansas, to recover the sum of $2,121.51.

The complaint alleges that the collector of Arkansas County demanded of the plaintiff a tax of ten cents per acre upon its lands in said county upon the pretended authority of act 472 of the Legislature of 1917 amended by act No. 102 of the Legislature of 1919; that the defendant refused to permit the plaintiff to pay the taxes legally assessed against its lands unless it paid said illegal tax of ten cents per acre as aforesaid; that plaintiff paid said taxes under protest and notified the defendant at the time that he would be called upon to refund the amount so paid; that the defendant still has and retains in his possession the amount of said taxes and has not paid the same over to the county treasurer. The plaintiff alleges that the act under which the taxes so collected were levied is discriminatory and unconstitutional.

The circuit court sustained a demurrer to the complaint and the plaintiff having declined to plead further, the demurrer was sustained, and the complaint was dismissed at the cost of the plaintiff. The plaintiff has appealed.

Buzbee, Pugh & Harrison and *A. S. Buzbee,* for appellant.

The tax is unconstitutional, and the court erred in sustaining the demurrer. The acts are unconstitutional. Article 16, § 5, Const. Ark.; art. 14, § 1, Const. U. S.

They are clearly a discrimination against nonresidents of this State and clearly prohibited by the Constitution.

E. W. Brockman, for appellee.

The taxes, alleged to be an illegal demand, were paid voluntarily, with full knowledge of the facts, and the same can not now be recovered. 107 Ark. 24 settles this case. The common law rule is settled by 97 U. S. 181; 98 *Id.* 541.

HART, J. (after stating the facts). The decision of the circuit court was wrong. The Legislature of 1917 passed an act regulating the working of public roads and highways in Arkansas County, and providing a tax therefor. Acts of 1917, volume 2, page 2173. Section 1 provides that all nonresidents of the State of Arkansas owning land in Arkansas County shall pay an annual road tax of $4.50, and that said tax shall be collected in the same manner that other taxes are collected.

The Legislature of 1919 passed an act for the better working of roads in Arkansas County which is amendatory to the act passed in 1917. Special Acts of Arkansas, page 180. Section 2 of that act provides that the tax against nonresidents of the State of Arkansas owning land in Arkansas County as provided for in section 16 of act 472, approved March 28, 1917, shall be ten cents per acre per annum for each acre of land owned instead of $4.50 per owner. The section further provides that the tax shall be collected each year in the same manner as other taxes are collected.

The act is unconstitutional. Section 5, article 16 of the Constitution of 1874 provides that all property subject to taxation shall be taxed according to its value, to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. The section further provides that one species of property from which a tax may be collected shall not be taxed higher than another species of property of equal value.

It is apparent from reading the section of the constitution just referred to, that the act under consideration is in violation of its provisions. It provides for a road tax of ten cents per acre upon the land of nonresidents when no such tax is imposed upon the land of residents of this State. Hence the act is discriminatory and must be declared unconstitutional.

The question of whether the Legislature could impose an acreage tax for road purposes on lands generally is not involved in this suit; for the act in question only imposes such tax upon the lands of nonresidents. Therefore we do not pass upon the question of whether or not such a tax could be imposed upon all lands alike.

It is insisted, however, that the tax was paid voluntarily, and on that account can not be recovered. In making this contention counsel for the defendant rely on the case of *Brunson* v. *Board of Directors,* 107 Ark. 24. In that case the landowner in a levee district made a payment of taxes under an illegal assessment with knowledge of the facts, and the court held that the payment was voluntary, and that the taxes could not be recovered. In that case, if the landowner had refused payment to the collector, the latter had no authority to levy upon and seize his lands to enforce payment. The statute required suit to be brought by the board of directors of the levee district to collect the taxes. The landowner could have made his defense in that suit, and thus would have had his day in court.

In the instant case the collector could have sold the lands for the nonpayment of the taxes, and this would have constituted a cloud upon its title. To prevent this the owner had the right to pay the taxes under protest and then sue the collector to recover them. This brings the case within the principle announced in *Dickinson* v. *Housley,* 130 Ark. 259.

It follows that the judgment must be reversed and the cause will be remanded for further proceedings according to the law and not inconsistent with this opinion.

HINES v. BETTS.

Opinion delivered December 20, 1920.

1. RAILROADS—DUTY OF PEDESTRIAN AT CROSSING.—There is no absolute rule in this State that a failure of a traveler to stop, look and listen at a public crossing is negligence as matter of law, making it obligatory on the courts to take the question of contributory negligence from the jury.
2. APPEAL AND ERROR—REVIEW OF DENIAL OF DIRECTED VERDICT.—In considering whether the court should have directed a verdict for the defendant, every fact and inference of fact favorable to the plaintiffs which the jury might believe to be true must be accepted as true, and every fact unfavorable to the plaintiffs which the jury might reject as untrue must be rejected.
3. RAILROADS — CONTRIBUTORY NEGLIGENCE — JURY QUESTION.—In an action for the death of a pedestrian struck by a train at a public crossing, his contributory negligence in entering on the track without stopping to look and listen, when there was a strong wind blowing and snow falling and the train was running at an unusual speed without signals, *held* a question for the jury.
4. RAIROADS—DISCOVERED PERIL—JURY QUESTION.—In an action for the killing of a pedestrian by a train at a crossing, where the trainmen discovered deceased's perilous situation and applied the emergency brake but did not blow the whistle or sound the bell, and deceased was struck when he was almost across the track, the question of discovered peril was properly submitted to the jury.
5. DEATH—DAMAGES FOR PAIN AND SUFFERING.—The widow and children of one negligently killed are not entitled to damages for his pain and suffering, but only to damages for the loss of his comfort and support.
6. APPEAL AND ERROR—HARMLESS ERROR.—In an action by a widow and children for the death of their husband and father, an instruction authorizing recovery of damages for deceased's pain and suffering was prejudicial; there being no method of determining how much the jury awarded for this element of damage.

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

STATEMENT OF FACTS.

Mrs. Tommy Betts for herself, and as next friend of her minor children, sued Walker D. Hines, as Director General of Railroads, to recover damages for the alleged

negligent killing of her husband, who was run over and killed by a passenger train of the railroad company.

The material facts are as follows: Andy M. Betts was struck and killed by a passenger train of the St. Louis & San Francisco Railroad Company as he was walking across Main Street in the city of Blytheville, Ark., about 5:45 o'clock in the afternoon on the 8th day of February, 1919. Main Street in the city of Blytheville runs east and west, and upon it are located nearly all of the stores or business houses. It is eighty feet wide between the building lines and the main line of the St. Louis & San Francisco Railroad Company runs north and south across it near the center of the business section. The right-of-way of the railroad company is 100 feet wide. The main line and one side track crosses Main Street. The railroad tracks are five feet wide and the space between them is nine feet. There is a good deal of crossing of the railroad track on Main Street. On the west side of the main track of the railroad company, and on the north side of Main Street, there is a stationary electric bell or gong for the purpose of warning the public of the approach of trains. A passenger train from St. Louis to Memphis is scheduled to arrive at the station at Blytheville at 5:45 p. m. The passenger depot is a short distance south of Main Street on the west side of the main track of the railroad. On the 8th day of February, 1919, at about 5:45 o'clock in the afternoon there was a strong wind blowing and a heavy snow falling which had covered the ground in the city of Blytheville. Andy M. Betts, a farmer, who lived in the country, was in the city of Blytheville on that afternoon and started along the sidewalk on the soutuh side of Main Street to cross the railroad track. He was forty-five years of age at the time, and was a strong, able-bodied man. There was a string of cars on the sidetrack which obstructed his view to the north until he crossed the sidetrack. These box cars were on the sidetrack from ten to eighteen feet north of the north line of Main Street. Betts continued

to walk across the main track after he crossed the side-track. According to those who saw the accident, he either was walking fast or was going in a jog trot. He was struck by the train after he had got nearly across the main track. The train was coming in from the north and one witness testified that Betts stopped a moment just before he stepped upon the main track.

The speed of the train as it approached the crossing on Main Street is variously fixed by the witnesses at from ten to thirty miles per hour. The witnesses also differed as to the distance that a train on the main line could have been seen by any one approaching the main track along the path traveled by Mr. Betts on the day in question. Several persons crossed the railroad track in advance of Mr. Betts, and one of them had got across the track just ahead of him. He saw the headlight of the approaching train as he crossed over. Some of the witnesses said that the train whistled some distance north of the Main Street crossing, but that they did not hear it whistle any more nor did they hear the bell ring as the train approached the crossing. Other witnesses testified that they did not hear the electric bell ring as the train approached the Main Street crossing. Most of the witnesses said that the train might have whistled again and they not have heard of it. But some of them said that they did not think it whistled but one time, and that was some distance above the Main Street crossing.

On the part of the railroad company, it was shown that the engineer and fireman were keeping a lookout, and that, as soon as the fireman saw Betts approaching the main track from his side, he signaled the engineer to stop the train and the engineer at once applied the air brake in emergency and did all he could to stop the train at once. It also introduced testimony tending to show that Betts must necessarily have seen the approaching train if he had looked to the north as he attempted to cross the main track.

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

The jury returned a verdict in favor of the plaintiffs in the sum of $10,000, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

W. F. Evans and *W. J. Orr,* for appellant; *M. P. Huddleston* and *S. R. Simpson,* of counsel.

1. As to pain and suffering the complaint fails to state a cause of action in favor of plaintiffs. Plaintiffs' instruction No. 12 was the only instruction on the measure of damages, and is clearly prejudicial in authorizing the jury to allow plaintiff's damages for pain and suffering of Mr. Betts. Kirby's Digest, § 6287; 53 Ark. 17.

2. The court erred in refusing instruction No. 9 as requested, and in giving it as modified. 125 Ark. 509.

3. Instruction 10, as requested, states the law as to contributory negligence as a defense to negligence in failure to give signals or for excessive speed. 110 Ark. 168. The court destroyed the life of this instruction by the modification. 125 Ark. 509; 110 *Id.* 168. See, also, 35 S. W. 216; 34 *Id.* 545; 93 *Id.* 564; 42 *Id.* 406; 20 *Id.* 161; 54 Ark. 431; 69 *Id.* 134; 64 *Id.* 364.

4. While instruction No. 6 is abstractly correct, it was error to give it in this case. 105 Ark. 299. It was error to refuse to direct a verdict for defendant. The instructions were prejudicial and erroneous.

Davis, Costen & Harrison, for appellees.

1. The contention that the complaint failed to state a cause of action for pain and suffering in favor of plaintiffs and that the court's instruction on the measure of damages is raised in this court for the first time. No specific objections were made below. 118 Ark. 1. Only a *general* objection was made below, and they can not specifically object here for the first time. 56 Ark. 602; 123 S. W. 797; 125 *Id.* 136. See, also, 133 *Id.* 1134; 88 Ark. 181, 204; 89 *Id.* 522; 93 *Id.* 589; 96 *Id.* 184; 118 *Id.* 337; 119 *Id.* 530.

2. Appellant was not prejudiced by the instruction. Under the evidence the jury would have been justified in returning a much larger verdict. 92 Ark. 432; 108 *Id.* 14.

3. Appellant's requested instruction No. 9 as modified was more favorable to them than they were entitled to under the facts and circumstances. 136 Ark. 246; *Ib.* 254; 60 *Id.* 409; 63 *Id.* 177; 64 *Id.* 236.

4. Instruction No. 10 was also too favorable to appellant.

5. There was no error in No. 4 given. It is not abstract. 105 Ark. 190. See, also, 94 Ark. 246, 251; 107 *Id.* 431, 438.

6. Instructions 3 and 5 given, correctly state the law. The jury were justified in concluding that the employees were not keeping a proper lookout, if they did not discover Betts until they were upon him.

7. The court properly refused to direct a verdict for defendant. 76 Ark. 227; 79 *Id.* 241. A question for a jury was made by the evidence. 90 *Id.* 19; 105 *Id.* 180; 136 *Id.* 246, 254.

HART, J. (after stating the facts). It is first insisted by counsel for the defendant that the evidence is not sufficient to support the verdict. In support of their contention, they insist that the court should have held as a matter of law that Andy Betts, who was killed, was guilty of contributory negligence in attempting to cross the railroad track at the time the train struck and killed him.

This court has expressly declared that the rule that the failure of a person, when about to cross a railroad track at a public crossing, to stop, look and listen for approaching trains constitutes contributory negligence barring recovery, is not a hard and fast rule under all circumstances. In other words, there is no absolute rule in this State that a failure on the part of the traveler to stop, look and listen at a public crossing is negligence as a matter of law and makes it obligatory upon the court under any and all circumstances to take the question of

contributory negligence from the jury. *C., R. I. & P. Ry. Co.* v. *Batsel,* 100 Ark. 526, and cases cited; *St. L., I. M. & S. Ry. Co.* v. *Roddy,* 110 Ark. 161, and *Smith* v. *Mo. Pac. Rd. Co.,* 138 Ark. 589.

In considering whether or not the court should have directed a verdict for the defendant, every fact and inference of fact favorable to the plaintiffs, which the jury might believe to be true, must be accepted as true; and every fact unfavorable to the plaintiffs which the jury might reject as untrue must be rejected. Tested by this rule, we do not think it can be said, as a matter of law, that Andy Betts was guilty of contributory negligence when he attempted to cross the railroad track on the evening he was killed. He was a farmer living out in the country from Blytheville, and the jury might have found that he was familiar with the schedule of the train and the rate of speed at which it usually approached the Main Street crossing. There was a city ordinance which provided that no railroad engine, train, or car should be moved within the corporate limits of the town of Blytheville at a greater speed than six miles per hour.

The fireman testified that the train was going at the rate of fifteen miles an hour when he first saw Betts approaching the main track on Main Street, and it is fairly inferable from his testimony that this was the usual speed at which the train approached the Main street crossing.

One of the witnesses testified that Betts was walking fast, and that he stopped after crossing the sidetrack for a moment just before going on to the main track and looked toward the north. Other witnesses say that the train whistled some distance above the Main Street crossing and did not whistle any more after that. The jury might have inferred that Betts, as he looked toward the north, saw the headlight of the approaching train and on account of the snow thought it was approaching at its usual rate of speed, and that he would have plenty of time to cross the track ahead of the train, as did the man just in front of him.

The jury might have also found that if the train had been approaching at a rate of speed not faster than fifteen miles an hour that Betts could have crossed in safety. It was inferable from the testimony that the train did not give the statutory signals of its approach by ringing the bell or sounding the whistle. This might have deceived Betts into thinking that the train was farther away than it really was. Then, too, as just stated, the condition of the atmosphere might have deceived him as above stated as to the rate of speed at which the train was approaching. Some of the witnesses said that the train was running at a speed of thirty miles per hour. The jury had a right to take into consideration all these facts in reaching its verdict. When it has done so, we do not think that it should be conclusively said that under all facts and circumstances adduced in evidence Betts was guilty of contributory negligence.

It is also contended by counsel for the defendant that the court erred in submitting to the jury the question of discovered peril. They point to the fact that the engineer and fireman both testified that Betts approached the track from the fireman's side, and that the fireman signaled the engineer to stop the train as soon as he discovered that Betts was about to attempt to cross the main track in front of it, and that the engineer immediately applied the air brake in emergency and did all that he could to stop the train. Their testimony in this respect is corroborated by the evidence of other witnesses.

It can not be said, however, that the undisputed evidence warranted the court in taking away from the jury the question of discovered peril. Betts had nearly crossed the track before the train struck him. According to some of the witnesses, he was going at a fast walk. The jury might have found that if the engineer had blown a sharp blast of the whistle this would have attracted Bett's attention to the nearness of the approaching train, and that he might have accelerated his speed or have jumped from the track to a place of safety. The failure

of the engineer to give the danger signals was sufficient to submit to the jury the question of the negligence of the defendant with respect to the doctrine of discovered peril. *Evans* v. *St. L., I. M. & S. Ry. Co.*, 87 Ark. 628, and *St. L., I. M. & S. Ry. Co.* v. *Evans,* 96 Ark. 547.

It is next contended that the court erred in its instruction on the measure of damages. In this instruction the plaintiffs are allowed to recover for the financial loss to the widow and children by reason of Betts' being struck and killed by the railroad train. The instruction also permits the jury to find for the plaintiffs for the conscious pain and suffering, if any, suffered by the decedent by reason of the injury. This was the only instruction on the measure of damages, and it clearly authorized the jury to allow the widow and children damages for the conscious pain and suffering of Andy Betts. This was wrong. The widow and minor children were only entitled to sue for damages which they sustained by reason of the death of the husband and father, and this was the financial loss to them of his comfort and support. They could not sue for damages for the conscious pain and suffering of decedent. Such suits must be brought, under our statute, by the personal representative of such deceased person. Kirby's Digest, §§ 6289-6290.

It is contended by counsel for the plaintiffs, however, that no prejudice resulted to the defendant from this instruction. They point to the fact that the evidence was sufficient to show that their financial loss was more than $10,000, the whole amount recovered. There was a general verdict for the plaintiffs in the sum of $10,000. The instruction submitted to the jury the amount to be recovered for conscious pain and suffering and also for the financial loss to the widow and children. Although Betts died in a short time, there was testimony from which the jury might have found that he endured conscious pain and suffering before his death. This court cannot know how much damages the jury intended to find, if any, for the conscious pain and suffering and how much for the financial loss for the widow and chil-

dren. Therefore, the instruction was erroneous in submitting to the jury an element of damages which the plaintiffs were not entitled to recover, and this was prejudicial to the rights of the defendant.

In the case of *Hines* v. *Johnson,* 145 Ark. 592, the court held that, in the case of the death of a child leaving both a father and mother living, the right of recovery of damages for the negligent killing of such child was, under our statute, in the father and not in the mother. Therefore, in an action brought by the mother in such a case, it was held error to instruct the jury that she might recover for the lost services of the deceased child. The reasoning of the court in that case applies here, and the judgment must be reversed because the verdict was general and there is no way for the court to determine from the record how much was erroneously awarded the plaintiffs on account of conscious pain and suffering endured by the husband and father before his death.

It follows that the judgment must be reversed and the cause remanded for a new trial.

RAMEY-MILBURN COMPANY *v.* FORD.

Opinion delivered December 20, 1920.

1. EXECUTORS AND ADMINISTRATORS—PAYMENTS ON UNAUTHORIZED CLAIMS.—Where executors without authority in the will continued the testator's business and purchased goods from a grocer to whom the testator was indebted at time of his death, but paid for such goods, the creditor could not apply the payments to the debt existing at the testator's death and leave unextinguished a portion of the debt the executors owed.
2. EXECUTORS AND ADMINISTRARORS—PERSONAL LIABILITY.—Executors are liable for goods purchased in the name of the estate without authority.
3. APPEAL AND ERROR — NECESSITY OF CROSS-APPEAL.—Appellee's claim not allowed by the trial court is not presented for review in the absence of a cross-appeal.

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

Miller & Yingling, for appellant.

This is not a claim against the estate, but, under Kirby's Digest, § 54, the sons were liable persnally by continuing to operate the mercantile business of their father. 19 Ark. 676; 61 *Id.* 414; 62 *Id.* 223. Administrator has no power to enlarge the liability of his intestate or bind the assets in his hands by any agreement of his. 10 Ark. 204; 18 Cyc. 247. This rule is approved in 65 Ark. 443; 61 *Id.* 410. See, also, 17 Ark. 571; 34 *Id.* 205. The court erred in finding for appellees.

Brundidge & Neelly, for appellees.

The indebtedness sued for is due appellant by the estate of J. A. Ford and not by them personally, and the court below adopted their contention. Kirby's Digest, § 54. It was a claim against the estate. Even if it was a personal liability and they were responsible, appellees have overpaid the debt, and they should have judgment for $115.41.

SMITH, J. J. A. Ford was engaged in the mercantile business until his death, which occurred November 25, 1919. He was survived by his widow and two sons. He left a will and named his sons as his executors; but the will made no provision for the continuance of his business. Ford, at the time of his death, was indebted to the appellant grocery company in the sum of $195.95. The sons continued this business, and bought goods from appellant company amounting to $353.33; but while so continuing the business, they paid appellant $468.74. Appellant credited the sum thus paid—without any direction so to do—on the oldest items of the account, and brought this suit against the widow and sons of Ford to recover the balance due it. There was a trial before the court upon the appeal from the justice court, and a judgment for defendants, from which is this appeal.

It is not insisted here that the widow should be held liable for this debt; but liability against the sons is asserted upon the theory that they had no right to continue

to operate the mercantile business, and they therefore became personally responsible for the goods bought by them while so doing.

The correctness of this position may be conceded without liability following as the result of that concession. There was no purpose on the part of the sons to form any partnership, and the goods were not sold on the faith of their credit. The sale was to the J. A. Ford estate. These sons were not personally liable for the debts owed by their father at the time of his death, as they had no connection with his business. They were liable for goods bought without authority in the name of the estate. But they paid for those goods, and appellant company had no right—without consent or permission so to do—to apply the payments made by the sons to a debt they did not owe and leave unextinguished a portion of the debt they did owe.

Appellees ask judgment here for $115.41, the sum paid in excess of the bills bought by them. But they were not allowed this claim in the court below, and have not prosecuted a cross-appeal. Their contention concerning this excess is, therefore, not presented for review.

Judgment affirmed.

JACKSON v. COLE.

Opinion delivered December 20, 1920.

1. TENANCY IN COMMON—ADVERSE POSSESSION.—A conveyance by a cotenant of the entire estate to a stranger gives color of title; if possession is taken thereunder, and the grantee claims the whole, his possession is adverse to the other tenants in common, and he acquires title by occupancy for the statutory period, except as to those under disability.
2. LIMITATION OF ACTIONS—PERSON UNDER DISABILITY.—Under Kirby's Digest, § 5056, adverse possession of land will bar recovery by an infant only when he fails to sue within three years after attaining his majority.

Appeal from Greene Circuit Court, First Division; *R. H. Dudley,* Judge; reversed in part.

Huddleston, Fuhr & Futrell, for appellants.

1. The answer to the complaint raises two issues: (1) that there was an exchange of lands by Isaiah Jackson for the lands in question; (2) that plaintiffs are barred by adverse possession. The first question was properly submitted to a jury; but the second issue was not properly submitted, nor in fact submitted at all.

2. Instruction No. 4 was in substance a peremptory instruction, and it was error. It does not come within the definition of adverse possession. In order to constitute adverse possession, it must be shown that it was actual, hostile, open and exclusive, and continuous for the full period prescribed by the statute. 65 Ark. 426; 43 *Id.* 486; 27 *Id.* 527. The mere nondemand and nonpayment of rent are not sufficient to make the holding adverse. 57 Md. 612. See, also, 14 S. W. 361; 7 Mich. 181. The possession of one cotenant is the possession of all, and one cotenant is trustee for all other cotenants. 221 S. W. 458; 68 Ark. 542; 49 *Id.* 242.

3. The instruction does not even require that occupants should have been claiming in their own right and fails to submit the question of ouster or disclaimer and notice. An actual termination of the relation of landlord and tenant must take place and brought home to the landlord or cotenant. 89 Am. St. Rep. 85. Our Arkansas cases support the principles announced. 15 Ark. 102; 27 *Id.* 527; 77 *Id.* 570; 114 *Id.* 376. See, also, 117 Ark. 418; 125 *Id.* 181; 102 *Id.* 679; 99 *Id.* 84, 446.

Block & Kirsch, for appellees.

1. There was no error in giving instruction No. 4. 1 R. C. L. 706 and cases cited; 36 Am. Dec. 178; 5 Am. Dec. 136; 53 L. R. A. 699. The acts required to constitute hostility were correctly given in the instruction. The instruction correctly states the law. 1 R. C. L. 704; 136 Am. St. Rep. 1016.

2. Irrespective of the plea of limitations, the undisputed evidence shows that Isaiah Jackson, the ancestor, became the owner of these lands as the result of a trade

between himself and J. R. Jackson and R. Jackson, and a directed verdict for appellees would have been entirely proper.

SMITH, J. Suits in ejectment were brought by appellants to recover an undivided half interest in a forty-acre tract of land and an eighty-acre tract of land. The cases were consolidated in the court below, and are here on one appeal. The plaintiffs in the suits are the heirs at law of J. R. Jackson, who died August 5, 1881; and the defendants are the daughters of Isaiah Jackson, who died in November, 1909. J. R. and Isaiah were brothers, as was also R. Jackson, who died in 1917.

About 1869 Isaiah Jackson moved on to certain lands, which the witnesses referred to as the railroad lands, from the fact that the title thereto was acquired from a railroad company. These railroad lands adjoin the land in suit, and possession of both tracts was taken by Isaiah Jackson at about the same time. The lands in controversy were not entered from the State until 1874, in which year J. R. and R. Jackson obtained a patent from the State. On January 2, 1897, R. Jackson executed a warranty deed to Isaiah Jackson for the land in controversy. The deed purported to convey the whole title. On July 31, 1906, Isaiah Jackson conveyed to his daughter, Alice, forty acres of the land by warranty deed, which declared it the intention of the grantor "to grant to the said Alice Cole a life-estate, with remainder over to her heirs." A similar deed was made on the same day to Nellie Rowe for the eighty-acre tract. The plaintiff, Jennie Penny, was born September 26, 1862, and was married to John Penny February 3, 1879, who died April 7, 1916. The plaintiffs, Carroll and Mildred Huff, were children of Lelia Huff, daughter of J. R. Jackson. They are twins and were born July 16, 1897. Their mother died January 14, 1899. The suit was begun in June, 1919, and resulted in a verdict and judgment for the defendants

Two defenses were interposed. One was that Isaiah Jackson exchanged the lands in suit with his brother for other lands which he owned. The second was that the title had been acquired by limitation. It is conceded that the question of the exchange of lands was properly submitted to the jury, and it need not, therefore, be further considered. The verdict of the jury on this question would have been decisive of the case, had the case been submitted on that question alone; but over the objection of the plaintiffs the court gave an instruction numbered 4, which reads as follows: "If you find and believe from the evidence that Isaiah Jackson, the ancestor of the defendant, went into possession of the lands in question in the year 1869, or thereabout, continued to reside upon said lands until the time of his death, made improvements thereon, by way of building houses, outhouses, clearing and fencing the lands, and any other improvements, and paid the taxes thereon, and in the year 1906 conveyed a portion of the lands to his daughter, Mrs. Cole, and the remainder to his daughter, Mrs. Rowe, who occupied the lands after the death of their father as their homestead, and they, or their husbands for them, have paid the taxes on said lands continuously since receiving their deeds to the lands, and made substantial improvements upon the lands, and these facts were known to plaintiffs at all times, and they were aware of what was being done by Mrs. Cole and Mrs. Rowe, and asserted no claim to any interest in the lands, then you will find for the defendants."

The correctness of this instruction presents the real question in the case, as it is contended by appellants, and virtually admitted by appellees, that it directed a verdict for the defendants, the facts there hypothetically stated being undisputed.

The insistence is that Isaiah Jackson's entry was permissive, and his subsequent holding was as tenant at will until 1897, when, by the conveyance to him from R. Jackson, he became a tenant in common with the heirs of J.

R. Jackson, and that thereafter his holding never became adverse to these heirs—as cotenants—and that if there was any question on this score it was one of fact, which should have been submitted to the jury.

Leaving out of account the question of the exchange of the lands—for the purpose of this discussion—it may be admitted that R. Jackson had the paper title to only an undivided half interest in the lands he conveyed, but he undertook to convey the whole title, and the conveyance was by warranty deed. Three years later Isaiah Jackson conveyed to the defendants the whole title. That conveyance was by warranty deed, and the estate conveyed—a life-estate, with remainder over—clearly indicates that grantor and grantee intended to pass, and receive, the whole title.

The instruction complained of required that there had been actual and continuous possession for a period of fifty years (1869-1919); that a conveyance had been made to the defendants thirteen years before the institution of the suit; that these grantees had occupied the lands continuously since as their homestead, and had improved the same, and paid the taxes thereon; and that all these facts were known to the plaintiffs, during all of which time they asserted no claim or interest in the land. The testimony shows that these things were true, and that the defendants were 43 and 41 years old, respectively, and both were born on this farm, and had lived there practically all their lives, and from their earliest recollection their father had always owned, and claimed to own, the land, and that they had owned, and claimed, their respective portions from the date of their father's deed. Under these circumstances it was not error to give the instruction set out above, except as to the plaintiff, Carrol Huff, for the reason hereinafter stated.

The excellent briefs in the case collect many of our cases dealing with the conditions under which one tenant in common may hold adversely against his cotenant and

acquire the title by adverse possession. We will not review those cases, as the law of the subject is well defined.

In the case of *Parsons* v. *Sharpe,* 102 Ark. 615, we said: "The rule sustained by the overwhelming weight of authority with reference to conveyances by one or more cotenants to a stranger, and the character of possession taken thereunder, is correctly stated as follows: 'The conveyance by one cotenant of the entire estate gives color of title; and if possession is taken, and the grantee claims title to the whole, it amounts to an ouster of the cotenants, and the possession of the grantee is adverse to them.' 1 Am. & Eng. Enc. of Law (2 ed.), p. 806, and numerous authorities there cited.

"That rule was recognized by this court in *Brown* v. *Bocquin,* 57 Ark. 97.

"On the other hand, the principle is well settled that where a conveyance is executed to a stranger by one tenant in common, purporting to convey only his undivided interest, he becomes a tenant in common with the other tenant (17 Am. & Eng. Enc. of Law (2 ed.), p. 661); and, in order to constitute an ouster, 'the tenant out of possession must have actual notice of the adverse holding or the hostile character of the possession must be so openly manifest that notice on his part will be presumed.' 1 Am. & Eng. Enc. of Law (2 ed.), p. 805."

The cases appearing in this quotation were cited and approved in the later case of *Wilson* v. *Storthz,* 117 Ark. 14. See, also, *Brashear* v. *Taylor,* 109 Ark. 281; *McKneely* v. *Terry,* 61 Ark. 527; *Cocks* v. *Simmons,* 55 Ark. 104; *Brewer* v. *Keeler,* 42 Ark. 289.

It is the law, as was stated in the case of *Wilson* v. *Storthz, supra,* that one entering upon the possession of land, under a deed of conveyance to him is presumed to occupy, and intends to claim, only the interest named in his conveyance. But Isaiah Jackson received a deed to the whole title, and he conveyed to these defendants the whole title, and the undisputed testimony is that these defendants occupied the land, and claimed the title, under

these deeds for more than seven years before the institution of this suit.

The subject under discussion is one which has frequently received attention in the annotated cases, many of which are cited in the notes to section 48 of the article on Cotenancy in 7 R. C. L., pages 854-855. Among these are *Lloyd* v. *Mills,* 32 L. R. A. (N. S.) 702; *Allen* v. *Morris,* 29 A. & E. Ann. Cas. 1310.

In the text of the section of R. C. L. above mentioned the law is stated as follows: "*Entry under conveyance of property by one cotenant.* A conveyance to a stranger to the title, by one cotenant, by an instrument purporting to pass the entire title in severalty, and not merely such cotenant's individual interest, followed by an entry into actual, open and exclusive possession by such a stranger, under claim of ownership in severalty, amounts to a disseisin of the other cotenants, which, if continued for the statutory period, will ripen into good title by adverse possession. * * * In considering this question the familiar principle is recalled that when one enters upon land, he is presumed to enter under the title which his deed purports upon its face to convey, both as respects the extent of the land and the nature of his interest." The author continues: "Therefore, in such a case, a sale of the whole tract is, in effect, such assertion of claim to the whole as is quite incompatible with an admission that the other tenant in common has any right whatever; and it follows that acts of ownership on the part of such a grantee must necessarily be adverse to any other part owner, even though, in such a case, the latter had no actual notice of the adverse character of the possession." It is stated in this same section that the authorities are conflicting on this last proposition. But it is not essential that we approve the law as thus stated to affirm the action of the court in giving instruction numbered 4, because that instruction required a finding that the plaintiffs had knowledge of the facts there hypothetically stated.

In the section quoted from it is further stated that the presumption that a grantee in possession, under a conveyance of the whole title by one tenant in common, holds adversely to the other cotenant may be overcome by words, acts and circumstances showing that at the time or subsequent to his taking possession the grantee acknowledged the rights of his cotenant. But here there is an entire absence of such testimony.

In Freeman on Cotenancy (2 ed.), § 197, the law is stated as follows: "*As Color of Title:* A conveyance by one cotenant, purporting to convey an estate in severalty, can not operate to the prejudice of another. This is true only so far as the immediate effect of such conveyance as a transfer of title is concerned. It does not follow that no rights can grow out of it, nor that it is, even as against the other cotenants, mere waste paper for all purposes. Such a conveyance constitutes color of title. The entry of the grantee made under the deed, and claiming an interest coextensive with that with which the deed purports to deal, is an entry under color of title. The cotenants are therefore bound to take notice of the deed and of the entry made under it, and to take such steps as may be required to enforce a recognition of their legal rights. Should they fail to do so within the time prescribed by the statute of limitations, their rights will be no longer susceptible of enforcement; and their interests, by operation of that statute, will vest in the party in possession under the deed."

In the case of *Newmarket* v. *Pendergrast,* 24 N. H. 54, one of the head notes is as follows: "If a tenant in common, being in possession of the land, conveys it with a covenant of warranty against all claims and demands, possession under the deed will be adverse to the title of the other tenants in common. In such case, if the fact is found that the possession of the grantee is under his deed, it is a legal conclusion that his possession is adverse and the question is not for the jury."

What we have said is conclusive as to the claim of the plaintiff, A. D. Jackson, who has been under no disability.

It is also conclusive as to his sister and coplaintiff, Mrs. Penny. It is true Mrs. Penny was a married woman from February, 1879, until April 7, 1916, but she became discovert on the last named date, through the death of her husband, and more than three years expired thereafter before the institution of this suit. Section 5056, Kirby's Digest.

This also disposes of the claim of Mildred Huff, who was born July 16, 1897, and, therefore, became eighteen years of age on July 16, 1915, a period of more than three years before the institution of this suit. *Brake* v. *Sides,* 95 Ark. 74; *Shapard* v. *Mixon,* 122 Ark. 530.

But the instruction was not a proper one as to Carrol Huff, who did not become twenty-one years of age until July 16, 1918, which was less than a year before the institution of this suit.

The judgment of the court must, therefore, be reversed as to Carrol Huff, as the statute of limitations did not run against him on account of his infancy, and the suit was brought within three years of the time when he became of full age.

The judgment of the court will therefore be reversed, and upon the remand of the cause it will be submitted to the jury as to Carrol Huff upon the other issues involved in the case, towit, that of the exchange of the lands and that of the acquisition of the title by Isaiah Jackson himself by his own possession.

As to all other appellants the judgment is affirmed.

McCULLOCH, C. J., (dissenting). The evidence warranted the finding that the possession of Isaiah Jackson began permissively under his brothers, J. R. Jackson and Richard Jackson, and that the character of that possession continued until the time of the conveyance to him by J. R. Jackson. Isaiah was not in the attitude of a stranger to the original owners, J. R. and R. Jackson,

for he occupied the land as the tenant by sufferance of the two owners, and his acceptance of the conveyance from one of them made him a tenant in common with the other. The character of the possession of appellees under the conveyance from their father, Isaiah Jackson, was not different. They resided on the place—were reared there—and there was no visible change of possession. So the possession, as shown by the evidence, was not necessarily hostile, and the issue should have been submitted to the jury. Instruction number 4 took that question away from the jury by declaring as a matter of law that the facts recited constituted adverse possession. When possession begins permissively, actual knowledge of adverse holding must be brought home to the owner, either directly or by notorious acts of unequivocal character. *Singer* v. *Naron,* 99 Ark. 446.

My opinion, therefore, is that the court erred in giving the instruction referred to.

ALIX COAL COMPANY *v.* NELSON.

Opinion delivered December 20, 1920.

MASTER AND SERVANT—ASSUMED RISK.—A coal miner engaged in the day shift in driving an entry in a coal mine, and who knew that the night shift had been blasting down the roof near his working place, in view of the fact that it was his duty to look after and secure the safety of such place, will be held to have assumed, as a risk incident to his employment, that the rock in the roof of his working place might have been loosened and sprung by a false shot in the entry made by the night shift.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran,* Judge; reversed.

J. D. Benson and *Pryor & Miles,* for appellant.

1. Appellant was entitled to a directed verdict. Nelson was an experienced miner and knew the danger and assumed the risk. 76 Ark. 72; 97 *Id.* 486; 98 *Id.* 145; 87 N. W. 736; 114 S. W. 785; 50 N. E. 36; 71 S. W. 80.

2. The court erred in refusing the instructions asked by defendant.

Dave Partain and *Evans & Evans,* for appellee.

The court correctly refused the peremptory request for a directed verdict, as the evidence shows that, by reason of the negligent acts and omissions of defendants, its agents and servants, the intestate was injured and his death caused thereby. There was legally sufficient evidence to send the case to a jury, and the verdict is sustained by the evidence. The instructions, given correctly, state the law of the case, that Nelson did not assume the risk of injury from the negligence of empolyer, unless he knew and appreciated the danger. The instructions given have been approved by this court. 136 Ark. 467; 232 U. S. 94. This case is very similar to 129 Ark. 550. Negligence of defendant was alleged in this complaint and shown by the evidence and the instructions given were correct, and those refused were not the law.

HUMPHREYS, J. Appellee, administratrix of the estate of T. J. Nelson, deceased, instituted suit for the use and benefit of his estate, for herself as widow, and her five minor children, in the Franklin Circuit Court, Ozark District, against appellant for damages in the sum of $30,000 on account of the alleged negligent killing of appellee's intestate by a falling rock, while engaged in taking down coal in the process of driving the fourth east entry of the slope in appellant's coal mine. The charge against the company was negligence in brushing down the roof of the entry which consisted in blasting down two or three feet of rock above the top layer of coal after the coal had been removed so as to make room in the entry to haul out the coal. The particular act of negligence alleged was putting in a faulty shot which sprung or loosened the rock constituting a part of the roof over the working place of said intestate, which caused it to fall and kill him.

Appellant filed answer, denying negligence on its part, and pleading assumption of the risk by appellee's intestate.

The intestate was killed instantly, and, for that reason, the cause for the use and benefit of the estate was not submitted.

The cause for the use and benfit of the widow and minor children was submitted to the jury upon the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment against appellant for $2,000.

At the time appellee's intestate, T. J. Nelson, was killed, he was engaged by employment in driving an entry in the coal mine of appellant. Men composing a night shift and day shift were doing the work. Nelson was a member of the day shift. It was the duty of the day shift to remove the coal and of the night shift to blast down two or three feet of the roof after the coal had been removed, so as to make it high enough to haul out the coal. Blasting out the roof was called "brushing." The company employed Walter Leverett and Will Evans to do the brushing. Nelson worked on Friday, August 29, 1919, and, before leaving in the afternoon, put shots near the end of the entry in the first or lower stratum of coal to blow it down. These shots were fired after he left, by appellant's shot firers, which shots, when fired, blew down the first stratum of coal. This left the second and third strata of coal in place. He did not return to his work until Tuesday morning, September 2. During the interim, Walter Leverett and Will Evans were engaged in brushing in the entry two nights and brushed to within a few feet of where Nelson would begin to take down coal when he returned to work. Nelson knew that they had been brushing in his absence and by ordinary observation could have seen how near the brushing came to his working place. The last shot put in by Walter Leverett and Will Evans was just above the right hand roof rib of the entry and several feet from the working place

of Nelson. Some put it as low as three feet and others as high as seven feet. The hole which had been drilled for the shot was two and one-half or three feet long, pointing in the direction of the face of the coal, or toward Nelson's working place. When this shot was fired, it blew down only about half the rock and substance adjacent to it which it should have blown down. This was called a false shot. They are not uncommon in the work of brushing. The evidence adduced by appellee tended to show that the force of the shot spent itself in a forward direction instead of blasting all the rock adjacent to it in a downward direction, and, on this account, sprung or loosened a rock more than four feet wide and six feet long over Nelson's working place and caused it to fall on and kill him, when he wedged down the third or top stratum of coal immediately under the rock; that two strata of coal were in place under the sprung rock in Nelson's working place; that, by inspection of the hole containing the false shot, the loosened or sprung condition of the rock, which fell on Nelson, would have been discovered.

The evidence adduced by appellant tended to show that, while the last shot put in by Walter Leverett and Will Evans was a false shot, its force did not bound forward and spring or loosen the rock over Nelson's working place; that all the rock and other material adjacent to the shot, which was loosened when it fired, was removed by said parties immediately after the shot was fired; that the rock which fell upon and killed Nelson was what is known as a hogback or slip rock, held in place by the coal under it, and fell when Nelson wedged the coal down which supported it.

The undisputed evidence showed that it was the duty of the company to look after the brushing in the entry by its night shift; that, when its employees drilled a hole in the roof of the entry and shot it down with dynamite, the duty devolved on it to take down from the roof in the entry all loose rock occasioned by the shot; that it

was the duty of Nelson to look after and secure the safety of the roof of his working place.

Nelson returned to his work Tuesday morning and began to wedge coal down from the roof of his working place. In the progress of the work, the rock, to which the coal was attached, fell on and killed him. The evidence was ample to sustain the amount of the judgment, if any liability existed against appellant.

The cause was submitted to the jury upon the theory that it was appellant's duty to use ordinary care to furnish Nelson a reasonably safe place in which to work and to make reasonable inspection to see that the place was reasonably safe; and that Nelson only assumed the risk incident to normal conditions, or the conditions as he changed them from hour to hour in the progress of his work, but that he did not assume dangers or hazards occasioned in the roof of his working place by a false shot near it in the entry proper. A majority of the court are of opinion that the facts in the case bring it within an exception to the general rule making it the duty of a master to use ordinary care to furnish a reasonably safe place to work—the exception being that one engaged in blasting and excavating in his working place in a mine assumes the risks incident to his employment and that the rock in the roof of Nelson's working place, loosened or sprung by the false shot in the entry, was a hazard or danger incident to his employment, as the duty on appellant to inspect for dangers entailed by the false shot was limited to the entry proper. *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140; *St. L., I. M. & S. Ry. Co.* v. *Baker,* 110 Ark. 241. The majority distinguish the instant case from the case of *Central Coal & Coke Co.* v. *Graham,* 129 Ark. 550, on the ground that in the instant case Nelson knew that the night shift had been blasting down the roof in the entry near his working place during his absence, and it was not an uncommon thing for the force of false shots to bound forward and spring or crack rocks six or seven feet away from it; whereas, in

the Graham case, the shots had been fired in his absence without any knowledge on his part and without making any visible change in the situation.

Mr. Justice HART and the writer are of the opinion that the case was submitted upon the correct theory; that Nelson's duty of inspection was confined to his own working place and not to false shots fired in the entry proper, which created additional hazards above the roof of his working place, not discoverable by reasonable inspection within the confines of the place. In other words, we think it was the duty of appellant to ascertain the effect of the false shot fired in the entry and to remove or afford protection against dangers occasioned thereby, or at least to have notified Nelson of the danger resulting therefrom to the roof of his working place so that he might have propped the rock which fell and killed him. We also think that, as no duty rested upon Nelson to investigate the effect of the false shot in the entry and, as he did not know that such a shot had been fired, the rule in the Graham case is applicable to the instant case.

In accordance with the view of the majority, the judgment is reversed and the case is remanded for a new trial.

HALE v. STATE.

Opinion delivered January 10, 1921.

1. CRIMINAL LAW—CHANGE OF VENUE—WITNESSES.—Under Kirby's Digest, § 2318, a motion for change of venue on the ground of prejudice in the minds of the inhabitants of the county must be supported by the affidavits of two credible persons who are electors and actual residents of the county; hence, where one of two affiants was not a qualified elector, bystanders can not be called to testify in support of the motion.
2. JURY—OPINIONS BASED ON RUMOR OR NEWSPAPER REPORTS.—Jurors were not disqualified by reason of opinions based on rumor or newspaper reports which it would require evidence to remove, if nevertheless they could give defendant a fair and impartial trial according to the law and the evidence.

3. CRIMINAL LAW—INCOMPETENT EVIDENCE—EFFECT OF WITHDRAWAL.—The erroneous admission of the testimony of an insane person was cured by its subsequent withdrawal.

4. WITNESSES—CROSS-EXAMINATION.—In a prosecution for homicide, it was not competent for the defendant, on cross-examination of State's witness, to elicit testimony that the witness had heard that defendant had made threats against the witness, nor to interrogate the witness as to the name of his informant.

5. WITNESSES—CROSS-EXAMINATION.—In a criminal prosecution, it was not competent for the defense to ask a State's witness, on cross-examination, whether he had heard defendant's brother make threats against another witness, where it does not appear that defendant was present.

6. WITNESSES—IMPEACHMENT.—In a criminal prosecution where defendant on cross-examination elicited from a State's witness that a brother of defendant, in the latter's absence threatened another witness if he gave certain testimony, such testimony was incompetent and immaterial; and it was not error to refuse to permit defendant's brother to contradict the State's witness, especially since the brother had disobeyed the court's order placing the witnesses under the rule.

7. CRIMINAL LAW—HARMLESS ERROR.—Where the State's objection to testimony by defendant was sustained, but he was permitted to answer the question objected to, this was tantamount to a withdrawal of the court's ruling.

8. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY—OBJECTION.—Where, during the closing argument of the prosecuting attorney, the audience applauded, and defendant objected to the applause, and the court reprimanded the audience, but defendant did not ask that the remarks of the prosecuting attorney be withdrawn, he can not, on appeal, complain because such remarks were not withdrawn.

Appeal from Perry Circuit Court; *Archie House*, Judge; affirmed.

Edward Gordon, J. N. Bowen and *Sellers & Sellers*, for appellant.

1. The court erred in refusing the change of venue and in its rulings as to the qualifications of jurors for cause. A juror who has formed any opinion on the case is *prima facie* incompetent. The jurors should have been rejected on defendant's challenge for cause. 56 Ark. 381; 113 *Id.* 301; 102 *Id.* 181.

2. It was error to permit witness Joe Wyatt to testify, as the testimony showed he was mentally unbalanced and did not know the nature of an oath. The witness, W. J. Stone, should have been allowed to answer questions as to threats made. It was also error to sustain the objections as to questions asked Arthur Kelley. The ruling was reversible error. Article 2, § 13, Constitution; 72 Ark. 461.

3. Many errors in the court's rulings as to the admission and exclusion of testimony of witnesses were made and the court permitted the audience in the courtroom to cheer and applaud the argument of the State's attorney in his closing argument and in not telling the jury that the argument was improper. On the law and the record, defendant did not obtain a fair and impartial trial.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. The offer to call bystanders did not in any wise comply with our statute. Kirby's Digest, § 2317.

2. None of the jurors accepted were disqualified, as their opinions were formed from newspaper reports and rumors. They were qualified jurors and there was no error in accepting them. 132 Ark. 518; 135 *Id.* 530.

3. There were no reversible errors in the admission or exclusion of testimony. 14 Enc. of Ev., p. 596.

4. The statement of the prosecuting attorney in argument to the jury was merely the expression of an opinion and not improper. 95 Ark. 172.

McCULLOCH, C. J. The indictment against appellant charged the crime of murder in the first degree in the killing of Birdie Wyatt, but he was convicted of murder in the second degree, and his punishment was fixed at twenty-one years in the penitentiary. Appellant filed a petition for change of venue, accompanied by the supporting affidavits of F. C. Taylor and G. L. Loucks, but on the examination of Loucks it was developed that he

was not a qualified elector of the county, which left only Taylor as a supporting affiant. The statute provides that a change of venue in a criminal case can only be ordered when the petition is "supported by the affidavits of two credible persons who are qualified electors, actual residents of the county and not related to the defendant in any way." Kirby's Digest, § 2318. When the court announced its ruling denying the petition for the change of venue, appellant's counsel asked permission to call as witnesses two bystanders, one of them the sheriff of the county, to prove that the minds of the inhabitants of the county were so prejudiced against appellant that he could not obtain a fair and impartial trial. This request was overruled, and error of the court is assigned in the ruling.

The statute, above quoted, requires that the petitions for change of venue must be supported by the affidavits of two credible persons. This requirement is not complied with by calling witnesses to testify on the subject in open court. A person can not be compelled to join in a supporting affidavit on petition for a change of venue, as the statute contemplates that the supporting affidavits shall be the voluntary acts of the persons themselves. There was no error of the court in its refusal to permit appellant to call witnesses in support of his petition. *Whitehead* v. *State,* 121 Ark. 390.

The examination of a great many of the jurors is set forth in the record, and it is urged that the court erred in its rulings as to the qualifications of the jurors. All of them testified, in substance, that they had opinions as to the guilt or innocence of the defendant, based upon rumor or newspaper reports, and that it would require evidence to remove those opinions, but that, notwithstanding those opinions, they could go into the jury box and give the accused a fair and impartial trial according to the law and evidence as presented. The jurors were not disqualified by that state of mind based upon mere rumor or newspaper report. *McGraw* v. *State,* 113 Ark. 301.

It is next urged that the court erred in permitting witness Joe Wyatt, brother of the deceased, to testify in the case when it was shown that he was mentally unbalanced and did not know the nature of an oath. The record shows that the court, after permitting the witness to testify, ruled that he was incompetent and directed the jury not to consider his testimony. This constituted a withdrawal of the testimony from the jury, and we must assume that the members of the jury obeyed the directions of the court and disregarded the testimony. It is unnecessary, therefore, to determine whether or not the witness was lacking in mental capacity so as to disqualify him from testifying.

Witness W. J. Stone, who was introduced by the State, gave testimony concerning alleged statements made to the witness by appellant concerning the killing of Birdie Wyatt and on cross-examination appellant's counsel asked the witness if any one had told him that appellant had threatened to kill witness, to which inquiry witness replied that he had heard of such threat. Thereupon appellant's counsel asked the witness who told him of the threat, and the court sustained the objection of the prosecuting attorney to that question. This ruling is assigned as error. The statement of the witness to the effect that he had heard of a threat said to have been made by appellant was not competent, and appellant had no right to draw it out from the witness on cross examination and to inquire the name of his informant concerning this said alleged threat.

Witness Arthur Kelly, who was introduced by the State, testified in regard to an alleged attempt on the part of appellant to induce the witness to testify falsely, and on cross-examination appellant's counsel asked the witness if he had heard that the defendant threatened to kill him. The witness replied that he had not heard of any such threat coming from appellant, but that he had heard appellant's brother, George Hale, state to Wilhite, another witness in the case, that if Wilhite swore certain things he would not get back home. This

amounted to proof of a threat on the part of appellant's brother, but it was not shown that appellant was present, and the testimony was not competent. However, appellant drew it out himself on cross-examination and did not make any objection and cannot complain now of that testimony. He offered to introduce his brother George to prove that he had not made any such statement to Wilhite, but the court refused to permit him to introduce George Hale as a witness because the latter had remained in the court room in disobedience of the order of the court putting the witnesses under the rule. The testimony of witness Kelly on this subject being incompetent and immaterial and having been brought out by appellant himself, he was not entitled to introduce other testimony contradicting it. There was no error in refusing to permit witness George Hale to testify.

Error of the court is assigned in refusing to permit appellant as a witness in his own behalf to contradict the statement of witness Stone as to what appellant had said to the latter. The record recites that the State's objection to this testimony was sustained, but that notwithstanding that the witness was permitted to answer the question without further objections and testified that he had made no such statement to witness Stone. This was tantamount to a withdrawal of the court's ruling and permission to appellant to testify on the subject.

During the closing argument of the prosecuting attorney applause by the bystanders was evoked at three different times, the remark on the last occasion being set forth in the record, and it is insisted that the court erred in not excluding it from the jury. The record shows, however, that the objection was not to the remark of the attorney, but to the applause, and that the court promptly reprimanded the audience and gave an admonition that further applause would not be permitted. The recital in the record is that the form of the objection was "we object," and the court understood it to relate solely to the applause and not to the remark of the prosecuting at-

torney, and gave the admonition and reprimand to the audience accordingly. Counsel for appellant made no further request of the court and did not ask that the remarks of the prosecuting attorney be withdrawn.

There are other assignments of error which are not of sufficient importance to discuss.

After a careful consideration of the record, we are of the opinion that there is no error and the judgment is therefore affirmed.

SOUTHWESTERN BELL TELEPHONE COMPANY v. HODGES.

Opinion delivered January 10, 1921.

1. APPEAL AND ERROR—INSTRUCTION—FAILURE TO OBJECT.—Failure of an instruction to define the term "proximate cause" used therein can not be complained of on appeal where the trial court's attention was not called to the omission.
2. TELEGRAPHS AND TELEPHONES—FAILURE TO GIVE CONNECTION—INSTRUCTION.—In an action against a telephone company for failure to furnish connection to a subscriber, where there was evidence that if plaintiff had obtained medicine in time it would have allevited her illness, and that her failure to obtain medicine in time resulted in aggravating and continuing her illness, defendant's requested instruction that before plaintiff could have verdict it must be found that defendant's failure to connect defendant with the drugstore was the proximate cause of her sickness was properly modified by inserting the words "increased or continuing" before the word "sickness."
3. TRIAL—ARGUMENTATIVE INSTRUCTIONS.—It was not error to refuse an instruction which was argumentative, or one that was covered by other instructions given.
4. APPEAL AND ERROR—OBJECTION NOT RAISED BELOW.—It is too late on appeal for the first time to object that there would have been no substantial injury if plaintiff had attempted to procure medicine by other means than the use of the telephone, where the point was not raised below; there having been merely requests for a peremptory instruction and for one that only nominal damages could be recovered.

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

Walter J. Terry and *Edward B. Downie,* for appellant.

The material questions in this case are, (1) was appellant negligent; and (2), if so, did this negligence cause the damages claimed to have followed; (3) are the damages excessive? All three of the instructions asked by appellees were given; the first was unfair, insidious and prejudicial; also abstract. Appellant was not liable in any event for any damages prior to 2:45 of the day the company was advised that Mrs. Hodges was sick; its first duty to appellees begin at that time. 103 Ark. 160. See, also, 92 Ark. 276; 96 *Id.* 78; 102 *Id.* 246.

2. The court erred in refusing the instructions asked by defendant. 131 S. W. 117; 80 Pac. 337; 139 S. W. 44; 133 Fed. 13; 131 N. W. 684.

3. There was no evidence that warranted the jury in drawing an inference against the appellant. 109 Ark. 206.

4. The verdict is excessive, and shows passion and prejudice. Only such damages as are the natural and proximate consequence of defendant's breach of contract can be recovered. 79 Ark. 484. The testimony fails to show any negligence on the part of appellant.

Murphy & McHaney and *Sherrill & Mallory,* for appellee.

1. Appellant was guilty of gross negligence, as the testimony shows.

2. This negligence caused the damages claimed by appellee. From the evidence the jury was fully warranted in finding that fact.

3. The verdict is not excessive, and there is no error in the instructions. 103 Ark. 160; 78 Ark. 545; 79 *Id.* 33; 216 S. W. 403; 89 Miss. 252; 8 Ga. App. 514.

McCULLOCH, C. J. The plaintiffs, R. J. Hodges and wife, N. V. Hodges, reside in the city of Little Rock. They lived at 514 Rock street, in this city, on March 29, 1918, and were subscribers to the telephone service furnished to the residents of this city by the defendant

Southwestern Bell Telephone Company. According to the allegations of the complaint, the defendant wrongfully failed and refused to furnish telephone service to Mrs. Hodges on the day mentioned above, and injury is alleged to have been sustained as the result of said breach of contract. This is an action instituted by the plaintiffs to recover damages on account of said breach.

The following are the facts as disclosed by the testimony adduced at the trial:

The Hodges family consisted of the plaintiffs and their young daughter, who was a school girl. The business of R. J. Hodges required his frequent absence from the city, and on the day in question he was out of the city and returned home about 12 o'clock that night. Their daughter attended school that day, leaving home about 8 o'clock in the morning and returned home about 5 or 5:30 o'clock in the afternoon. Mrs. Hodges has for several years been subject to severe attacks of headache which were caused or superinduced by malaria. Her physician had given her two prescriptions to relieve such attacks when they came on. One of the prescriptions was for calomel in purgative doses, and the other was for potassium bromide and caffeine to be used as a sedative, and the directions to Mrs. Hodges by her physician were that when she felt an approaching attack of her ailment to have both prescriptions filled and to take the medicine and go to bed and rest. The prescriptions were filed with a druggist who conducted his business at Ninth street and Rector avenue in this city, and Mrs. Hodges was accustomed to having the prescriptions filled and sent over to her residence when she was warned of the approach of an attack of illness.

She testified that she got up that morning with a headache and felt that one of the attacks described was coming on, but she told her daughter to go on to school. Soon after the child left the house Mrs. Hodges went to the telephone and began an effort to get connection with the central exchange, so that she could call the drug store to have the prescriptions filled. She got no response

from central, though she frequently repeated her efforts, until about 1 o'clock, when she was informed that her telephone service had been discontinued. She was unable to talk with the operator any further at that time, but after continuing her efforts she got connection at 2:45 o'clock, and after being informed again that the service had been discontinued on account of failure to pay the monthly bill which fell due that month, she informed the operator, as well as the manager, that she had paid the bill, and that she was sick and was endeavoring to get connection with the drug store in order to obtain medicine with which to relieve her ailments. The telephone bill had, in fact, been paid when due, and the discontinuance of service was the result of a mistake and was unjustified. The manager promised to have the 'phone connected up but failed to do so, according to Mrs. Hodges' testimony, and she continued her efforts to get connection with the drug store until about 4:30, when she became so ill that she was rendered unconscious and knew nothing of subsequent events until the next day. The daughter came home about 5 o'clock and found her mother across the telephone table unconscious and groaning with pain. The child also attempted to get the telephone service, but failed and went to the home of the nearest neighbor to order groceries by telephone. This neighbor was Mrs. Boyce, whose door was only a few feet from that of the Hodges home.

Mrs. Hodges testified that her headache grew worse as the day advanced, and that she had a severe rigor between one and two o'clock. The testimony shows that she suffered severely as the result of that illness, which would have been alleviated by the medicine she failed to obtain in apt time, and that it kept her in bed for several weeks. She was ill for a considerable length of time thereafter. The testimony shows that her husband and co-plaintiff expended a large sum of money in an effort to obtain relief for her ailments. The jury returned a verdict in favor of plaintiffs and awarded Mrs. Hodges com-

pensation for her injury in the sum of $2,000 and awarded R. J. Hodges the sum of $1,000.

The court gave the following instruction at the request of plaintiff, over the objections of defendant:

"You are instructed that if you believe from the evidence that the plaintiff, Mrs. Nolia V. Hodges, had paid her telephone bill for the month of March, 1918, and that the defendant telephone company knew, or, by the exercise of ordinary care, should have known that such telephone bill was paid; and that on or about March 29, 1918, this plaintiff became ill and needed medicines or the attention of a physician, and that to secure said medicines or such attention she attempted to get a telephone connection with her druggist or physician, and that said defendant company refused or failed to give her connection, and you find that defendant was informed at the time by Mrs. Hodges that she was ill and alone and needed the medicines and medical attention which she was attempting to procure by 'phone and that, as a result of such refusal or failure to give this service requested by Mrs. Nolia V. Hodges, the said plaintiff's illness grew in severity and caused her to suffer great pain since that time, and that such continued illness is the proximate result of defendant's failure to give such service, then you will find for the plaintiffs."

The objection urged here against this instruction is that it failed to define the term "proximate cause," and left the jury unadvised as to the meaning that should be given to that term. The defendant offered no specific objection to the instruction, nor did it ask for an instruction defining the term "proximate cause," as applicable to the facts of the case. In fact, appellant requested the court to give a similar instruction (No. 3) submitting the issue as to the proximate result of the alleged misconduct of defendant's servants in failing to give service, and that instruction, like the one objected to, did not undertake to define the term "proximate cause." The defendant having failed to call attention to the omission to

properly define the term, it is in no attitude now to assign as error the ruling of the court in giving this instruction.

It is also argued that this instruction is erroneous because there was no testimony sufficient to establish the fact that the procurement of the medicine would have prevented injury. There was testimony tending to show that the medicine, if procured, would have arrested the progress of the illness of Mrs. Hodges, and that the illness would not have become aggravated to the extent that the testimony showed that it did, and which, according to the testimony, caused acute and continued suffering.

The third instruction requested by the defendant reads as follows:

"3. You are instructed that, before you can return a verdict in favor of the plaintiffs, you must find that the failure of the defendant telephone company to give Mrs. Hodges connection with the drug store was the proximate cause of her sickness; that the failure of the company to give the telephone connection desired was the direct and contributing cause of Mrs. Hodges' injury, and that, had it not been for the defendant's failure to give the desired connection, the injury would not have occurred."

The court refused to give the instruction as requested, but modified it by inserting before the word sickness the words "increased or continued." Defendant also requested the following instruction, which the court refused to give:

"6. Before you can find a verdict for the plaintiff for other than nominal damages, you must find that if plaintiff's telephone had been in working order that she would have gotten in communication with the drug store, that the medicine would have been sent to her, and that it would have relieved her condition and would have prevented her subsequent illness. It is not enough to entitle plaintiff to a verdict for them to show that they might or

probably would have gotten the drug store, that the medicine would have been sent and that it might or probably would have relieved her condition and averted her subsequent sickness, but these facts must be certainly and definitely shown. You can not indulge in speculation as to whether plaintiff would have gotten into communication with the drug store, that the medicine would have been sent, and that it would have relieved her condition and prevented her subsequent illness."

The court gave instruction No. 5 requested by the defendant, which reads as follows:

"5. A party to a contract is only liable in case of a breach thereof for such damages as he can see or is advised are likely to flow from the breach. In this case there is nothing in the contract agreeing to furnish telephone service to indicate that the failure to furnish it on the day named in said complaint, or any other particular day, would result in the damages claimed in the complaint sued on, and it is not shown that the plaintiff advised the defendant of her sickness and the need of telephone service to procure medicine until about 2:45 p. m. on the day on which the defendant is charged with breach of its contract. You are instructed that, until the defendant was advised of these special circumstances, it could not be held liable under said contract for the damages claimed. You are further instructed that the defendant, after it had been advised of Mrs. Hodges' sickness and her desire to communicate with her physician or drug store, had a reasonable time, acting promptly and diligently, within which to restore telephone connection so that she might use her telephone. Therefore, if you find that the defendant did restore the telephone service within a reasonable time, acting promptly and diligently, your verdict will be in favor of the defendant."

The modification of instruction No. 3 was proper, for, as stated before, there was evidence tending to show that if Mrs. Hodges had obtained medicine in apt time it would have alleviated her illness, and that her failure to

obtain medicine in apt time resulted in aggravating and continuing her illness.

Instruction No. 6, asked by defendant, was properly refused because it is agumentative. All that appellant was entitled to in that instruction was embraced in other instructions given.

It is contended here for the first time that, according to the undisputed evidence, Mrs. Hodges could have prevented the injury by resorting to other methods of obtaining the medicine and that her failure to take any steps to mitigate the injury resulting from the failure to furnish service prevents plaintiffs from recovering any substantial amount of damages. In other words, it is contended that there would have been no substantial injury if Mrs. Hodges had attempted to procure the medicine by other means. The doctrine announced by this court in *Young* v. *Berman,* 96 Ark. 78, and *Western Union Tel. Co.* v. *Ivy,* 102 Ark. 246, is invoked. After a careful consideration of the contention, we have reached the conclusion that the point is raised too late, and that it would be an injustice to plaintiff to permit it to be raised now for the first time. It is true that defendant asked for a peremptory instruction and also asked for an instruction telling the jury that there could only be a recovery for nominal damages, but, conceding that the question was technically raised by these instructions, yet there is no escape from the conclusion, after careful perusal of the proceedings below, that the question of mitigation of damages was never actually called to the attention of the court or the plaintiffs in the action. Mrs. Hodges and her daughter and Mrs. Boyce, her neighbor, each testified in the case, and neither of them was asked a single question in regard to the opportunities for communicating with the drug store or of obtaining the medicine in any other way. Mrs. Hodges testified in detail about the occurrences of the day and was cross-examined at length on the subject, but she was not asked any question tending to elicit an explanation as to why she did not make an effort to get relief in some other way. It may be that she could

have satisfactorily explained to the jury why she could not and did not obtain relief in some other way. It would, as before stated, be unjust to the parties to permit that question to be raised here for the first time, for the plaintiff could have been put on guard by a simple question on this subject or by a request for an instruction directly submitting the issue as to the duty of Mrs. Hodges to mitigate the injurious results from the failure of the defendant to furnish telephone service.

It is further contended that the verdict is excessive, but we think the evidence tends to establish injuries to the plaintiffs which justify the award of damages fixed by the jury.

The judgment is therefore affirmed.

SMITH, J. (dissenting). The judgment recovered was for $3,000, that sum being awarded as compensation for the failure to give a subscriber, who was entitled to service, telephonic connection with a nearby drug store, which would have enabled the subscriber to have placed an order for two prescriptions to be filled. One prescription was of calomel in purgative doses, the other for potassium bromide and caffeine. There was testimony to the effect that these prescriptions, if taken in time, afforded Mrs. Hodges, the person for whom they were written, relief from the headaches from which she periodically suffered.

But the doctor who wrote the prescriptions testified that the direction accompanying the prescriptions was for the patient to go to bed and to remain quiet and to take the medicine at the first indication of the troubles the medicine was intended to relieve. Mrs. Hodges testified that when she arose on the morning in question she felt one of the attacks coming on. She did not retire. Neither did she allow her daughter to remain at home with her. On the contrary, she told her daughter to go to school, and the daughter went. Mrs. Hodges performed unassisted all her domestic duties. In the meantime, she continued to grow worse, and at 1 o'clock had

a rigor, yet it was not until 2:45 in the afternoon that she furnished to the telephone company the explanation of the special circumstances which made the company liable for the special damages. *Southern Telephone Co.* v. *King,* 103 Ark. 160. After knowing early in the morning that one of these periods of suffering was coming on, and after knowing that she should take the medicine and go to bed as directed by the doctor, she permitted half the day to expire before she even told the telephone company of the special circumstances.

She says she was all the time trying to get telephone service. She could have sent her daughter for the medicine in the morning; but she thought she could 'phone the order. She could herself have gone to the drug store a few blocks away; but she relied on the use of the 'phone. The time was March 29; the place, 514 Rock street, one of the old and long built-up residential streets of the city of Little Rock. Necessarily many 'phones in the neighborhood were accessible, and would no doubt have been available in so great an emergency if Mrs. Hodges preferred to use the telephone, rather than to go, or to send to, the drug store as she might have done. In my opinion, it would be difficult to state a case where the duty to minimize the damages could be more obvious, or the means of doing so be more readily at hand.

It is said that the question of the duty to avert the injury and reduce the damage was not mentioned in any form in the trial below, and that it is too late to raise it now. I am of the opinion, however, that this question goes to the sufficiency of the evidence to support the amount of the damages recovered; and the question of the excessiveness of the verdict was properly raised below. The question is, therefore, presented here, and since the duty to mitigate the damages, and the opportunity to do so, are established by all the testimony, the judgment should be reversed; or, if this is not done, it should be affirmed for nominal damages, as connection was furnished the subscriber late in the afternoon.

In so announcing my view, I have in mind that this is a suit for damages for the failure to give service, and that in such actions it is proper to consider the duty of the party injured to minimize the damages. *Western Union Telegraph Co.* v. *Ivy,* 102 Ark. 246.

Mr. Justice WOOD concurs.

EVANS v. DAVIS.

Opinion delivered January 10, 1921.

1. INSANE PERSONS—PROOF OF MATERIAL ALLEGATIONS.—A decree quieting the title of an insane person which subjects the land to the repayment of taxes paid by the defendants is erroneous if rendered without proof that the defendants paid the taxes, as there must be proof of every material allegation prejudicial to the right of an infant or person of unsound mind before judgment can be rendered against him.
2. INSANE PERSONS—PROCESS ON CROSS-COMPLAINT.—In a suit by an insane person, process on a cross-complaint need not be served on him or his guardian, since he is already a party to the action.
3. INSANE PERSONS—CROSS-COMPLAINT—DEFENSE BY GUARDIAN.—It is error to render a judgment on a cross-complaint against a person under disability without defense being made by a guardian.
4. INSANE PERSONS—JUDGMENT WITOUT ANSWER BY GUARDIAN.—A decree requiring an insane plaintiff to repay taxes paid by defendants as a condition of quieting his title, if it can be considered as a decree on a cross-complaint, so as to be erroneous because no answer was made by his guardian, was not void.
5. INSANE PERSONS—PURCHASER UNDER ERRONEOUS DECREE.—One who purchased an insane plaintiff's property at a sale under a decree that was erroneous because rendered without answer filed by his guardian will be protected in his right as such purchaser, and the insane plaintiff will be entitled to restitution of the fund received from the sale.

Appeal from Ashley Chancery Court; *M. L. Hawkins,* Chancellor; reversed.

Compere & Compere, for appellant.

1. The only remedy of the idiot is appeal. Kirby's Digest, § 4431, subdiv. 5; 79 Ark. 194-200.

2. The appeal could be taken at any time during the disability. 80 Ark. 519; 71 *Id.* 172; 22 Cyc. Law and Prac., p. 1247; 2 Cent. Ed. Am. Digest, p. 2251, §§ 1910-11.

3. The order to sell the lands was void. 80 Ark. 519; 43 *Id.* 427; 56 *Id.* 419-23. Where the decree is not responsive to the issue it is void. 81 Ark. 440-62; 87 *Id.* 206-10.

The lower court ordered an idiot's land to be sold without a foundation, no evidence whatever as to tax. All the matters in the decree except that quieting title in John Wood were aside from the issue and absolutely void. 56 Ark. 418; 55 *Id.* 562; 81 *Id.* 440-62.

C. M. Walser, for appellee, C. Altenberg.

Relief was properly granted appellee. It was a proceeding to quiet title, and all outside interests disclosed were properly disposed of. The matter was in issue and having been decided appellant can not complain or question the judgment. 37 Fed. 738; 30 Iowa 433; 74 *Id.* 244.

If Altenberg did not in fact have a claim for taxes paid and a right to a lien, it can easily be shown, and it is the duty of appellant before the decree can be opened to show a meritorious defense. Kirby's Digest, § 4434; 22 Kan. 768; 55 Neb. 202; 90 Ark. 44; 104 *Id.* 449. Appellee's lien has never been satisfied, and we ask that it be preserved and enforced.

McCULLOCH, C. J. This is an appeal by a person of unsound mind, now under guardianship, from a decree rendered in the chancery court of Ashley County in the year 1901. The suit was one instituted in said chancery court for appellant by next friend to quiet title to three tracts of land in that county aggregating 324 acres. Appellant was not under guardianship at that time and, as before stated, he sued by his next friend, alleging that he inherited the land in controversy from his father, J. J. Wood, who died on March 15, 1870, seized and possessed thereof. All of appellees, as well as certain other parties, were made defendants in the case and were personally served with process.

It was alleged in the complaint that the lands were unoccupied at the time of the commencement of the action and that one of the defendants, A. E. Davis, had entered upon the lands and cut and removed timber of the value of $500. The prayer of the complaint was for a decree quieting appellant's title and for further relief.

Two of the defendants, who are apellees here, A. E. Davis and E. F. Stanley, filed a joint answer in which they denied that appellant had title to the lands and also claimed to be the owners of the land under purchase at a tax sale. They alleged also that they paid taxes on the land since their said purchase and prayed that, in the event the court should hold that appellant had title, a lien should be declared in their favor for the amount of taxes paid.

G. H. Richardson, who is also an appellee here, filed his answer denying the allegations of the complaint with respect to the ownership of the land by appellant, and also alleged that he was the owner of the land under purchase at an overdue tax sale. He also alleged that he paid the taxes on the land subsequent to his purchase at the overdue tax sale and prayed that if the court should decree in favor of appellant as to the title of the land a lien be declared in his favor for the amount of taxes he had paid.

The court rendered a final decree reciting that the cause was heard on the petition of appellant and the affidavit of one Giles as to the land being wild and unoccupied and the answers of the defendants, and the decree was in favor of appellant for the recovery of the lands and quieting his title thereto, but in favor of the defendant, A. E. Davis, declaring a lien on two of the tracts of land in controversy for the amount of $82.47, the amount of taxes paid by him, and in favor of defendant C. A. Altenberg for the sum of $36.10, the amount of taxes paid by him on one of the tracts, and in favor of G. H. Richardson for the amount of $42.45, paid by him for taxes on one of the tracts. The court appointed a commissioner to sell the land to discharge said liens if the

sums so awarded should not be paid within the time specified in the decree. The record further shows the report of the commissioner of the sale by him in accordance with the decree of the court and the purchase of the land at said sale by one who was not a party to the cause. The record also shows the confirmation of the sale by the court and the approval of the commissioner's deed to the purchaser.

A guardian was recently appointed for appellant, and he obtained this appeal in the manner prescribed by statute which permits an appeal to be taken by a person of unsound mind within six months after the removal of such disability. Kirby's Digest, § 1199, as amended by Acts of 1915, page 205. According to the recitals of the record, the decree was rendered without any proof being adduced showing that appellees had paid taxes on the land. This was erroneous and calls for a reversal of the decree, as there must be proof of every material allegation prejudicial to the rights of an infant or person of unsound mind before a judgment can be rendered against him. *Luck* v. *Adkins,* 53 Ark. 303.

It is also contended that the decree against appellant for the recovery of taxes should be reversed because it was rendered on the cross-complaint of appellees, without service of process on appellant or the appointment of a guardian to make defense for him. It was unnecessary to serve process on appellant, for he was already a party to the suit as plaintiff in the action. *Pillow* v. *Sentelle,* 49 Ark. 430. It is error to render a judgment on a cross-complaint against a person under disability without defense being made by a guardian (*Sexton* v. *Crebbins,* 80 Ark. 519), but the question is presented whether or not the claim for taxes set up by appellees in their answer constituted a cross-complaint or merely went to the equity of appellant's complaint asking for relief in quieting his title. Inasmuch as the cause is to be reversed on other grounds, we need not decide this question. Even if the claim for taxes be treated as a cross-complaint, so as to call for an answer before judgment could be ren-

dered, this was only an error, and the decree was not void. *Boyd* v. *Roane,* 49 Ark. 397; *Waldron* v. *Taenzer,* 79 Ark. 16; *Martin* v. *Gwynn,* 90 Ark. 44.

On the remand of the cause appellant will be entitled to restitution of the fund received by appellees from the proceeds of the sale, unless the decree on the hearing of the cause and proof should be in favor of appellees as before, for the recovery of the amount of taxes paid. Proof can be taken on that subject. The court had jurisdiction of the person and subject-matter, and the degree was not void; therefore the purchaser under the sale will be protected in his rights as such purchaser. *Boyd* v. *Roane, supra; Buford* v. *Briggs,* 96 Ark. 150; *Dodson* v. *Butler,* 101 Ark. 416. The decree against appellant will therefore be reversed and the cause remanded with directions to proceed in accordance with this opinion.

WOOD, J., disqualified.

FARRELL v. OLIVER.

Opinion delivered January 10, 1921.

1. STATE—ILLEGAL PAYMENT OF PUBLIC FUNDS.—Under Const. 1874, art. 16, § 13, authorizing any citizen of any county, city or town to sue to protect the inhabitants thereof against the enforcement of any illegal exactions whatever, a citizen and taxpayer can maintain a suit to prevent a misapplication of State funds, as well as of the funds of counties, cities or towns.
2. STATE—MISAPPROPRIATION OF PUBLIC FUNDS—RELIEF.—The constitutional remedy against the unlawful appropriation of public funds is obtainable as a matter of right, not of discretion, and the courts will not consider the taxpayer's delay in starting such suit until nearly the close of the biennial period for which the appropriation was made.
3. STATE—GENERAL APPROPRIATION BILL.—The constitutional provision (art. 5, § 30) that the general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the State is mandatory.

4. STATE — APPROPRIATION FOR INDUSTRIAL SCHOOLS — VALIDITY.— Within Const., art. 5, § 30, restricting appropriations by a general bill to those for the ordinary expenses of the executive, legislative and judicial departments, and in view of art. 6, § 1, defining the "executive department," an appropriation for the maintenance of industrial schools is not an appropriation for the "ordinary expenses" of the executive department, and is invalid when embraced in the general appropriation bill.

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

Reid, Burrow & McDonnell and *Gus Ottenheimer,* for appellants.

1. Act 400, Acts 1919, is unconstitutional and void, and the court erred in sustaining the demurer. Art. 5, § 30, Constitution. The attempted appropriation is a part of and included in the general appropriation bill supposed to cover any ordinary expenses of the executive, legislative and judicial departments of the State, and the attempted appropriation is unconstitutional. The act No. 400, Acts 1919, for the maintenance of an industrial school is not an appropriation for the ordinary expense of the executive, legislative and judicial departments of the State." The provision of the Constitution is mandatory. 6 R. C. L. 55. See, also, 27 Ark. 266, 281; 33 *Id.* 17; 103 U. S. 580; 12 C. J. 740; 93 Ark. 336. The appropriation here does not fall strictly within the ordinary expense of the three departments and it is violative of the Constitution and void. 1 Ark. 311; 12 *Id.* 101. The executive department is expressly defined in the Constitution. Art. 6, § 1. See, also, art. 4, § 16, Constitution; 110 N. E. 130; 32 Pac. 417; 14 Fla. 283; 40 N. E. 454; 67 *Id.* 28; 83 N. W. 72; 110 N. E. 130; 120 N. W. 116; 119 Ark. 314; 106 Ark. 506.

2. A taxpayer has the right to maintain a suit to enjoin the illegal expenditure of money of the public funds. 66 Ark. 82; 110 N. E. 130; 123 Ark. 253; Constitution, art. 16, § 13; 108 Ark. 306.

John D. Arbuckle, Attorney General, and *Silas W. Rogers,* Assistant, for appellee.

1. We do not as a general rule question a taxpayer's right to maintain a suit to enjoin the illegal expenditure of public funds, but we do question the necessity of invoking such right in this case.

The remedy by injunction is a summary, peculiar, extraordinary remedy, and ought not to be exercised except to prevent great and irreparable injury or mischief. In this case the great and irreparable mischief will be done when appellants are granted the relief sought. Failing to start proceedings two years ago when the appropriations were made, they should not be heard now to save a few thousand dollars. An injunction now would be against good conscience and work injustice. 14 R. C. L. 310, 435. The mere allegation of irreparable injury is not sufficient unless the facts are stated. 5 A. L. R. 916; 7 *Id.* 7685-6, 756.

2. The appropriation for a boys' industrial school in the general appropriation bill is sufficient, as the school is part of the executive branch of the government, and the items for improvement, salaries and contingent expenses are classed as the ordinary and necessary expenses of administration.

McCULLOCH, C. J. The General Assembly of 1917 made provision for two institutions, designated respectively as the Boys' Industrial School of the State of Arkansas and the Girls' Industrial School of the State of Arkansas, and created a board of management for each of said institutions, the members thereof to be appointed by the Governor. The appropriations for the maintenance of these institutions at the legislative session of the year 1919 were embraced in the general appropriation bill, and appellants, who are residents of Pulaski County and tax payers, instituted this action in the chancery court of Pulaski County to restrain the State Auditor from drawing warrants on said appropriation and to restrain the State Treasurer from paying said war-

rants. Said appropriation of funds is attacked on the ground that the same was made in violation of the express provision of the Constitution, which reads as follows:

"The general appropriation bill shall embrace nothing but appropriations for the ordinary expense of the executive, legislative and judicial departments of the State. All other appropriations shall be made by separate bills, each embracing but one subject." Art. 5, § 30.

The right of appellants to maintain this suit is challenged, but we are of the opinion that as citizens and tax payers of one of the counties of the State they can maintain an action to restrain the Auditor and Treasurer from paying out funds without legal appropriation thereof by the Legislature.

The Constitution (art. 16, § 13) provides that "any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

This court has construed that provision to mean that a misapplication by a public official of funds arising from taxation constitutes an exaction from the tax payers and empowers any citizen to maintain a suit to prevent such misapplication of funds. *Lee County* v. *Robertson,* 66 Ark. 82; *Grooms* v. *Bartlett,* 123 Ark. 255. The provision quoted above refers, in express terms, to citizens "of any county, city or town," but the exactions from which a remedy is afforded are not those limited to counties or towns, and this provision of the Constitution is broad enough to afford a remedy against Statewide exactions which are illegal. Such is the effect of our decision in *Griffin* v. *Rhoton,* 85 Ark. 89.

There is eminent authority for holding, even in the absence of an express provision of the Constitution, such as that referred to above, that a remedy is afforded in equity to tax payers to prevent misapplication of public funds on the theory that the tax payers are the equitable owners of public funds and that their liability to

replenish the funds exhausted by the misapplication entitle them to relief against such misapplication. *Fergus* v. *Russell,* 277 Ill. 20, 110 N. E. 130.

Again, it is argued that appellants have waited until the end of the fiscal period is approaching and until the greater portion of the appropriated funds have been paid out by the State Treasurer, and that the attack on the validity of the appropriation is not made in good faith. These are considerations which do not appeal to the courts for the reason that the remedy of injunctive relief is not discretionary, but where available at all it is awarded as a matter of right. If, therefore, it be found that the appropriation is invalid, there is no alternative other than to grant the relief restraining the State officers from paying out the funds. We need not search for the reason upon which the constitutional requirement was based, for the mandate must be obeyed as written.

This brings us to the main question in the case, whether or not the appropriation for the institution referred to can lawfully be embraced in a general appropriation bill. If it can not be so embraced in the general appropiration bill, then it is unlawful, for the provision of the Constitution in this regard is obviously mandatory. The contention of the Attorney General, in defending the validity of the appropriation, is that the Constitution divides the powers of the State government into three distinct departments and that all of the institutions of the State, including the Boys' Industrial School, must be classed as a part of the executive branch of government, and that the appropriation therefor may be included in the general appropriation bill. Section 1, article 4, of the Constitution, reads as follows:

"The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body of magistracy, towit: Those which are legislative to one, those which are executive to another, and those which are judicial to another."

This provision of the Constitution classifies the powers of government and is in recognition of the principles of constiutional government which are peculiarly American, in that there is a division into three departments, executive, legislative and judicial. The classification of powers is not confined to the State government alone as contra-distinguished from local government, but it constitutes a division of all governmental power in the State. It may be conceded that all governmental activities necessarily fall into one of these classes, and yet it does not follow that all appropriations made by the Legislature in support of the exercise of these enumerated powers can be embraced in the general appropriation bill. If that be the proper interpretation of the Constitution, then section 30, article 5, would have no force or effect at all because all appropriations of funds would fall within the definition, "ordinary expense of the executive, legislative and judicial departments of the State." It is our duty to reconcile, as far as possible, the different provisions of the Constitution, so as to give full effect to each.

The Constitution defines each of the separate departments of State government. Section 1 of article 6 defines the executive department in the following language: "The executive department of this State shall consist of a Governor, Secretary of State, Treasurer of State, Auditor of State, and Attorney General, all of whom shall keep their offices in person at the seat of government * * *." This is the constitutional definition which indicates what is meant in section 30, article 5, by these words, "ordinary expense of the executive, legislative and judicial departments of the State." In the case of *Oliver* v. *Morton,* 36 Ark. 134, it was held that "the executive department of the State is expressly defined by the Constitution, article 6, section 1. It consists of the Governor, Secretary of State, Auditor, Treasurer, and Attorney General. Subordinates in their several departments may be well enough said, also, to be one of them." Section 30, article 5, must be construed as dealing with

appropriations of State funds in providing for the ordinary expenses of the departments of the State government—not referring to the exercise in the broader sense of governmental power, either by State authorities or local authorities. It is, in other words, an appropriation for the departments of State government and must therefore be read in the light of the definition given by the Constitution as to what constitutes those departments. It is easy to see that the maintenance of these institutions of the State is not a part of the expenses of the executive department of the State. The definition is broad enough, as was said in *Oliver* v. *Morton, supra,* to embrace subordinates in the several departments, but by no reasonable stretch of the language can it include charitable institutions created by the Legislature and placed under the management of boards created for that purpose. The control of such institutions is administrative and falls within the executive powers of government, but the control and maintenance is not a part of the expenses of the executive department of State as defined by the Constitution.

The enumerated branches of the executive department are required to maintain offices "in person at the seat of government" and the ordinary expenses of the department are those which pertain to the maintenance of those offices and the exercise of the functions which relate thereto. Even the fact that one or more of these executive officers may have supervision over State institutions would not bring the expense of the maintenance of the institutions within the definition, "ordinary expense of the executive, legislative and judicial departments of the State."

Our conclusion is that the appropriation was not made in the manner expressly required by the Constitution and is invalid. Therefore the chancery court erred in sustaining a demurrer to the complaint. The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

INDEX

ABATEMENT AND REVIVAL:

necessity of pleading that action is brought prematurely. *Felder* v. *Hall Bros. Co.*, 94.

ACTIONS:

proceedings *in rem* and *quasi in rem* distinguished. *Simpson* v. *Reinman*, 47.

ADVERSE POSSESSION: See LIMITATION OF ACTIONS, TENANCY IN COMMON.

intention to hold adversely as element of. *Moir* v. *Bailey*, 347.
presumption that possession of grantor is not adverse to grantee. *Id.*
notice of claim of ownership presumed when. *Id.*
title acquired by adverse possession when. *Id.*

APPEAL AND ERROR:

order granting new trial not reversed when. *Arkansas Light & Power Co.* v. *Paragould*, 1.
objection to ambiguous instruction must be specific. *Sandlin* v. *Bailey*, 23.
exclusion of evidence harmless when. *Dewberry* v. *Furst & Thomas*, 26.
conclusiveness of chancellor's decree on conflicting evidence. *Hill* v. *Imboden*, 99.
on appeal from order directing verdict, evidence viewed in light favorable to appellant. *Brotherhood of Railroad Trainmen* v. *Merideth*, 140.
motion for new trial unnecessary when. *Vaughan* v. *Hinkle*, 149.
liability of losing party for costs of appeal in attachment. *Id.*
erroneous and conflicting instructions prejudicial when. *Kelly Handle Co.* v. *Shanks*, 208.
presumption that allegations omitted from pleadings were supplied by proof. *Kansas City So. Ry. Co.* v. *Rogers*, 232.
dismissal of counterclaim harmless error when. *Ellis & Co.* v. *Farrell*, 274.
necessity of bringing up rejected evidence. *Id.*
verdict sustained by conflicting evidence. *Armour & Co.* v. *Drury*, 310.
refusal to require complaint to be made more specific; harmless error when. *De Queen & E. Rd. Co.* v. *Park*, 350.
erroneous admission of plaintiff's statement in corroboration of his testimony prejudicial when. *Security Life Ins. Co.* v. *Ingram*, 393.

APPEAL AND ERROR—Continued.
refusal to direct verdict for plaintiffs not prejudicial when. *Harris* v. *Irby*, 403.
review of judgment directing verdict. *Wooten & Co.* v. *Bain-Adams Co.*, 462.
conflicting instructions harmless when. *Fort Smith Rim & Bow Co.* v. *Qualls*, 475.
order vacating judgment not appealable. *Hawkeye Tire & Rubber Co.* v. *McFarlin*, 491.
rule as to review of denial of directed verdict. *Hines* v. *Betts*, 555.
erroneous instruction as to improper element of damages held prejudicial. *Id.*
necessity for appellee to take cross-appeal. *Ramey-Milburn Co.* v. *Ford*, 563.
necessity for objection to failure to define "proximate cause." *Southwestern Bell Tel. Co.* v. *Hodges*, 585.
objection not considered if not raised below. *Southwestern Bell Tel. Co.* v. *Hodges*, 585.

APPROPRIATION BILLS: See STATE.

ASSOCIATIONS:
members of fruit growers' association proper parties in suit against carrier, when. *De Queen & E. Rd. Co.* v. *Park*, 350.
agent of such association may sue on behalf of such members. *Id.*

ATTACHMENT: See COSTS.
right of sheriff to allowance for feeding attached cattle. *Vaughan* v. *Hinkle*, 149.
proper judgment on dissolving attachment. *Knuckles* v. *Pressley*, 217.

ATTORNEY AND CLIENT:
complaint alleging interference with attorney's contract with client held good. *Hogue* v. *Sparks*, 174.
liability for preventing attorney from collecting claim. *Id.*

BANKRUPTCY:
effect of discharge of partnership upon liability of partners. *Wm. R. Moore Dry Goods Co.* v. *Ford*, 227.

BASTARDS:
presumption that child born in wedlock is legitimate. *Jacobs* v. *Jacobs*, 45.
such presumption applies though child conceived before marriage. *Id.*
evidence held not to overcome such presumption. *Id.*
children of forced marriage *held* legitimate. *Id.*
recognition of child born after marriage not necessary. *Id.*

BENEFICIAL ASSOCIATIONS:

right of action for wrongful expulsion of member. *Bonham* v. *Brotherhood of Railroad Trainmen*, 117.
reinstatement not ordered until remedy afforded by rules of the society is exhausted. *Id.*
suit treated as one for reinstatement. *Id.*
societies may provide methods for redressing grievances of members. *Id.*

BILLS AND NOTES:

note of bank officers given for purpose of concealing bank's indebtedness not void, when. *Felker* v. *Boatmen's Bank*, 186.
primary liability of joint accommodation maker. *Id.*
instruction disapproved where defense of payment was relied on. *Manley Carriage Co.* v. *Fowler & Hill*, 295.
burden of proving payment is on defendant. *Cheney* v. *Auto Fedan Hay Press Co.*, 517.
plaintiff's possession of note of defendant raises presumption of non-payment. *Id.*

BROKERS:

right to commission for procuring purchaser of land. *Holt* v. *Calaway*, 526.
instruction as to owner preventing brokers from making sale approved. *Id.*

CARRIERS: See ASSOCIATIONS.

evidence of shipper's conversation with carrier's agent admissible when. *De Queen & E. R. Co.* v. *Park*, 350.
written notice to supply cars waived when. *Id.*
liability for failure to furnish cars. *Id.*
evidence of negligence in failing to assist passenger. *Hines* v. *Patterson*, 367.

CERTIORARI:

writ denied after delay of two or three years. *Brinkley Twp. Road Dist.* v. *Dixon Twp. Road Dist.*, 167.

COMPROMISE AND SETTLEMENT:

settlement of controversy as consideration for agreement. *Weaver* v. *Emerson-Brantingham Imp. Co.*, 379.
acceptance of check not bar to asserting further claim when. *Drainage Dist. No. 5* v. *Kochtitzky*, 494.

CONSTITUTIONAL LAW:

Acts 1917, p. 1683, relating to condemnation for levee purposes, held not to violate due process clause. *Dickson* v. *Board of Directors, etc.*, 14.
race discrimination as depriving accused of equal protection of laws. *Ware* v. *State*, 321.
error to overrule motion to quash indictment for race discrimination when. *Id.*
statute regulating employment of children is valid. *Terry Dairy Co.* v. *Nalley*, 448.

CONTRACTS. See CORPORATIONS.

intent of parties enforced. *Stoops* v. *Bank of Brinkley*, 127.
sufficiency of complaint alleging interference with contract. *Hogue* v. *Sparks*, 174.
liability for defeating attorney's claim. *Id.*
liability for malicious interference with another's contract. *Id.*
new oral contract may be substituted for written contract. *Weaver* v. *Emerson-Brantingham Imp. Co.*, 379.
effect of failure to reduce verbal contract to writing as agreed. *Becker Provision Co.* v. *Parker Hardware Co.*, 539.

CORPORATIONS:

unauthorized act of agent ratified by corporation, when. *Arkansas Light & Power Co.* v. *Paragould*, 1.
contract to pay off materialman's lien not *ultra vires* when. *Becker Provision* v. *Parker Hardware Co.*, 539.
when *ultra vires* contracts enforced. *Id.*

COSTS:

losing party in attachment to pay costs incurred. *Vaughan* v. *Hinkle*, 149.

COURTS:

probate court has no jurisdiction over property contests between executor and others. *King* v. *Stevens*, 443.
such court may adjudge title to legacy. *Id.*
and may determine to whom funds in executor's hands should go. *Id.*

CREDITOR'S SUIT:

complaint not demurrable for failure to state debtor's property. *Wm. R. Moore Dry Goods Co.* v. *Ford*, 227.
bill lies to uncover personalty. *Id.*
creditor may sue for benefit of himself and others who join. *Id.*

CRIMINAL LAW. See WITNESSES; REMOVAL OF CAUSES; CONSTITUTIONAL LAW.

remark of court not considered on appeal where not objected to. *Marsh* v. *State*, 77.
error as to instructing, concerning possession of recently stolen property not cured, when. *Pearrow* v. *State*, 182.
how corporate existence proved. *Id.*
improper cross-examination harmless, when. *Id.*
finding that confessions were not obtained by threats or promises of reward upheld. *Pearrow* v. *State*, 201.
error to refuse to instruct that confessions must be freely and voluntarily made. *Id.*
instruction *held* not to assume that road was public. *McCracken* v. v. *State*, 300.
admission of improper evidence to prove undisputed fact harmless. *Id.*
State not required to make election, when. *Id.*
question not raised on appeal, when. *Id.*
jurisdiction of justices of peace over prosecutions for obstructing highways. *Id.*
change of venue properly denied, when. *Ware* v. *State*, 321.
record held to show presenting of motions to quash before arraignment. *Id.*
effect of motion to quash indictment. *Id.*
medical experts may testify on issue of insanity. *Kelley* v. *State*, 509.
their opinions relevant, when. *Id.*
form of hypothetical questions. *Id.*
province of jury to determine facts. *Id.*
opinion based on hypothetical facts disregarded, when. *Id.*
weight of expert evidence for jury. *Id.*
self-serving declarations inadmissible. *Thrash* v. *State*, 547.
affidavits of credible witnesses required to support petition for change of venue. *Hale* v. *State*, 579.
bystanders not called to support petition. *Id.*
admission of incompetent evidence cured by withdrawal. *Id.*
withdrawal of court's ruling held to cure error. *Id.*
necessity for objecting to improper argument. *Id.*

DAMAGES: See DEATH.

for personal injuries not excessive, when. *Payne* v. *Wood*, 286.
loss of employment as element of damages for personal injuries. *Hines* v. *Patterson*, 367.
award for personal injuries *held* not excessive. *Id.*

DEATH:

widow and children of one negligently killed not entitled to damages for pain and suffering. *Hines* v. *Betts*, 555.

DEEDS:

gross inadequacy of price as evidence of grantor's incompetency. *Campbell* v. *Lux*, 397.
age and feebleness as evidence of grantor's incompetency. *Id.*
finding of incapacity sustained when. *Id.*

DIVORCE:

when change of custody of children not ordered. *Nelson* v. *Nelson*, 362.
father not liable for children's support, when. *Id.*
divorced wife suing for children not entitled to attorney's fee, when. *Id.*

DOWER:

antenuptial agreement held to be an equitable jointure in lieu of dower. *Comstock* v. *Comstock*, 266.
validity of oil and gas lease of dower land by widow. *Lee* v. *Straughan*, 504.

DRAINS:

jurisdiction of equity to restrain expenditure of district funds. *Drainage Dist. No. 5* v. *Kochtitzky*, 494.
district not authorized to change plans after contract let. *Id.*
effect of contractor consenting to change. *Id.*
engineer not authorized to change specifications. *Id.*

EJECTMENT:

plaintiff required to recover on strength of his own title. *Spurlock* v. *Gaikens*, 50.

EMINENT DOMAIN: See LEVEES.

EQUITY:

ignores form and looks to substance. *Troupe* v. *Ancrum*, 36, 44
he who seeks equity must do equity. *Stoops* v. *Bank of Brinkley*, 138.

EVIDENCE:

plans of levee district proved from record. *Dickson* v. *Board of Directors, etc.*, 14.
written agreement modified by parol. *Dewberry* v. *First & Thomas*, 26.
parol evidence admissible to show why vendor's lien on record was cancelled. *Conley* v. *Archillion*, 64.
parol evidence admitted to prove that part of the written contract had been detached. *Standard Sewing Mach. Co.* v. *Rainwater*, 81.

EVIDENCE—Continued.

parol evidence not admitted to vary written contract. *Stoops* v. *Bank of Brinkley*, 127.
may be admitted to explain ambiguity. *Id.*
parol evidence not admitted to show parties' construction of language used. *Id.*
declarations of insured properly excluded in suit on policy. *Id.*
interest of beneficiary not defeated by such declarations. *Id.*
parol evidence admitted to show identity of causes of action. *Felker* v. *Boatmen's Bank*, 186.
parol evidence of written contract as basis of action inadmissible without foundation laid. *Ellis & Co.* v. *Farrell*, 274.
letters by third person to defendant held inadmissible. *Id.*
statement of bystander not part of *res gestae*. *Hines* v. *Patterson*, 367.
no admission from mere silence, when. *Id.*
physician may testify opinion that plaintiff was injured internally. *Id.*
statement of child as evidence of his age. *Terry Dairy Co.* v. *Malley*, 448.

EXECUTION:

execution purchaser took title as against an invalid laborer's lien. *Ruddell* v. *Reves*, 259.
description of land in sheriff's deed held sufficient. *Mosby-Dennison Co.* v. *Maxwell*, 482.

EXECUTORS AND ADMINISTRATORS:

allowance or disallowance of claim is judgment binding all parties. *Stover* v. *Robinson*, 262.
no relief against disallowance, when. *Id.*
when relief given against probate orders. *Davis* v. *Straus*, 282.
remedy for mere errors and irregularities. *Id.*
administrator not accountable to heirs for property turned over to them. *Davis* v. *Straus*, 282.
how claim of corporation authenticated. *Superior Oil & Gas Co.* v. *Sudbury*, 319.
appointment of administrator by clerk subject to approval of court. *Groschner* v. *Winton*, 520.
jurisdiction to appoint confined to county of residence or death of decedent. *Id.*
appointment by clerk attacked collaterally, when. *Id.*
effect of executors continuing testator's business. *Ramey-Milburn Co.* v. *Ford*, 568.
liability of executors for goods purchased in name of estate. *Id.*

FIXTURES:

rule as to, between vendor and vendee. *Hall* v. *Burns*, 157.
kitchen cabinet a fixture, when. *Id.*

FOOD:

evidence held to sustain finding of impurity in sausage. *Armour & Co.* v. *Drury*, 310.

FORCIBLE ENTRY AND DETAINER:

duty of sheriff to accept defendant's delivery bond. *Felder* v. *Hall Bros. Co.*, 94.
Kirby's Dig., § 8638, should be liberally construed. *Id.*

FRAUD:

in finding of benefit fund committee not established, when. *Western Union Tel. Co.* v. *Robertson*, 406.

FRAUDS, STATUTE OF:

requirements of statute met by different but connected writings. *Arkansas Light & Power Co.* v. *Paragould*, 1.
ratification of agent's writing may be oral. *Id.*
parol settlement in lieu of jointure of wife *held* not within statute. *Comstock* v. *Comstock*, 266.
payment and taking possession held to take case out of statute. *Beattie* v. *Smith*, 532.
agreement to pay another's debt not within statute when. *Becker Provision Co.* v. *Parker Hardware Co.*, 539.

GENERAL ASSEMBLY. See STATE.

GOOD WILL:

agreement not to re-engage in business not broken, when. *Harris* v. *Irby*, 402.

GUARDIAN AND WARD:

right of dependent child to choose guardian. *Arkansas Children's Home Soc.* v. *Walker*, 356.

HIGHWAYS:

board of commissioners may not employ a commissioner to supervise construction. *Hill* v. *Cruce*, 61.
such unlawful employment not cured by 1 Road Laws, 1919, p. 6. *Id.*
time for appealing from order opening and changing roads. *Carter* v. *Randolph County*, 221.

HIGHWAYS—Continued.

road improvement district created by Legislature not disturbed by courts, when. *Tatum* v. *Wallis*, 288.
effect of omission of benefited lands. *Id.*
must be no arbitrary exclusion of lands. *Id.*
special act held not discriminatory. *Id.*
highway created by prescription, when. *McCracken* v. *State*, 300.
right of highway by prescription acquired, when. *Id.*
proceeding to collect road assessment must comply with statute substantially. *Simpson* v. *Reinman*, 417.
such proceeding void for failure to name true owner in possession. *Id.*
effect of designating third person having no interest in land. *Id.*

HOMESTEAD. See OIL AND GAS:

not lost by failure to claim before marriage. *Spurlock* v. *Gaikens*, 50.
not abandoned, when. *Id.*

HOMICIDE:

deceased's general reputation for morality not competent. *Kelley* v. *State*, 509.
instruction as to insanity of accused disapproved. *Id.*

HUSBAND AND WIFE:

marriage as consideration for antenuptial agreement. *Comstock* v. *Comstock*, 266.
construction and enforcement of antenuptial agreement. *Id.*
antenuptial agreement valid though not acknowledged. *Id.*
antenuptial agreement *held* to be just and reasonable. *Id.*
postnuptial settlement on wife upheld if fair and equitable. *Id.*
effect of wife accepting a sum in satisfaction of an antenuptial agreement. *Id.*

INDICTMENT AND INFORMATION.

when objection taken to panel of grand jury. *Ware* v. *State*, 321.
rules of pleading in civil and criminal proceedings identical. *Id.*
effect of misnaming the crime charged. *Id.*

INFANTS: See MASTER AND SERVANT.

validity of statute regulating employment of. *Terry Dairy Co.* v. *Malley*, 448.

INSANE PERSONS: See HOMICIDE.

to sustain judgment against, material allegations must be proved. *Evans* v. *Davis*, 595.
no process on, in cross-complaint. *Id.*
guardian must defend cross-complaint. *Id.*
judgment against, on cross-complaint without answer by guardian not void. *Id.*
purchaser under erroneous decree against, protected. *Id.*

INSURANCE: See BENEFICIAL ASSOCIATIONS.

evidence held not to support inference of intentional killing. *Aetna Life Ins. Co.* v. *Little*, 70.
term "accidental" defined. *Id.*
presumption that violent death was accidental. *Id.*
how such presumption overcome. *Id.*
recovery on accident policy not defeated by insured's contributory negligence. *Id.*
action on insurance policy not premature, when. *Brotherhood of Railroad Trainmen* v. *Merideth*, 140.
statement that designated beneficiary was insured's wife held a warranty, when. *Id.*
effect of breach of such warranty. *Id.*

INTOXICATING LIQUORS:

evidence of discovery of mash, liquors, etc., as evidence of being engaged in whiskey business. *Marsh* v. *State*, 77.
identification of defendant as seller question for jury, when. *Id.*

JUDGMENT: See JUSTICES OF THE PEACE.

relief in equity against disallowance of claim by probate court not allowed, when. *Stover* v. *Robinson*, 262.
relief in equity against probate judgments. *Davis* v. *Straus*, 282.
power of courts to vacate their judgments. *Hawkeye Tire & Rubber Co.* v. *McFarlin*, 491.
motion to vacate judgment in favor of administrator not collateral attack on appointment, when. *Groschner* v. *Winton*, 520.
evidence *held* to show fraud in procuring judgment. *Id.*

JURY:

time for making challenge to the panel. *Ware* v. *State*, 321.
not disqualified by opinions based on rumor or newspapers. *Hale* v. *State*, 579.

JUSTICES OF THE PEACE:

error of suing for claim in excess of jurisdiction cured by remitting excess. *Knuckles* v. *Pressley*, 216.
judgment on dissolving attachment. *Id.*
jurisdiction of prosecutions for obstructing highways. *McCracken* v. *State*, 300.

LANDLORD AND TENANT: See FORCIBLE ENTRY AND DETAINER.

finding that land was taken by defendant by authority held sustained. *Sandlin* v. *Bailey*, 23.
landlord entitled to damages from share-cropper, when. *Knuckles* v. *Pressley*, 216.
contract between landlord and share-cropper, *held*, mutual. *Id.*
contract for day's wages construed. *Id.*
lease of "approximately 650 acres" construed. *Cox* v. *Fisher*, 223.
relief in case of gross deficiency. *Id.*
construction of lease as to rental to be paid. *O'Kane* v. *McCuen*, 236.

LARCENY:

instruction as to presumption of property recently stolen disapproved. *Pearrow* v. *State*, 182.
possession of recently stolen property as evidence of guilt. *Id.*
ownership of property must be proved. *Id.*
sufficiency of allegation of ownership of crop in tenant. *Hawkins* v. *State*, 298.

LEGISLATURE. See STATE.

LEVEES:

Acts 1917, p. 1683, providing for relocation of levee, held constitutional. *Dickson* v. *Board of Directors, etc.*, 14.

LIMITATION OF ACTIONS:

payment of interest stops running of statute. *Conley* v. *Archillion*, 64.
suit on purchase notes of land not barred upon assumption of debt, when. *Id.*
new action brought within year after dismissal. *Felker* v. *Boatmen's Bank*, 186.
parol evidence admitted to show identity of causes of action. *Id.*
adverse possession bars recovery by infant, when. *Jackson* v. *Cole*, 565.

LOGS AND LOGGING:

time for removing timber, question for jury, when. *Beattie* v. *Smith*, 532.
criterion of reasonable time for removing timber. *Id.*
matters considered in determining reasonableness of time. *Id.*

MANDAMUS:

ministerial discretionary powers not controlled. *Fraser* v. *Keck*, 255.
Land Commissioner's determination that land was not an island not controlled. *Lewis* v. *Owen*, 469.

MARRIAGE:

presumption of validity of marriage duly solemnized. *Brotherhood of Railroad Trainmen* v. *Merideth*, 140.
burden of proving its invalidity. *Id.*
validity of, question for jury, when. *Id.*

MASTER AND SERVANT:

liability of master for servant's wrongful acts. *Wells Fargo & Co. Express* v. *Alexander*, 104.
master not liable for assault by servant, when. *Id.*
question of master's negligence for jury, when. *Central Coal & Coke Co.* v. *Fitzgerald*, 109.
servant does not assume risk of master's negligence, when. *Id.*
assumed risk and contributory negligence questions for jury, when. *Id.*
liability for vice-principal's negligence. *Id.*
degree of care required of master to furnish suitable appliances. *Kelly Handle Co.* v. *Shanks*, 208.
assumed risk question for jury, when. *Id.*
instruction not objectionable as ignoring defense of contributory negligence. *Id.*
instruction as to assumed risk disapproved. *Id.*
laborer not entitled to lien for hauling article. *Ruddell* v. *Reves*, 259.
burden of proving allegations of complaint. *Western Union Tel. Co.* v. *Robertson*, 406.
validity of release of claims. *Id.*
conclusiveness of finding of benefit fund committee. *Id.*
such finding not fraudulent, when. *Id.*
statute regulating employment of children upheld. *Terry Dairy Co.* v. *Malley*, 448.
employment of minor under 14 is negligence *per se*. *Id.*
liability of master for violating child labor law. *Id.*
no defense that another's negligence contributed to the injury. *Id.*

MASTER AND SERVANT—Continued.

defenses of assumed risk and contributory negligence not available. *Id,*
effect of minor employee misrepresenting his age. *Id.*
employment of minor under 16 is negligence *per se,* when. *Fort Smith Rim & Bow Co.* v. *Qualls,* 475.
minor is under 16 till sixteenth birthday. *Id.*
miner held to have assumed risk of working in unsafe place. *Alix Coal Co.* v. *Nelson, 574.*

MAXIMS: See EQUITY.

no one ought to be compelled to accuse himself. *Pearrow* v. *State,* 207.

MECHANICS' LIEN:

claim may be filed within ninety days after last item of account was furnished. *Hill* v. *Imboden,* 99.
burden on materialman to prove delivery of materials. *Id.*

MORTGAGES:

evidence considered to determine whether an absolute deed was intended as mortgage. *Anderson* v. *Powell,* 87.
presumption that absolute deed was intended as such. *Id.*
sufficiency of evidence to overcome such presumption. *Id.*
evidence *held* sufficient to overcome such presumption. *Id.*
effect of agreement to release part of land when purchase price paid. *Stoops* v. *Bank of Brinkley,* 128.
necessity of record as against third persons. *Ruddell* v. *Reves,* 259.

MUNICIPAL CORPORATIONS:

authority to maintain waterworks. *Arkansas Light & Power Co.* v. *Paragould,* 1.
authority to contract for electric pump and current to operate it. *Id.*
record as *prima facie* evidence of passage of ordinance. *Id.*
municipal contract for installing electric pump accepted when. *Id.*

NEGLIGENCE. See RAILROADS; MASTER AND SERVANT; CARRIERS.

NOVATION:

new oral agreement may be substituted for written contract. *Weaver* v. *Emerson-Brantingham Imp. Co.,* 379.

OIL AND GAS:

effect of oil and gas lease by one tenant in common. *Lee* v. *Straughan,* 504.
validity of widow's lease of dower and homestead. *Id.*
powers of lessee of cotenant over supply of minerals. *Id.*

PLEADING: See CREDITOR'S SUIT.

failure of plaintiff to answer cross-complaint waived when. *Hill* v. *Imboden*, 99.
complaint for interference with contract *held* good on demurrer. *Hogue* v. *Sparks*, 174.
remedy for defective statement of cause of action. *W. R. Moore Dry Goods Co.* v. *Ford*, 227.

PUBLIC LANDS:

refunding of purchase money not made without appropriation. *Oliver* v. *Bolinger*, 242.
authority of county judge of Mississippi County to lease school lands. *Fraser* v. *Keck*, 255.
binding contract to lease such lands made when. *Id.*

RAILROADS:

suits for personal injuries brought against carrier while road in hands of Director General. *Hines* v. *Mauldin*, 170; *Kansas City So. Ry. Co.* v. *Rogers*, 232.
order No. 50 of Director General *held* void. *Kansas City So. Ry. Co.* v. *Rogers*, 232.
penalty and attorney's fee not recoverable for failure to post stock killing during federal control. *Id.*
liability for personal injuries to passenger while road under federal control. *Hines* v. *Patterson*, 367.
duty of pedestrian to exercise care at crossing. *Hines* v. *Betts*, 555.
contributory negligence for jury when. *Id.*
discovered peril for jury when. *Id.*

REFORMATION OF INSTRUMENTS:

sufficiency of evidence to justify reformation. *Troupe* v. *Ancrum*, 36.
evidence *held* sufficient. *Id.*
prayer *held* sufficient to justify reformation. *Id.*

RELEASE:

of claim binding, when. *Western Union Tel. Co.* v. *Robertson*, 406.

RELIGIOUS SOCIETIES:

jurisdiction to restore possession of church property. *Morris* v. *Griffin*, 439.
no defense that church was built on wrong lot when. *Id.*

REMAINDERS:

in personal property may be created at common law. *King* v. *Stevens*, 443.

REMOVAL OF CAUSES:

murder case not removable on account of racial discrimination. *Ware* v. *State*, 321.

SALES:

warranty implied in sale of carload of meal. *Courtesy Flour Co.* v. *Westbrook*, 17.
remedies for breach of, express warranty. *Id.*
effect of acceptance of goods after discovery of breach of implied warranty. *Id.*
right to damages waived, when. *Id.*
minds of parties *held* not to have met when. *Standard Sewing Mach. Co.* v. *Rainwater*, 81.
when contract complete. *Rock* v. *Deason & Keith*, 124.
food control act not applicable to prior sales of food. *Id.*
sufficiency of delivery according to custom. *Wooten & Co.* v. *Bain-Adams Co.*, 462.
error to direct verdict for seller, when. *Id.*
duty of buyer with respect to deliveries under installment contract. *Id.*

SCHOOLS AND SCHOOL DISTRICTS:

act No. 15 of 1919, *held* to repeal act 321 of 1909. *Common School Dist. No. 52* v. *Rural Special School District No. 11*, 32.
rural special school districts not formed by dismembering common school districts. *Id.*
procedure for transfer of territory from common school to single school district. *School Districts Nos. 14 & 58* v. *Henderson*, 338.
remedy of district from which territory is taken. *Id.*
legislative power to change boundaries. *Id.*
county court's judgment transferring territory not attacked collaterally. *Id.*
no relief in equity against order annexing territory to district. *Id.*

STATE:

Auditor not to draw warrant until appropriation made. *Oliver* v. *Bolinger*, 242.
misapplication of State's funds enjoined by citizen and taxpayer. *Farrell* v. *Oliver*, 599.
delay in asking such relief immaterial. *Id.*
matters properly embraced in general appropriation bill. *Id.*
validity of appropriation for industrial schools. *Id.*

STATUTES:

later of two irreconcilable acts controls. *Common School District No. 52* v. *Rural Special School District No. 11*, 32.

STATUTES CITED:

ACTS OF CONGRESS:

Act March 21, 1875 329
March 21, 1918 ..... 170, 232
Rev. Stat., sec. 1977 329
40 Stat. at L. 124

KIRBY'S DIGEST:

§ 1, 2 525
110 319
116, 117 321
1187 5
1199 598
1758 301
2272 330
2318 579
2354–6 334
2639 45
3006 222
3066 10
3138 513
3405–6 242
3415 242
3638 95
3772 359
3902 50
3905 266
3984 186
4527 338
4905–6, 4912 242
4981 101
4995 259
5011 259
5167 266
5396 259
5473 9
5675 5
5694 424
6289–90 562
6774 232
7328 222

KIRBY'S DIGEST—*Cont.*

§ 7540 338
7695 338
8020 45

CONSTITUTION OF 1874:

Art. 4, § 1 603
5, 29 242
5, 30 600
7, 40 301
9, 3 53
16, 5 ..... 316, 551
16, 12 242
16, 13 599

SESSION LAWS:

1899, p. 347 223
1905, p. 267 14
1905, p. 398 255
1907, p. 144 232
1909, p. 518 356
1909, p. 698 350
1909, p. 1163, § 20 418
1909, No. 321 32
1911, p. 166 359
1911, p. 364 222
1913, p. 279, § 29 187
1915, p. 684 266
1915, p. 1505 ..... 452, 475
1915, No. 338 61
1917, p. 1683 14
1917, p. 2173, § 2 551
1919, p. 36 266
1919, p. 180, § 2 551
1919, p. 205 598
1919, No. 15 32
1919, 1 Road Laws, p. 6 61
1919, 1 Road Laws, pp. 634, 652 288

STIPULATIONS:

statute requiring stipulation that judgment absolute be rendered as affirmance construed. *Hawkeye Tire & Rubber Co.* v. *McFarlin*, 491.

such statute inapplicable to order vacating judgment. *Id.*

SUBROGATION:

attaching creditor paying taxes entitled to be subrogated to State's lien, when. *Stoops* v. *Bank of Brinkley*, 127.

TAXATION:

remedy for overvaluation. *W. P. Brown & Sons Lumber Co.* v. *Sims*, 253.
effect of breach of assessor's promise to correct list. *Id.*
personal property of Masonic Lodge not exempt, when. *Grand Lodge F. & A. M.* v. *Taylor*, 316.
when property used for charity exempt. *Id.*
tax sales must substantially comply with statute. *Simpson* v. *Reinman*, 417.
tax on nonresidents' lands held discriminatory. *White River Lumber Co.* v. *Elliott*, 551.
right to recover illegal tax paid under protest. *Id.*

TELEGRAPHS AND TELEPHONES:

instruction as to liability for failure to give telephone connection properly modified, when. *Southwestern Bell Tel. Co.* v. *Hodges*, 585.

TENANCY IN COMMON:

cotenant bound by oil and gas lease executed by him, though his cotenants not bound. *Lee* v. *Straughan*, 504.
powers of lessee of one tenant in common. *Id.*
possession of co-tenant's grantee adverse, when. *Jackson* v. *Cole*, 565.

TORT:

malicious interference with contract. *Hogue* v. *Sparks*, 174.

TRIAL. See APPEAL AND ERROR.

verdict for plaintiff for the amount sued for, upheld. *Dewberry* v. *Furst & Thomas*, 26.
not error to refuse abstract instruction. *Murray Transfer Co.* v. *Jones*, 153.
argumentative or repetitious instructions properly refused. *Kelly Handle Co.* v. *Shanks*, 208; *Southwestern Bell Tel. Co.* v. *Hodges*, 585.
unnecessary to repeat instructions. *Ellis & Co.* v. *Farrell*, 274.
instruction properly refused as assuming disputed fact. *Fort Smith Rim & Bow Co.* v. *Qualls*, 475.

TROVER AND CONVERSION. See WAREHOUSEMEN.

USURY:

taking of highest interest for twelve months in advance *held* not usury. *Cain* v. *Stacy*, 55.
loan not invalidated by employment of lender, when. *Id.*
finding that contract was not usurious *held* sustained. *Id.*

VENDOR AND PURCHASER:

finding that subvendee assumed payment of purchase money note upheld. *Conley* v. *Archillion*, 54.
suit on such note not barred by laches, when. *Id.*
widow and heirs of such subvendee proper parties to suit to enforce lien. *Id.*
unnecessary to reform deed to show assumption of payment of purchase money. *Id.*
renewal notes for purchase of land constitute liens thereon. *Star Line & Zinc Mining Co.* v. *Arkansas Nat. Bank*, 246.
effect of taking renewal notes not in form of original notes. *Id.*
effect of purchasing land with recitals in deed of outstanding purchase notes. *Id.*
one failing to inquire at available sources *held* not innocent purchaser. *Id.*
vendor's lien extinguished by payment. *Id.*
such lien not extinguished by transfer of notes, when. *Id.*
lien kept alive by assignment of purchase notes, when. *Id.*
duty of purchaser to point out defects in abstract. *Dozier* v. *Union Bank & Trust Co.*, 336.
effect of vendor alleging that purchaser had refused to comply with contract. *Id.*
burden of proof in action to recover forfeit. *Id.*
right to forfeit contract waived by vendor, when. *Missouri Pac. Railroad Co.* v. *Frost*, 472.
vendor taking possession liable for rental value. *Id.*

WAREHOUSEMEN:

instruction as to failure to deliver goods stored discussed. *Murray Transfer Co.* v. *Jones*, 153.
liability for loss of stored goods. *Id.*
liability for converting stored goods. *Id.*

WATERS AND WATERCOURSES.

right of city to change water rates. *Arkansas Light and Power Co.* v. *Paragould*, 1.
such change *held* not to impair obligation of contract. *Id.*

WILLS:

presumption against partial intestacy. *Barlow* v. *Cain*, 160.
will *held* not to convey all of personalty. *Id.*
effect of devise of incumbered land. *Id.*
by whom taxes on devised land payable. *Id.*
effect of devising life estate with power of disposal. *Moore* v. *Avery*, 193.
paramount rule to arrive at testator's intention. *Id.*
will construed to devise property of which testator had power of disposition. *Id.*

WITNESSES:

error to cross-examine accused's father concerning articles found in his possession not alleged to have been recently stolen. *Pearrow* v. *State*, 182.
accused may be cross-examined about other crimes. *Pearrow* v. *State*, 201.
accused not impeached by admissions as to other crimes procured by threats. *Id.*
in suits between husband and wife either may testify. *Comstock* v. *Comstock*, 266.
witness not corroborated by his own statement. *Security Life Ins. Co.* v. *Ingram*, 393.
may be impeached by proof of contradictory statement. *Wooten & Co.* v. *Bain-Adams Co.*, 462.
objection to witness' mental competency taken at what stage. *Thrash* v. *State*, 547.
impeachment by proof of insane delusions. *Id.*
also by proof of impairment of mind by disease or other cause. *Id.*
improper to cross-examine State's witness as to threats by defendant. *Hale* v. *State*, 579.
so also as to threats by defendants' brother. *Id.*
such witness not impeached as to such incompetent evidence. *Id.*

WORDS AND PHRASES:

accidental. *Aetna Life Ins. Co.* v. *Little*, 70.
approximately. *Cox* v. *Fisher*, 226.
executive department. *Farrell* v. *Oliver*, 603.
jointure. *Comstock* v. *Comstock*, 266.
more or less. *Cox* v. *Fisher*, 226.
operate and maintain. *Arkansas Light & Power Co.* v. *Paragould*, 1.
supposed owner. *Simpson* v. *Reinman*, 426.

Ex. G. M.
8/1/21