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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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T. D. CRAWFORD
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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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

J. S. UTLEY, - - - - - - - - Attorney General

WILLIAM P. SADLER, - - - - - - - - - Clerk

T. D. CRAWFORD, - - - - - - - - - Reporter

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

HUDDLESTON *v.* BERNSTEIN.

Opinion delivered March 7, 1921.

1. SALES—ACCEPTANCE BY BUYER.—A buyer can not be required to accept goods of substantially different value from those ordered by him.
2. SALES—DELIVERY TO CARRIER.—The rule that the seller's delivery of goods to a carrier is delivery to the buyer is inapplicable where the goods [illegible] delivered substantially differ in value from those ordered.
3. SIGNATURES—SIGNING BY MARK—PRESUMPTION.—Where a buyer's signature to an order, made by mark, was not witnessed as required by statute, and was not admitted by the buyer, the order is not *prima facie* evidence of a written contract.

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

J. C. Pinnix and *O. A. Featherston,* for appellant.

[illegible] error to direct a verdict for the plaintiff, as there was evidence for a jury to pass upon and the evi[illegible] was conflicting. 73 Ark. 761; 76 *Id.* 520. Where [illegible] is any evidence to establish an issue, it is error to [illegible] from the jury. 63 Ark. 94; 77 *Id.* 556; 36 [illegible]; 35 *Id.* 146; 62 *Id.* 63; 84 *Id.* 57. Where there is [illegible] conflict of evidence, the question is for a jury. 38 [illegible] 0. Where there is any evidence to establish an issue, it is error to take the case from the jury. 89 Ark. [illegible] *Id.* 368; 39 *Id.* 491; 99 *Id.* 490; 97 *Id.* 438. Where

the evidence is conflicting, the question is always for the jury. 101 Ark. 376; 105 *Id.* 213; 97 *Id.* 438; 98 *Id.* 334; 96 *Id.* 379. See, also, 23 Ark. 115; 99 *Id.* 490; 85 *Id.* 390; 112 *Id.* 507; 91 *Id.* 383; 102 *Id.* 460; 76 *Id.* 88; 71 *Id.* 445; 72 S. W. 220; 210 U. S. 281, 52 Law Ed. 1061; 119 Ark. 581; 120 *Id.* 206; 98 *Id.* 334, 370; 34 L. R. A. (N. S.) 1200.

If there is any evidence to sustain an issue, it is error to direct a verdict, but a case for a jury is made. 37 Ark. 164; *Ib.* 230; *Ib.* 580; 35 Ark. 146; 33 *Id.* 350; 36 *Id.* 451; 89 *Id.* 368; 97 Ark. 643; 103 *Id.* 401.

W. T. Kidd, for appellee.

The court properly directed a verdict, as there was no controversy for a jury. 89 Ark. 124; 69 *Id.* 489. There is no error in the instructions. 69 Ark. 489; 89 *Id.* 178.

HUMPHREYS, J. This suit was commenced by appellee against appellant on the 31st day of August, 1920, before a justice of the peace in Pike County, upon a verified account based upon an alleged order for roof paint, of date October 16, 1918. The trial in the magistrate's court resulted in a dismissal of the suit, from which an appeal was prosecuted to the circuit court. The cause proceeded to a hearing in that court, and, when the evidence had been concluded, the court sent the case to the jury, over the objection of appellant, on the sole issue of whether appellant was indebted to appellee in the sum of $89 or $99.50. The jury returned a verdict for $89. A judgment was rendered in accordance with the verdict, from which is this appeal.

The order made the basis of the suit was signed as follows:

his
"J. W. x Huddleston."
mark

The signature by mark was not witnessed as required by the statutes of this State. The materials specified in the order total $99.50 and were to be shipped to Mur-

freesboro, Arkansas, f. o. b. destination; terms, net, thirty days, or two per cent. discount if paid within ten days from date of invoice.

S. R. Graham testified that appellant told him he had ordered roof paint to cover the house he (Graham) was living in, which was then at the depot, but that the bill for it was wrong, being for a greater amount than he ordered; that appellant requested him to write to appellee and explain the error; that he complied with the request.

Appellant testified, in substance, that he could not read or write, and that he had no recollection of having signed an order; that, if the order introduced in evidence covered the materials to the amount of $99.50, it had been changed and was not the order given by him; that, upon receipt of the bill of lading, he notified appellee by letter that the shipment of roof paint exceeded in value the order made, and that he had refused acceptance of the order on that account and would not accept the shipment unless made to correspond in value with the order made by him; that he received no answer to the letter.

The effect of the instruction of the court was to peremptorily direct a verdict against appellant in a sum not less than $89. This was error, because it took from the jury the issue presented by the evidence as to whether appellant was indebted to appellee in any sum. Appellant interposed the defense that he was not indebted to appellee in any sum unless the shipment substantially conformed to the order made by him. This was a good defense, for a purchaser can not be required to accept goods of substantially different value from those ordered by him. The court instructed the jury upon the theory that a delivery of the goods to the carrier was a delivery to appellant. This assumption would have been correct had the shipment substantially corresponded with the order, but was incorrect if the shipment materially differed from the order. Appellant testified that he only ordered $89 worth of roof paint; whereas, the shipment

was for roof paint in the value of $99.50. The court should have instructed the jury to return a verdict for appellant if the order given by him was for only $89 worth of roof paint. Appellee contends, however, that the peremptory instruction was correct because appellant was bound on the written order which specified roof paint in the amount of $99.50. This position is not sound because the order introduced in evidence was not signed by appellant in the manner required by the statutes of this State for signatures by mark. Unless admitted or so signed, it could not be regarded as even *prima facie* evidence of a written contract.

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

DURRETT v. HARRIS.

Opinion delivered March 14, 1921.

1. FRAUDULENT CONVEYANCES—ELECTION TO TREAT LANDS AS BELONGING TO DEBTOR'S WIFE.—Where a creditor, having bought in his debtor's land on execution sale, knowingly permitted the debtor's wife to redeem the land in her name with her husband's funds, the creditor can not thereafter subject the proceeds of the land upon its subsequent sale by the wife.
2. BANKRUPTCY—POWERS OF TRUSTEE.—Under Bankruptcy Act, § 70, authorizing a trustee in bankruptcy to "avoid any transfer by a bankrupt of his property which any creditor might have avoided," where a creditor of a bankrupt was not entitled to avoid a transfer of property to the debtor's wife by reason of having elected to treat it as purchased with her funds, the trustee can not attack the conveyance for the creditor's benefit.

Appeal from Union Chancery Court; *J. M. Barker,* Chancellor; affirmed.

W. E. Patterson, for appellants.

1. It was not contended below, and we presume it will not be contended here, that the trustee in bankruptcy has not the right to pursue the claim of any creditor or is not "clothed with plenary power to sue to avoid any

transfer made by the bankrupt of her property which any creditor may have avoided, whether made within four months prior to the adjudication of bankruptcy or not." Brandenburg on Bankruptcy (3 ed.), p. 738, subdiv. (e), § 70; 75 Ark. 562; 103 *Id.* 105; 7 C. J., p. 247, § 387 (b) and notes.

2. Appellees pleaded in their answers as a defense to this action the discharge in bankruptcy of D. F. Harris, and he made his motion to dismiss on that ground. The motion was properly overruled. The discharge of a debtor in bankruptcy in no way precludes the trustee from recovering the property of the bankrupt which has been fraudulently transferred. 103 Fed. 64. The discharge is personal to the bankrupt, and does not release his fraudulent grantees from liability for the fraud committed by them. 103 U. S. 301; 168 Ala. 363; Ann. Cases 1912 B 249 and note.

The effect of a discharge is personal to the bankrupt. It does not release property owned by the debtor at the time he became bankrupt, although standing in the name of another, * * * and does not preclude the trustee from recovering the property from the bankrupt's estate which has been fraudulently transferred nor affect the right of creditors to have a fraudulent conveyance made by the debtor before his bankruptcy set aside. 7 C. J., p. 395-6, § 704 (1). The rights of the creditors against third parties liable jointly with the bankrupt or secondarily for him are not impaired by the bankrupt's adjudication nor his discharge. 2 Remington on Bankruptcy (2 ed.), § 1510; 118 Ark. 441.

3. The property here, 200 acres in land, the proceeds of which are involved here, was purchased and paid for wholly with funds procured and made wholly by the knowledge, skill, labor, time and efforts of the husband, D. F. Harris, and the placing it in his wife's name was a fraud upon creditors. 73 Ark. 179; 101 *Id.* 573; 106 *Id.* 237; 129 *Id.* 396; 121 *Id.* 383; 132 *Id.* 268; 134 *Id.* 241; 135 *Id.* 115; 86 *Id.* 225; 91 *Id.* 394; 108 *Id.* 164; 68 *Id.* 102;

55 *Id.* 116; 56 *Id.* 80; 50 *Id.* 46; 45 *Id.* 520; 218 S. W. 177; 12 R. C. L., p. 668.

Transactions between husband and wife affecting the rights of creditors, especially when the husband is insolvent, are closely scrutinized with care, and the burden is upon the wife to show good faith, or they will be set aside. 134 Ark. 241; 218 S. W. 177; 86 Ark. 225; 89 *Id.* 77; 75 *Id.* 562; 110 *Id.* 335.

4. The evidence shows fraud. All the facts and circumstances show taking the deed in the wife's name was a fraud on creditors. 110 Ark. 347; 113 *Id.* 100; 113 *Id.* 104-8.

It was a fraud to invest the earnings of the husband in the wife's name so as to defeat creditors. 20 Cyc. 355-8-9; 13 S. W. 78; 21 Cyc. 1429. Such earnings are subject to the husband's debts. 12 R. C. L. 509-524; 13 *Id.* 524, 1161.

Courts of equity will always subject the husband's earnings and property to his debts, where placed in the wife's name. 23 L. R. A. (N. S.) 1124; 21 Ky. L. R. 931. See, also, 14 Ky. L. R. 667; 48 S. W. 355; 91 Am. Dec. 98; 38 Am. St. Rep. 30; 16 S. E. 570; 39 W. Va. 567; 26 L. R. A. 537; 20 S. E. 599; 67 Ill. App. 274; 21 L. R. A. 623; 9 Ala. 933; 12 Gratt. 74; 16 Ohio St. 509; 91 Am. Dec. 98; 53 Iowa 470; 81 Iowa 302; 30 Am. Rep. 500; 55 Miss. 60; 90 Me. 376; 38 L. R. A. 190; 26 L. R. A. 537; Bump on Fraud. Convey., p. 250. These decisions are sustained by our own court. 66 Ark. 419; 67 *Id.* 110; 75 *Id.* 562; 89 *Id.* 77; 135 S. W. 78. The husband clearly furnished the means and paid for the lands, and, though in the wife's name, they are clearly subject to the debts of existing creditors, and the court erred in its decree.

Neill C. Marsh, Callaway & Huie and *Gaughan & Sifford,* for appellees.

1. Authority is found in the American decisions for any one of the three following propositions:

(1) If the wife of an insolvent debtor conducts a business depending upon the skill and labor of her hus-

band, and they, acting together, have the intent of accumulating property in her name for the purpose of defeating the husband's creditors in the collection of their debts, the property may be subjected to the payment of his debts.

(2) While the insolvent debtor has the right to provide for the necessary wants of his family, whatever he earns over and above that amount goes to his creditors; so that, should his wife own a business or own property, he can only devote to her business or her property a reasonable amount of his time and skill, and whatever accumulation resulting from his labor and skill may come to her separate estate, over and above a reasonable contribution thereto, is subject to his debts and may be subjected by his creditors.

(3) The creditor is entitled to all the property of his debtor except exemptions given by law, and only after the creditor has taken all the debtor's property and applied it to the payment of debts, is the debtor himself free. He is under no legal obligation to work for the creditor, nor to accumulate anything for the creditor. 67 Miss. 710; 19 Am. St. Rep. 344; 55 Pa. St. 432; 99 Am. Dec. 769; 98 N. W. Rep. 486; 78 Am. Dec. 632.

Equity has no jurisdiction to compel men to work for their creditors when they prefer to work for their wives and children. 78 Am. Dec. 632; 12 Am. St. Rep. 641; 44 N. Y. 343; 21 U. S. (Law. Co. Ed.) 269; 28 Fed. 819; 89 Ark. 77; 75 *Id.* 562.

2. The suit of the bank against D. F. Harris is a stale claim and inequitable.

McCULLOCH, C. J. D. F. Harris, one of the appellees, was for many years prior to the year 1911 engaged in the sawmill business, and became heavily indebted to creditors; the Merchants' & Farmers' Bank of Junction City, Arkansas, one of the appellants in this action, being one of them. He owed the bank three notes, one for $1,000, one for $1,973 and the other for $2,500. Harris resided in Junction City and owned an undivided half

interest in a tract of land in that (Union) county, containing 424 acres; his brother, C. A. Harris, being the owner of the other half interest. The bank instituted an action at law in the circuit court of Union County against Harris to recover on the said note for the sum of $2,500, and sued out an order of general attachment, which was levied on the Union County land. Judgment was rendered in favor of the bank in that action, the attachment was sustained, and the land was ordered sold. At the sale, which was held on January 6, 1912, the bank became the purchaser of Harris' undivided half-interest in the land for the sum of $1,800, which was credited on the judgment, and received from the sheriff a certificate of purchase. A few days prior to the expiration of the period allowed for redemption from the sale, Mrs. C. D. Harris, the wife of D. F. Harris, paid to the bank the sum of $2,080, and the latter assigned to Mrs. Harris the certificate of purchase, upon which the sheriff executed to her a deed conveying the land attached and sold. Mrs. Harris and the other tenant in common subsequently divided the land and a part of the tract containing 200 acres was conveyed to her in severalty. She sold forty acres of the land to another person and then purchased forty acres more, which gave her the amount of acreage she received in the division. Mrs. Harris continued as the owner of the 200 acres, which was a farm partly in cultivation, until November, 1918, when she sold and conveyed it to S. E. Bass for the consideration of $5,000, of which $1,500 was paid by check on another bank in Junction City, the remaining sum of $3,500 being evidenced by note executed by Bass to Mrs. Harris.

The present action was immediately instituted by the Merchants' & Farmers' Bank in the chancery court of Union County against D. F. Harris and his wife to subject the proceeds of the sale to Bass (check and note) to the payment of the remainder of the debt still owing by D. F. Harris to the bank, the basis of the action being the charge that the funds used by Mrs. Harris in payment

to the bank of the consideration ($2,080) for the assignment of the certificate of purchase were really the funds of Harris himself, fraudulently accumulated and held in the name of his wife for the purpose of hindering the bank and other creditors in the collection of these debts. Shortly after the institution of this suit, D. F. Harris filed his petition in bankruptcy, and was duly adjudged a bankrupt, and appellant Durrett was elected trustee of the estate and intervened in this action, asking that the funds in controversy be decreed to be the property of the estate of the bankrupt. The chancery court, on the final hearing of the cause, dismissed the original complaint of the bank, as well as the complaint of the trustee as intervener for want of equity.

The testimony adduced in the case establishes the fact that the funds used by Mrs. Harris in paying the bank for the purchase of the land were accumulated in the business operations of D. F. Harris in the name of his wife, and that such operations were so conducted in the name of Mrs. Harris for the express purpose of putting the proceeds beyond the reach of Harris' creditors. When Harris became insolvent in the year 1911, he divested himself of all of his property, except this undivided half-interest in the Union County land which he held with his brother. He had no other property left, nor did his wife own any property. She was not a business woman, and gave her entire time and attention to housekeeping. Harris himself seems to be a capable business man, and he found an opportunity to secure contracts with the Federal government to furnish timber for use in constructing locks and dams in the Ouachita River at Camden and in the Sunflower River in the State of Mississippi. He availed himself of this opportunity, and, in order to prevent interference from creditors, he took the contracts in the name of his wife and operated the business in her name. No capital was required, and the skill and efforts of Harris were substantially all that were involved in the enterprise. Harris managed the

business openly and entirely, using his wife's name in the contracts and in his dealings with the proceeds arising from those business operations. Mrs. Harris had nothing to do with the business except to permit the use of her name. This state of affairs seems to have been well known and a matter of notoriety in the community where the business was carried on, and where the Harrises resided, where the bank operated its business and its officers resided. The business was profitable, and from the accumulated profits the sum of $2,080 was used to purchase from the bank for Mrs. Harris the tract of land which the bank had acquired at the attachment sale. Learned counsel for appellants say that, since the holding of the funds in the name of Mrs. Harris was colorable and in fraud of the rights of creditors, the purchase of the certificate amounted to no more than a redemption of the land from the sale. Conceding that to be true as to other creditors of Harris, it ought not to be so treated as to the bank which received the funds as a payment by Mrs. Harris for the purchase of the land. The bank made its election to accept the funds in purchase of the land. It accepted the funds, not as the property of Harris, the debtor, but as the property of Mrs. Harris. The bank knew or could have known then as well as now the source of those funds and how they were accumulated. In order to escape the effect of its election at that time to treat the funds as being those of Mrs. Harris and to accept the same from her in purchase of the land, it devolves on the bank to show that it accepted the funds in ignorance of their source. It is inconceivable that the bank did not know or have abundant opportunity to ascertain at that time the true state of affairs in regard to those funds. Mrs. Harris had no property, and was apparently not engaged in any business whereby there could be accumulated earnings. Her husband attended to the business, and he also made the purchase of this land from the bank for his wife.

We think that the bank is bound by its election and can not now be heard to say that the funds used in the purchase of the land should, in equity, be treated as the property of Harris and followed through the land to the proceeds of the sale to Bass, so as to subject those proceeds to payment of the debt of Harris to the bank. Under such circumstances, a court of equity will not lend its aid to uncover an alleged fraud. Whatever the rights of other creditors of Harris might have been, the bank is not in an attitude to set up the fraud for the purpose of subjecting the proceeds of the sale of the land to the payment of their debt.

The trustee is in no better attitude as the representative of the bank, a creditor of the bankrupt. A trustee in bankruptcy may, under section 70 of the National Bankruptcy Statute, "avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided," and this is the extent of his rights and authority. *Boyd* v. *Arnold,* 103 Ark. 105.

Since appellant bank is not in the attitude to avoid the transfer by Harris, the trustee can not do so for it. There is no proof in this record to show that there are other creditors who are entitled to avoid the conveyance.

Decree affirmed.

BANK OF BLACK ROCK *v.* B. JOHNSON & SON TIE COMPANY.

Opinion delivered March 14, 1921.

1. BANKS AND BANKING — FORGED CHECK.—Payment of a forged check by the bank upon which it is drawn is made at the bank's peril, under Crawford & Moses' Digest, § 7789, and the bank is not justified in charging it against the depositor's account unless the latter is precluded from setting up the forgery or want of authority.

2. BANKS AND BANKING—QUESTION FOR JURY.—In an action by a depositor against a bank to recover the amount of a forged check charged against his account, where the bank cashed the check and returned it with others to the depositor, who kept it for seven days without making complaint that it had been forged,

and permitted the bank to charge the forged check to its account, it was error to direct a verdict for plaintiff, as the court should have submitted to the jury the question whether or not plaintiff had exercised ordinary care in examining the checks and discovering the forgery and reporting it to the bank.

3. BANKS AND BANKING—FORGERY OF CHECK—NEGLIGENCE OF DEPOSITOR.—If a depositor is guilty of negligence in not discovering and giving notice of a forged check, the bank might thereby be prejudiced by being prevented from taking steps by the arrest of the criminal or by attachment of his property or other proceeding to compel restitution.

Appeal from Lawrence Circuit Court, Western District; *D. H. Coleman,* Judge; reversed.

STATEMENT OF FACTS.

Appellee sued appellant before a justice of the peace to recover $295, being the amount of a forged check purporting to have been drawn by appellee, which was cashed by appellant and charged to appellee. Judgment was there rendered in favor of appellant, and the case was carried to the circuit court by appellee, where there was a trial *de novo.*

The facts, briefly stated, are as follows:

The B. Johnson & Son Tie Company is a foreign corporation doing business in the State of Arkansas, and W. M. Prater is its State manager. W. N. Pruett was one of appellee's agents, who had authority to sign checks for appellee in payment of ties. Appellant is a bank doing business at Black Rock, Arkansas. Appellee had furnished the bank with Pruett's signature on a card and the bank had been cashing his checks for two or three years. The check in question was for $295, dated May 22, 1919, and payable to J. Jones at the Bank of Black Rock. It was signed, "B. Johnson & Son Tie Company, per W. N. Pruett, Inspector." The check was cashed by the bank on May 26, 1919, and was sent by it to appellee and received by it on June 4, 1919. Appellee kept the check until June 11, 1919, when it took it up and the bank charged its account with it. Appellee closed out its account with appellant on June 11th, and placed it with

another bank. At that time nothing was said about the check sued on being a forgery. Subsequently appellee found out that the check in question was a forgery. Appellee gained the information in this way. It received another check drawn on another bank purporting to have been signed by its agent, W. N. Pruett. It discovered that this check was a forgery and immediately sent to both the banks with which it did business for all checks purporting to have been issued by it and cashed by the banks. The checks were about 800 in number. Among them was the check sued on, and it was discovered to be a forgery. Appellee then notified appellant of the fact that the check was a forgery and demanded payment of appellant, which was refused. This was about thirty days after appellee had taken up the check after it had been cashed by appellant.

A verdict for appellee was returned, and to reverse the judgment rendered this appeal has been prosecuted.

R. C. Waldron, for appellant.

The court erred in directing a verdict for appellee. 115 Ark. 166. Appellees did not give notice of the forgery of the check in time. 4 N. H. 457; 49 Ark. 45. The testimony was conflicting and a jury should have passed on the case.

Cohn, Clayton & Cohn and *L. B. Poindexter,* for appellee.

The check was a forgery, and appellant was negligent. Appellant was not prejudiced by the failure to give notice earlier. Whenever a bank receives money on deposit, it agrees that it shall only be paid out on the order of the depositor, and it can not charge a depositor with money paid out on a forged check. 142 Ark. 414-18; 7 C. J. 683. See, also, Negotiable Inst. Act, §§ 23, 185; C. & M. Digest, §§ 7789, 7951; 205 S. W. 96-8-9.

Where a check forged has been paid through the negligence of the bank's employee the bank is liable, even if the depositor is neglectful in notifying the bank of the

forgery. 76 Hun (N. Y.) 475; 27 N. Y. Supp. 1070; 10 Misc. 680; 171 N. Y. 219; 57 L. R. A. 529, 533-4; 20 L. R. A. (N. S.) 79-80; 16 *Id.* 593, 600; 141 Ark. 414-18; 73 *Id.* 561-7-8; 115 *Id.* 326.

Even if appellant had not been negligent, delay on the part of the depositor to notify the bank of the forgery is immaterial where the bank fails to allege or prove damage or prejudice growing out of such failure. 92 Cal. 4; 27 Pac. 1100; 14 L. R. A. 320; 5 Utah 504; 18 Pac. 43; 69 Tex. 38; 6 S. W. 171; 51 Md. 562; 39 Mo. App. 72; 191 Mass. 159; 77 N. E. 693; 76 Hun. 475; 27 N. Y. Supp. 1070; 10 Misc. 680; 31 N. Y. Supp. 790; 171 N. Y. 219; 57 L. R. A. 529-33-4; 20 L. R. A. (N. S.) 79, 80, and note; 141 Ark. 414, 418; 73 Ark. 561-7-8; 115 *Id.* 177.

HART, J. (after stating the facts). The undisputed evidence shows that the signature of appellee to the check in question was forged.

Section 7789 of Crawford & Moses' Digest relative to the effect of a forged signature is as follows:

"When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such a right, is precluded from setting up the forgery or want of authority."

Under this section payment upon a forged check by a bank upon whom it is drawn is made at the bank's peril, and it is not justified in charging it against the depositor's account unless the latter is precluded from setting up the forgery or want of authority. This brings us to a consideration of what facts or circumstances will preclude the person, whose signature has been forged, from setting up the forgery.

In *Leather Manufacturers' Bank* v. *Morgan,* 117 U. S. 96, it was held that a depositor is bound personally or

by his agent, and with due diligence, to examine the passbook and vouchers, and to report to the bank, without unreasonable delay, any errors which may be discovered in them; and if he fails to do so, and if the bank is thereby misled to its prejudice, he can not afterward dispute the correctness of the balance shown it in the passbook.

In *Citizens Bank & Trust Co.* v. *Hinkle,* 126 Ark. 266, the court held that it is the duty of a depositor to examine his returned checks and to make complaint to the bank if they furnish notice that improper charges have been made against his account.

In *Weinstein* v. *National Bank of Jefferson,* 69 Tex. 38, the court held that a bank is not liable to a depositor, when money has been paid out by it on forged checks, if the depositor, after receiving a statement of his account by which he is enabled to ascertain the forgery, neglects to inform the bank thereof in reasonable time, and thereby loses the opportunity of recovering the money, which it could have secured if promptly informed.

In *Janin* v. *London & San Francisco Bank* (Cal.), 14 L. R. A. 320, it was held that a depositor owes to the bank the duty of examining his checks within a reasonable time after they are returned to him in order to discover and give notice of any forgery. See, also, *Dana & Dana* v. *National Bank of the Republic,* 132 Mass. 156; *Shipman* v. *Bank of the State of New York* (N. Y.), 12 L. R. A. 791; *Hardy* v. *Chesapeake Bank* (Md.), 34 Am. St. Repts. 325; Morse on Banks and Banking (5 ed.), vol. 2, §§ 472-473; *First National Bank of Birmingham* v. *Allen* (Ala.), 27 L. R. A. 426, and *Robinson* v. *Security Bank & Trust Co.,* 141 Ark. 414. These authorities hold that the depositor must not only use due diligence in giving the bank notice or knowledge of the forgery, but must also exercise due diligence in discovering it. The depositor can not require the bank to correct a mistake to its injury from which it might have protected itself, but for the negligence of the depositor. So it is held that where the latter fails to complain within a reasonable

time after the checks have been returned to him the banker would have the right to consider that there was no objection to the checks, and that by the depositor's failure to speak in proper time he virtually admits the correctness of the items charged.

In the case of *State* v. *Abramson,* 57 Ark. 142, this court recognized that under the rules of commercial law it is the duty of a payer of commercial paper to give notice to the payee of the forgery within a reasonable time after its discovery, or to lose his right of recovery against the payee as a penalty for the failure to do so.

In the application of this principle the court held that where forged county warrants are paid in discharge of a debt to the county, laches will not be attributed to the county in failing to apprise the payer of the forgery until such time as the county court has had opportunity to examine and pass upon the genuineness of the warrants.

In discussing the question of notice in that case the court said that what is a reasonable time depends upon the reason for requiring the notice, and that what is a sufficient notice must depend in a great measure upon the effect produced by the lapse of time upon the remedies of the payee.

The court further said that the notice should be given in a time reasonably sufficient to enable the payee to effectually use his remedies for reimbursement, if it can be done.

In the course of dealing between appellant and appellee, appellant, after it had cashed the check in question along with other checks, returned them to appellee, and appellee held them for seven days without making any complaint that the check in question had been forged and then permitted appellant to charge the checks along with the forged one to its account. As we have already seen, it became its duty to examine the checks when returned to it and exercise reasonable care to see whether

any of them had been forged and, if so, to notify the bank of that fact.

Under the circumstances, we think the court erred in directing a verdict for appellee, and that it should have submitted to the jury the question of whether or not appellee had exercised ordinary care in examining the checks and discovering the forgery and reporting it to the bank.

But it is insisted by counsel for appellee that the court did not err in directing a verdict in its favor because no injury was shown to have resulted to the bank on account of the delay in reporting the forgery to it. They insist that there is no evidence in the record tending to show that any pecuniary benefit would have accrued to appellant if reasonable notice of the forgery had been given it by appellee. Hence they claim there was no testimony in the record to justify the submission of any question of fact to the jury in this case.

While the authorities are divided on this question, we think the better view is stated in the case of *Leather Manufacturers' Bank* v. *Morgan,* 117 U. S. 96, where it was held that if the depositor was guilty of negligence in not discovering and giving notice of the forgery, the bank might thereby be prejudiced because it was prevented from taking steps by the arrest of the criminal or by attachment of his property or any other form of proceedings to compel restitution. The arrest of the forger may afford means for the restoration of the money, or it may disclose ways by which the injured party may recover the money paid out, and we think it is for the jury to say whether the injured party has been deprived of or delayed in the exercise of any rights, the practical effect of which would be to enable him to protect himself.

Therefore, we are of the opinion that the court erred in directing a verdict for appellee, and for that error the judgment will be reversed and the cause remanded for a new trial.

CARROLL v. TEXPORT OIL COMPANY.

Opinion delivered March 14, 1921.

1. JUSTICES OF THE PEACE—NOTICE TO SET ASIDE DEFAULTS.—Crawford & Moses' Digest, § 6448, providing that judgment by default may be set aside by a justice at any time within ten days after being rendered, does not apply where the parties appeared and had a trial; § 6449 applying in such case and requiring ten days' notice of the motion for new trial or rehearing.
2. COURTS—RETAINING JURISDICTION AFTER MOTION TO GRANT NEW TRIAL.—Although it is necessary to file a motion for a new trial within ten days in municipal courts, in which the general law as to practice before justices of the peace is made applicable, where the motion is made within time, the court does not lose jurisdiction by failure to act within the ten days; but, if action on the motion is not invoked on the motion within ten days, the court loses jurisdiction.
3. STIPULATIONS—IN CONTRAVENTION OF STATUTE.—An agreement between counsel that a motion for a new trial in a municipal court may be taken up at any time when it is mutually convenient is void, being in contravention of the statute, which requires that action of the court be invoked within ten days.

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

Pratt P. Bacon and *John N. Cook*, for appellant.

1. Appellee alleges fraud in procuring the judgment, which was not denied by appellant, and no proof was offered or introduced to sustain it. One who seeks to vacate a judgment by default for fraud assumes the burden of proving it. 93 Ark. 462.

If the order setting aside the judgment was void, then the judgment was not affected thereby and remains in full force and effect, and all proceedings subsequent thereto are void. 24 Cyc. 597 and note 59.

2. The court erred in not sustaining the demurrer to appellee's petition for certiorari, and both parties are bound by the record of the municipal court, as far as the same may extend. Kirby's Digest, § 1316. The judgment of the municipal court in favor of appellant was rendered by consent on the day set for trial and is reg-

ular on its face. The municipal court is a court of record. Acts 1917, p. 735, § 1. All statements of the position of appellee outside of these records are immaterial and irrelevant. 30 Ark. 17. The municipal court was without power to set the judgment aside except "within ten day after being rendered," and appellee was bound to know that any order made by said court setting aside the judgment was void if same was made after ten days from the rendition thereof. Having permitted the days to expire, after it had the right of appeal it has no remedy by certiorari. 37 Ark. 318; 131 *Id.* 215. Appellee was not entitled to the writ of certiorari, but appellant was, and the order of the municipal court made on August 18, 1920, setting aside the judgment should be quashed, as the court had no jurisdiction to make it.

SMITH, J. On May 22, 1920, appellant filed suit against appellee company in the municipal court of Texarkana, and summoned the State National Bank of that city as garnishee. A bond was given, and the attachment was dissolved and the garnishee discharged. On June 18, 1920, appellee filed its answer, and, by consent, the cause was set for trial on July 1, 1920. The cause was continued and reset for trial on July 20. On that day appellant appeared by his attorney, and appellee failed to appear, and judgment was rendered against it for the amount sued for.

On July 29 appellee filed its motion to set the default judgment aside, and as grounds therefor alleged that the junior member of the firm of attorneys which had charge of the case was confined in a hospital, and that the senior member of the firm did not know the case had been set for trial. This motion was granted on August 18, 1920, the default judgment was set aside, and the case reset for trial on September 1, 1920. On this last-named day appellant appeared in the municipal court and moved the court to set aside the order vacating the default judgment. This motion was granted on September 3, and the order of August 18 was vacated

and set aside, and appellee appealed from that order to the circuit court. On September 6 appellant filed in the circuit court a motion to dismiss appellee's appeal. This motion was granted, and the appeal was dismissed.

On September 14 appellee filed in the circuit court its petition for certiorari, alleging the facts set out above, and further that at the time the original default judgment was rendered appellant had appeared by his attorney, who represented to the court that he believed the defendant (appellee) had no defense, that the answer and bond had been filed to release money to meet a payroll, and that this representation was false and had misled the court and induced it to render judgment by default. That, after filing this motion to set aside the default judgment, appellee's attorney had asked appellant's attorney when the motion could be taken up in the court, and appellant's attorney answered that they would present the motion at any time that was convenient to both parties. That, relying upon said statement, appellee allowed said motion to remain on file without being acted upon by the court until August 17, on which date he was advised that the motion would be heard the next day, and on that day the default judgment was set aside. It was further alleged in the petition for certiorari that the order of the court made on September 3, setting aside its order of August 18, was void, for the reason that the court was without jurisdiction to make it, as the judgment, by the order of August 18 had ceased to exist, and that the petitioner (appellee) had a valid defense to said suit, but the nature of the defense was not alleged.

On September 21, 1920, appellant filed his petition in the circuit court for certiorari to quash the order of the municipal court made on August 18, 1920, setting aside the default judgment rendered July 20, 1920. This petition alleged that the order which it seeks to quash was void because more than ten days had elapsed after the default judgment had been rendered before the court was asked to set it aside, and the court was thereafter without

jurisdiction to make that order. It was there alleged that petitioner for this second writ of certiorari (appellant) had never been advised of the filing of the motion to vacate the default judgment and had no notice of its pendency until it had been granted. An answer was filed to this petition by appellee, in which it reiterated the facts alleged in its own petition for certiorari.

The two petitions were heard together, and the court overruled a demurrer filed by appellant to appellee's petition, and granted appellee's petition for certiorari, and quashed the order of the municipal court made on September 3 vacating and setting aside the order of August 18, and remanded the case to the municipal court for trial. The court denied appellant's petition for certiorari to quash the order of August 18. A motion for a new trial was filed in which the orders of the court were assigned as error.

The municipal court of Texarkana was created by act 138 of the Acts of 1917 (Acts 1917, p. 734), and section 7 thereof makes all provisions of the general law applying to justices of the peace and not inconsistent with the act applicable to that court.

The proceeding sought to be reviewed by this appeal is not one to set aside a judgment as having been obtained by fraud, but is a proceeding by certiorari to quash an alleged void order of the municipal court. The validity or invalidity of the order sought to be quashed depends upon the construction of section 6448, C. & M. Digest. This section reads as follows:

"Judgment of dismissal for want of prosecution, or judgment by default may be set aside by the justice at any time within ten days after being rendered, if the party applying therefor can show a satisfactory excuse for his default, and a meritorious cause of action or a meritorious defense, whereupon a new day shall be fixed for trial, and notice given to the opposite party; and any execution which may in the meantime have been issued shall be recalled in the same manner as in cases of

appeal, and the cause shall proceed to trial as though no such judgment had been taken."

This section does not deal with the practice in a case where the parties appeared and a trial was had before the court. Section 6449, C. &. M. Digest, governs in that case, and requires a notice of ten days of the motion for a new trial or a rehearing.

This court, in the case of *Frizzell* v. *Willard,* 37 Ark. 478, held that no notice was required of the filing of a motion under section 6448 until the default judgment had been set aside and a new day fixed for trial. Notice of that fact is required by the statute. It thus appears that it was the legislative will that the parties seeking the benefit of this statute should move expeditiously and within the time limited. This section 6448, under which appellee proceeded, is a special statutory proceeding. It was not intended to deprive one of his right to have a judgment set aside as having been obtained by fraud, nor was it intended to affect one's right of appeal. It was designed to afford relief to the litigant whose suit was dismissed for want of prosecution or against whom a judgment by default had been taken where the litigant could show a satisfactory excuse for his delay and that he had a meritorious cause of action or defense. But this relief can be granted only where the litigant proceeds within the time limited by law, towit, ten days after the rendition of the judgment. This means that the party must file his motion and invoke the order of the court thereon within ten days. If this is done, and for any reason the court does not act thereon, jurisdiction of the motion is still retained by the court.

This is the construction which the Supreme Court of California gave to a somewhat similar statute of that State in the case of *Spencer* v. *Branham,* 41 Pac. 1095, 109 Cal. 336. There a judgment by default was entered on April 20 against Leonard by a justice of the peace. Within the ten days allowed by law, Leonard filed a motion to set the judgment aside, and alleged an excuse for

his neglect. The motion was set for hearing on May 8, and was heard and granted on that day, and the cause set down for trial. Thereafter a proceeding was brought to prohibit the trial on the ground that the justice had no jurisdiction to grant the motion because it was not made within ten days of the trial. The court there said: "The question then is, when a motion must be made upon notice within a given period, can a party extend his own time by filing a written motion within the period, and giving notice of a hearing of the motion at a time after the period has expired? To ask the question is to answer it. The application for relief must be by motion, and 'making and not filing a written application for such rule or order is not sufficient. The attention of the court must be called to it, and the court moved to grant it.' *People* v. *Ah Sam,* 41 Cal. 645. Here, although the attention of the court may have been called to it, no present action was requested." The court added, however: "If the motion had been made, had the court continued the hearing for argument, or for further evidence, it would not have lost jurisdiction, for in such case the application would have been made in time."

In this case, as in that, the motion to vacate was filed within the time limited by law, but in this case, as in that, the ruling of the court was not invoked within the ten days. This fact appears from the recitals of appellee's petition for certiorari. Appellee seeks to excuse that failure by alleging an agreement with opposing counsel to take the motion up at any time when it was mutually convenient. But the court made no order in regard to this motion, and was not asked to rule thereon, within the ten days, and appellee relied upon the agreement at its peril. The agreement was in contravention of the statute, and the parties could not thus enlarge the time for invoking the action of the court, which the statute provided.

It follows, therefore, that the municipal court should not have set the default judgment aside, and the circuit

court should not have set aside the order of the municipal court vacating its order which set aside the default judgment.

The judgment of the court below is therefore reversed, and the cause will be remanded with directions to the circuit court to enter an order directing the municipal court to vacate its order which set aside the judgment rendered on July 20.

BROWN v. STATE.

Opinion delivered March 21, 1921.

1. SEDUCTION—CORROBORATION OF PROSECUTRIX.—In a prosecution for obtaining carnal knowledge of an unmarried female by a false promise of marriage, under Crawford & Moses' Digest, § 2414, though sexual intercourse was admitted, it was necessary that the testimony of the prosecutrix be corroborated as to the alleged promise of marriage.
2. SEDUCTION—CORROBORATION OF PROSECUTRIX.—In a prosecution for obtaining carnal knowledge of an unmarried female by a false promise of marriage, evidence *held* to corroborate the testimony of the prosecutrix as to the promise of marriage.
3. SEDUCTION—INSTRUCTION.—In a prosecution for seduction an instruction that social attention on defendant's part was not of itself corroboration of the testimony of the prosecutrix as to the promise of marriage unless such attention was exclusive and such as to raise a presumption that an engagement existed was properly refused as being on the weight of evidence.
4. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—The refusal of a requested instruction was not error when it was covered by others given.

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

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

1. The testimony is not sufficient to support the verdict, as the evidence of the injured female is not corroborated with respect to the alleged promise of marriage. The promise to marry and the fact of intercourse must be proved, either directly or inferentially, by other testi-

mony than the prosecutrix's. 42 Ark. 482; 77 *Id.* 16; 101 *Id.* 45. Here there is no direct evidence relating to the promise of marriage except that of the prosecutrix; the letter in evidence can not be regarded as adding additional proof, either directly or inferentially, for it is identified solely by the prosecutrix. The only evidence offered by the State in corroboration of the promise was that of defendant's social attentions to the prosecutrix. This was not legally sufficient. 77 Ark. 472; 102 Pa. St. 208; 104 Mo. 644; 45 Tex. Co. 290; 63 S. W. 317; 48 *Id.* 192; 31 *Id.* 366.

2. Instruction 4 asked by defendant should have been given. It was also error to refuse No. 5. Their refusal was prejudicial error. 24 R. C. L. 61; 110 N. W. 380.

J. S. Utley, Attorney General, and *E. E. Godwin,* Assistant, for appellee.

1. The testimony of the prosecutrix was sufficiently corroborated as to alleged promise of marriage. Appellant admits sexual relations with the prosecutrix, and her testimony as to relations does not have to be corroborated. 130 Ark. 149; 132 *Id.* 92.

2. The promise of marriage is fully proved and sufficiently corroborated. The letter of defendant to the girl is sufficient corroboration of appellant's promise of marriage. 135 Ark. 221; 130 *Id.* 149.

3. There was no error in refusing the instructions asked, Nos. 4 and 5. They are not the law and were properly refused. 24 R. C. L. 779.

The jury evidently believed the girl's testimony, and the verdict is amply sustained by the testimony.

McCULLOCH, C. J. Appellant was convicted in the circuit court of Johnson County of the statutory crime of obtaining carnal knowledge of a certain unmarried female, by virtue of "a false or feigned expressed promise of marriage." Crawford & Moses' Digest, § 2414. The principal contention here is that the testimony is not

sufficient to sustain the verdict, in that the testimony of the injured female was not corroborated with respect to the alleged promise of marriage.

Bertha Ketcheside, who at the time of the commission of the offense was a girl of about eighteen years of age, resided with her widowed mother near the town of Knoxville, in Johnson County, and appellant, a young unmarried man, lived in the same community. According to the testimony of the girl, she and appellant became acquainted with each other in December, 1917, and from that time until the first act of sexual intercourse between them he visited her frequently and his attentions to her were marked. He visited her every Saturday night and Sunday and occasionally other nights during the week. They became engaged to be married in May, 1919, and the first act of intercourse occurred on the night of the second Saturday in October, 1919. On that day, according to the girl's testimony, they set the date for their marriage, which was to take place at the county fair to be held on October 16, 1919. The act of sexual intercourse was repeated a number of times after the first act, and a few months later it was found that the girl was pregnant, and appellant ceased to visit her. They met at the county fair at Clarksville on October 16, for the purpose, as the girl supposed, of being married, but appellant asked for a postponement until the following Sunday, and when they returned home that night he declared to her that he would not marry her at all. The baby was born on April 7, 1920. This is the girl's narrative of her relations with appellant, who admitted on the witness stand that he had intercourse with her at the first time and place which she described, and frequently thereafter as late as in December, 1919, but he denied that he had ever promised to marry the girl.

The alleged acts of sexual intercourse being admitted, corroboration of the testimony of the injured girl on that issue was not essential to a conviction. It was, however, essential that her testimony should be corroborated as to the alleged promise of marriage, and we are

of the opinion that there was sufficient corroborating testimony. She testified that appellant visited her weekly and at times oftener than that for a period of about a year, and that about the time of their engagement in May, 1917, his attentions to her were almost entirely exclusive of the attentions to her of any other young man. The girl's mother corroborated her testimony in this respect and stated that appellant visited the girl frequently—always as often as once a week and sometimes oftener—and that during the summer of 1919 no other young men were visiting her. This is sufficient to constitute corroboration of the testimony of the injured girl, and was a circumstance which warranted the inference that there was an engagement between them to marry. *Lasater* v. *State,* 77 Ark. 468. In addition to those circumstances, we are of the opinion that corroboration is found in the contents of a letter shown to have been written by appellant to the injured girl on August 10, 1919, in which he referred to the arrangement for them to be married at Clarksville on October 16. The girl produced the letter at the trial and testified that it was one that she received from appellant, and that she kept it in a drawer at her mother's house with other letters from him and had burned the others, but by accident this one had not been burned. The girl's sister testified that this letter was in the same handwriting as the other letters which she had seen in the drawer. Appellant admitted that he had been carrying on correspondence with the girl. This testimony, when taken together, warranted the jury in finding that the letter produced was written by appellant, and, if so, there can be no question that the language of the letter constituted abundant corroboration of the girl's testimony with reference to the promise to marry.

Error of the court is assigned in refusing to give the following instruction:

"You are instructed that social attention on the part of defendant is not in itself corroboration, unless you find that such attention was exclusive, and was such as

to raise the natural presumption that an engagement existed. In other words, to amount to corroboration, social attention must be such as usually exists, or is practiced, between parties who are engaged to be married."

This instruction was erroneous in telling the jury that the social attentions on the part of appellant to the girl could not be taken as corroboration unless such attentions were exclusive. This amounted to an instruction on the weight of the evidence, for it can not be said as a matter of law that the testimony of marked social attentions by a young man to a girl is without force as a circumstance indicating a promise to marry merely because such attentions were not exclusive. There may be cases where visits and social attentions of young men are so infrequent that it should be said as a matter of law they were not sufficient to carry any force as testimony to establish a promise of marriage, but it would be going too far to say that, because the attentions were not exclusive of the attentions of the man to other females, or of the attentions of other men to the injured female in question, they are without probative force as indicating promise of marriage. The court therefore properly refused to give this instruction.

Counsel also insists that the court erred in refusing to give instruction number 5, which told the jury that there must be corroboration of the promise of marriage as well as of the alleged act of intercourse, but this was fully covered by another instruction given on the court's own motion, and it was not error therefore to refuse the instruction requested by appellant, even though it was correct in form.

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

BEARD v. BEARD.

Opinion delivered March 21, 1921.

DOWER—DYING WITHOUT CHILDREN—ANCESTRAL ESTATE.—Under Crawford & Moses' Dig., § 3536, providing that a widow shall be endowed in fee simple in one-half of the real estate of her husband dying without children where said estate is a new acquisition, and not an ancestral estate, *held* that where a husband, in taking a grant from his father, assumed a portion of a mortgage indebtedness, the husband's estate was a new acquisition, though he died without paying such assumed indebtedness, and the widow's dower was in fee; there being no children.

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

Driver & Simpson, for appellant.

There is only one question before this court, and that is the nature of the estate acquired by Don P. Beard from his father. If it was ancestral, appellee is entitled to dower in the lands for life; if the lands were a new acquisition, she is entitled to dower in said lands in fee. *Kelley's Heirs* v. *McGuire* settles the principles of this case. 19 Ark. 401. This case falls within the rule in 107 Ark. 504. See, also, 97 Ark. 568; 98 *Id.* 568; 69 *Id.* 237.

When appellant, the father of appellee's husband, conveyed to him the lands in question with the burden of a $6,000 mortgage, the assumption of payment of same by appellee's husband could not in any way or manner render the estate held by her husband any other than an ancestral estate, and the case should be reversed.

Buck & Lasley, for appellee.

The only question is whether the deed executed by appellant to Don P. Beard, the husband of appellee, was a deed of purchase or of gift. If a deed of purchase, the land was a new acquisition, and appellee, the widow of the grantee, was entitled to dower in fee; if a deed of gift, the estate was ancestral, and appellee was only entitled to dower for lifetime. In determining whether it was a deed of purchase or of gift, we may look to its recitals, and a recital in the deed that the conveyance is made for a valua-

ble consideration is of the essence of the contract or deed, and it was not competent to show by parol evidence that such conveyance was a deed of gift. But the decree is correct for other reasons. The deed contains in the covenant clause this provision "and we covenant with Don P. Beard that we will forever warrant and defend the title to said lands against all claims whatever, except for a deed of trust amounting to six thousand dollars which the grantee, Don M. Beard, assumes and agrees to pay." Under this language and upon delivery of the deed, Don P. Beard became personally liable for this six thousand dollars against the land and could have been sued thereon and a judgment taken on foreclosure, and further if the appellant had been required to pay any part of this debt he would have had a cause of action against Don P. Beard for the amount of the debt so paid by him. 42 Ark. 197; 110 *Id.* 70. The deed was delivered, and the lower court was right in its findings. 110 Ark. 70; 128 *Id.* 320; 113 *Id.* 289. After accepting the deed, the grantee is bound by the conditions in the deed. 2 Devlin on Real Estate, pp. 175-8; 47 Ark. 317; 50 *Id.* 433. The execution and delivery of the deed, in view of the language therein containd, is sufficient to make the conveyance one of purchase. In addition, the proof shows a valuable consideration was paid by the son, Don P. Beard, other than the assumption of the debt mentioned in the deed. The consideration was a mixed one, part a consideration for value and part love and affection. 98 Ark. 93; Walker's Am. Law (4 ed.), p. 409. See, also, 15 Ark. 555; 49 N. E. 479; 8 R. C. L. 965. The lower court properly found the issues for appellee. It was a purchase and not one of blood.

McCULLOCH, C. J. Appellee is the widow of Don P. Beard, deceased, who was the owner of a tract of farm land in Mississippi County, and the only question involved in the present controversy is whether the decedent held the lands as a new acquisition by purchase, so as to give his widow a title in fee to her dower interest,

or as an ancestral estate, so as to limit the widow's dower interest to an estate for life.

There is no substantial dispute concerning the material facts of the case. The lands in question were originally owned by appellant, W. A. Beard, the father of Don P. Beard, and the former conveyed the lands to the latter by deed of conveyance dated June 16, 1917, reciting a consideration of "one dollar and other valuable considerations," and also containing the following recital: "It is expressly understood that this deed is made subject to a deed of trust now on the lands conveyed herein, amounting to six thousand dollars, held by the Mississippi Valley Trust Company of St. Louis, Missouri, * * * and which this grantee, Don P. Beard, assumes and agrees to pay."

Coincident with the execution of the deed, W. A. Beard voluntarily executed to Don P. Beard a declaration in writing to the effect, that he, the said W. A. Beard, would "pay for the said Don P. Beard to the Mississippi Valley Trust Company of St. Louis, Missouri, or its assigns, five years after date of the certain deed of trust, at which said deed of trust becomes due, the sum of three thousand ($3,000) dollars to apply as against the indebtedness evidenced by said deed of trust, * * * provided title to said real estate is held by the said Don P. Beard, and provided, that said real estate is owned by the said Don P. Beard in person." It appears from the testimony in the case that the mortgage debt to the Mississippi Valley Trust Company did not fall due for five years, and before its maturity Don P. Beard died without having paid any of the debt.

There was oral testimony to the effect that the conveyance from W. A. Beard to his son was intended as a gift. But the deed of conveyance itself contained the recital of a consideration moving from the grantee to pay one-half of the mortgage debt which he assumed by the acceptance of the conveyance. The proof shows that the land was of value largely in excess of the mortgage debt, and it is undisputed that the father intended to make a

gift to his son of the land at least to the extent of the value in excess of one-half of the mortgage debt. But it is equally undisputed that the son obligated himself by the acceptance of the deed to pay one-half of the debt, and to this extent he received the title by purchase.

It has become the settled rule in this State, as announced in the decisions of this court, that an estate can not, legally speaking, come partly by gift and partly by purchase, and that, "in order to constitute a gift from a parent to a child an ancestral estate, within the meaning of our statute, the conveyance must be made entirely in consideration of blood and without any consideration deemed valuable in law; and if such deed is executed partly for a valuable consideration, the estate acquired is a new acquisition." *Martin* v. *Martin,* 98 Ark. 93; *Hill* v. *Heard,* 104 Ark. 23; *McElwee* v. *McElwee,* 142 Ark. 560; *Earle* v. *Earle,* 145 Ark. 559.

Counsel for appellant attempts to bring this case within the rule announced in *Howard* v. *Grant,* 107 Ark. 504, where the ancestor has become the equitable owner of land under a title bond, and the purchase price was paid by the personal representative after the death of the ancestor, and we held that the estate taken by the heirs was ancestral, notwithstanding that purchase price was thus paid. This case does not, however, fall within the rule announced in that case, for here there was an obligation on the part of the grantee to pay one-half of the mortgage debt in consideration of the conveyance. This imposed an enforceable obligation on him (*Felker* v. *Rice,* 110 Ark. 70; *Walker* v. *Mathis,* 128 Ark. 317), and constituted a valuable consideration for the conveyance. The fact that the consideration was inadequate or was only in part a consideration for the conveyance does not alter the rule that an estate acquired under such circumstances is a new acquisition. Nor does the fact that the grantee had not in fact paid the consideration affect the application of the rule, for, the obligation being a valid one, it could be enforced against his estate.

The chancery court was correct in holding that the estate of Don P. Beard in the land was a new acquisition, and that the widow was entitled to an estate in fee simple in the portion allotted to her as dower.

Affirmed.

GREENE COUNTY *v.* SMITH.

Opinion delivered March 21, 1921.

1. TAXATION—TRUST ESTATE.—Where, under an instrument designated as a "declaration of trust," a trust estate was created for the purpose of acquiring oil and gas leases in a foreign State, the interest of the beneficiaries in leases so acquired was not subject to taxation in this State, under Crawford & Moses' Digest, § 9853, providing that investments in bonds, stocks, joint-stock companies, or otherwise, of persons residing in this State shall be subject to taxation; the term "or otherwise" referring to investments of the same class to which the specific words belong.
2. TAXATION—OIL AND GAS LEASES IN ANOTHER STATE.—An interest in oil and gas leases in another State must be deemed an interest in real property, and not taxable in this State, under Crawford & Moses' Dig., § 9792.

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

Jeff Bratton, for appellant.

The finding and judgment of the circuit court is contrary to the law and the evidence. Under the Constitution 1874, art. 16, pars. 5, 6, 7, all property in this State is subject to taxation except certain specified exceptions and stock or shares in a trust estate like this one are not exempt from taxation. See Kirby's Digest, § 6873; *Ib.,* § 6872; 87 Ark. 484; act 147, Acts 1919, § 4; 43 Ark. 527. As to what is property, see 37 Cyc. 781, and as to the place of taxation, 37 Cyc. 805. The stock was subject to taxation. 41 Ark. 517. And in this State. 60 Ark. 473-4; 33 *Id.* 195; 24 Cyc. 1074; 119 Ark. 369.

R. P. Taylor, for appellee.

1. There is no bill of exceptions in the case; it was not filed in time. 118 Ark. 6; 103 *Id.* 46; 58 *Id.* 110; 42 *Id.* 488, C. & M. Digest, § 1323.

2. Appellants' failure to abstract the petition and evidence is fatal. The stocks in the *declaration* of trust were not subject to taxation. The doctrine of "*ejusdem generis*" forbids. 95 Ark. 114-16; 73 *Id.* 600-2; 105 Mass. 519. Appellee was exempt from paying taxes in Arkansas on property in Texas. 249 U. S. 223; C. & M. Digest, § 9702; 64 Ark. 136. A lease of coal beneath the surface is taxable. 105 Pa. 469. See, also, C. & M. Digest, § 9856. The lands were exempt. 97 Ark. 254; C. & M. Dig., §§ 750 to 771. The land was taxable only in the State of the domicile of the owner. The judgment is right.

WOOD, J. Under a certain instrument designated as a "Declaration of Trust" a trust estate was created known as the "Commercial Lease Syndicate," with offices under that name in Paragould, Arkansas, and such other places as the trustees might designate. The object of the trust, as declared in the instrument, was "to provide a trust in which various persons may have ownership rights, the assets of the trust to be managed by trustees, who shall be free from the direction of said persons having ownership rights, or any of them. The persons having ownership rights shall be trust beneficiaries only, unaffected by any such relation as that of partnership or joint stock association." It is declared that the property acquired shall be in the name of the Commercial Lease Syndicate as trustees, the property to be held for the benefit of the holders of trust certificates. Two persons are named in the instrument as trustees, and it is declared, among other things, that they "shall have full power to do all things which in their judgment are necessary and prudent in the management and conduct of this trust." It is declared that the business of the trust shall be the purchase, sale and exchange of oil, gas or mineral

leases or lands, or interests or rights in such leases and lands, and the development of such leases or lands. To this end the trustees are specifically authorized and empowered to buy, sell and exchange such oil, gas and mineral leases and lands and to develop such leases or lands. They (the trustees) "may sell and dispose of any part or portion of all the trust estate free and clear of any claim of any beneficiary of this trust or holder of trust certificates." The holders of trust certificates have the right "to receive the profits that may be apportioned and paid over by the trustees and to receive a proportionate part of the corpus of the trust estate at the time of the dissolution of the trust." The trustees have the power under the instrument to appoint a substitute or substitutes who shall succeed to the powers and duties of the persons named as trustees. The instrument was signed by the two persons named as trustees. The trust estate was valued at $14,000, and the interest of each beneficiary is to be represented by certificates showing that he is the owner of such proportion of the estate represented by the ratio of his share, which shall be $100 or some integral multiple thereof to $14,000. The instrument contains various other provisions which it is unnecessary to set forth.

The trustees issued to Griffin Smith a certificate showing that he was the owner of shares in the syndicate to the amount of $3,000. Before issuing the certificates of shares, the trustees named in the declaration of trust applied for and received from the State Bank Commissioner authority to sell shares in the property held in trust under the declaration. The board of assessors of Greene County assessed the certificate issued to Smith at $1,500. Smith instituted this action in the county court under the provisions of act 147 of the Acts of 1919, § 11, to have the assessment set aside. The cause was heard upon an agreed statement of facts in which it is set forth, among other things, that the property rights of Smith which he seeks to have exempted from taxation were evidenced by the declaration of trust above mentioned. The

agreed statement of facts contains this recital: "The only property in which the said Smith holds any beneficial interest or ownership whatever by reason of said declaration and certificates consists of oil and gas leases on real estate in the State of Texas." Other recitals are set forth in the agreed statement of facts, and the declaration of trust is made an exhibit to the agreed statement.

The county court sustained the assessment, and the circuit court, on appeal, entered a judgment setting aside and vacating the same, from which judgment Greene County prosecutes this appeal.

1. The instrument under review, designated as a "Declaration of Trust," is unique, but the beneficiaries under it are not stockholders in any corporation or joint stock company within the meaning of any of the provisions of chapter 38 of Crawford & Moses' Digest. The business arrangement set forth in the instrument between the beneficiaries and the trustees was one by which the trustees were to have the legal title to, and the sole right of management of, certain oil and gas leases on lands in the State of Texas, which the beneficiaries were to furnish the money to buy. These leases, when purchased, were to be held, developed, and otherwise managed by the trustees for the benefit of those who had invested their money therein. It is manifest, when the language of the trust instrument is considered as a whole, that it was not the purpose of the trustees or the beneficiaries to create anything like a joint stock corporation or company, or other artificial entity separate and apart from the real owners.

We conclude, therefore, that the individual interest or share of each beneficiary in the estate created by the declaration of trust, as evidenced by the certificates issued, is not subject to taxation under section 9853 of Crawford & Moses' Digest. See *Hoadley* v. *County Commissioners,* 150 Mass. 519; *Cropper* v. *Malley,* 249 U. S. 223.

Section 9853, *supra,* provides: "All property, whether real or personal, in this State, and all moneys,

credits, investments in bonds, stocks, joint stock companies, or otherwise, of persons residing therein, etc. * * * shall be subject to taxation." The words "or otherwise," as used in that section under the rule of *ejusdem generis,* refer to the same class to which the specific words preceding belong. *Hempstead County* v. *Harkness,* 73 Ark. 600; *C., R. I. & P. Ry. Co.* v. *State,* 95 Ark 114-116.

2. The estate in which the appellee, under the trust declaration, owns an equitable interest is real estate situated in the State of Texas and is, therefore, not taxable in this State. Section 9792 of Crawford & Moses' Digest provides: "The term 'real property and lands,' wherever used in this act, shall be held to mean and include not only the land itself, whether laid out in town lots or otherwise, with all things therein contained, but also all buildings, structures and improvements, and other fixtures of whatever kind thereon, and all rights and privileges belonging or in anywise appertaining thereto." For the purpose of taxation, a lease on land in Texas for oil and gas production is real property and not subject to taxation in this State. See *Union Compress Co.* v. *State,* 64 Ark. 136; *Consolidated Coal Co.* v. *Baker,* 12 L. R. A. (Ill.) 247.

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

MITCHELL *v.* LINDLEY.

Opinion delivered March 21, 1921.

1. EVIDENCE—OPINION AS TO PARTY'S FINANCES.—On the trial of a claim of a father for money alleged to have been loaned to his deceased son with which to buy land, where a bank cashier was permitted to testify as to the amount of decedent's deposits on the day he purchased the farm and the amount drawn out by him on that day, the question whether his finances or accumulations were such that he could carry as much as $1,500 in cash at any time was properly excluded, as usurping the function of the jury.

2. EXECUTORS AND ADMINISTRATORS—BURDEN OF PROOF OF CLAIM.—One presenting a claim against a decedent for an alleged loan not evidenced by writing had the burden of proving the debt.

3. EXECUTORS AND ADMINISTRATORS—CLAIM—SUFFICIENCY OF EVIDENCE.—On trial of a claim for an alleged loan to decedent, a verdict for the administrator *held* supported by the evidence.

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

STATEMENT OF FACTS.

B. F. Mitchell presented his claim to J. W. Lindley, administrator of the estate of J. C. Mitchell, deceased, for money alleged to have been loaned decedent with which to purchase a farm.

The probate court disallowed the claim, and B. F. Mitchell appealed to the circuit court. The evidence adduced in the circuit court was substantially as follows: On the 25th day of June, 1919, J. C. Mitchell purchased a farm in Jackson County, Arkansas, for $1,925, which was paid in cash.

According to the testimony of Oscar Mitchell and Lillian Mitchell, the brother and sister of J. C. Mitchell, the latter told them at the time he purchased the farm that he had borrowed $1,500 from his father with which to pay for it. After he had purchased the farm, J. C. Mitchell again told them that he had paid for the farm by borrowing $1,500 from his father and with $500 of his own money. J. C. Mitchell had rented some land on the shares in 1918, and there were twelve bales of cotton of the share crop that had been shipped to Memphis, and Mitchell had drawn $100 a bale on this cotton. On the 25th day of June, 1919, he had about $500 on deposit in the bank and had drawn out the balance.

According to the testimony of E. B. Holt, he was cashier of the Bank of Tuckerman, and J. C. Mitchell had done business with the bank for two or three years. He paid the purchase price of the land in question on the 26th day of June, 1919, in cash. He made the payment through the bank and delivered to Holt three packages of currency containing $500 each and a check for $500,

B. F. Mitchell carried an account with the bank, and about a year before this had withdrawn more than $1,500. B. F. Mitchell at the time he drew out his money was given three packages of $500 each and $100 in gold. The $500 packages given to B. F. Mitchell were similar to the ones paid in by J. C. Mitchell at the time he purchased the land. On the 15th day of May, 1919, J. C. Mitchell deposited in the bank $900 which had been advanced him on his cotton which he had shipped to Memphis. Up to the 24th day of June, 1919, J. C. Mitchell had drawn out about $350, and on the 26th day of June, 1919, he had on deposit in the bank about $550. He was then asked: "Was his finances such, or his accumulations such, that he could carry as much as $1,500 in cash at any time?" A. "I think not." Upon objections made by the administrator, the answer was withdrawn from the jury, and it was instructed not to consider it. Counsel for B. F. Mitchell saved exceptions to the ruling of the court.

According to the evidence adduced by the administrator, J. C. Mitchell bought and paid for the land on June 26, 1919. He died on the 19th day of September, 1919. No note or other evidence of indebtedness signed by J. C. Mitchell was presented to the administrator by B. F. Mitchell.

According to the testimony of Dan Pierce and John H. Pierce, B. F. Mitchell told them, before the death of his son, J. C. Mitchell, that the latter had bought the farm and paid for it with his own money.

On cross-examination they stated that B. F. Mitchell told them that his son had the money of his own to pay for the farm. B. F. Mitchell denied that he had had the above conversation with Dan and J. H. Pierce.

The jury found for the administrator, and the case is here on appeal.

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

1. The court erred in excluding the testimony of Mr. Holt from the jury regarding the lnancial condition of J. C. Mitchell, deceased. Evidence of the probability

of a loan being made was certainly competent. 168 Ill. 419; 85 *Id.* 611; 109 Ill. App. 358; 129 *Id.* 96; 66 Atl. 1049; 1 Wigmore on Ev. 38.

Failure to make claim when occasion therefor exists has some tendency to prove the invalidity or nonexistence of the claim. 81 Mich. 172 and notes. See also to same effect. 33 Vt. 639; 104 Ala. 222; 129 Mich. 429; 31 Ind. App. 151; 58 Md. 442; 11 Conn. 375; 109 Me. 537. It was therefore error to exclude the evidence of Mr. Holt as to the financial condition of the deceased, and the error is prejudicial.

2. The evidence is not sufficient to justify the verdict.

HART, J. (after stating the facts). It is first contended by counsel for appellant that the court erred in excluding from the jury the testimony of Holt with regard to the financial condition of J. C. Mitchell, deceased, as follows: "Was his finances such, or his accumulations such, that he could carry as much as $1,500 in cash, at any time?" A. "I think not." Counsel contend that the above testimony was competent as tending to show that the financial condition of J. C. Mitchell was such that he was not likely to have had $1,500 at the time he purchased the farm.

We can not agree with counsel in this contention. The cashier was permitted to state the amount of money J. C. Mitchell had on deposit in the bank during the year 1919, the amount he drew out, and the amount he had on hand on the day he purchased the farm. This was all that the witness knew about the financial condition of J. C. Mitchell. The testimony was conflicting as to whether or not he had the money with which to pay the whole purchase price of the farm, and it was a question for the jury to determine whether or not he borrowed the $1,500 from his father with which to pay a part of the purchase price of the farm. The witness could only state the facts within his knowledge relating to the financial condition of J. C. Mitchell and his ability to pay cash for the farm

at the time he purchased it. It would not be competent for him to give his opinion as to his ability to pay cash for the farm. That was the precise question for the jury to determine. To allow the witness to express his opinion as to whether or not J. C. Mitchell had $1,500 in cash would be to allow the witness to usurp the functions of the jury. The court allowed the witness to testify as to all matters within his knowledge relating to the financial condition of J. C. Mitchell and properly excluded from the jury the opinion of the witness with regard thereto.

It is also insisted by counsel for appellant that the evidence is not sufficient to justify the verdict. We can not agree with counsel in this contention. Appellant did not introduce in evidence any note or other instrument of writing signed by J. C. Mitchell in which he promised to pay appellant $1,500 or any other sum. The burden was upon appellant to prove his debt. He only did this by the testimony of witnesses who said that J. C. Mitchell told them that he had borrowed $1,500 from his father with which to pay for the land in question.

On the other hand, two witnesses for appellee testified that appellant had admitted to them that his son had paid for the land with his own money. Therefore, the evidence was sufficient to support the verdict, and the judgment must be affirmed.

WILMOT v. WEST.

Opinion delivered March 21, 1921.

1. CONTRACTS—SUBSTANTIAL PERFORMANCE.—In a suit on a building contract, the finding of the chancellor that there had been a substantial compliance with the contract *held* not against the preponderance of the evidence.
2. ARBITRATION AND AWARD—AGREEMENT.—Where, in a suit on a building contract, the parties agreed that the court might appoint two disinterested persons to examine the work and ascertain its actual value, the contractor could not complain that the value of the work was ascertained in that way.

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

STATEMENT OF FACTS.

E. O. West brought suit in equity against S. G. Wilmot for $1,884.35, alleged to be due him for materials furnished and labor performed in making certain improvements upon a two-story frame dwelling house in the city of Hot Springs, Arkansas, belonging to S. G. Wilmot, and also to have the amount recovered declared to be a lien on the house and the lot upon which it is situated.

E. B. Mooney also brought suit in equity against S. G. Wilmot to recover $300 for materials furnished and labor performed upon the same house under a sub-contract with West and to have the amount recovered declared a lien upon said house and lot. The two suits were consolidated and tried together upon a state of facts substantially as follows:

Mrs. S. G. Wilmot owned a two-story frame house situated on a lot in Hot Springs, Arkansas, which she had purchased for $5,000. She wished to have material alterations and repairs made on the property, and in September, 1917, entered into a written contract with E. O. West for that purpose. The contract provided that the repairs should be constructed in accordance with the specifications accompanying the contract, and that all the materials furnished and the labor done should be furnished and executed in a first-class and workmanlike manner. The consideration recited was $2,655. The specifications provided for the excavation for front steps and a driveway on the lot. It provided for a concrete retaining wall, a concrete walk, and other concrete work. It also provided for a cobblestone fence, 120 feet long, 12 inches thick, and not to exceed 2½ feet high. It provided that the contractor might use all the materials taken out of the building available to be re-used and furnish the rest of the materials except as specified in the contract. The owner was to furnish shingles for the roof

of the porch and the garage. The garage was to be one-story and of the size and specifications provided in the contract. The contract also provided for a butler's pantry, a kitchen, and a sleeping porch of the kind and character designated in the specifications. It provided for an extension of the front porch and the kind and character of materials to be used in constructing and roofing it.

Subsequently Mrs. Wilmot made additional agreements with West for material changes and alterations in her plans for repairing the dwelling house. The sleeping porch was changed into a room, and the front porch was altered so as to make it two stories high with a sleeping porch on the second story. The plans for the garage were changed so as to make it two stories high. The roofs of the garage and of the front porch were changed from shingle to some sort of composition roofs. This was done because the change of the front porch from one story to two stories and of the garage would make the roof so flat that it was not practical to have a shingle roof on either of them. Numerous other changes in the plans for the repairs of the interior of the house were agreed upon between the parties.

When the repairs were near completion, Mrs. Wilmot called in F. J. W. Hart, an architect of thirty years' experience, to inspect the work which had been done by Mr. West. Mr. Hart testified that the hardwood floors put in by West were better than the average, but that the general character of the work done by West on the remainder of the building was of very common grade. He stated in detail the defects in the work.

Mrs. Wilmot also testified in detail about the defects in the materials furnished and the work done by Mr. West on the house. Her husband was her agent in making the contract, and he also testified that neither the materials nor the workmanship came up to the specifications required by the contract.

E. B. Mooney was a sub-contractor under E. O. West and did the stone work required by the contract

for West. Certain changes in the stone work were agreed upon by the parties during the progress of the work. West and Mooney were witnesses for each other. Each testified that the work strictly came up to the specifications of the original contract except where alterations were agreed upon between the parties, and that where alterations were agreed upon, the work both in regard to workmanship and materials came up to the specifications of the contract. They also testified that, after the contract had been completed, Mrs. Wilmot went with them to the building and examined the repairs in detail, and admitted to them that the work done and the materials used came up to the specifications of the contract and that she owed them respectively the amounts claimed. Each claimed the amount sued for in this action.

During the progress of the trial the chancellor appointed, with the consent of the parties, two persons to make an examination of the work and materials used and to make a report to him thereof. The men appointed were empowered to take additional testimony if necessary. They made their report to the court of the amounts which should be allowed West and Mooney, and the court substantially followed their report in making its finding of the amounts due by Mrs. Wilmot to West and Mooney.

Two witnesses testified that it would be difficult to tell whether the materials came up to specifications after they had been put into the building. One of them said that it was not a first-class job, and the other stated that it looked to be a fair job. Two other witnesses testified that the reputation of Hart in the community for truth was bad. Other testimony will be stated or referred to in the opinion.

The chancellor was of the opinion that E. O. West should recover of Mrs. S. G. Wilmot the sum of $1,154.18, and that E. B. Mooney should recover of her the sum of $300. It was decreed that these sums should be a lien upon the lot and dwelling house in question, and that the house and lot should be sold for the purpose of paying

the amounts found to be due West and Mooney respectively, if payment was not made to them within thirty days after the date of the decree.

To reverse the decree, Mrs. S. G. Wilmot has duly prosecuted this appeal.

C. Floyd Huff and *James E. Hogue,* for appellants.

Appellee was entitled to recover nothing under any of his contracts. There was a failure to comply with them all and an open disregard of their provisions. There can be no recovery where there is an entire contract with a stipulated price for the whole work, and only a part thereof is performed.

The words "workmanlike manner" have been judicially construed. 64 Ark. 34-7; 58 Mo. 146; Wright (Ohio) 229, 230. Appellee was not entitled to recover under any of his contracts as he failed to comply with them. 102 Ark. 152 and cases cited; 86 Ark. 570. And he had no lien on the building erected. 133 Ark. 277. Where there is a lack of substantial compliance by a contractor, he can not recover or establish a lien. 86 Ark. 570; 133 *Id.* 277; 100 *Id.* 166; 79 *Id.* 506. Neither the work nor the materials were first-class, and the work was not done in a workmanlike manner in accordance with the contract. They violated the contract in many respects, and the work was never accepted as satisfactory or in compliance with the specifications and contract. In the Mooney case the same claim is made and he never filled his contract.

It was error to allow a recovery on a *quantum meruit,* as no deductions were made for defective work or materials.

A. B. Belding and *A. J. Murphy,* for appellees.

All the work except the garage was passed on and approved by Mrs. Wilmot and Hart, also the prices on everything. All the matters were passed on by the commissioners and all proper credits allowed. The contracts were plain, definite and unambiguous and well under-

stood by both parties. Mrs. Wilmot was not deceived, and she knew what the cost of the alterations would be, and the price was agreed upon. Mrs. Wilmot was not deceived, and a definite and fixed price was fixed and agreed upon. The burden of proof was on appellants to sustain their contention, and they have failed. The findings of the chancellor are sustained by the evidence, and the decree in both cases should be affirmed.

HART, J. (after stating the facts). To reverse the decree, counsel for appellant invoke the rule laid down in *Harris* v. *Graham,* 86 Ark. 570, and later cases to the effect that where there has been a lack of substantial performance of a contract by a contractor, he can not establish a lien upon the property. We can not agree with counsel for appellant in their contention. The chancellor found that there had been a substantial compliance with the contract by both West and Mooney. It cannot be said that his finding of fact in this respect is against the preponderance of the evidence.

The record comprises five hundred and thirty-four pages of type-written matter, and it will therefore be impractical to set out an abstract, or even a synopsis of all the testimony. Indeed, to do so would serve no useful purpose. The testimony is in direct and irreconcilable conflict, and we deem it sufficient to say that we have given all of it careful consideration.

In the first place, it may be stated that West and Mooney both testified that after the work had been finished Mrs. Wilmot went to the house and examined the work in detail. She expressed herself to them as being satisfied with the work done by them as well as the materials used in doing it. She said that she had been caused some dissatisfaction by her husband's employing Mr. Hart, an architect, to look over the work, and his report; but that she had great confidence in Mr. West, and after examining the house she was satisfied that he had made the repairs in accordance with his agreement.

It may be noted here that numerous changes were made in the plans during the progress of the work. This indicates that Mrs. Wilmot was present and examined the work as it progressed. She made no complaint during all this time concerning the workmanship or the materials used. It is true that Hart, the architect, stated that the general character of the work was bad. But in this respect he is directly contradicted by the two men appointed by the chancellor to examine the work and to make a report thereon to him.

J. D. Brock and Eugene Patton were appointed by the court with the consent of the parties to make an examination of the work done by West and Mooney for Mrs. Wilmot. They were directed to ascertain the actual value of the work as per prices charged for such work at the time the same was done and were empowered to hear evidence of witnesses as to the same. The order provided that the parties to the suit might be present at the examination of the work. Patton and Brock examined the work and filed a detailed report to the court of the results of their examination. They reported that they had inspected and appraised the work done and the materials used in repairing the house. They further reported that where all risk is assumed by the builder, and the contractor only charges a commission for superintending or carrying on the work, ten per cent. of the cost of the labor and materials is the usual amount allowed him. West and Mooney testified that their profits were no greater than ten per cent. of the cost of the labor and the materials.

It is true that two carpenters employed by Mrs. Wilmot testified that it was impossible to ascertain what kind of materials went into the building; but, if their testimony should be accepted as true, it would not help Mrs. Wilmot any, for it would with equal force lessen the credit which should be given to Hart's testimony. This would leave West and Mooney testifying that they had performed the contract in accordance with their contract,

and Mrs. Wilmot and her husband testifying to the contrary. Brock and Patton were appointed by the court as disinterested persons with the consent of both parties for the express purpose of examining in detail the work done and materials used in the repair of the house and premises. Their report showed that they made a careful and detailed examination as they were ordered to do. Their report also shows that Mrs. Wilmot was indebted in the respective amounts found by the chancellor, and, as above stated, when all the surrounding circumstances are considered, we do not think it can be said that the finding of the chancellor, in this respect, is against the preponderance of the evidence.

E. O. West has taken a cross-appeal, and it is earnestly insisted by his counsel that he is entitled to the amount sued for, instead of the amount allowed him by the chancery court. He bases his contention upon the fact that the parties made a contract, and that the evidence shows that West is entitled to the amount sued for under his contract. But little need be said on this branch of the case. As we have just seen Brock and Patton, with the consent of the parties to this lawsuit, were appointed to inspect the work and make a report as to its value. Brock and Patton made a detailed report in accordance with the order appointing them, and it can not be said that their finding is against the express contract made by the parties. The parties agreed that they should ascertain the actual value of the work done by West as per prices charged for such work at the time same was done, and they are in no attitude to complain now that this was done.

Therefore the decree will be affirmed.

WILLIAMS v. WALKER.

Opinion delivered March 21, 1921.

1. APPEAL AND ERROR—AMENDMENT OF PLEADINGS TO CONFORM TO EVIDENCE.—Pleadings will not be treated on appeal to conform to an issue raised by the evidence where it is apparent that the issue was not fully developed.
2. PARTNERSHIP—EVIDENCE.—A finding of the existence of a partnership *held* not contrary to the preponderance of the evidence.
3. LIMITATION OF ACTIONS—PARTNERSHIP ACCOUNTING.—The relation between copartners does not create such a trust as will exempt a bill for an accounting and settlement from the operation of the statute of limitations.
4. LIMITATION OF ACTIONS—PARTNERSHIP ACCOUNTING.—The statute of limitations of three years is applicable to an action for an accounting between partners.
5. LIMITATION OF ACTIONS—PARTNERSHIP ACCOUNTING.—A suit for an accounting by one member of a partnership, formed to purchase collateral securities from a pledgee, was not barred where the partnership had not been dissolved, repudiated or settled at the time of filing of the suit.

Appeal from St. Francis Chancery Court; *A. L. Hutchins,* Chancellor; affirmed.

L. C. Going, for appellant.

1. The findings of the court are against the clear preponderance of the evidence. The plaintiff's claim was not established as the law requires.

2. The claim is barred by the statute of limitations. 14 Ark. 62.

The three-year statute of limitation is applicable to an action for an accounting between partners. 92 N. Y. S. 904; 102 App. Div. 589; 56 S. W. 418; 10 Ky. Law. Rep. 448; 10 O. C. D. 71; 181 Pac. 437; 14 Ark. 192; 20 R. C. L. 216, § 259. The burden was on the plaintiff to show that his action was not barred. 69 Ark. 311; 64 *Id.* 26; 27 *Id.* 343, 500.

An action is commenced when the complaint is filed and summons issued. 104 Ark. 627. Since no summons was ever issued on the cross-complaint of appellee, no

action was commenced until appellant filed his answer on March 5, 1920.

J. W. Morrow, for appellee.

1. The chancellor found that Walker was correct in his contention, and his finding is not against the clear preponderance of the evidence. Walker owned a half interest in the funds, as the evidence shows and as the chancellor found.

2. Walker is not barred by any statute of limitations. Williams occupied toward Walker a position of trust, and the statute does not run. The law is so clear that authorities need not be cited.

SMITH, J. This litigation was begun September 8, 1917, when the First National Bank of Forrest City filed a bill against Eugene Williams and George P. Walker, to foreclose a mortgage. No defense was made to the suit, but on November 18, 1918, Walker filed a cross-bill against Williams, in which he alleged that he and Williams had entered into a partnership whereby, for a consideration of $7,500, they had purchased from Cook, Gray & Co., of Memphis, Tennessee, certain collaterals of the J. W. Beck Company, of Forrest City, deposited with Cook, Gray & Company to secure an indebtedness of the Beck Company. Williams filed an answer to the cross-complaint on March 5, 1920, in which he denied the existence of a copartnership. In addition, Williams alleged that the cause of action sued upon was barred by the statute of limitations.

The issues are stated in appellant's brief as follows: "The two questions raised by the pleadings may be concretely stated as follows:

"Did Williams, for the benefit of himself and Walker, as the result of a partnership arrangement, purchase from Cook, Gray & Co., the collateral of the J. W. Beck Company, and did appellee, Walker, own an undivided one-half interest in the profits arising from that partnership?

"Second. If any cause of action has existed in favor of Walker and against Williams on account of said partnership arrangement, has the statute of limitation barred the same?"

These were the issues raised by the pleadings, and, after thus stating them in his brief, appellant also questions the right of Walker to the relief prayed upon the ground that, if he was interested in the purchase of this collateral from Cook, Gray & Company, he concealed that interest from his creditors by taking an assignment of the collateral to Eugene Williams individually, instead of to himeslf and Williams.

But, as has been said, no such issue wa sraised in the pleadings. The deposition of Walker was taken a second time, and it was then that, upon his cross-examination, he stated that he was in financial difficulty and did not want anything in his name. But no attempt was made to develop the extent of his financial difficulty. He may or may not have been insolvent. He was further asked on his cross-examination: "When did your financial condition get better," and he answered, "Since 1916." His solvency appears to have been conceded at the time of the trial. It appeared that he owed the Beck Company a personal indebtedness, and that he had endorsed for that company to Cook, Gray & Company; but it is not shown that he was otherwise indebted.

The creditor who sold the collateral was Cook, Gray & Company, and it must be assumed that company knew of Walker's indebtedness to the Beck Company, and of his liability as an endorser for that company. In fact, Cook, Gray & Company had employed Walker to assist in the collection of the collateral, which was later sold, and it was while thus employed that the offer to sell to him was made, and the offer to sell included his own indebtedness.

We think this testimony is not sufficient to require us to treat the pleadings as being amended to raise

the issue that Walker's purchase was in fraud of his creditors.

The testimony of Williams and Walker is in irreconcilable conflict, and numerous circumstances are pointed out contradicting and corroborating each of them. The testimony may be summarized as follows:

Beck & Company had borrowed money from Cook, Gray & Company, and had hypothecated certain collateral, mostly chattel mortgages, and Walker and other stockholders of the Beck Company had endorsed the paper of the Beck Company. The Beck Company went into bankruptcy, and N. B. Nelson was elected trustee. Immediately upon the adjudication in bankruptcy, Cook, Gray & Company employed Walker to assist them in the collection of the collateral. Cook, Gray & Company advised Walker that they would take $6,000 for the collateral they had, which included an obligation of Walker's, secured by a chattel mortgage, for $4,000, and they would take $7,500 for the collateral and the open accounts of the Beck Company for which there was no security. Included in this last item was an account of Walker's for several thousand dollars.

Up to this point there appears to be no contradiction in the testimony. The parties differ as to what thereafter occurred.

Walker testified that a copartnership between himself and Williams was formed to purchase the collateral and the open accounts. That he gave Williams a mortgage on his home for $5,750, which Williams at once sold to the bank of which he (Williams) was cashier, and that Williams himself advanced $1,750, and with the $7,500 thus raised they bought the collateral and the open accounts. That the Beck Company did a general furnishing business extending over both St. Francis and Cross counties, and much effort, labor and expense were required to realize on the securities the Beck Company had taken. That he (Walker) assumed the duty of realizing on this collateral as a part of the partnership agreement,

and devoted five months of his time thereto. That his duty under the partnership agreement required him to collect up and sell various articles of personal property, and some live stock, and in some cases he took renewal notes. That all collections of money were turned over to Williams, and all renewal notes taken were made payable to Williams' order. That his first note to Williams was dated January 23, 1912, and at Williams' request he executed a new note on April 29, 1914. That the partnership agreement with Williams was that this note should be satisfied out of the collections which he (Walker) was making, and this should have been done, as more than enough money had been collected for that purpose, but Williams explained that he had not been able to collect all the notes which he (Walker) had turned over to him (Williams), and that he (Williams) needed a new note to carry the account properly with the bank, and that no interest had been, or would be, charged on the note. No interest was charged, and the note was renewed and made payable directly to the bank. This is the note secured by the mortgage which this suit was brought to foreclose.

Walker further testified that he did not press the matter of a final settlement, as he knew his own indebtedness to the Beck Company had been paid through his copartnership with Williams, and while he knew he had some additional profits he supposed, when all the collections were finally made by Williams, a final settlement would be had, and that Williams had never told him he was through liquidating the notes which he (Walker) had turned over to him, or that he was prepared to make a final settlement, and it does not appear that all the notes were ever collected.

Williams testified that there was no partnership, and that the purchase from Cook, Gray & Company was for his own benefit, and that he alone advanced the entire consideration for the purchase. That Walker at the time owed the Beck Company something over $9,000, which be permitted Walker to settle by executing the note for $5,750. That he was the cashier of the bank, and opened

a new account at the bank, which was carried in the name of "Eugene Williams—Beck Company Note Fund." That the $7,500 was paid by himself alone. That the last item of the account was collected on October 28, 1913, and the account at the bank was checked out and closed by him on January 1, 1914, and that he never knew Walker claimed an interest in the purchase until the foreclosure suit was brought.

The assistant cashier of the bank, and the man who succeeded Williams as cashier upon his retirement from the bank, testified that he had frequently heard Walker and Williams discussing the various accounts included in the Cook, Gray & Company collateral, but did not know anything about the respective interests of the parties.

Walker was very strongly corroborated by Nelson, the trustee in bankruptcy. The claim of Cook, Gray & Company was filed by Williams and Walker, and Nelson testified that Williams and Walker had discussed the purchase many times in the office of the Beck Company in his presence. That Walker was the active man in the matter, and he had on more than one occasion heard each of them, in the presence of the other, speak of the transaction as a partnership affair.

The testimony shows that the last item collected was not on October 28, 1913, as stated by Williams.

Among the accounts purchased was that of a man named Switzer, whose account was secured by a life insurance policy, which had been assigned to the Beck Company. This policy was for a thousand dollars. Switzer died, and an attorney was paid a fee of $25 for assisting in the collection of the policy, and the balance of $975 was collected July 12, 1916, and was credited on Walker's note to the bank. In his first deposition, when asked why he had given Walker credit for the proceeds of the policy, Williams answered: "Simply because his note was past due at the time, and I was undertaking to help him pay it, and at that time he was not in a position to pay it." Williams' deposition was taken a second time, when he explained that, upon further investigation, he found that

the Switzer note was not included in his purchase, and that he had not bought the insurance policy, and that "the insurance policy either belonged to Walker by virtue of his having bought the book accounts of Beck & Company, or belonged to the First National Bank as collateral against their notes—I don't know which." Nelson testified, however, that the Switzer account and policy was sold and transferred to Williams along with all the other collaterals.

The court found the facts to be that Williams acquired possession of the collateral and accounts by virtue of a partnership agreement, and that he had collected thereon the sum of $12,246, and that the partnership had not been dissolved, repudiated, or settled at the time of the filing of this suit, and entered a decree based upon that finding. The court's direction upon that finding is not questioned; but it is insisted that the finding itself is contrary to the preponderance of the evidence; and that Walker's cause of action was barred by the statute of limitations.

Upon a consideration of all the testimony in the case, we are unable to say that the court's finding is clearly against the preponderance of the testimony. Nor do we agree with counsel for appellant that the cause of action was barred.

In the case of *Adams* v. *Taylor,* 14 Ark. 626, this court held that the relation between copartners does not create such a trust as will exempt a bill for an accounting and settlement from the operation of the statute of limiations. And it is also true that the three years' statute of limitations is applicable to an action for an accounting between partners. But that statute does not begin to run until the cause of action has accrued.

In the case of *Luke* v. *Rhodes,* 117 Ark. 605, which was a suit for an accounting between copartners, we said, in disposing of a plea of laches and of limitations, "Of course, the right to sue for an accounting would continue as long as the partnership continued, and no plea of limitations or laches could be made against such

suit while the partnership continued." And we have here an express finding of fact that "the said partnership had not been dissolved, repudiated, or settled at the time of the filing of this suit." If this be true as a matter of fact, then it necessarily follows as a matter of law that the suit was not barred. See, also, *Lasker-Morris Bank & Trust Co.* v. *Gans,* 132 Ark. 402.

In the case of *Pearce* v. *Mann,* 10 Ky. Law Rep. 448, it was held by the Kentucky Superior Court that "limitation does not begin to run against a claim by one partner against another, growing out of the partnership transaction, until the termination of the partnership. And where a partnership was entered for the purchase of certain notes, the profits to be equally divided, the partnership did not end until the completion of the adventure by the collection of the notes in full."

Decree affirmed.

GUARANTY LOAN & TRUST COMPANY *v.* HELENA IMPROVEMENT DISTRICT.

Opinion delivered March 28, 1921.

1. EMINENT DOMAIN—CONDEMNATION FOR LEVEE PURPOSES.—In a proceeding under Crawford & Moses' Digest, §§ 3933 *et seq.*, to condemn land for levee purposes, a proceeding not strictly in accordance with the statute, in that there was no appraisement, may be a substantial compliance therewith where defendant was served with process and appeared and filed answer.
2. EMINENT DOMAIN—RIGHT OF PLAINTIFF TO DISMISS.—Under Crawford & Moses' Digest, § 3933 *et seq.*, one seeking condemnation of land for levee purposes can not withdraw from the proceeding after having taken advantage of the process of the court to obtain possession of the land, and the owner, on demand, has the right to a trial for the purpose of recovering damages without having to institute a separate action for that purpose.
3. DEEDS—RESERVATION OR EXCEPTION IN FAVOR OF A STRANGER.—A reservation or exception in favor of a stranger is void or inoperative, and the grantee is not estopped to deny its efficacy.

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

Moore & Vineyard and *Fink & Dinning,* for appellant.

1. The court erred in dismissing the action. There is nothing indefinite or uncertain as to the meaning of the deed known as Exhibit A, and it clearly shows on its face that the clause relied on by appellee applies only to the ground that was taken or being taken at the time of its execution, which was on November 30, 1898, and that it did not grant or undertake to grant or reserve for the benefit of any one whomsoever any future right to impair the integrity of the lots by taking or appropriating additional parts thereof. The words of the deed itself indicate this. "Now located and occupied" can have no other meaning or application than to the lease then located and placed on the premises. "To connect the levee on said premises with the line of levee now constructed and to be constructed" can mean only the same thing that there was a continuous levee of which the one across the premises formed a part and that on each side of the premises the levee connected up. The consideration mentioned in this deed is $7,500, and it is inconceivable that a purchaser would pay such a price and take nothing for it, which would be the case if the court's construction of the deed is correct. According to the contention of appellee, the grantees, Wiley and Crebs, took absolutely nothing by the deed of conveyance to it from the Cotton Oil Company. However, if the contention of appellant as above set forth as to the meaning of said deed is not correct, then the court erred in denying appellant the right to show by proof that the clause had reference solely to the date of its execution, that the levee intended had already been construed and connected, though this may not have been known to the grantor. There was a latent ambiguity and parol proof was admissible to explain. 10 R. C. L. 1067; *Ib.* 1065; 22 C. J. 1270; 40 Ark. 237; 98 *Id.* 544; 106 *Id.* 83; 93 *Id.* 191. Parol evidence

is admissible to explain something indefinite. 92 Ark. 504; 94 *Id.* 195; 78 *Id.* 586; 129 *Id.* 473.

2. The clause relied on by appellee, and upon which construction this action was dismissed by the court, is absolutely void. 30 Ark. 640. Nor was the cause a reservation, as it is repugnant to the granting and habendum clauses of the deed itself. 131 Ark. 103; 82 *Id.* 209.

3. Appellee being a stranger to the conveyance from the Cotton Oil Company to Wiley and Crebs, it has no legal right to make any claim for additional levee purposes out of the property in controversy, even if the deed had specifically provided for the taking of the same. A reservation to a stranger to a conveyance is void. Washburn on Real Property, § 2354; Devlin on Deeds, § 979; 100 Pa. St. 84; 11 Me. 278; 26 Am. Dec. 525.

McCULLOCH, C. J. Appellee, Helena Improvement District, is an improvement district created by a special statute enacted by the General Assembly of the year 1897 for the purpose of constructing a levee to protect property in and near the city of Helena. Later, other statutes were passed enlarging the powers of the district, but those statutes have no bearing on the present controversy, which is an action instituted by appellee against appellant to condemn a right-of-way across certain lots owned by appellee in the city of Helena for the purpose of "enlarging and strengthening the levee now surrounding said Helena Improvement District." The action was instituted in March, 1914, and after service of process on appellant the circuit judge made an order, on the application of appellee, fixing the amount of $500 to be deposited by appellee pending the final hearing of the cause. The amount so fixed by the circuit judge was deposited in accordance with the order, and appellee proceeded to appropriate the lands sought to be condemned.

Appellant filed an answer, alleging that it was the owner of the lots mentioned in the complaint, that the appropriation thereof by appellee for the purpose of enlarging and strengthening the levee would totally de-

stroy the value of the whole of the lots, and that appellant would, by reason of said appropriation, suffer damages in the sum of $10,000, for the recovery of which the answer contained a prayer.

At the October term, 1915, of the court, appellee filed an amendment to its complaint, alleging that appellant acquired title to said lots from G. W. Willey and D. H. Crebs, who obtained title under a deed to them from the Arkansas Cotton Oil Company, dated November 30, 1898, executed "subject to the right of public authorities to construct and maintain a levee over said lots as then constructed, located and occupied." Appellant answered the complaint as amended, denying that it acquired its title from Willey and Crebs or that under the terms of said deed appellant had acquired any rights to the use of the property.

The cause came on for hearing at the October term, 1920, of the Phillips Circuit Court, and, while the jury was being impaneled, counsel for appellee moved the court that the action "be dismissed on the pleadings and the deed exhibited with the complaint," referring to the deed from the Arkansas Cotton Oil Company to G. W. Willey and D. H. Crebs. Appellee was then permitted to introduce the deed in evidence, and the court, over the objections of appellant, rendered judgment dismissing the action.

It was expressly agreed by counsel for appellee during the proceedings that appellee had already taken possession of the property in controversy and constructed a levee thereon, after the institution of this action. Appellant filed its motion for a new trial, which was overruled, and prosecuted its appeal to this court. There is a bill of exceptions in the record reciting the proceedings before the trial court.

Condemnation proceedings by levee districts are regulated by a statute enacted by the General Assembly of the year 1905, now found in Crawford & Moses' Digest, § 3933 *et seq.* We held in the case of *Young* v. *Red*

Fork Levee Dist., 124 Ark. 61, that this statute was general in its operation, and that it governed condemnation in all drainage and levee districts in the State, whether created under general statutes or by special statutes. Appellee does not seem to have proceeded strictly in accordance with this statute, but the proceedings are substantially in conformity therewith, except that there is no provision in the statute referred to for a preliminary deposit of an amount of damages estimated by the circuit judge. The statute in question provides, in substance, that there shall first be an appraisement by the appraisers appointed by the circuit judge, which said appraisement becomes final unless excepted to within the time prescribed by the statute. In this case there was no appraisement of the damages by a board of appraisers, but appellant was served with process and appeared and filed its answer, asking for the recovery of damages by reason of the appropriation of its property.

The statute provides that, "in case exceptions are filed by either party within the time herein prescribed, it shall be the duty of the clerk to docket the cause," and that "the award of the appraisers shall constitute all necessary pleadings in such procedings, and, in case a trial is demanded or requested by either party, the question shall be tried as other common law cases are tried, and the owner, or owners, of the land shall be entitled to recover the value of the land appropriated, or intended to be appropriated."

The judgment in the present case was literally one allowing the dismissal of the action, but it was in substance a judgment on the pleadings and exhibits. Treating it simply as an order permitting appellee as plaintiff to voluntarily dismiss the action, it was erroneous. Under the statute referred to, the party seeking the condemnation of property can not withdraw from the proceedings after having taken advantage of the process of the court to obtain possession of the land. The owner had, on demand, the right to a trial for the purpose of

recovering damages, and this right is given in that action without having to institute a separate action for that purpose.

Nor is the judgment correct if it be treated as a final one on the pleadings and exhibits. The deed executed by the Arkansas Cotton Oil Company to Willey and Crebs contained the following recital: "But this deed is made subject to the right of public authorities of the city of Helena, Arkansas, to maintain a levee over and across lots twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27) and twenty-eight (28), as now located and occupied, and connect the levee on said lots with the line of levee now constructed and to be constructed, and to remove such portion of the said building as may be necessary to make such connection."

It does not anywhere appear in the pleadings or proof that appellant was privy to that deed, and it must be assumed, in the absence of a showing to that effect, that appellee was a stranger to it. A rule, apparently universal in its application, seems to be that "a reservation or exemption in favor of a stranger to a conveyance is void or inoperative," and that a grantee in a deed "containing a reservation or exception in favor of a stranger to the conveyance is not estopped to deny its efficacy." *Beardslee v. New Berlin Light & Power Company,* 207 N. Y. 34, 32 Am. & Eng. Ann. Cas., 1287.

In order to establish the right on the part of appellee to the use of the land in controversy without compensation to the owner, it would be necessary to show that it obtained said right from the owners in the chain of appellant's title prior to the conveyance to Willey and Crebs.

For the error in dismissing the action, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

BROWN v. EPPERSON.

Opinion delivered March 28, 1921.

DRAINS—COUNTY TREASURER'S COMMISSIONS.—Under Acts 1913, No. 177, § 17, the treasurer of a county is not entitled to any commissions on sums deposited with him by the county collector, but which the commissioners of the district had deposited in a bank.

Appeal from Arkansas Circuit Court, Southern District; *W. B. Sorrels,* Judge; affirmed.

J. M. Henderson, Jr., for appellant.

The trial court erred in its construction of the law. The county treasurer was entitled to a commission of 1 per cent. on the drainage taxes paid over to him by the collector under act 279 of 1919 and act 177 of Acts of 1913, act 279, Acts 1909, p. 829, §§ 10, 11, act 177, Acts 1913, § 17. This is an amendatory act, and the two acts should be construed together as one act. If there is doubt as to the meaning, or apparent repugnancy, we must look to the intention of the Legislature. 102 Ark. 205; 30 *Id.* 135; 31 *Id.* 119-127; 89 *Id.* 378; 22 *Id.* 369. The spirit and reason of the law should prevail over its letter. 36 Cyc. 1108; 86 Ark. 578; 11 *Id.* 44. The judgment was without authority of law, and the court erred in refusing a new trial.

Robert E. Holt, for appellees.

Construing the original and amendatory acts together as one act, it is clear the court below properly decided this case on the law and the evidence, and there is no error. C. & M. Dig., § 1906. Under the circumstances of this case the treasurer was not entitled to any commission.

WOOD, J. This action was brought by the appellees as commissioners of J. R. Wulff Drainage District No. 4 of Arkansas County against the appellant, who was the treasurer of such county, to recover the sum of $243.53, which the appellees alleged were commissions on drainage taxes turned over by the collector of Arkansas County

to the appellant as county treasurer. The appellees alleged that appellant was unlawfully retaining the above amount for his commission.

The appellant, in his answer, admitted that he was retaining the above amount, which was one per cent. of the drainage funds which the collector had turned over to him. He alleged that he received the drainage funds and had the same in custody for a period of from ten to sixty days, and during that time was responsible for same under his bond as treasurer of the district. He denied that he was unlawfully retaining the amount claimed as his commission, but averred that he was lawfully entitled to same. The cause, by consent, was submitted to the court siting as a jury, and the court found that for four years in succession the treasurer of the district each year had retained a commission of one per cent. of the drainage funds which the collector had turned over to him amounting in the aggregate to the sum claimed in the complaint; that the retention of said commissions, under act 177 of the Acts of 1913, was unlawful. The court thereupon entered a judgment in favor of the appellees for the amount claimed by them, and from that judgment is this appeal.

The only question presented for our consideration is whether or not the appellant was entitled to the commissions retained by him as found by the court. This question involves the construction of section 10 of act 279 of our general drainage laws of the Acts of 1909, p. 839, which is as follows: "The amount of the taxes herein provided for shall be annually extended upon the tax books of the county, and collected by the collector along with the other taxes * * *; and the same shall by the collector be paid over to the county treasurer at the same time that he pays over the county funds." And section 11, which provides: "The treasurer shall pay out no money, save upon the order of the board, and upon a warrant signed by the chairman thereof. He shall be allowed a commission, not exceeding one per

centum, upon all sums lawfully paid out, to be fixed by the board; and he shall give special bond in a sum to be fixed by the county court as treasurer of each drainage district. * * * If the commissioners deem best, they may require the treasurer to deposit the funds of the district in a solvent bank, which will pay interest thereon at not less than three nor exceeding four per cent., and shall give a good bond, conditioned that said funds shall be safely kept, and paid out in accordance with law. Said order shall relieve the treasurer and his bondsmen from liability from loss for such funds through the insolvency of said bank and its bondsmen; but no such order shall be effective unless in writing, and entered on the minutes of the board before said funds are deposited with such bank."

Also section 17 of act 177 of the Acts of 1913, which amends act 279 of the Acts of 1909, *supra,* and also act 221 of the Acts of 1911. The only part necessary to set forth of act 177 of the Acts of 1913 is as follows: "Section 17. If the commissioners deem best, they shall deposit the funds of the district in a solvent bank which will pay interest at not less than three nor exceeding four per cent., and shall give a good bond, conditioned that said funds shall be safely kept and paid out in accordance with the law. Said order shall relieve the treasurer and his bondsmen from liability for loss of such funds through the insolvency of said bank and its bondsmen, and no commission shall be paid the treasurer on sums so deposited, and said bank shall pay out the funds only on warrants drawn upon it as prescribed for funds in the hands of the treasurer."

The above provisions of the respective statutes are *in pari materia.* When so construed, it is manifest that the lawmakers intended that the treasurer should not be allowed any commissions on sums which had been deposited with him by the collector, but which the commissioners of the district, under authority of the last act, had the discretion to and had deposited in a bank upon

terms and conditions therein prescribed. When the acts are read in connection with each other, it appears that when the commissioners deposited the money in bank, the treasurer was to be relieved of all the duties and responsibilities connected with such funds which had been imposed upon him under the provisions of act 279, *supra,* except the mere duty of acting as a conduit for the passing of the money from his hands into the hands of the commissioners and the depository bank, which they had selected. This duty is not a complex or onerous one, and it is clear it was not the purpose of the Legislature to allow him any commission for the performance of that duty. Since he was relieved of the duties and responsibilities incident to the handling and disbursement of the funds as provided by act 279, *supra,* it was the intention of the lawmakers as expressed in section 17 of act 177, *supra,* that "no commission shall be paid the treasurer on sums so deposited."

It will be observed that section 11 of act 279, *supra,* and section 17 of act 177, *supra,* are almost precisely the same, except section 17 of the latter act contains the words "no commission shall be paid the treasurer on sums so deposited," above quoted. These words are significant, and they must be construed to mean that the treasurer was not to receive any commission on moneys of the drainage district which had merely passed through his hands as a conduit from the collector of the district to the commissioners and the depository selected by them. If this construction results in imposing upon the treasurer a special duty of temporarily holding and turning over funds for which no specific compensation is awarded him, nevertheless such is the law, and many duties are required of nearly all public officers as incidental or connected with their official positions, for which no specific remuneration is allowed. Public officials can only receive such compensation as is expressly allowed them by law. The construction of these statutes by the trial court was correct, and judgment is therefore affirmed.

SCOTT v. WISCONSIN & ARKANSAS LUMBER COMPANY.

Opinion delivered March 28, 1921.

1. TRIAL—DIRECTED VERDICT.—If there is any evidence tending to establish an issue in favor of a party, it is error to direct a verdict against him.
2. MASTER AND SERVANT—DIRECTED VERDICT—CONTRIBUTORY NEGLIGENCE.—It was error to direct a verdict against the administrator of an employee who was killed while in performance of duties, upon the ground that the undisputed evidence showed that the death of the deceased was caused by his own negligence, if reasonable minds might differ as to whether the manner in which the deceased was doing the work was so obviously and imminently dangerous that no prudent man would have undertaken it.
3. MASTER AND SERVANT—NEGLIGENCE—JURY QUESTION.—Evidence *held* to present a question for the jury as to whether a lumber company was negligent in failing to exercise ordinary care to furnish a safe place to an employee employed in unclogging a conveyor trough, and, if so, whether the defective condition of such place was the proximate cause of the death of deceased who was caught on a shaft while engaged in unchoking the conveyor.
4. MASTER AND SERVANT—ASSUMED RISK.—When a master is negligent in having a projecting set screw where it might catch in the clothes of one engaged in unclogging a conveyor, of which condition deceased had no knowledge, he did not assume the risk therefrom unless such dangerous condition was so open and obvious that, in the exercise of ordinary care, he should have discovered it.
5. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE.—Where an employee, in obeying the express commands of his superior and in the customary way, undertook to unclog a wood conveyor while the belt was running and was caught on a shaft and killed, the question whether deceased was negligent *held* under the evidence to be a question for the jury.

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

Andrew I. Rowland, D. D. Glover and *J. G. Sain,* for appellant.

The testimony here warranted the submission of the controversy to a jury, and it was error to direct a verdict for the defendant.

When a servant enters the employment of the master, he only assumes the usual and ordinary risks of the employment, and does not assume the negligence of the master, or the master's servants unless he knew and appreciated it. There is no testimony that deceased knew that defendant's servants had put this setscrew in the lineshaft. The testimony shows that this set screw was of unusual and dangerous length and not intended for a small shaft of this kind. Deceased did not assume the risk, and whether he did or not was for a jury, under proper instructions. 86 Ark. 508, 515; 97 *Id.* 347; 102 *Id.* 646; 105 *Id.* 353; 111 *Id.* 9; 113 *Id.* 45; 123 *Id.* 119; 90 *Id.* 555, 226; Labatt on Master and Servant, §§ 7-14.

It is the duty of the master to make reasonable inspections to see that the place of work and appliances are safe. 90 Ark. 227. It is his duty to exercise ordinary care in discovering defects and in repairing them, and he is liable if he fails to exercise due care in selecting a safe place to work and safe appliances for the servant to work. 91 Ark. 389; 87 *Id.* 321; 92 *Id.* 502.

In determining whether or not a verdict is properly directed, plaintiff's evidence should be given the strongest probative force.

A case was made for a jury here. 105 Ark. 401; 79 *Id.* 53; 86 *Id.* 244; 87 *Id.* 321.

Ordinarily the question of assumed risk is one of fact for a jury, unless the facts are undisputed. 98 Ark. 29; 91 *Id.* 102; 92 *Id.* 502, 554; 95 *Id.* 291; 89 *Id.* 372; 96 *Id.* 451; 104 *Id.* 267; 99 *Id.* 490; 120 *Id.* 208. See, also, 124 Ark. 588; 132 *Id.* 385; 134 *Id.* 136; 77 *Id.* 458; 86 *Id.* 329, 507; 88 *Id.* 28; 88 *Id.* 556; 82 *Id.* 86; 102 *Id.* 460.

W. R. Donham and *T. D. Wynne,* for appellee.

The alleged negligence was not the cause of the injury. The proof must establish a causal relation between the negligence complained of and the injury sustained. A master may be guilty of negligence in operating defective machinery, yet the proof may show that the negligence existing was not the cause of the injury sus-

tained. 76 Ark. 440. There can be no recovery if the evidence tends to prove that the accident was not caused by the defect complained of. 4 Labatt on M. & S., par. 1570. The uncontradicted proof here is that the defects complained of were not the cause of the injury, and the court properly directed a verdict for defendant.

Before a servant is relieved of the assumption of risk by reason of complaint and promise to repair, it must be established (1) that the servant complained of the identical defect which caused the injury; (2) that the complaint was made because of a fear that a continuation in the employ of defendant with the defects complained of would jeopardize the employee's personal safety, and (3) that the employee continued in the work because of the promise to repair having been made. Applying the facts to these fundamental principles, the court properly directed a verdict.

WOOD, J. The Wisconsin & Arkansas Lumber Company, hereafter called appellee, is a corporation having a mill plant and engaged in the business of manufacturing lumber and other timber products at Walco, Arkansas. Roy Scott, hereafter called deceased, had been in the employ of the appellee for more than eight years. For more than two and a half years prior to his death, he was employed in the capacity of lath mill foreman. While in the discharge of his duties as such foreman on the 30th day of January, 1920, his clothing was caught on a line shaft, and he was killed. The deceased was twenty-nine years old and left surviving him a widow and five children. This suit was brought by his father, hereafter called appellant, as administrator, against appellee, to recover damages for the benefit of the widow and children of the deceased.

In addition to the above facts, which are undisputed, the testimony on behalf of the appellant tended to prove the following facts: In connection with the mill plant and situated on or near the first floor of the lath mill is a machine called the "hog" which cuts up slabs into

small particles. This material is used to furnish the greater part of the fuel of the furnaces for eight boilers which supply power for the entire mill plant, which had a cutting capacity from one hundred to one hundred and thirty-five thousand feet of lumber a day, log scale. This fuel material was discharged from the hog into conveyor boxes or troughs about eighteen inches or two feet wide and fourteen or sixteen inches deep. The bottom of these troughs were lined with sheet iron along which run endless conveyor chains, which convey the fuel to the furnaces. About eighteen or twenty feet from the lath mill floor was a line shaft. The box conveying the fuel material ran from the hog to near this line shaft up an incline at an angle of about twenty degrees and a distance of one hundred or one hundred and thirty feet. The conveyor trough from the hog was operated by a belt and pulley located on a line shaft which is about two feet from the elevated end of the conveyor trough. From the end of the conveyor trough to the sprocket wheel which pulled the conveyor chain was about two and a half or three feet. About two and a half feet beneath the elevated end of the trough and the sprocket wheel which moved the conveyor chain was another trough and a conveyor chain which carried fuel into the boiler room. These troughs and chains ran at right angles to each other at the elevated end of the trough from the hog. Near the elevated end of the trough conveying fuel from the hog there were holes in the lining of the trough. Pieces of the fuel would catch in these holes and in the sprocket wheel. This had caused the conveyor chains to stop frequently. In order to reach the machinery at this elevated point, a ladder about five or six feet long extended from the floor to a running board ten or twelve inches wide, which ran by the side of the trough from the hog to a point within two or three feet of the end of that trough. When the conveyor chain and sprocket wheel became clogged, this stopped the conveyance of the fuel from the hog. To unclog the conveyor

chain and sprocket wheel at that elevation, one had to ascend the ladder and walk over the plank walk and stand with one foot on the end of the plank and the other on the top of the trough running to the fuel house. When one went up the walk way to the end thereof, he was in a position about two feet from the line shaft and pulley to his left and about two feet from the sprocket wheel pulling the conveyor chain from the hog on the right, and in front of him was a brick wall at a distance of three or four feet. When one stood with one foot on the plank walk and the other on the side of the conveyor trough running to the fuel room, the line shaft and pulley were to his back, and the sprocket wheel and end of the conveyor trough from the hog would be in front of him and the brick wall to the left. Whatever position he assumed he was surrounded on one side by the revolving shaft, on the other by the brick wall, and on the other by the sprocket wheel. The above was the customary way of unchoking the conveyor chain and sprocket wheel, whether done by the foreman or some one else. There was no other way provided, and it was the custom to do it while the machinery was going. If the belt had been thrown, it would have stopped the shaft, the lath mill and the hog, and the supply of fuel from that source would have been cut off. There was a set-screw near the upper end of the line shaft next to the cog-wheels on the collar about opposite where one would have to stand to unchoke the conveyor chain as indicated above. This set-screw was not sunk, but protruded about an inch or an inch and a half from the shaft.

On the morning of the 30th of January, 1920, the deceased, up to eight or nine o'clock, had unchoked the conveyor chain five times. About nine o'clock the general foreman of the appellee said to the deceased, "Roy, we want all the fuel pushed through that hog we can get." The deceased replied, "I don't know what about your fuel unless we can get something done to that conveyor." The foreman said, "Don't let that hog stop today. We are short of fuel; watch her close and keep her unchoked, and

keep her going steady. I will fix it tomorrow." The deceased replied, "I will do my best," About 1:30 o'clock p. m. of that day the deceased was killed while unchoking the conveyor chain. His jumper was caught in the set-screw and wrapped around the line shaft, which was revolving from one hundred and twenty-five to one hundred and thirty revolutions per minute. It was rather dark at the place where the deceased was killed, but not so dark as to require a lantern in the day time to work by. The set-screw could not be seen when the line shaft was revolving. It was the duty of the deceased to look after the machinery in the lath mill and to keep the same going and to call attention to any repairs necessary to be done, but it was not his duty to make the repairs. That duty devolved on the millwright.

On behalf of the appellee, the testimony tended to prove that the proper way to make repairs on the sprocket wheel and to unclog the conveyor chain from the hog was to throw the belt off, which could be done by pushing it with the foot or with a stick. There was no danger in doing it that way. The general foreman testified that he didn't remember the deceased making any complaint on the morning he was killed about the conveyor trough. Witness did not know that deceased was going, or had gone, to the place where he was killed until they reported that he was killed. It was the witness' duty to see the repairs kept up, which he did as much as possible. Witness did not urge the deceased to keep the chain going or complain of the fuel being short. Witness did not promise to make any repairs. It was witness' duty to have repairs made. He had millwrights under him for that purpose. Witness did not know whether the conveyor troughs had any holes in them or not. Witness had not made any provision in there to get to the sprocket wheel and conveyor chain except the plank walk. On the morning that the deceased was killed, there was a piece of slab three or four feet long fastened in between the chain and sprocket wheel.

Witness did not pay any attention to the set-screw before the injury. Witness was an experienced mill man, having been foreman of various large mills, and in his judgment it didn't make any difference in a place like that as to whether the set-screw was sticking out an inch above the collar or not. According to the general custom among the best mills, some of them have the shaft screws counter sunk, and some of them are left sticking out.

One of the witnesses for appellee, who was assistant foreman of the mill at the time the deceased was killed, testified that he had known the deceased all the time he was an employee of the appellee—seven or eight years. Witness had seen the deceased in the locality where he was killed a number of times before, Witness supposed he went up there on his own accord. Witness had been up there and caught hold of him and demanded that he come out of danger. Deceased would be pulling out the long sticks and slabs that would get up on that chain and stop the chain from moving. Witness went up there himself, but it was not witness' place to have the deceased with him at all. When witness went up there to unclog the sprocket wheel, it was witness' duty to disbelt the machinery in order to keep down danger, and witness took his foot or something and kicked the stuff out of the sprocket wheel and the conveyor chain. Witness generally kept a stick there to throw the belt. If there wasn't any stick there, he would touch it with his foot, and it would fly right off. The deceased knew how the belt was thrown, for witness had told him, and the deceased had seen witness throw the belt a great many times. If anybody got in there with the belt running, they were putting up their lives as a sort of a joke. They were taking chances. Witness told the deceased when he saw him in there to come out; that if that shaft ever got caught in a man's clothes it would kill him. The sticks had been catching in the sprocket wheel under the conveyor chain ever since the mill had been running. They didn't have

any place for a man to work in there because it was not a place for a man to work. If the deceased got in there to unchoke it while the machinery was running, he would have to stand with one foot on the plank and the other on the edge of the conveyor box. Witness supposed that the set-screw, from the way all the other set-screws are, would stick out from a quarter to half inch—not over five-eighths of an inch at the outside. It was the practice to shift set-screws from place to place and after the death of deceased the set-screw around which his clothes were wound was shifted to another place. Another witness who had eighteen or nineteen years' experience as a millwright testified on behalf of the appellee that it was not safe to run a line shaft with a set-screw sticking out of the collar five-eighths of an inch, unguarded or unshielded by anything.

There was testimony also on behalf of the appellee tending to show that the deceased's clothing was not caught in the set-screw, but was wrapped around the line shaft and over the set-screw. Other witnesses testified on behalf of the appellee corroborating substantially the testimony of the above witnesses and showing that it was the duty of the millwrights and not the foreman to make the repairs and adjustments that the deceased was making.

The appellant alleged that the appellee was negligent in failing to exercise ordinary care to furnish the deceased a safe place to work, and set out in detail the facts which his testimony tended to prove, as above set forth. The appellee in its answer denied specifically the allegations of negligence in the complaint and set up as affirmative defenses contributory negligence and assumed risk on the part of the deceased. The appellant presented several prayers for instructions asking the court to submit to the jury the issues which he conceived were raised by the pleadings and sustained by the evidence in his behalf. The court refused all these prayers, to which ruling the appellant duly excepted. Thereupon the court on its own motion instructed the jury to return

a verdict in favor of the appellee to which ruling appellant duly excepted. A verdict was returned as directed, and a judgment was entered in favor of the appellee, from which judgment is this appeal.

1. The recitals in the judgment show that the trial court directed the verdict in favor of the appellee on the ground that the undisputed evidence showed that the death of the deceased was caused by his own negligence. In directing the verdict the court told the jury that the deceased went into a place knowing it to be dangerous and knowing it to be absolutely unsafe. In *St. L., I. M. & S. Ry. Co.* v. *Holman,* 90 Ark. 555-567, we said: "The law is well settled that if the nature of the defects is such as to create an open, imminent danger such as no prudent man would encounter, and the servant continues at work in the face of this manifest peril, and is injured by reason of the defects, he is barred of any right of recovery because of his own contributory negligence. But where the nature of the defect is not so obviously dangerous as to impress the man of ordinary prudence with a feeling or consciousness of imminent danger in the place where, or in the machinery and appliances with which he has to do the work, then he may continue in the performance thereof; and if he is injured while so engaged, the master will be liable."

Since the trial court directed the verdict in favor of the appellee on the evidence, in testing whether or not its ruling is correct, we must give the evidence its strongest probative force in favor of the appellant. "If there is any evidence tending to establish an issue in favor of a party, it is error to direct a verdict against him." *Barrentine* v. *Henry Wrape Co.,* 120 Ark. 208; *Farmers' Bank* v. *Johnson,* 105 Ark. 136; *McDonald* v. *St. L., I. M. & S. Ry. Co.,* 98 Ark. 334, and cases there cited. A directed verdict in favor of the appellee was proper only if under the evidence and all reasonable inferences therefrom the appellant in law was not entitled to recover. *Works* v. *Fort Smith Biscuit Co.,* 105 Ark. 526. The ques-

tion here is whether reasonable minds, viewing the evidence in its most favorable light for the appellant, could have returned a verdict in his favor. If so, the court erred in directing the verdict. If not, then the ruling of the court is correct. *St. L., I. M. & S. Ry. Co.* v. *Cone,* 111 Ark. 309; *St. L., I. M. & S. Ry. Co.* v. *Coleman,* 97 Ark. 438, and cases there cited.

Applying the above familiar rules to the facts of this record, we are convinced that it should not be declared as a matter of law that the method pursued by the deceased in unclogging the sprocket wheel and conveyor chain subjected him to such an open and imminent danger that no prudent man, under the circumstances, would have undertaken it. True, the testimony on behalf of the appellee tended to prove that it was dangerous for any one to undertake to unclog the sprocket wheel and conveyor chain in the manner it was being done by the deceased, unless the belt was thrown—"that if anybody got in there with the belt running they were putting up their lives as a sort of joke—they were taking chances." But, on the other hand, the testimony on behalf of the appellant tended to prove that the deceased was unclogging the conveyor chain and sprocket wheel in the customay way; "that it was the custom to do it while the machinery was going." There was no rule of the company forbidding employees going into the place where the deceased was killed to unclog the sprocket wheel and conveyor chain without first throwing the belt and stopping the line shaft and other moving machinery. Even if there had been such a rule, the testimony on behalf of appellant would have warranted the conclusion that same had been abrogated by a custom acquiesced in by the general foreman of the company, whose duty it would have been to enforce the rule. Witnesses for the appellant testified that the customary way of doing it was to unchoke it while it was running, and these witnesses testified that about 9:00 o'clock on the morning of the day when the deceased was killed, the

general foreman of the mill plant told the deceased "not to let the hog stop that day—to watch her close, keep her unchoked—and keep her going steady." It was shown that the conveyor chain had been stopped four or five times before that on that morning; that the general foreman knew that it was choking, and hence gave the deceased the orders indicated in order that there might not be any shortage of fuel for the boilers.

Now, in view of the fact that there was testimony tending to prove that the custom was to unclog the sprocket wheel and conveyor chain while the machinery was running, and that the deceased when he was killed was pursuing that custom, and in doing so was obeying the orders of his superior, the general foreman, it occurs to us that reasonable minds might differ as to whether or not the danger incident to unclogging the conveyor chain and sprocket wheel in the manner indicated was so obvious and imminent that no prudent person would undertake it. In appellant's complaint there is a general allegation that the appellee was negligent in failing to exercise ordinary care to provide the deceased a safe place to work, and the specific acts constituting such negligence are alleged to be the using of a line shaft with a set-screw of unusual length sticking up near the end of said line shaft without any shield or protection over it, and the using of a conveyor box in which the lining had become defective causing the same to choke with the slabs and fuel material being conveyed. The testimony tended to prove that this defective condition of the conveyor trough caused the conveyor chain to become clogged more frequently than would have been the case otherwise. The protruding set-screw on the line shaft, when the latter was in motion, undoubtedly enhanced the danger of unclogging the sprocket wheel and conveyor chain while the machinery was running. Under the evidence, it was a question for the jury to determine whether or not the appellee was negligent in failing to exercise ordinary care to correct these conditions, and whether

such conditions were the proximate cause of the death of the deceased.

There was testimony on behalf of the appellant tending to prove that the place where the deceased was killed was rather dark, and that the set-screw could not be seen when the line shaft was revolving. It was not the duty of the deceased to place the set-screws in the first instance, nor to shift them from place to place. The duty of construction and making repairs devolved upon the appellee and was intrusted to other servants. The deceased had no duty of inspection either, except to discover the repairs that were necessary to keep the lath mill running. The deceased, while unclogging the sprocket wheel and conveyor chain, was performing a servant's duty, and he assumed all the ordinary risks incident thereto. But a servant does not assume any risk arising from the use of defective machinery caused by the negligence of the master, unless he knows thereof and appreciates the danger incident to its use; or unless the defect and danger are so patent that one, in the exercise of ordinary care for his own protection in the performance of his duties in the usual and ordinary manner with the machinery furnished him, would necessarily discover the defect and know and appreciate the danger. Therefore, if the appellee was negligent in having a projecting set-screw at the place where the same was located, and if the deceased had no knowledge of such defective condition and did not appreciate the danger thereof, and if the defect and danger were not so open and obvious that in the exercise of ordinary care in the performance of his duties he should have discovered same and have known and appreciated the danger, then he did not assume the risk if he was discharging his duty of unclogging the sprocket wheel and conveyor chain in the customary way acquiesced in by the appellee.

2. The primary duty of a servant is to obey the orders of his master. *Central Coal & Coke Co.* v. *Fitzgerald,* 146 Ark. 109. Therefore, if the general

foreman of the appellee had directed the deceased "not to let the hog stop that day — to keep it going steady," meaning thereby that the deceased should unclog the sprocket wheel and conveyor chain without throwing the belt, and while the machinery was in motion, then if the deceased was caught by the projecting set-screw on the revolving line shaft and thereby lost his life while carrying out the orders of his superior, he did not assume the risk, and the appellee would be liable, unless the danger of attempting to unclog the sprocket wheel and conveyor chain while the machinery was in motion was a danger so obvious and imminent that no servant in the exercise of ordinary care and prudence would have undertaken it despite the directions if his master. If the danger was so obvious and imminent that no servant, in the exercise of ordinary care and prudence, would have encountered it notwithstanding the directions of the master so to do, then the deceased in undertaking to carry out the orders of the general foreman, if there were such orders, was guilty of contributory negligence. It occurs to us that the trial court erred in holding that the undisputed evidence proved such to be the case.

The above principles of law concerning the relation of master and servant applicable to the facts which the testimony in this record tended to prove are well established by the authorities generally and have been announced by this court in numerous cases. Most of the decisions of this court bearing upon the issues here involved are cited in the excellent briefs of counsel for the respective parties. An examination of the cases upon which appellee relies for an affirmance of the judgment will discover that the facts in those cases differ in essential particulars from the facts of the present case. It could serve no useful purpose and would unduly extend this opinion to review them.

Our conclusion is that the issues of the alleged negligence of the appellee, and of the assumption of risk and contributory negligence on the part of the deceased,

should have been sent to the jury under appropriate instructions of the trial court. For the error of the court in directing a verdict in favor of the appellee, the judgment is reversed and the cause is remanded for new trial.

PEEL v. LANE.

Opinion delivered March 28, 1921.

1. LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR.—A tenancy from year to year may be created either by an express agreement or by a lease for one or more years and the holding over of the tenant after the period of such lease and the payment of an annual rental after the first year without a new contract.
2. LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR.—In an action of unlawful detainer where the landlord alleged a failure to pay an increased monthly rental under a tenancy from month to month, and the tenant's testimony tended to prove that the tenancy was one from year to year at the original rental, it was error not to submit the tenant's theory to the jury.
3. APPEAL AND ERROR—MOOT QUESTIONS.—Where a landlord brought unlawful detainer, alleging tenant's failure to pay an increased monthly rental under a tenancy from month to month after ten days' notice to quit premises, and the tenant testified that the tenancy was from year to year, and the term had not expired at the time of appeal, so that a six months' notice would be necessary to terminate the tenancy, the questions involved were not moot questions.
4. LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR—NOTICE TO QUIT.—Six months' notice is necessary to terminate a tenancy from year to year.

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

STATEMENT OF FACTS.

On June 18, 1920, Mrs. E. Cora Lane brought an action of unlawful detainer against Miss Jennie Peel to recover possession of a dwelling house which the former had rented to the latter.

According to the testimony of Mrs. E. Cora Lane, in 1917 she rented to Miss Jennie Peel a seven-room

dwelling house in Plumerville, Arkansas, for the term of one year with the rent payable monthly at the rate of $15 per month. In May, 1919, Mrs. Lane told Miss Peel that she intended to sell her place, and it was agreed between them that thereafter Miss Peel should become a tenant at will, paying Mrs. Lane the same rent by the month. On the 1st day of February, 1920, Mrs. Lane notified Miss Peel that she would have to come up on the rent and was going to charge her $20 per month. Miss Peel notified her that she would give her an answer by the first of May. Miss Peel later on declined to pay $20 per month rent for the house, and on the 1st day of May, 1920, Mrs. Lane had served on her a notice in writing to vacate the premises on, or by, June 8, 1920.

Other witnesses corroborated the testimony of Mrs. Lane.

According to the testimony of Miss Jennie Peel, she rented the dwelling house in question by the year from Mrs. Lane during the first part of January, 1917, and agreed to pay the yearly rental at the rate of $15 per month. She continued, without objection, to occupy the premises at a yearly rental payable monthly in advance until the 18th day of February, 1920. At that time Mrs. Lane told her the taxes were so high that she was going to raise the rent $5 per month. Miss Peel replied that she was renting by the year, and that Mrs. Lane should have informed her that she was going to raise the rent before she started on the year. She reminded Mrs. Lane that she had made some repairs since the first of the year 1920. She never agreed with Mrs. Lane to increase her rent to $20 a month. The testimony of Miss Peel was corroborated by other witnesses.

The case was tried on the 8th day of October, 1920, and the jury was instructed by the court to return a verdict for the plaintiff for the possession of the property, but the court submitted to the jury to find from the evidence the amount of damages suffered by the plaintiff.

The jury found for the plaintiff and allowed her $15 per month from June 8 to October 8, 1920, as rent. The case is here on appeal.

Edward Gordon, for appellant.

It was reversible error to direct a verdict for plaintiff for possession. The tenancy was one from year to year, and the notice given was sufficient. 65 Ark. 471-3-4; 11 Vroom 133; Taylor on Landlord and Tenant, § 478; Archb. on Land. & T. 87. These authorities sustain the contention of appellant. Notice must be given at the end of a rental period. See, also, 131 Ark. 77; 99 *Id.* 260.

C. A. Holland, for appellee.

1. There is only a moot question before the court, and costs only are involved. It does not fall within the exceptions to the rule, as stated in 113 Ark. 24; 125 *Id.* 324. The rule as to holding over by a tenant is well settled. 16 R. C. L. 1160, § 681.

2. The notice was sufficient.

3. The doctrine of estoppel has no application here. The presumption that the tenant holds in accordance with the terms of the original lease is not conclusive and is rebutted by proof of a new contract differing from the original contract. 16 R. C. L., p. 1162, § 683. The cases cited by appellant on estoppel are not in point.

HART, J. (after stating the facts). The court erred in directing a verdict for the plaintiff for the possession of the premises.

According to the testimony of the defendant, she rented the premises by the year in January, 1917, agreeing to pay the rent monthly in advance. She paid the rent as agreed upon and occupied the premises without objection until the 18th day of February, 1920, when she was told by the plaintiff that she would have to pay an additional rent of $5 per month, or quit the premises. She declined to pay the additional rent, and the plaintiff brought suit for the possession of the premises.

In *Lamew* v. *Townsend,* 147 Ark. 282, the court held that tenancy from year to year may be created, either by an express agreement, or by a lease for one or more years and the holding over by the tenant and the payment of an annual rental after the first year without a new contract.

There was a tenancy from year to year according to the testimony of Miss Peel, and her theory of the case should have been submitted to the jury.

It is insisted by counsel for the plaintiff that the judgment should not be reversed because it is not the policy of our law to decide moot questions. It is contended that the issue raised has ceased to be of any practical value because her tenancy has expired.

We can not agree with counsel for two reasons. In the first place, according to the testimony of Miss Peel, she was a tenant from year to year. Her tenancy commenced in the early part of January, and having held over until the 18th day of February, 1920, without objection on the part of the plaintiff, her term would not expire until the first part of January, 1921. The case was tried in the circuit court on the 8th day of October, 1920, and her tenancy had not expired at that time. In the next place, she received only a month's notice to quit. Under the common law in case of a tenancy from year to year, the tenant was entitled to six months' notice before his tenancy could be terminated. 24 Cyc. 1379, and cases cited, and 16 R. C. L., § 695, p. 1174, and cases cited. That the common law requires six months' notice where the tenancy is from year to year was recognized by this court in *Stewart* v. *Murrell,* 65 Ark. 471. In that case the court held that, in the absence of a local custom to the contrary, a tenant from month to month must give thirty days' notice of his intention to vacate the leased premises, but recognized that the common law rule was six months where the tenancy is from year to year.

Again the rule was recognized in *Bromley* v. *Aday,* 70 Ark. 351, where the court held that ten days' notice

to quit could not be considered reasonable in a tenancy from year to year.

In *Reece* v. *Leslie,* 105 Ark. 127, the court held that the notice for the length of time required by law before the bringing of the suit must be given, and that the notice must end with the rental period.

In *Currier* v. *Barker,* 2 Gray, Mass. 227, the importance of giving notice was stated as follows: "The notice to quit is technical, and is well understood. It fixes a time at which a tenant is bound to quit, and the landlord has a right to enter at a time at which the rent terminates. The rights of both parties are fixed by it, and are dependent on it. Should the landlord decline to enter, and the tenant quit according to the notice, the tenant could be no longer holden for rent, although he had given no notice to the landlord. The lease is 'determined' by such notice, properly given by either party. It is manifest therefore that, when such consequences depend upon the notice to be given, the notice should fix with reasonable exactness the time at which these consequences may begin to take effect."

There is no statute in this State changing the common-law rule with regard to notice where the tenancy is from year to year. Consequently the notice given by the plaintiff in this case was insufficient as to length of time and was also ineffectual because not terminating at the end of the yearly tenancy.

Therefore, the judgment must be reversed and the cause will be remanded for a new trial.

FERGUSON v. MONTGOMERY.

Opinion delivered March 28, 1921.

1. ELECTIONS—PRIMARY ELECTION CONTEST—SUPPORTING AFFIDAVITS. —The provision in Crawford & Moses' Digest, § 3757, that a complaint in a primary election contest shall be supported by the affidavit of at least ten reputable citizens is satisfied where the required number of reputable citizens combine in one affi-

davit, made upon belief merely, without setting forth the facts upon which their belief is based.

2. ELECTIONS — AFFIANTS TO BE OF SAME PARTY.—Crawford & Moses' Digest, § 3772, providing that a complaint in a primary election contest shall be supported by the affidavit of at least ten reputable citizens, implies that such affiants shall be members of the same political party with contestant.

3. ELECTIONS — PRIMARY ELECTION CONTEST — SUFFICIENCY OF COMPLAINT.—A complaint in a primary election contest should not be dismissed because the affidavit of ten reputable citizens, required by Crawford & Moses' Digest, § 3772, failed to state that such affiants were of the same political party with contestant.

4. ELECTIONS — PRIMARY ELECTION CONTEST — AMENDMENT OF COMPLAINT.—Where the original complaint in a primary election contest alleged that illegal votes were cast for contestee in certain townships, it was not error to permit contestant to amend his complaint to include other townships in which the evidence showed that illegal votes were cast for contestee; there being no showing that the amendment would unduly delay the trial.

5. ELECTIONS—CONTROL OF COURTS OVER PRIMARY ELECTIONS.—Except to the extent that jurisdiction is conferred or regulated by statute, the courts have no power to interfere with the judgments of the constituted authorities of political parties in matters involving party government and discipline, or to determine disputes within a political party as to the regularity of the election of its executive officers.

6. ELECTIONS—REGULATION OF PRIMARY ELECTIONS.—The existence of political parties may be recognized by the State, and within reasonable limits the means by which partisan voters shall be protected in exercising their preferences for party candidates may be regulated.

7. ELECTIONS—PRIMARY ELECTIONS.—The object of holding a primary election by a political party is to select party candidates, and no voter should be permitted to vote at the primary election of a political party unless he is a member of such party.

8. ELECTIONS—PRIMARY ELECTIONS.—The avowed purpose of Crawford & Moses' Digest, § 3778, is to take away from political parties the right to provide rules regulating primary election contests, but it does not affect the tests required of voters at the primaries held by such parties.

9. ELECTIONS — PRIMARY ELECTIONS — REVIEW.—In primary election contests the courts may review the action of the duly constituted authorities of a political party in allowing members of an opposition party to vote in a primary.

10. ELECTIONS—PRIMARY ELECTIONS.—It is the duty of the courts to construe the act regulating primary election contests so as to advance the remedy provided by the act, rather than to render it futile or unavailing.

11. ELECTIONS—PRIMARY ELECTIONS.—In a contest over a nomination in a Democratic primary, where the rules of the party provided that none but Democrats should participate therein, it was error to refuse to permit contestant to prove that certain Republicans were allowed to vote for contestee.

12. ELECTIONS—EVIDENCE—ILLEGAL VOTES.—In a contest of the Democratic nomination for a county office, contestant's offer of proof that a number of Republicans had voted for the contestee *held* sufficiently definite.

13. ELECTIONS—NECESSITY OF CHALLENGING VOTERS.—In a contest for the Democratic nomination, the contestant did not lose his right to object to Republican votes for contestee because he did not challenge such votes at the polls.

14. ELECTIONS—PRIMARY ELECTIONS—FRAUD.—It was not error to refuse to throw out the entire vote of a township on account of illegal votes, though the judges and clerks of election failed to make duplicate register of the names of the electors in the order in which they presented their ballots, as required by § 3765, Crawford & Moses' Digest, since the requirement in that section that each ballot shall be signed by the voter afforded a means of eliminating the illegal votes.

15. ELECTIONS—PRIMARY ELECTION CONTEST—OUSTER OF DEFENDANT.—Under Crawford & Moses' Digest, § 3776, providing that, if a nomination contest should not be finally determined until after an election, and the defendant is elected and found not entitled to the nomination, the judgment should operate as an ouster, the word "defendant" should be construed to mean the party who defends the suit when finally determined, whether in the circuit court or in the Supreme Court, so that it applies equally to contestant and contestee.

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

STATEMENT OF FACTS.

This is a suit to contest a primary election brought in the circuit court under our statute, by J. M. Montgomery against G. D. Ferguson to contest the nomination for the office of county judge of Johnson County.

Montgomery, the contestant, alleged that he received more legal votes for the office of county judge in the

Democratic primary held the 10th day of August, 1920, than were cast for Ferguson, the contestee, but that the latter had been returned as the the Democratic nominee for said office.

In his complaint, Montgomery alleged that certain fraudulent practices were indulged in and certain illegal votes were cast for Ferguson in certain voting precincts named in his complaint. His complaint states the number of illegal votes received by Ferguson and the townships in which they were received.

Ferguson filed an answer within the time prescribed by the statute and specifically denied the allegations of the complaint. He stated that certain illegal votes were cast for the contestant in certain townships named by him in his answer.

The number and character of the illegal votes are stated in the answer. The proof developed irregularities and illegal votes in other townships than those named in the pleadings, and Montgomery was permitted during the trial to amend his complaint to conform to the proof taken. This was done over the objections of Ferguson.

At the conclusion of the hearing the circuit court found that Montgomery had received fifty-five more votes in the primary election than Ferguson. Judgment was accordingly rendered declaring Montgomery the Democratic nominee for the office of county judge of Johnson County, and his name was ordered to be placed upon the official ballot to be voted in the general election held in said county on Tuesday, November 2, 1920.

From the judgment rendered, Ferguson has duly prosecuted an appeal to this court.

Montgomery was duly elected at the general election aforesaid and has been holding the office of county judge of Johnson County since that time.

Jesse Reynolds, Paul McKennon and *Hill & Fitzhugh,* for appellant.

1. The court erred in overuling the complaint on account of the insufficiency of the supporting affidavit.

2. It was error to refuse to admit testimony as to the alleged Republican votes cast for Montgomery. This was a Democratic primary, and Republican votes could not be counted. Ballots not numbered were counted, and the vote in Pittsburgh township should have been cast out.

Ward township's vote should have been cast out, and the judges bet on the election. Illegal votes were cast by Republicans. 125 Pac. 739; 129 Cal. 337; 61 Pac. 1115; 22 S. D. 146; 115 N. W. 1121; 228 Ill. 111; 81 N. E. 1109; 40 Ore. 166; 66 Pac. 714; 92 Neb. 313; 43 L. R. A. (N. S.) 282. Under the law no candidate should be declared a Democratic nominee where his majority is made up of Republican votes. The court went beyond the pleadings in making its findings. Its departure from the issues was material, and the evidence did not authorize it. 159 S. W. 646. Ballots not numbered were illegal. Kirby's Digest, § 2811; 69 Ark. 501; Brundidge act, § 9.

In Stonewall township not all the ballots were signed, and in Pittsburgh Township twenty-two ballots were not signed. In two townships judges of election were forced out by physical or moral suasion and by-standers not electors, or committee, chosen their successors. Kirby's Digest, §§ 2801-2. The Constitution and laws were ignored and violated, and the law should be upheld.

Webb Covington, for appellee.

1. The supporting affidavit was sufficient. 136 Ark. 217; 136 Ark. 221.

2. The law authorizes the amending of the complaint. Initiative act No. 1, § 12, p. 296; 125 Ark. 561-2.

The allegations of the complaint were sufficiently broad, and it was the duty of the court to repect all illegal ballots. 32 Ark. 561.

3. The complaint was subject to amendment. 159 S. W. 646.

4. No illegal votes were counted. Initiative act No. 1, § 17, p. 2302, Acts 1917. See 26 R. C. L., § 35, p. 1032; 95 Ark. 443; 57 N. J. L. 442; 51 Am. St. 624.

Courts do not require a voter to disclose for whom he voted. 49 Ark. 238; 53 *Id.* 172. The act is constitutional. 40 Ore 167; 66 Pac. 714.

None of the objections made by appellant are fatal. 43 Ark. 62. Illegal votes do not affect the result of an election unless it appears how they were cast. 54 Ark. 409. The returns are accepted when purged of the illegal votes. 73 Ark. 187. It is immaterial whether illegal votes are received or not if not sufficient to overcome the majoity. 39 Ark. 549. Nothing will justify the exclusion of an entire township vote if the election has been legally held and fairly conducted, unless it renders it impossible to ascertain the majority vote. 124 Ark. 256; 49 *Id.* 241. There was no error in the Pittsburgh vote, nor in Grant Township, nor in Hill Township. As far as the returns show, no election was held in Hill Township. It takes poll books and tally sheets to make a *prima facie* showing of an election. 102 Ark. 651. The returns are shown by the record to be in the handwriting of one man, Tom Holland. The entire ticket is in his handwriting, and there was no certificate of the judges and clerks. This is not such a return as requires appellee to produce any proof whatever. Hill Township vote should have been excluded from the count, and it gave appellant twenty-five votes and appellee one. The evidence in reference to the vote in Ward township fails to disclose any state of facts calling for a recount, and the court properly overruled the motion.

It is admitted that probably 500 names were added to the polltax list after the 3d of July, 1920. These polltax receipts were illegal, and there were erasures and changes in the record, as shown by the testimony.

At the general election in November, 1920, the county judge was elected in Johnson County; and if appellee was elected county judge, the result of this cause can not affect that election.

There were combinations and numerous violations of law. Acts 1913, act 308, §§ 10-12. There was a com-

bination to defeat the will of the people and deprive them of their choice for county judge. They violated the election laws. It is clear that they did not intend for appellee to receive the nomination and resorted to many illegal methods to defeat him. The court below had the parties before him and heard all the evidence, and the findings are supported by the law and a clear preponderance of the evidence.

HART, J. (after stating the facts). By the Initiative Act of 1917, it is provided that all political parties selecting their candidates for office through primary elections shall be subject to the provisions of the act, and that all primary elections for the nomination of county, district, and State offices, shall be held on the same day. Crawford & Moses' Digest, § 3757.

Another section of the act gives any candidate the right to contest the nomination by an action brought in the circuit court.

It further provides that the complaint "shall be supported by the affidavit of at least ten reputable citizens and shall be filed within ten days of the certification complained of, if the complaint is against the certification in one county. Crawford & Moses' Digest, § 3772.

Montgomery filed with his complaint an affidavit signed by ten persons, the body of which is as follows:

"Comes J. V. Herring, Rafe Stegall, J. J. Lingar, Sam Harris, Dave Timmons, Ewell Love, J. F. Simmons, Jas. M. Lewis, E. E. Gifford, W. B. Cox, S. J. Morgan, and C. H. Love, ten reputable citizens of said county, and State of Arkansas, and state under oath that the statements made in the foregoing complaint are true to the best of their knowledge, information and belief."

Ferguson filed a motion to dismiss the complaint on account of the insufficiency of this supporting affidavit.

The court overruled the motion, and error is assigned to the action of the court in this regard.

We do not agree with counsel in this contention. In *Logan* v. *Russell,* 136 Ark. 217, the court held that under

the above section the affidavits of ten reputable citizens need not be separate, but may be combined in one affidavit and made upon the belief of the affiants merely, without setting forth the facts upon which their belief is based.

The court also held that the affidavits are jurisdictional, and that the complant and affidavits must be filed within the time specified.

In the instant case, the affidavits were filed within the time required by the statute, and under the decision just referred to the affidavit was sufficient in form. That is to say, all the affiants signed the same affidavit, and it was not necessary to state the facts upon which their support of the complaint rests.

But it is insisted that the affidavit is defective because it does not state that the affiants were members of the Democratic party, and that this was necessary under the statute. On the other hand, it is claimed that the statute does not prescribe that the affiants shall be members of the Democratic party. It is true that the statute does not so state in express terms, but we think such is the necessary implication from its language when considered with reference to the declared purpose of the statute.

In *Simmons* v. *Terral,* 145 Ark. 585, the court had the section under consideration and held that the word, "citizens," as used in the section, is synonymous with the word, "electors." The court said that the known object of the law was to prevent fraud in the exercise of political privileges, and that, inasmuch as these privileges are accorded by the act to electors only, it was clear that the word, "citizens," as used in the act, was intended to be synonymous with "electors."

Now the object of primary election statutes is to give the electors of recognized political parties the immediate control in the selection of their own candidates. Therefore, only those who are entitled to participate in the primary were directly interested in the election and could be said to be reputable citizens or electors within the meaning of the statute.

The intent of the statute was to regulate party nominations by the vote of the electors of the respective parties, and only such electors are entitled to vote in the primaries. The statute provides for primary elections for the recognized political parties, and it was evidently intended that only those might participate in the primaries who belonged to the political faith of the party holding the election. If the framers of the act meant "reputable citizens" to be "electors," it certainly meant electors who were entitled to vote at the primary election which was to be contested. Otherwise, the members of other political parties might sign the affidavits for the purpose of creating dissension or injuring the political party holding the primary.

It does not follow, however, that the complaint should have been dismissed, because the affidavit filed followed the language of the statute, and, under the decisions cited above, this was all that was necessary. Of course, if it had been shown by proof that the affiants were not Democrats, this would have been fatal to the complaint under the decisions above cited; and the proceedings should have been dismissed for noncompliance with the statute. In our State the primary is the means of nomination of all officers, State, district and county, and the object of our primary statute was to provide a method whereby the partisan voter could express his choice for his candidate under the protection of the State by means similar in practice to the Australian ballot in use in the general elections. The framers of the act did not contemplate that the members of any other party than the one holding the primary should be permitted to vote in it or to participate in any contest under the provisions of the statute.

It is next insisted that the court erred in permitting Montgomery to amend his complaint. In his original complaint Montgomery alleged that certain illegal votes had been cast for his opponent in certain townships named in his complaint.

In his answer Ferguson alleged that certain illegal votes had been cast for Montgomery in certain other

townships named in his answer. During the progress of the trial it developed that certain illegal votes were cast for Ferguson in other townships than those named in either the complaint or answer, and Montgomery was allowed to amend his complaint so as to embrace these other townships.

We do not think there was any error in this regard. As just stated, the statute recognizes the use of the political parties by the people, and its object was to enable the members of the recognized political parties to express their choice for a candidate to be nominated by their respective parties by means similar in practice to those used at the general elections.

In *Govan* v. *Jackson,* 32 Ark. 553, the court said that the real inquiry in election contests was as to whether the contestant or the respondent received the highest number of legal votes, and was not confined to the ground specified in the contestant's notice of contest.

So here the object of the pleadings was to produce a single issue, and that issue was whether or not certain illegal votes of a designated kind had been received at the primary election. The proceeding is entirely statutory. The act contemplates that there shall be a summary trial and disposition of the case to the end that if the contestant is successful he may be voted for at the general election or, if the contest is not finally determined until after the general election, the term of office or a material part thereof shall not have expired.

It is impossible to state with precision the rule with regard to amendments of the pleadings. Much must be left to the discretion of the court, or the very object of the statute will be defeated. On the one hand, the contestant should not be allowed to make amendments which would necessarily unduly delay the trial of the contest, and on the other hand he should be allowed to make amendments in all cases where no such delay would result and where the amendment was made for the purpose of presenting the issues with due diligence.

As stated in *Mann* v. *Cassidy,* 1 Brewster's Penn. Repts., p. 11, "The rule must not be held so strict as to afford protection to fraud, by which the will of the people is set at nought; nor so loose as to permit the acts of sworn officers, chosen by the people, to be inquired into without an adequate and well-defined cause."

There is no provision in the act prohibiting amendments, and there is nothing in the record tending to show that the amendment would have unduly delayed the trial of the case. Therefore, we think that the court did not err in allowing the amendment.

It is next insisted that the court erred in refusing to allow Ferguson to prove that certain Republicans were allowed to vote for Montgomery and in sustaining a demurrer to his answer in which the same fact was alleged.

In this contention we think counsel are correct. Except to the extent that jurisdiction is conferred by statute or that the subject has been regulated by statute, the courts have no power to interfere with the judgments of the constituted authorities of established political parties in matters involving party government and discipline, or to determine disputes within a political party as to the regularity of the election of its executive officers. 20 C. J., par. 158, p. 137. The rule as thus laid down was recognized and applied by this court in *Walls* v. *Brundidge,* 109 Ark. 250.

Primary election laws were unknown under the common law. They are purely the creatures of statute, and every provision for contesting such elections is directed by statute. The same object is sought in allowing contests in primary elections as is sought in general elections, and that is to throw out illegal and fraudulent votes. It has been well said that the "contest of an election is a remedy given to the people by petition for redress, when their suffrages have been thwarted by fraud or mistake."

The weight of authority and the better reasoning is that the people by the Legislature or through an initiative act may recognize the existence of political parties, and within reasonable limits regulate the means by which

partisan voters should be protected in exercising individual preferences for party candidates, which is the general purpose of the primary election law of this State. 20 C. J., par. 110, p. 113; 9 R. C. L., p. 1072, *et seq.; State of Minn.* v. *Moore,* 59 L. R. A. (Minn.) 447; *State ex rel. Miller* v. *Flaherty* (N. D.), 41 L. R. A. (N. S.) 132; *Baer* v. *Gore,* (W. Va.), L. R. A., 1917 B, p. 723; *Waples* v. *Marrast* (Tex.), L. R. A. 1917 A, p. 253, and *Phillips* v. *Strassheim,* (Ill.), 22 L. R. A. (N. S.) 1135.

It is contended by counsel for Montgomery that the ruling of the circuit court should be upheld because the statute does not prohibit Republicans from voting in a primary election held by the Democratic party.

Under the authorities cited the constituted authorities of the political parties have exclusive jurisdiction as to the regularity of primary elections except as taken away by statute. The Legislature may or may not prescribe tests of the right of voters to vote at primary elections.

As we have already seen, the act under consideration recognizes organized political parties and provides that all primary elections for the nomination of county, district, and State officers shall be held on the same day. No one could logically assert that the framers of the act intended that any elector without any party belief whatever had the right to participate in said primaries because he might be a qualified elector within the meaning of our Constitution.

The act in question prescribes no tests for party affiliations. Therefore, the duly constituted authorities of the recognized political parties had a right to prescribe the tests for the voters at the primary elections to be held by such political parties. To hold otherwise would be to destroy the usefulness of the act and to render it unreasonable in its application or practical effect.

As bearing on the question we refer to *Rouse* v. *Thompson,* 81 N. E. 1109, where the Supreme Court of Illinois, in discussing statutory regulations for securing fair primary elections, said that if the independent voter

or voter affiliating with an opposition party can vote at the primary election of a party with which he has no political affiliation and thereby control the nomination of a party which he will vote against at the polls, the freedom of the primary election is destroyed. Again the court said:

"The object of holding a primary election by a political party is to select party candidates, and it is too plain for argument that no voter should be permitted to vote at the primary election of a political party unless he is a member of such party, and unless provision is made to prevent persons voting at a primary election for the candidates of a party who are not affiliated with such party, the whole scheme of nominating party candidates by a primary election would fail, because of being incapable of execution."

In *Logan* v. *Russell, supra,* the court said that the provisions of the statute under consideration should receive a liberal interpretation so as to effectuate the wholesome purposes intended by its framers.

In *McDaniel* v. *Ashworth,* 137 Ark. 280, in an election case, in discussing the interpretation of the statutes, the court said:

"The whole subject was reviewed in the case last cited, and the doctrine was made plain that the duty of the courts in interpretation of statutes was to endeavor to ascertain from the language used the true intention of the lawmakers, and when that intention was ascertained to disregard everything which was in conflict with that intention, and, if necessary, to omit words or substitute others so as to make the statute harmonize with the manifest will of the lawmakers."

It is contended that our primary law takes away the right of political parties to prescribe the tests of persons voting at primary elections held by such parties. Reliance is placed upon section 3778 of Crawford & Moses' Digest. It reads as follows:

"All laws or rules of political organizations holding primary elections providing for contest before political

conventions or committees other than the proceedings herein provided shall be of no further force or effect."

The avowed purpose of this section is to take away from political parties the right to provide rules regulating contests. It has no relation whatever to the tests required of the voters at the primaries held by such parties, and does not purport to deal with that question. This view is borne out by section 3791 of Crawford & Moses' Digest, which makes it a misdemeanor for a person to vote in the primary of a party which the voter does not adhere to or affiliate with.

It is also insisted that the courts have no right to review the action of the duly constituted authorities of the party in allowing the Republicans to vote.

The act was passed for the purpose of conferring jurisdiction on the courts over contests and this makes the contest proceeding a judicial action, and it is no longer merely a political question to be settled within the party. To hold otherwise would destroy the very purpose of the act, and render it abortive. It is our duty to construe the act to advance the remedy provided by the act, rather than to render it futile or unavailing.

This brings us to a consideration of the rules of the Democratic party in force at the time the primary election was held on the 10th day of August, 1920. They provide that none but Democrats shall participate in said election and that a Democrat is defined to be one who supported the nominees of the Democratic party in the preceding general election, or was prevented from attending the election by unavoidable cause.

As we have already seen our primary law recognizes that there are different political parties in this State, and it is a matter of common knowledge that the Democratic and Republican parties are the two great rival parties, not only of this State, but throughout the United States. The word, "Republican," therefore, has a well-defined meaning and indicates one who affiliates with the Republican party in contradistinction to the Democratic party, or any other political party. If a Republican

should quit his own party and join another one, he would no longer be called a Republican. Therefore, when counsel for Ferguson alleged that Republicans had been allowed to vote for Montgomery and offered to prove that fact, they used words which were well understood by the people and which conveyed the meaning that they were not entitled to vote at a Democratic primary election.

But it is insisted that the offer of proof in this respect, was not sufficiently definite. We can not agree with counsel in this contention. We quote from the record the following:

Q. Your name is A. J. Edwards?

A. Yes, sir.

Q. You live in Sprada Township?

A. Yes, sir.

Q. Did you vote in the primary election held on the 10th day of August?

A. Yes, sir.

Q. Mr. Edwards, what is your politics?

A. Republican. Black too.

Q. Did the judges challenge your vote, Mr. Edwards?

A. No, sir. Nothing was said to me about it.

The record further shows that the attorneys for Ferguson offered to show that the number of Republicans set out in his answer voted in the primary election and voted for Montgomery. In his answer Ferguson sets out the number of Republicans that were allowed to vote for Montgomery and the townships in which they voted.

The court not only sustained a demurrer to this part of the answer of Ferguson, but refused to allow him to make the proof just referred to. Therefore, we think the offered proof was sufficiently definite and that the court erred in refusing to allow it to be introduced in evidence.

We are also of the opinon that under our primary act Ferguson did not lose his right to object to the Republican votes because he did not challenge the voters at the polls. Such a course would have required him to have kept watchers at each polling precinct, and this would

have been too expensive and cumbersome. He might have pursued that course and have caused the judges to have thrown out these votes. It is sufficient to say that the adoption of such a course by him is not required by the statute as a prerequisite to his right to contest the election on that account.

It is insisted that the court erred in not throwing out the votes of Pittsburgh Township and in not allowing the parties to the contest to prove the number of votes in their favor in that township by parol evidence under the rule announced in *Williams* v. *Buchanan,* 86 Ark. 259, and cases cited, where the contest was under the general election law. The face of the returns shows that Montgomery received 183 votes and Ferguson 125 votes, or a majority of 58 votes for the contestee. The record shows that the ballots from his township were not numbered.

Section 3765 of Crawford & Moses' Digest, provides that the judges and clerks of the election should make a duplicate register of the names of each and all the electors in the order in which they present their ballots, placing opposite each name its number in the manner prescribed by sections 3797 to 3802 regulating general elections, which provide that every ballot shall be numbered in the order in which it shall be received and the number recorded by the election officers on the list of voters, opposite the name of the elector who presents the ballots. The object is to prevent fraud, and it is the duty of the election judges and clerks to carry out the provisions of the act in primary elections as well as in general elections. When the ballot is numbered in the order in which it is received and the number is recorded on the list of the voters, the number opposite the name of the voter on the list will also appear on the ballot, and thus there is an identification of the ballot voted by each elector. The neglect to perform this duty is an evidence of fraud under the primary election act, but it is not conclusive evidence of fraud, and it does not necessarily follow that for the failure to comply therewith the vote of the entire precinct should be thrown out. Conflicting views have

been expressed by the courts as to what circumstances will justify throwing out the entire vote of a township. Such a power necessarily belongs to whatever court has jurisdiction to pass upon the merits of a contested election case, and it is such a dangerous power that it should be exercised only in an extreme case, that is to say, a case where it is impossible to ascertain with reasonable certainty the true vote. McCrary on Elections, (4 ed.), section 523 and 20 C. J., par. 346, p. 249.

Section 3765 of the digest regulating primary elections also provides that each ballot shall be signed by the voter at the bottom thereof at a place which shall be provided for his signature, and that if the voter is unable to subscribe his name the same shall be signed by one of the judges and attested by all of said judges. This provision is also designed to prevent fraud and serves the same purpose as numbering the ballots as prescribed by the statute. Thus the framers of the act designed to establish a double check against fraud. Both provisions should be carried out by the judges and clerks of the primary election.

In the present case it does not appear from the record that the judges and clerks failed to require the voters to sign the ballots, and it does not appear from the record that their failure to number the ballots as required by the statute was the result of fraud. The signature of the voter served to identify the ballots, and under the circumstances disclosed in the record we do not think the court erred in not discarding the entire vote of the precinct.

Finally, it is insisted that the ouster section of the primary act is void because it is directed solely against the contestee or the defendant in the contest proceeding and brings the act within that class of statutes condemned generally as discriminatory and void. It is also claimed that, if not void, there can be no ouster of Montgomery under the statute because he was elected county judge at the general election in November, 1920, during the pendency of this appeal, and that the section does not apply

to him because he was the contestant or plaintiff in the case in the court below, and that the statute only applies to the contestee who is the defendant in the circuit court. Counsel also point to the fact that in this court the parties are designated by statute as appellant and appellee and that Ferguson is the appellant here. The section in question is 3776 of Crawford & Moses' Digest, and reads as follows:

"Should a proceeding under §§ 3772-3773, or a criminal prosecution under § 3774, be not determined finally until after the election, and the defendant in such proceeding is elected to the office as the nominee of the party, and it is determined that he was not entitled to the nomination, or the judgment contains a finding that he violated the laws, as provided in § 3774, then such judgment shall operate as an ouster from office, and the vacancy in it shall be filled as provided by law for filling vacancies in such office in case of death or resignation."

We think that the word "defendant" as used in the section was not intended to be used in its strictly technical sense, but that it should be given a broader interpretation so as to carry out the act instead of destroying or crippling its usefulness. This court has already declared that the act "should receive a liberal interpretation so as to effectuate the wholesome purposes intended by its framers."

Again in *McDaniel* v. *Ashworth, supra,* in construing an act providing for the election of directors for the St. Francis Levee District, the court said that it was "the plain duty of the court, in the construction of statutes, to arrive at the legislative will and to sweep aside all obstacles in the way of accomplishing it." When we consider the object and purposes of the statute, it is plain that the word, "defendant" was used to denote the party who defends the suit when it was finally determined whether it was in the circuit court or in this court.

The section provides in brief that, should a contest proceeding or a criminal prosecution be not finally determined until after the general election, and the defend-

ant in the proceeding is elected as the nominee of the party, and it is determined that he was not entitled to the nomination, or that he violated the law, then such judgment should operate as an ouster from office. The object was to prevent one illegally nominated and thereby securing an election at the general election from holding the office during the term provided by law or a material portion thereof, and thereby rendering abortive the contest proceeding.

In *Duntan* v. *McCook,* 94 N. W. 942, the Supreme Court of Iowa had under consideration a statute as follows:

"A defendant against whom a judgment has been rendered, or any person interested therein, having matter of discharge which has arisen since the judgment, may upon motion, in a summary way, have the same discharged, either in whole or in part, according to the circumstances," and it was there contended that the word "defendant" was used in its strict technical sense. But the court held that the word might refer to the plaintiff as well as the defendant, and said:

"By 'defendant' is meant the party against whom the judgment or decree has been entered, and not necessarily the defendant in the suit; and the term 'judgment' is employed in the statutory sense, being any 'final adjudication of the rights of the parties in an action.' "

In *Thayer, Petitioner,* 11 R. I., p. 160, Amy Thayer sought to be discharged from imprisonment on an execution for costs awarded against her in an action of trover in which she was plaintiff and Mary M. Thayer was defendant. The court had under consideration the construction of a statute providing for an execution against the body, which was served by arresting Amy Thayer, the plaintiff, and said that "no reason occurs to us why plaintiff, whatever be the nature of the action, against whom judgment has been rendered for costs should be dealt with differently than if the judgment were for a debt." We quote from the opinion the following:

"It will be perceived, by reference to the section mentioned, that no provision in terms is made for an execution against the body of a plaintiff, but only for an execution against the body of a defendant. The respondent's counsel suggests that the word 'defendant' should be construed to mean the defendant in execution, and not merely the defendant in suit, and, therefore, to include a plaintiff against whom a judgment has been obtained by a defendant. We think the section susceptible of this construction, and are led to adopt it, because there is no other authority for an execution against the body of a plaintiff; and we can not suppose that the General Assembly did not intend to give a defendant, who has recovered judgment for costs, or for a balance due him upon a plea in set-off against a plaintiff, the same process to compel the payment of his costs or debt which the plaintiff, if successful, would have had against the defendant."

For the error in refusing to admit the testimony with regard to the Republican votes alleged to have been cast for Montgomery, the judgment will be reversed and the cause remanded for a new trial.

McCULLOCH, C. J. (dissenting). My dissent is based on the ground that the majority have given an erroneous interpretation of what is termed the ouster provision (Crawford & Moses' Digest, § 3776) and that the appeal should be dismissed for the reason that the statute does not authorize the ouster of appellee from the office to which he was elected.

The statute provides, in substance, that if the contest over a nomination, or a criminal prosecution for corrupt practices in the election, be not finally determined until after the general election "and the defendant in the proceeding is elected to the office as the nominee of the party, and it is determined that he was not entitled to the nomination, or the judgment contains a finding that he violated the laws, * * * then such judgment shall operate as an ouster from office, and the vacancy shall be filled as provided by law."

Now, I readily concede that, if it can be seen from a reasonable interpretation of the statute that its framers really meant to provide for ouster under the state of facts existing, as in the present case, the court would be justified in discarding the precise word or words used or in disregarding the literal meaning of particular words used, so as to give effect to the obvious meaning of the framers of the statute. But the language used does not indicate, with any reasonable degree of certainty, that it was meant to provide for an ouster in any instance except where the defendant in the contest—the contestee—has been elected to the office as the party nominee and afterward loses the nomination by the final judgment of the court. Nor could the language be changed so as to make a provision to fit the present case by a mere substitution of some other word for the word "defendant" used in the statute. The appellee was not, and is not, in any sense a defendant in the contest, and in order to provide for an ouster after his election to office it would have to be expressed in language sufficient to declare that any party to the contest who, before the final determination of the contest, is elected to office, shall be ousted if the final decision be against him. The word "defendant," as used in the statute, means what its ordinary definition implies. It does not include a plaintiff in an action who is the appellee on appeal of the cause to a higher court. Such meaning can not reasonably be attributed to the uses of the word "defendant," for the ouster statute applies also to a "defendant" in a criminal prosecution, and one who appeals from a judgment of conviction would not be a defendant within the meaning of the statute as now interpreted by the majority, who hold that the appellee on the appeal is the "defendant" within the meaning of this statute.

In order to see what was in the minds of the framers of this section of the statute, it should be considered in connection with the preceding section, and when the two sections are thus considered it becomes clear, I think, that

the framers of the statute used the words "successful candidate" in one section and "defendant" in the other, synonymously as referring to the candidate who has been successful in the primary election, and they do not refer to a plaintiff or contestant in an action who is adjudged to be the rightful nominee.

This is merely a failure on the part of the framers of the statute to provide for such a contingency as is presented in the present case. However desirable it may appear that such a contingency should be provided for, the courts are not authorized to supply the omission.

It is not essential to the validity of this feature of the statute that it should be held to be applicable to an appellee. The lawmakers had the power to create the remedy and prescribe its terms and extent. A contestant for office can not complain if he finds himself without a remedy under given circumstances. The statute does not discriminate against individuals or classes. It merely provides that, if a contestee is elected to office, he must give up the office if he finally loses the contest. The fact that the statute does not provide, reciprocally, that the contestant must also give up the office if he finally loses the contest does not render the statute void.

Such being my interpretation of the statute, I think that the appeal of appellant shold be dismissed for the reason that the election of appellee has brought the contest to an end, and the decision of this court as to the correctness of the rulings of the trial court, involves moot questions.

I am also unable to agree with the majority in the interpretation of the section of the statute (§ 3772) in regard to the supporting affidavits. The statute does not require that the affidavits must be made by citizens or electors of any particular party, nor that they must have voted in the primary. If they are electors of the county, they are qualified.

Neither do I agree to that part of the opinion holding that the complaint can be amended to embrace

charges of fraud in other townships. The proceeding is purely statutory, and is not a civil action within the meaning of our statute on amendments to pleadings. *Davis* v. *Moon,* 70 Ark. 240. The affidavits of ten citizens must, under this statute, support the charges in the complaint which can not, after the expiration of the time specified for filing it, be amended to embrace other charges. *Russell* v. *Logan,* 136 Ark. 217.

I agree with the majority that the trial court erred in its ruling concerning the right of either party to the contest to purge the ballot of the votes of persons who were not members of the Democratic party. But for the fact that the right to prosecute an appeal has passed away by the election of appellee to the office, this erroneous ruling of the court would call for a reversal.

LINNEY *v.* E. C. LINNEY & COMPANY.

Opinion delivered March 28, 1921.

1. COURTS—JURISDICTION OF SUIT BY NONRESIDENT.—A nonresident may bring an action in a State court, even though he might have brought suit originally in the Federal court, and it was not error to refuse his motion to dismiss for the want of jurisdiction.
2. APPEAL AND ERROR—INSUFFICIENCY OF ABSTRACT.—Where the pleadings were not specifically abstracted to enable the Supreme Court to know upon what allegations plaintiff expected relief, or what relief he expected, the abstract was insufficient under rule 9, and the appeal should be dismissed.

Appeal from Pulaski Chancery Court; *J. E. Martineau,* Chancellor; appeal dismissed.

Oscar H. Winn, for appellant.

1. The chancellor had no jurisdiction to try the case and this court has none. Appellant can not waive jurisdiction of the Federal court nor surrender it over a controversy between citizens of different States, *nor over a controversy involving the use and infringement of a trademark.*

2. It is clearly shown that the questions involved were Federal questions. A reference to the law is sufficient. The court erred in refusing to dismiss the action. Section 8, p. 11, Judicial Code (2 ed.), Long's Federal Courts. See, also, *Ib.*, §§ 256, 16-17-18-19-20. There was nothing before the court but a Federal question, and the court below had no jurisdiction, and the judgment should be reversed and dismissed or transferred to the Federal court.

Carmichael & Brooks, for appellees.

1. This case should be affirmed under rule 9, as there is no sufficient abstract.

2. If there was, there was no motion to transfer to the Federal court. The motion to remove was not within time allowed by law for removal to the Federal court.

3. The case did not involve, except incidentally, the right to a trademark or formula, but was a case dealing with the formation, organization and conduct of a corporation.

4. No Federal question was involved.

5. Only defendants can remove.

6. If there was any merit in the motion to remove, the record must show that the lower court acted on it in some way.

Really there is nothing before the court, and the appeal should be dismissed.

SMITH, J. Appellant was the plaintiff below, and in the brief on his appeal to this court has this to say of his pleadings:

"As shown in the transcript at pages 12 to 22, plaintiff having no funds with which to publish the complaint, the amendment and supplemental complaint, and appellant's only opportunity to present same to the court is to ask the reading by the judge, the transcript as follows: pages 1 to 22, inclusive, and pages 32 to 37, inclusive, and pages 43 and 44."

After this statement there follows next in order what appears to be a "Motion to Dismiss for Want of Juris-

diction," which was filed by appellant in the court below. This motion appears to have been copied in full and reads as follows:

"Since it was shown in the testimony, and since the plaintiff is a citizen of the State of Tennessee, and since he has not any desire or inclination or intention to change his fifteen years' residence and citizenship in the State of Tennessee, plaintiff requests that this cause and suit be dismissed, or that same be permitted to be removed to the United States District Court upon the proper application being filed either in this court or the Federal Court."

Thereafter follows an abstract of a demurrer and an answer and a cross-complaint filed by appellee. The brief contains no abstract of the decree, but it appears from the argument made that the court refused to dismiss the cause for want of jurisdiction. In the argument which appellant makes in his brief he says that there was involved the question of the use and infringement of a trademark, of which only the Federal court would have jurisdiction.

The pleadings have not been sufficiently abstracted for us to know upon what allegations appellant expects relief nor, indeed, what relief he expects.

His motion to dismiss recites, as a ground therefor, the diverse citizenship of the litigants. But appellant was himself the plaintiff, and the courts of this State are open to him, although, on account of his residence in another State, he might have brought the suit in the first instance in the Federal court.

There has been no substantial compliance with rule 9 of this court requiring an abstract of the record in the case, and for this reason the appeal must be dismissed. It is so ordered.

COPLEN v. TEXARKANA TIRE HOUSE.

Opinion delivered March 28, 1921.

1. APPEAL AND ERROR—ORDER DIRECTING VERDICT.—On appeal from an order directing a verdict, the highest probative value will be given to the testimony opposed to that action.
2. SALES—BURDEN OF PROOF.—A vendor selling automobile tires has the burden of proving an agreement, express or implied, to pay for such tires.
3. SALES—DIRECTION OF VERDICT.—In an action for the purchase price of automobile tires, it was error to direct a verdict for the plaintiff where under the evidence it was a question whether the tires were sold to defendant or to another, and also whether the tire company had ratified an agreement by its agent to replace defendant's old tires with new ones free of charge.

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

H. M. Barney, for appellant.

1. It was error to direct a verdict, as there was some evidence to sustain the issue in favor of appellant. The rule is to take that view of the evidence most favorable to the party against whom the verdict is directed. 135 Ark. 542.

2. Where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. 89 Ark. 368; 103 *Id.* 401.

3. The theory of defendant is established by the evidence. Fraud avoids a contract *ab initio* at law and in equity. 22 Ark. 517; 13 S. W. 935. There was fraud in the delivery of the tires, and appellee had no right to sue, even on a *quantum meruit.* The case should have been submitted to a jury.

Pratt P. Bacon and *A. S. Gibson,* for appellee.

The case was tried below, and the court directed a verdict upon the theory that the burden was on the appellant to prove that the unknown representative was the agent of the Firestone Rubber Company and that he had the authority to make adjustments of the kind in

question. Where a case is tried in the lower court upon a definite theory, it can not, for the first time on appeal, be contended that it should have been tried on a different theory. 64 Ark. 257; 83 *Id.* 382; 101 *Id.* 101; 109 *Id.* 527. In the light of the above authorities, appellant's argument that the Texarkana Tire House extended credit to N. H. Williamson is futile.

One who deals with an agent is put upon notice of the limitations of his authority and must ascertain what that authority is, and, if he fails to do so, he deals with the agent at his peril. 105 Ark. 111; 117 *Id.* 173; 140 *Id.* 306. See also appellant's requested instruction No. 7.

There is not a word of proof in the record as to the authority of the representative of the Firestone Rubber Company, or whether he was such a representative of said company, and all the proof in the record as to the authority of the tire house representative is that introduced by appellee, which shows that the tire house man did *not* have the authority to make such an agreement as that claimed by appellant. Neither is there any evidence tending to show that appellee was in any sense the agent of the Firestone Rubber Company. Appellant was dealing with an alleged unnamed agent of the Firestone Rubber Company and with an agent of appellee. It was appellant's duty to ascertain the authority of both of said agents, and if he failed to do so he dealt with them at his peril. The burden was on appellant to prove the agency and the authority of the agents, and, on his failure to discharge this burden, the court could do nothing except instruct a verdict against him. The judgment is right and should be affirmed.

SMITH, J. The Texarkana Tire House, a Texas corporation, sued and recovered judgment against appellant for $329.82, the sales price of two solid tires 36x12. The verdict was returned under the direction of the court.

The testimony on the part of plaintiff showed an ordinary sale and a failure to pay; but, as the verdict

was directed by the court, we must give to the testimony opposed to that action its highest probative value.

The testimony on appellant's behalf was to the following effect. Appellant bought a truck from a dealer named Williamson, who guaranteed the tires thereon. The tires were manufactured by the Firestone Company, which had a branch office in Dallas, Texas. Appellant used the truck for a short time, when the tires began to crumble and gave way. Appellant reported the fact to Williamson, who took the matter up with a representative of the Firestone Company. An appointment was made to meet this representative at the office of appellee. Appellee was the distributing agent for the Firestone Company in the Texarkana territory. The representative of the Firestone Company examined the tires at appellee's office, saw they were defective, and stated that the rubber had been cooked too long, and directed a Mr. Villars, the assistant manager of appellee, who was present and saw the examination, to order a new pair of tires and to do so without charge. According to appellant, he took no part in these negotiations. All the negotiations were between Williamson, Villars, and the Firestone Company's reputed representative, and appellant supposed the investigation of the tires and the subsequent conversations in regard thereto all related to Williamson's warranty, the existence of a breach of it, and the manner of making the warranty good. Appellant did not order any new tires, none were ordered for him, and the whole transaction, as he understood it, was between Williamson, who had sold him the tires and had guaranteed them, and the agent of appellee and the representative of the Firestone Tire Company. Williamson fully corroborated appellant.

Appellant testified that the tires on the truck were 36x10, and after the Firestone Company's representative gave orders to Villars to replace the tires without charge, appellant stated that he would prefer tires 36x12, and asked if he could be allowed to pay the difference in the cost and get a 12-inch tire instead. This was assented

to, and appellant understood he would only be expected to pay the difference, amounting to $40, and that he has since been ready, and is now willing, to pay that difference. Later appellee notified appellant that the new tires had arrived. The truck was carried to appellee's place of business, where the old tires were removed and the new tires were placed on the truck. Appellee took charge of the old tires, and has them yet, so far as appellant is advised. Nothing was said at the time about paying for the new tires, and appellant left the old ones with appellee, thinking they were no longer his property.

On the part of the appellee, testimony was offered to the effect that it was a mere selling agent for the Firestone Company, that it had no authority to guarantee tires, or to make guarantees good, on selling Firestone tires, and that it had paid for the tires purchased for appellant's truck. Villars contradicted appellant and Williamson as to what was said and done when the tires were ordered; but we must, of course, assume, in view of the record in the case, that this conflict in the testimony would have been resolved by the jury in appellant's favor.

The testimony did not show the authority of the reputed representative of the Firestone Company to make the adjustment claimed, and Villars disclaimed any authority on his part to bind appellee to any agreement in regard to replacing tires; and the action of the court in directing the verdict is defended because of the absence of this showing of authority on the part of Villars, or the reputed representative of the Firestone Company.

We think a case was made for the jury. It will be observed that this is not a suit against appellee wherein it is sought to charge appellee with responsibility and liability for the act of an agent. Appellee brought the suit, and, to recover, must show an agreement, either express or implied, on appellant's part to pay for the tires.

Under the testimony set out above, the jury might have found that the sale was to Williamson, and not to appellant, and that appellant's only obligation was to pay the difference between the price of a ten and a twelve-

inch tire. Moreover, the jury might have found, if the testimony set out above had been accepted as true, that Villars, under the direction of the reputed representative of the Firestone Company, had agreed to replace the tires without charge in fulfillment of Williamson's guaranty, and that appellant accepted the tires under this belief. Appellant might not have been willing to accept another pair of Firestone tires if he had known he would be expected to pay for them.

Under this view of the testimony, it is not a question of the authority either of Villars to bind appellee or of the authority of the reputed representative of the Firestone Company to bind that company. Villars was in fact an agent of appellee and professedly was acting for it. Appellee apparently ratified what Villars did, and, so far as appellant knew, appellee had done so. If appellee was unwilling to be bound by the act of its own agent, or to rely upon its agent's statement as to what the trade was, then some other agent or representative of appellee higher in authority than Villars should have confirmed the terms of the contract before apparently complying with it. Section 1723 of Mechem on Agency (2 ed.).

Both these defenses should have been submitted to the jury with directions to find for appellant if either defense was established by the testimony.

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

MATTHEWS v. BROWN.

Opinion delivered March 28, 1921.

ESTOPPEL—MISLEADING CONDUCT.—Where a lessee of a minor's land induced the guardian to sell the land, and posted notices of the sale, and bid for the land at the guardian's sale, without stating that he had a lease on the land, he will be estopped, after a sale of the land to the highest bidder, to assert the existence and validity of his lease.

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

J. H. Bowen and *Mehaffy, Donham & Mehaffy*, for appellant.

Appellee, by his conduct, is estopped from questioning the validity of the guardian's sale. 10 R. C. L. 694. He had full knowledge of all the facts and is estopped. 10 R. C. L. 762, 781; 2 Pom., Eq. Jur. (4 ed.), § 802. Appellee's lease, if he has one, is unenforceable. C. & M. Dig., §§ 5031-36. If he had a valid case, he is estopped from setting it up.

Sellers & Sellers, for appellee.

1. The pretended guardian's sale was absolutely void. 123 Ark. 396-7; 135 *Id.* 551; 130 *Id.* 21. The court never acquired jurisdiction, as the petition did not set out that there were no debts, nor did the order of court, and no bond was filed by the guardian. C & M. Dig., § 5046; 85 Ark. 556; 89 *Id.* 284. This is not a collateral attack upon the validity of a pretended guardian's sale.

2. There is no estoppel. The citations from 10 R. C. L. are not in point. If there is estoppel the doctrine applies to appellant, and there is nothing in appellant's contention of estoppel.

SMITH, J. Appellant bought the lands here sued for at a guardian's sale, and, after paying the amount of his bid and receiving a deed, he brought this suit to recover the possession of the land from appellee, who was the tenant in possession at the time of the sale: The lands had been owned by M. G. Smyers, and upon his death a part thereof were set aside to his widow as dower, and the remainder thereof to the widow and minor children as homestead. The widow leased the land to appellee for a year, and upon the expiration of that lease renewed it for a term of five years. The widow was the guardian of the minor children.

Appellee conceived the idea of buying the land, and opened negotiations with the widow and guardian on the subject. He agreed to pay $5,000 if the lands were sold. This offer appeared to be satisfactory, as the widow de-

sired to reinvest in a farm in Texas. Appellee employed John L. Hill, an attorney, to obtain the necessary orders of court, and paid the attorney's fee therefor, although he was later reimbursed out of the proceeds of the sale.

Appellee was the moving party throughout, and posted the notices of the sale. He was present on the day of the sale, and pursuant to his agreement so to do made a bid of $5,000. It does not appear what intervening bids were made, but appellant bid $6,500, and the lands were struck off to him at that price, and he received the guardian's deed. The widow also executed an individual quitclaim deed.

Appellant bases his demand for the possession of the land on these two deeds; while appellee contends the sale was made subject to his lease, and further that the guardian's sale was void for numerous reasons. Appellant defends the guardian's sale, and attacks the validity of appellee's lease. In addition, appellant says appellee, by his conduct, has estopped himself to question the validity of the guardian's sale.

We have concluded this last stated contention is well taken, and, as it appears decisive of the case, we do not decide the other questions presented.

In addition to the testimony set out above, it was shown that during the negotiations between appellee and the guardian, and prior to the guardian's sale, appellee was offered $500 to surrender and cancel his lease, but after consideration of the offer he declined to accept it. These facts were not known to appellant prior to the sale.

Mr. Hill testified that he knew by hearsay that appellee had a lease, but he had never had any conversation with him about the lease before the sale. He knew the guardian had no thought of the lease getting in the way of the sale, and that the order of sale probably never would have been applied for but for appellee's suggestion. He testified that, when the order of sale was procured, nothing was said about the sale being made subject to the lease.

Appellee testified that at the beginning of the movement to sell the land he expected to become the purchaser, and that he had an agreement with the guardian and those interested to pay $5,000, and that he considered his lease as a part of the purchase price which he would have to pay. He also testified that under his lease he had made valuable improvements which he would not otherwise have made.

There was no order of the probate court directing the guardian to make the lease, or approving it, and appellant testified that he examined the official records before purchasing, and found no reference to the lease. That the orders of the court regarding the sale contained no reference to the lease, and the notices of sale were likewise silent on the subject, and that he had no information that appellee claimed a lease until about two minutes before the sale. That Mr. Hill, who had charge of the proceedings, represented the guardian in crying the sale, and stated at the time of the sale that he understood appellee had a lease or claimed to hold a lease. Appellee was present and made no statement himself but became a bidder at the sale.

The court below found that the sale was ordered by the probate court of Perry County, and had been held in the manner and form as prescribed by law, and that at the sale appellant became the purchaser, but subject to the lease of appellee, and that appellee was entitled to the possession of the land until the expiration of the lease on January 1, 1923.

We think appellee is estopped. There was no authority to sell the land except under the order of the court, and it is the policy of the law that lands thus sold shall bring the highest price obtainable. To that end bidding should be open and on a common basis. Appellant had made an examination of the record to satisfy himself about the sale which was about to be made. Other bidders—if there were such—may have taken the same precaution. Appellee had procured this sale to be ordered

by the court, and appellant testified that he understood appellee had himself posted the notices of sale. A copy of this notice was offered in evidence, and there was nothing in it to indicate that an incumbered title would be sold or that possession of the land would not be obtained by the purchaser. Appellee admitted posting the notices, and he must, of course, be charged with knowledge of the fact that the purpose of the notice was to invite competition. The notice required approved security of the purchaser, and appellant had evidently made his arrangement to comply with this requirement. So, no doubt, had other bidders. Appellee furnished no corroboration or explanation of the auctioneer's statement in regard to the lease, or the period of its duration, and the bidding proceeded. If appellee had made a statement, which had deterred others from bidding, his bid of $5,000 would have been the only bid; whereas the sum of $6,500 was actually bid and paid for the land. Who can know what action the court might have taken in confirming the sale if a showing had been made that, after being instrumental in having the order of sale procured, appellee had suppressed bidding by asserting the existence of his lease?

We think appellee's attitude toward this sale is such that it would be inequitable to permit him now to assert the existence and validity of his lease. Rorer on Judicial Sales, § 443; *Epley* v. *Witherow,* 7 Watts (Penn.), 163; 10 R. C. L., pp. 694 and 781; Pomeroy's Eq. Jur. (4 ed.), vol. 2, § 802; *Pabst* v. *Ferch,* 147 N. W. 714; *Connor* v. *Abbott,* 35 Ark. 376; *Trapnall* v. *Burton,* 24 Ark. 399; *Danley* v. *Rector,* 10 Ark. 211; *Shall* v. *Biscoe,* 18 Ark. 142; *Smith* v. *Murphy,* 141 Ark. 410.

The decree of the court below is, therefore, reversed and the cause will be remanded with directions to the court below to award appellant possession of the land.

SLOAN v. BUTLER.

Opinion delivered March 28, 1921.

TROVER AND CONVERSION.—One whose property has been unlawfully converted may recover its value from the tort-feasor, regardless of an opportunity to recover possession of the property from another.

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

Starbird & Starbird, for appellant.

The court erred in both instructions, Nos. 1 and 3. The theory of defendant was, and the court sustained him in that theory, that if afterward plaintiff, even after suit was brought, had an opportunity to recover his mule and did not do so but still pursued the defendant, he lost his action by his own negligence. But this is not the law. The proposition is well settled that defendant, having once converted the property, is liable for his conversion, regardless of the owner's opportunity to otherwise save himself. 28 Cyc. 2060; 29 Ark. 365; 37 *Id.* 32; 39 *Id.* 387; 89 *Id.* 342. The errors were misleading and prejudicial.

HUMPHREYS, J. Appellant instituted suit against appellee before a justice of the peace in Crawford County, Arkansas, to recover $50 on account of the alleged unlawful conversion by appellee of a mule belonging to appellant.

Appellee denied that he unlawfully converted the mule, and the trial upon this issue resulted in a judgment in favor of appellee, from which appellant prosecuted an appeal to the circuit court of said county.

In the circuit court the cause was submitted to a jury upon the pleadings, evidence and instructions of the court with like result. An appeal from the circuit court judgment has been duly prosecuted to this court.

The record disclosed that the mule in question was owned by appellant; that its maximum value was $50; that it escaped from his pasture and wandered away.

There was evidence tending to show that appellee later found the mule trespassing upon his land, took it up, and, without complying with the estray laws, sold or gave it to Everett Riddle. There was also evidence tending to show that Everett Riddle himself took the mule up without the assistance of appellee, and retained possession thereof.

Appellant testified that he made no effort to recover the possession of the mule from Riddle because he had already instituted suit against appellee for converting it.

Over the objection and exception of appellant, the court sent the case to the jury upon the theory that he had no right to recover damages from appellee for the unlawful conversion of his mule if he could have recovered the mule from Everett Riddle and failed to do so. One whose property has been unlawfully converted may recover its value from the tort-feasor, regardless of an opportunity to recover the possession of the property. *Norman* v. *Rogers,* 29 Ark. 365; *Warner* v. *Capps,* 37 Ark. 32; 38 Cyc. 2060.

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

MISSOURI PACIFIC RAILROAD COMPANY *v.* REED.

Opinion delivered March 28, 1921.

CARRIERS—LOSS OF SHIPMENT—PRESENTATION OF CLAIM.—Under a bill of lading providing that, in case of loss or failure to deliver after a reasonable time, the consignee, in order to recover the value of the goods, should file a claim in writing therefor with the carrier within six months thereafter, *held* that the consignee should present his written claim within six months after shipment, and not within six months after definitely ascertaining that it had been made, unless the carrier either concealed the shipment from the consignee or refused to issue a duplicate bill of lading upon request, in which case the six months' period would date from the time the shipment was disclosed to consignee.

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

Thos. B. Pryor and *Vincent M. Miles,* for appellant.

The verdict should have been directed for defendant, on either of two grounds, (1) because the claim was not filed within six months, and (2) because there was no proof that these extracts had ever been delivered to the railway compay for shipment. The following cases settle the question in favor of defendants. 101 Ark. 310; 111 *Id.* 102. There are other errors in the record, but appellants were entitled to a directed verdict.

J. E. London, for appellee.

We are protected by the limitation set out in the bill of lading as to he time of filiing the claim. It was not too late. No man can take advantage of his own wrong to the injury of another. Tested by this rule, the appellant is liable. Appellee used due diligence in trying to discover the true facts. The cases cited by appellant have no application here. Immediately the appellee discovered that the goods were lost, he filed his complaint and complied with our statute. This was a question of fact, and the court's instruction submits every question that was material to the jury. Having found for the plaintiff under this instruction, the matter is final. There was legally sufficient evidence to sustain the verdict and it should not be disturbed. 117 Ark. 71; *Ib.* 223; 113 *Id.* 400; 107 *Id.* 158; 92 *Id.* 120, 586. There was no error of law, and the verdict is sustained by a clear preponderance of the testimony. 119 Ark. 518. Where appellant has suppressed evidence, he can not be heard to complain that he did not get the benefit of it. 113 Ark. 82.

HUMPHREYS, J. Appellee brought suit against appellant before a justice of the peace in Crawford County to recover $44.25 on account of the loss or failure to deliver a shipment of flavoring extracts by D. H. Kyle from Atkins, Arkansas, to appellee at Alma, Arkansas, over appellant's railway between said points. A duplicate bill of lading issued by appellant to the consignor,

D. H. Kyle, of date March 1, 1918, describing "one box of drugs," was attached to the itemized account filed before the justice of the peace and made the basis of the suit. The bill of lading provided that, in case of loss or failure to deliver the shipment after a reasonable time for delivery, the consignee, in order to recover the value of the goods, should file a claim in writing therefor with appellant within six months thereafter. Appellant defended upon the grounds, first, that appellee failed to file a written claim for the value of the goods within the time provided in the bill of lading; second, that the goods described in the bill of lading were of different kind and character from those specified in the account filed with the magistrate.

The record reflected that appellee was the general manager for the Red Ball Chemical Company, and D. H. Kyle one of his agents; that he had shipped the extracts to D. H. Kyle with the understanding that he might return them in case he did not sell them and receive a credit on his account; that he requested his salesman, Kyle, to pay for the extracts, and was informed that he had returned them; that the shipment did not reach him, whereupon he wrote his salesman time and again for a bill of lading or a duplicate bill of lading so that he might trace the shipment; that his salesman replied that he did not have the original bill of lading and could get no duplicate; that he instituted suit at Atkins against his salesman for the value of the extracts; that, when he went to Atkins to attend the trial, Kyle insisted that he had shipped the extracts to him; they then called on the agent and obtained the duplicate bill of lading made the basis of the suit; that, after obtaining it, he dismissed the suit against Kyle, and, upon his return to Alma in January, 1919, presented a claim for the value of the extracts to appellants; that he had no personal knowledge as to whether the box of drugs described in the bill of lading contained the extracts itemized in the account filed in the magistrate's court.

At the conclusion of the evidence, appellant requested the court to direct a verdict in its favor, which the court refused to do, and, over the objection of appellant, submitted the cause to the jury upon the theory that appellee had six months, under the terms of the bill of lading, after definitely ascertaining that the shipment had been made, to present his claim for the loss of the goods or for failure to deliver same. The court's interpretation of the contract, as reflected by the instructions given to the jury, was incorrect. In the light of the record, it was appellee's duty to have presented his written claim for the value of the goods within six months after the shipment was made. The original bill of lading was issued and delivered to the consignor, D. H. Kyle, who was the agent and salesman for appellee. No duty rested upon appellant to furnish appellee with a duplicate bill of lading unless appellee had requested or demanded that they do so. Counsel for appellee contend that the record reflects that such request or demand was made, and that the agent of appellants refused to furnish a duplicate bill of lading in order to conceal the loss of the extracts *en route*. We find nothing in the record to support such contention. On the contrary, the evidence reflects that, when appellee called upon the agent at Atkins, in company with D. H. Kyle, the agent produced the bill of lading showing that "one box of drugs" had been shipped on March 1, 1918, and furnished a duplicate of such bill of lading to Kyle, who turned it over to appellee. Of course, if appellant, through its agent, had concealed the shipment from appellee or had refused to issue appellee a duplicate bill of lading upon request, the six months' period within which appellee might present a claim, under the terms of the bill of lading, would necessarily date from the time the shipment was disclosed to the consignee. As stated above, the facts do not show or warrant an inference that appellant denied or concealed the shipment; hence the court erred in refusing to direct a verdict upon the record for appellant.

For the error indicated, the judgment is reversed and the cause dismissed.

NEWPORT LEVEE DISTRICT v. PRICE.

Opinion delivered March 28, 1921.

1. EMINENT DOMAIN—EVIDENCE OF SENTIMENTAL VALUE.—In an action aginst a levee district for damages for land taken for right-of-way, it was error to admit evidence tending to establish a sentimental value of the property taken on account of being bought and improved for a home.

2. APPEAL AND ERROR—HARMLESS ERROR.—The error of admitting evidence tending to establish a sentimental value of property taken by a levee district for its right-of-way was not prejudicial where it was, in effect, eliminated by an instruction given by the court upon the measure of damages.

3. EMINENT DOMAIN—EVIDENCE.—In an action by the owner of land taken by a levee district for levee purposes, where plaintiff testified that he paid a certain amount for the entire tract of land, it was error not to permit the levee district to show when plaintiff purchased the land.

4. APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE.—In a suit against a levee district to recover damages for appropriation of a strip of land under the right of eminent domain, error of the court in refusing to allow the district to show when plaintiff purchased the land at a designated price was harmless where it was clearly inferable from the testimony that the land was purchased about three years previously.

5. EMINENT DOMAIN — DAMAGES FOR APPROPRIATION OF LAND.—The measure of damages for land appropriated for levee purposes, is the difference between the value of the whole land before the taking and the value of the remainder after the taking; and in a landowner's action for damages for right-of-way taken it was not error to refuse to permit the levee district to show the market value of a barn appropriated, as distinct from the land.

6. EMINENT DOMAIN—DAMAGES CAUSED BY INDEPENDENT CONTRACTOR.—A levee district, authorized to appropriate private premises for levee purposes, can not escape liability for injuries to a house moved by an independent contractor, upon the ground that the contractor assumed all obligations for damages resulting on account thereof.

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

John W. & Joseph M. Stayton, for appellants.

1. It is clear, from the evidence, that the property possessed a sentimental value in the eyes of the appellee. He testified that he did not want to sell it at all; that he bought it for his home and his own use. The court erred in permitting such evidence to be considered by the jury, as it was highly prejudicial to the rights of appellants.

2. It was error to refuse to permit appellants to show what appellee had paid for the whole ten acres originally, a part of which was taken by appellants. It was error to exclude such eveidence, as it was pertinent and comepetent for a jury to consider. 42 Ark. 265.

3. It was error to refuse to permit appellee to be interrogated as to his idea of the fair market value of the barn located on the land at the time it was taken. 88 Ark. 129.

4. It was plainly error for the court to refuse to give instruction No. 1 asked by appellants. Sea was an independent contractor; he was liable and not appellants. 111 Ark. 94; 212 U. S. 215.

Gustave Jones and *G. A. Hillhouse,* for appellee.

The verdict in view of the testimony is not excessive. Appellee had built him a home, well improved, comfortable and convenient. No evidence of passion or prejudice appears in the record, or that the jury was unduly influenced. The evidence sustains the verdict, and there is no error of law. The cases cited by appellant were entirely different from this.

HUMPHREYS, J. Appellee instituted suit against appellant in the Jackson Circuit Court for damages for the sum of $2,500 on account of appropriating, under the right of eminent domain, about one acre of land with improvements thereon, seventy-five feet in width off of one entire side of a ten-acre tract owned by him, near the city

of Newport, and for damages resulting from the appropriation.

Appellee admitted the appropriation of the land for levee purposes, but joined issue as to the amount of damages resulting, alleging the value of the land and improvements appropriated and damaged to be $200, which amount it tendered.

The cause was submitted to the jury upon the pleadings, evidence and instructions of the court, which resulted in a verdict against appellant in the sum of $1,700. A judgment was rendered in accordance with the verdict, from which an appeal has been duly prosecuted to this court.

The Newport Levee District, appellant herein, was created by act No. 249 of the Acts of the General Assembly of 1917, and, in the construction of the levee authorized by said act, it appropriated for right-of-way purposes a strip of land seventy-five feet wide off of one side of a ten-acre tract near Newport, owned by appellee. At the time of the appropriation, the improvements upon the strip of land consisted of a dwelling house, fences and cross-fences, and outbuildings, consisting of a barn, houses for pigs, etc. The dwelling was a frame house, painted inside and out, with brick flues, with porches front and back, the construction of which cost about $2,300. The barn was 14 by 16 feet in the main, with sheds on three sides. The main part of the barn was built of split and hewed logs, most of cypress, and was covered with boards and shingles. There were racks and troughs around the barn to feed the stock. In addition to the hog houses, there were troughs and other conveniences for raising hogs. Before appellants appropriated the property, they employed ..... Sea to move the house off of the right-of-way onto another part of the ten-acre tract designated by appellee, which was damaged in moving. The other improvements on the property were torn down and appropriated by appellants. It is fairly inferable from appellee's entire evidence that the improve-

ments, including the dwelling, were placed upon the property by appellee about three years before the appropriation, a short time after he purchased the ten-acre tract of land, for which tract he paid $1,800.

In the course of the examination of appellee, he was permitted to testify, over the objection of appellants, as follows:

Q. What did you put these improvements on this piece of land for, for what purpose?

A. Well, I figured on going out there and living. I had been in business fourteen or fifteen years, and I figured on making it my home and living there.

Q. Making it a home?

A. Yes, sir.

Q. Mr. Price, did you want the house moved from there on to that other piece of land?

A. No, sir.

Q. You didn't want to live there, you wanted to live where you put your house, did you?

A. Yes, sir; that is what I put it there for.

Q. What do you say now, Mr. Price, would be your idea of the fair market value of that land?

A. Well, I don't know. I didn't want to sell it at all myself, you know. I bought it for my own use for my home, and I don't know what it would be worth. I spent fifteen years you might say in saving up money for the place.

In the course of the cross-examination of appellee by appellant, he testified that he paid $1,800 for the entire tract, whereupon appellant propounded the following question to him: "Q. And when was that you paid $1,800 for the eight acres?" The court refused to permit this question to be answered, and proper exceptions were saved by appellant.

In the course of further cross-examination of appellee by appellant, he testified that it cost him $250 or $300 to build the barn; that it was worth what it cost him; that it was worth $500 to him. Appellant then asked ap-

pellee concerning the market value of the barn; whereupon the court ruled, over the objection and proper exception of appellant, that appellant could not show the fair market value of the barn, because there was no fair market value on second-hand barns in this country on another man's land, and stating further that he did not think the fair value would be the measure of damages on the barn; that the test would be the damages to appellee by tearing it down.

The first insistence of appellant for reversal is that the court admitted evidence tending to establish a sentimental value of the property on account of being bought, planned and constructed by appellee for a home. It was improper to admit this evidence, but we do not think it prejudicial, for it was, in effect, eliminated by the instruction given by the court upon the measure of damages, which was not objected or excepted to by appellant.

The second insistence of appellant for reversal is that the court refused to permit appellants to show by appellee at what time he paid $1,800 for the entire ten-acre tract. The price paid for land is a circumstance tending to show its market value at or near the time purchased. The real issue in the instant case was the value of the land at the time appropriated, together with the damages resulting on account of the appropriation, and evidence tending to show that appellee had purchased the tract near the time of appropriation for $1,800 would have been a circumstance tending to establish the value of the land taken and damages resulting on account of the appropriation. It was error therefore to exclude the evidence of appellee as to the time he paid $1,800 for the entire tract, but we do not regard it as prejudicial error, for it is clearly inferable from the evidence that he built the house about three years before the strip of land was appropriated by appellants, shortly after he purchased it. This fixed the time at which appellee paid $1,800 for the entire tract. There was no dispute in the evidence upon this point. It is not contended that by pressing this point

upon cross-examination appellants could have shown that appellee paid $1,800 for the entire tract at a later date than about three years before the appropriation of the land. We are of opinion that no prejudice resulted to appellant in this regard.

The next insistence of appellant for reversal is the refusal of the court to permit appellee to be interrogated as to the fair market value of the barn disconnected from the land, and to the statement of the court that the proper measure of damages was not the fair market value of the barn, but the damage done to appellee by tearing it down. The barn was clearly a part of the real estate appropriated by appellant. The question at issue was not the market value of the barn disconnected from the real estate, but the value of the real estate appropriated with the improvements thereon, as well as damages resulting from the appropriation. This court has established the rule for measuring damages in condemnation proceedings to be the difference between the value of the whole land before the appropriation and the value of the portion remaining after the appropriation. *Little Rock, Miss. & Texas Ry. Co.* v. *Allen,* 41 Ark. 431. The court did not err, therefore, in refusing to permit appellee to be interrogated concerning a fair market value of the barn disconnected from the land.

The last insistence of appellant for reversal is that the court permitted proof of the damages resulting on account of removing the dwelling from the lands appropriated to adjoining lands belonging to appellee. The insistence of appellant is that the contract for removing the dwelling was let to a Mr. Sea with the understanding that he should receive $150 for the job and assume all obligations for damages resulting on account of the removal thereof. Appellant requested the following instruction upon this point, which was refused by the court:

"You are instructed that if you find from the evidence that the defendants employed one Sea to move the

house of the plaintiff from the land taken by the defendants on to the plaintiff's land, and that the said Sea had the sole control of the manner of doing such work, the hiring and discharge of the employees engaged in such work, and the sole control of the manner in which they did such work, then the said Sea was an independent contractor, and the defendant would not be liable for any damage done to said house by said Sea or his employees in moving it."

The doctrine of independent employment has no application in condemation proceedings. The right to appropriate private property for public use was not delegated by the Legislature to an independent contractor of appellant but to appellant itself, and the exercise of the right of eminent domain can not be farmed out by the agency to whom delegated so as to escape liability on account of appropriating private property for public use. It was said in the case of *Lesher* v. *Wabash Navigation Co.*, 14 Ill. 85 (Am. Dec., vol. 56, p. 494), that (quoting from the syllabus):

"Corporation authorized by charter to enter upon private premises and take therefrom materials for the erection of public works, and liable for compensation to the owners, is liable to the owners for the materials so taken by contractors employed by the corporation for the prosecution of a portion of the work, although the contractors were to furnish the materials and to do the work for a stipulated price.

"Contractors employed to perform portions of public work by corporation chartered for that purpose are none the less the servants of the corporation because they do the work by contract and for a stipulated price."

No error appearing, the judgment is affirmed.

YOUNG v. LOWE.

Opinion delivered April 4, 1921.

1. GUARDIAN AND WARD—NECESSITY OF APPOINTMENT OF GUARDIAN.—Crawford & Moses' Digest, § 80, vesting decedent's property, not exceeding $300 in value, jointly in his widow and minor children, does not require the appointment of a guardian for the minor children to protect their interest in such property.
2. DESCENT AND DISTRIBUTION—VESTING ESTATE IN WIDOW AND HEIRS. Crawford & Moses' Digest, § 80, vesting decedent's estate, not exceeding $300 in value, jointly in his widow and minor children, intended to give the property jointly to the widow and children, with the right in the widow to use the property by mortgage or otherwise for the benefit of herself and the children.
3. INJUNCTION—ESTATE VESTED IN WIDOW AND CHILDREN—BREACH OF TRUST.—Equity will enjoin a widow from using for her exclusive benefit property that was vested in her and her minor children for their joint benefit.

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

Trimble & Trimble, for appellants.

1. The court erred in the first paragraph of its oral instructions. It invaded the province of the jury, and was improper and prejudicial and unsupported by the evidence. As a question of law, the property did not descend to the wife and children jointly. Kirby's Digest, § 2636. The same error occurs in the third paragraph of the oral instructions.

2. The verdict is clearly without evidence to sustain it. The execution of the mortgage by John Lowe and wife to the Gates Mercantile Company was not authorized, and it acquired no title under the mortgage, and by the transfer of the note to Nichols he acquired no interest in the property and had no authority to take possession and dispose of it under the mortgage.

Chas. A. Walls, for appellees.

The widow and minor children were entitled to $300 of the personal estate absolutely and it was the duty of the probate court to make an order vesting that amount

in them. Kirby's Digest, § 3; *Ib.*, § 72. There is absolutely no evidence to support a verdict for plaintiff. Nichols had the right legally to sell the property under the mortgage to the Gates Mercantile Company, assigned to Nichols, and appellants were not entitled to recover any amount whatever.

McCULLOCH, C. J. Appellees, who are infants suing by their next friend, instituted this action in the court below to recover damages for alleged conversion of certain personal property by the appellees, John Lowe and Tom Nichols. It developed on the trial of the issues, from the undisputed testimony, that the property in controversy was a mule of the value of $65 and a lot of cattle of the value of $137, making a total of $202. This was agreed upon during the progress of the trial as the value of the property in controversy.

It appears from the testimony that this property was originally owned, with other personalty, by Osia Young, the father of appellants, who died during the year 1915, leaving Florence Young, his widow, and appellants as his heirs at law. There was no administration on the estate of Osia Young, and the property fell to his widow and minor children, being held and used by the widow for the benefit of herself and the children who resided with her. The widow subsequently married appellee John Lowe. Osia Young had mortgaged his personal property to a firm of merchants in Hazen, and John Lowe paid off the mortgage debt in the sum of $168 after he intermarried with the widow, and later Lowe and his wife mortgaged the property now in controversy, together with other personal property owned by John Lowe, to a firm of merchants in Lonoke, to secure an indebtedness for advances made to Lowe and his wife to enable them to farm. The merchants assigned the mortgage and debt it secured to appellee Tom Nichols, who foreclosed the mortgage under the power contained therein. This was after the death of Lowe's wife, the widow of Osia Young. This suit was then instituted against Lowe and Nichols for the alleged conversion of

the property. The court submitted the issues to the jury, and a verdict was returned in favor of appellees.

There is an obscurity in the testimony as to the total value of the personal property left by Osia Young, but, for the purpose of testing the correctness of the judgment below, we assume either that the property did not exceed in value the sum of $300, or that, if the total value of the property exceeded that sum, the property in controversy was a part of that which, under the statutes of this State, went to the widow and children as against creditors. The statute provides that when the personal property of the estate of a decedent does not exceed in value the sum of $300 the same shall vest absolutely "in the widow and minor children, or widow, or children, as the case may be," and that "where the personal estate exceeds in value the sum of $300, the widow and minor children, or widow or children, as the case may be, may retain the amount of $300 out of such personal property at its appraised value." Crawford & Moses' Digest, § 80.

The evidence in the case warranted the conclusion that the widow of Osia Young used the property and mortgaged the same for the joint benefit of herself and minor children, and the question involved now is whether or not she was authorized to do this and to dispose of the property without the concurrence of a guardian for the minor children. It will be observed that the property under the circumstances described in the statute is vested jointly in the widow and minor children and not in severalty. This statute was enacted as a part of the administration statute and was designed for the protection of the widow and infant children of decedents who might have left estates of little value. It was designed to afford a method to expeditiously dispose of the property and hold it at as little expense as possible for the benefit of those on whom the title was cast. It is inconceivable, therefore, in this view of the matter, that the lawmakers intended to confer upon the infants such a separate right as would require the intervention of a guardianship in

order to protect their interest in the property and give them full enjoyment of it. If the statute be construed as having that effect, to require a guardian in order to enable the infant to enjoy the estate, its value would thus be frittered away in the expense of the guardianship. What the lawmakers obviously intended was to give the property jointly to the widow and children, and that the widow as the head of the family should have the right to use the property for the benefit of herself and the children. This does not mean that the infants are without remedy in the event the widow abuses the power thus conferred and uses the property for her own use in exclusion of the rights of the children. A court of equity would restrain such abuse of power as a violation of the trust. But there is no evidence in the present case of an abuse of authority by the widow. The children lived with her, according to the testimony, and there is nothing to show that she did not use the property or mortgage the property for the benefit of the children as well as for herself. This being true, the mortgage which she executed to the merchants was valid, and a foreclosure of the mortgage did not constitute a wrongful conversion of the property. The judgment is therefore affirmed.

TIPLER-GROSSMAN LUMBER COMPANY v. FORREST CITY BOX COMPANY.

Opinion delivered April 4, 1921.

1. SALES—WAIVER OF PROMPT DELIVERY.—Though a contract for the sale of lumber specified lumber which had already been manufactured on the seller's mill yard, where the purchaser's attention was called to the fact that the seller was selling part of such lumber to another but the purchaser did not insist on the performance of the contract to the exclusion of other sales by the seller, it will be held to have waived the expeditious performance of the contract and consented to later delivery.
2. SALES—TIME OF PAYMENT—WAIVER.—In a buyer's action for failure to deliver lumber sold, in which the seller claimed that the buyer broke the contract by failure to pay for the lumber de-

livered, within the time it had agreed to pay, it was error to ignore the issue as to a waiver of prompt payment where there was evidence tending to prove such fact.

3. CONTRACTS — PERFORMANCE — INTERFERENCE BY GOVERNMENT.— While a party is generally bound by his contract to perform same, he is excused by lawful interruption or interference by the government of the place where the contract is to be performed.

4. CONTRACTS—NONPERFORMANCE — GOVERNMENTAL REQUISITION.—A requisition of the subject-matter of a contract by the government in time of war constitutes an excuse for nonperformance by the party who obeys the requisition.

5. CONTRACTS—GOVERNMENTAL INTERFERENCE—INSTRUCTION.—Where there was no evidence that the seller of lumber was required to furnish lumber under governmental order which interfered with his contract with the buyer, it was error to instruct the jury that the seller's delay in performance would be excused if caused by priority orders under government control or necessity for war purposes.

Appeal from St. Francis Circuit Court; *J. M. Jackson*. Judge; reversed.

C. W. Norton, for appellant.

1. Plaintiff was not entitled to any so-called government priority orders as having the effect of releasing defendant from its contracts or justifying the cancellation of its contracts by defendant. If Mr. Seaton had had direct and preferential orders from the government, that would not have authorized him to refuse to perform these contracts. 126 Ark. 46; 189 S. W. 654; Elliott on Contracts (2 ed.), §§ 1891, 1897; 148 Fed. 597; 244 *Id.* 250; 29 Ark. 330.

2. The court erred in its construction of the contract that the lumber was to be delivered to plaintiff (purchaser) when loaded on cars at shipping point, and the same error was made in its instructions. 200 S. W. 795. See, also, 111 Ark. 521; Ann. Cases 1916 A 1043; 128 Ark. 124; 193 S. W. 498; 88 Ark. 491-6; 83 *Id.* 551.

The two defenses—priority of government orders and a prior breach of contract by plaintiff by nonpayment—are without merit, either in fact or law.

Mann & Mann, for appellee.

1. Appellant had willingly and cheerfully released appellee or acquiesced in the conduct of appellee in not shipping to appellant the lumber as ordered. The consent of appellant to the disposition of the lumber relieves the court of the necessity of construing the contract as it relates to the place of delivery. The authorities cited by appellant do not excuse from performance of the contract, and have no application where performance is waived. 3 A. L. R. 32. The entire output of appellee was consumed by government orders. 9 A. L. R. 1510-15. Appellant can not complain of the instructions given.

2. There was no breach of contract by appellee. This case is controlled by 88 Ark. 491, and the court properly instructed the jury.

McCULLOCH, C. J. This is an action instituted by appellant against appellee to recover damages for alleged breach of contract for the sale and delivery of lumber. Appellee denied that it had broken the contract, and alleged that the first breach was committed by appellant in failing to pay for lumber delivered under the contract. Appellee also filed a counterclaim for an unpaid balance in the sum of $323.14 for lumber sold and delivered. There was a trial of the issues before a jury, which resulted in a verdict in favor of appellee on its counterclaim for the recovery of three hundred and five dollars and seventy-two cents.

Appellant was engaged in the lumber business, with its principal place of business in the city of Green Bay, Wisconsin, and appellee was engaged in the lumber manufacturing business at Forrest City, Arkansas, and had a mill at Calion, Arkansas, where it manufactured rough lumber.

On March 10, 1917, and on March 17, 1917, appellee entered into contracts with appellant to sell the latter certain specified lumber then manufactured and situated at appellee's mill at Calion. These contracts were in writing in the form of correspondence between the par-

ties. The first contract was for gum and plain white oak lumber, and the second was for quarter-sawed white oak. The last contract was, as we understand the testimony, substantially complied with, but the breach was committed in the performance of the first contract in regard to the gum lumber. It was specified in the writing that the lumber was to be delivered "Chicago, Illinois, rate of freight," and that the terms of payment were to be cash in sixty days with 2 per cent. discount on payments within ten days from date of invoice. Appellee made shipments of lumber to appellant on these contracts from time to time, beginning on April 28, 1917, and running down to November 14, 1917, when the last car was shipped. Payments were made by appellants on these shipments from time to time, the last payment being made on December 25, 1917, leaving a balance, which the jury found to be the sum specified in the verdict, three hundred and five dollars and seventy-two cents.

During the progress of these transactions a controversy arose between the parties as to when these payments should be made, whether strictly within sixty days after date of invoice, or, as contended by appellant, after the delivery of the lumber at point of destination and the receipt of freight bills, which appellant was to pay and deduct from the invoices. The controversy does not appear to have reached an acute stage or to a demand on the part of appellee that the payments be made more promptly on penalty of a forfeiture of the contract. The contracts specified lumber which had already been manufactured on the mill yard at Calion, but the evidence discloses the fact that the parties did not continue to treat the contract as applying solely to that lumber, but elected to treat it as applicable to any lumber of those specifications to be manufactured by appellee. The evidence discloses the fact that during the pendency of the contract appellee was selling lumber to Swift & Company of Kansas City, to be used as "shooks" or material for the making of packing cases used in the shipment of food products. This was brought to the attention of appellant,

who did not insist on the performance of the contract to the exclusion of other sales by appellee in the operation of its mill. This testimony, in other words, warranted a finding that appellant waived the expeditious performance of the contract and consented to later delivery.

The contention of appellant, however, is that appellee definitely broke the contract by the unequivocal refusal expressed in a letter of May 6, 1918, to continue to perform the contract. This letter was introduced in evidence, and it expresses a refusal on the part of appellee to furnish any more lumber under the contract. The refusal to do so was put on the ground that appellee was engaged in furnishing shooks to Swift & Company, and that it was in response to a governmental requirement for war purposes. At the conclusion of the letter, however, the subject of appellant's failure to pay the balance due for lumber shipped was referred to, but was not stated as a breach of the contract on the part of appellant. The letter concludes in the following language:

"While we are on this subject, we should like to remind you that we still hold open account on two cars shipped for you, which have never been settled for, notwithstanding these shipments are about as old as the order itself. There may be some specific and good reason for this delay, but we do not comprehend why the consequences should be ours, particularly so since we do not know where the stock is or who got it.

"We have no other stock which we can offer you; in fact, as stated, all our efforts are centered on supplying our factory, and we have shipped nothing excepting a certain amount of oak for government use."

The contention of appellee in the trial below was that at that time appellant had already broken the contract by failing to make the payments for lumber already shipped, and that appellee was justified in refusing to ship any more lumber.

There are numerous assignments of error with respect to the court's charge to the jury and its refusal to give certain instructions requested by appellant. We

deem it sufficient for disposal of the case here to discuss only those assignments which relate to the instructions given by the court at the request of appellee. The first three of these instructions read as follows:

"You are instructed that if you find from a fair preponderance of the evidence that the plaintiff, Tipler-Grossman Lumber Company failed and refused to pay for said lumber, or any part thereof, when the same fell due, which under the contract was within sixty days from the date fo shipment, then the defendant was not required to continue to furnish lumber to the plaintiff while any part of the account was due and unpaid, and your verdict would be for the defendant."

"You are instructed that if you find from the evidence that the plaintiff Tipler-Grossman Lumber Company failed or refused to pay for said lumber, or any part thereof, when such payment fell due, which under the contract within sixty days from the date of shipment, this would constitute a breach of the contract, and your verdict would be for the defendant.

"And if you further find from the testimony that there is due the defendant on its cross-complaint any sum from the plaintiff, your verdict will be for the defendant for such sum as you may find to be due according to the evidence."

"You are instructed that, under the terms of the contract involved in this suit, payments were to be made two per cent. discount if payment made within ten days of date of shipment or sixty days from date of shipment, so if you find that payments of any sum on any car was withheld after the same was due and request made for payment, this would constitute a breach of the contract, and the plaintiff could not recover, and your verdict should be for the defendant for the balance due it."

These instructions amounted to a peremptory direction to the jury to return a verdict in favor of appellee, for it was undisputed that appellant had failed to pay some of the invoices for lumber within sixty days after the date thereof. But the instructions ignored the issue

raised by the proof as to whether or not appellee waived the punctual payment within the time specified in the contracts. There is proof to the effect that there was necessary delay in ascertaining the amount of freight bills so as to deduct the same from the invoices, and in the correspondence between the parties appellee never at any time insisted that the contract would be forfeited unless payments be made within sixty days from the date of invoice, regardless of time of delivery or the ascertainment of the amount of freight.

Learned counsel refer especially to letters from appellee to appellant, dated, respectively, on October 22, 1917, and November 19, 1917, asking for payment of past due bills, but in neither of these letters was it insisted that there would be a forfeiture of the contract unless payment be promptly made. These letters were merely requests for payments, and, according to the undisputed proof, appellant continued to make partial payments from time to time up to December 25, 1917, and large sums were paid during that time without any objections on the part of appellee that the payments were not being made strictly in accordance with the terms of the contract. These instructions were erroneous in ignoring this issue, and they were in conflict with other instructions on this subject given at the instance of appellant.

The court also gave the following instruction, over the objection of appellant:

"You are instructed that if the delay by the defendant in shipping lumber to plaintiff was caused by priority orders under government control, or necessity for war purposes, such delay was not the fault of the defendant, and the priority orders were a legal excuse for such delay."

The language of this instruction is very obscure in leaving it to the jury to determine what would constitute "priority orders under government control, or necessity for war purposes," and without furnishing the jury any guide as to the law on the subject. The general rule of law is that a party is bound by his contract to perform,

and that he must perform or pay damages upon his failure to do so, but there are exceptions to this general rule, one of which is that performance is excused by lawful interruption or interference by the government of the place where the contract is to be performed. A requisition of the subject-matter of the contract by the government in time of war comes within the exceptions to the general rule, and constitutes an excuse for nonperformance by the party who obeys the requisition.

The Congress of the United States enacted a statute, which was approved June 3, 1916, known as the National Defense Act (Compiled Statutes, section 3115 g), which empowered the President of the United States, acting through the head of any department of the government, "in addition to the present authorized methods of purchase or procurement, to place any order with any individual, firm, association, company, corporation, or organized manufacturing industry for such products or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, etc." The act also provides that compliance with all such orders shall be obligatory on any such individual, firm or corporation, and it prescribes a penalty for failing to comply with its provisions.

The case of *Roxford Knitting Co.* v. *Moore & Tierney,* 265 Fed. 177, is a leading case on the construction of this statute, and the Supreme Court of the United States refused a writ of certiorari to carry the case up for further review. The court construed the statute not to mean that "all contracts made by the government in a period of national emergency are to have precedence over civilian contracts," but that where material is furnished under the form of a voluntary contract with the government it will be held to be a requisition under the statutes if under the circumstances it appeared that the contract was executed merely as a form of obedience to governmental orders. To quote the exact language the court said: "That the entire surrounding circum-

stances must be considered to determine whether the formal contract entered into was a voluntary agreement covering the whole matter, or whether it was a mere settlement of details after the manufacturer had been directed to furnish certain material. And it affirmatively appears that the officer in charge of the purchase of supplies for the navy thought he was entitled to use and did use the contract form in cases where the parties on both sides reached an agreement with regard to the price of material."

And again the court said: "And when a manufacturer is given to understand that he is required to supply certain goods to the government of the United States, and is told that he has no option to decline to comply, we are satisfied that as to those goods an 'order' has been placed or received, within the spirit and intent and the letter of the statute, whether the authoritative direction is written or oral, and notwithstanding the fact that the parties actually come to an agreement in what has the form of a contract."

There is no evidence in this case that appellee was required to furnish material under a governmental order, written or verbal, which caused interference with the performance of his contract with appellant. In appellee's correspondence with appellant and in the testimony of appellee's manager on the trial of the case below, general statements were made that they were furnishing their lumber under government order; but when the witness was interrogated specifically as to the form of the transaction he was unable to make any statement on the subject, except that appellee furnished shooks to Swift & Company, of Kansas City to use in packing food products for transportation for the government. This testimony is at most but hearsay, and does not even establish the fact that Swift & Company were operating under a requisition from the government or that appellee was acting under such a requisition, either directly or indirectly. The instruction was therefore entirely with-

out any evidence to support it, and should not have been given.

There was sufficient evidence to warrant a submission to the jury of appellant's charge against appellee of having broken the contract without justification, and this issue should have been submitted to the jury free from objectionable instructions.

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

STANDLEY v. MASON.

Opinion delivered April 4, 1921.

VENDOR AND PURCHASER—FORECLOSURE OF VENDOR'S LIEN—REDEMPTION.—Though a sale of land under contract to convey the same on payment of the purchase price constitutes a reservation of the legal title merely as security for the payment of the price, and though equity treats this form of transaction as having the same effect as a mortgage, it is not a mortgage in the strict sense of the term, and does not fall within the statute which allows a year for redemption from sales under mortgages or deeds of trust.

Appeal from Carroll Chancery Court, Eastern District; *B. F. McMahan,* Chancellor; affirmed.

Johnson & Simpson, for appellants.

The demurrer of appelleees admitted the allegations of the complaint. 104 Ark. 466. The complaint states facts sufficient to constitute a cause of action. The effect of the contract alleged was to create a mortgage on the lands in favor of the vendor, Mason. 13 Ark. 533; 15 *Id.* 188; 16 *Id.* 126; 27 *Id.* 61; 29 *Id.* 357; 34 *Id.* 113; 66 *Id.* 167; 84 *Id.* 160; 100 *Id.* 543. The relationship between appellant and James W. Mason was that of mortgagor and mortgagee, and Mason prosecuted one of the remedies given by law (13 Ark. 533), but the court, through error or oversight, cut off and barred appellant's right of redemption under the foreclosure sale. Appellant clearly had the right to redeem within one year. The

right to redeem must be clearly waived in the mortgage. Kirby's Digest, § 5420; 117 Ark. 412. The court erred in barring appellant's equity of redemption. 14 Ark. 633.

Roy Thompson and *F. O. Butt,* for appellees.

The only question at issue is whether or not a purchaser of land under a bond for title has any right of redemption after a sale under foreclosure to recover the purchase money. The decisions of this court settle the proposition adverse to the contentions of the appellant. 106 Ark. 79; 126 *Id.* 313; 139 *Id.* 218. The chancellor was correct in finding that appellant failed to show any equitable cause of action or right to relief.

McCULLOCH, C. J. The land in controversy was originally owned by appellee Mason, who entered into a written contract to sell the same to appellant Standley on the terms specified in detail in the contract. There was a default in the payment of the purchase price, and appellee sued in the chancery court to foreclose his lien. There was a decree foreclosing the lien, and the property was sold thereunder.

This is an action instituted by appellant to compel appellee to allow a redemption of the property, the right to which is claimed under a statute which provides that where land is sold under decree of the chancery court to foreclose a mortgage or deed of trust, "the mortgagor, his heirs or legal representatives, shall have the right to redeem the property so sold at any time within one year from date of sale," but that "the mortgagor may waive such right of redemption in the mortgage or deed of trust executed and foreclosed. Crawford & Moses' Digest, § 1411.

The question has been decided by this court against appellant's contention in the case of *Priddy* v. *Smith,* 106 Ark. 79. In that case the sale was to foreclose a vendor's lien, and we decided that the statute permitting redemption applied only to instruments in the form of mortgages or deeds of trust and not to equitable mortgages, but we stated in the opinion that the decision was

based "on the broader ground that an equitable mortgage is not within the terms of the statute allowing redemption after sale."

This rule was reaffirmed in the later case of *Bothe* v. *Gleason*, 126 Ark. 313.

A sale of land under contract to convey the same on payment of the purchase price constitutes a reservation of the legal title merely as security for the payment of the price, the same as if a conveyance had been executed and a mortgage given in return to secure the price. A court of equity treats this form of transaction as having the same effect as a mortgage. But it is not a mortgage in a strictly legal sense, and does not fall within the scope of the statute which allows a year for redemption from sales under mortgages or deeds of trust. The decree refusing to allow the redemption was correct, and the same is affirmed.

EAST v. EAST.

Opinion delivered April 4, 1921.

1. DIVORCE—PAYMENT OF ALIMONY.—Where a decree of divorce ordered the husband to pay a certain amount as alimony to the wife, and the husband, in a proceeding to compel performance of such order, admitted that he had sufficient funds at the time of the decree, it devolved upon him to account for them, and the chancellor was not bound to accept as true his unsupported statement that the funds had been stolen from him.
2. DIVORCE—ENFORCEMENT OF ALIMONY DECREE.—While the common-law writ of *ne exeat* has been abolished, Crawford & Moses' Digest, §§ 3506-9, provide adequate remedy for the enforcement of decrees for alimony and maintenance.
3. DIVORCE—ALIMONY—IMPRISONMENT.—Imprisonment of a divorced husband for failure to pay alimony is justified only on the ground of wilful disobedience to the orders of the court, and as soon as it is made to appear that he is unable to comply with such orders he should be discharged.

Appeal from Lawrence Chancery Court, Eastern District; *Lyman F. Reeder*, Chancellor; affirmed.

Smith & Gibson, for appellant.

The evidence is undisputed that appellant is unable to comply with the order of court and he should be discharged. 81 Ark. 504; 9 A. L. R., *Snook* v. *Snook.* Appellant has neither the means nor ability to comply with the order of court, and the chancellor should have ordered his discharge.

W. A. Cunningham, for appellee.

The evidence as a whole shows that the court was fully justified in disbelieving appellant's story about losing the money, and the action of the chancellor was right.

McCULLOCH, C. J. Appellant R. A. East and appellee Sula East were formerly husband and wife, but were divorced by decree of the chancery court of Lawrence County, rendered in January, 1920, in an action instituted by appellee against appellant on the ground of cruel treatment. There were four living children of these parties, the oldest one being eighteen years of age and the youngest four years of age, and in the decree the custody of each of the children was awarded to appellee, and the court also decreed to appellee the payment of the sum of $1,150 by appellant as alimony out of funds which he then had in bank. Certain other items of personal property were also decreed to appellee.

The decree for alimony was pursuant to a written stipulation of the parties. Instead of paying over the money to appellee in accordance with the decree of the court, appellant drew the money out of the bank and, taking his youngest child with him, he left Lawrence County. He went to Heber Springs, and stayed there awhile, and then to Hot Springs, Arkansas, and afterward went to Springfield, Missouri.

In April, 1920, appellee filed in the chancery court of Lawrence County her petition in the nature of a prayer for a writ of *ne exeat* to cause appellant's arrest and compel him to comply with the decree of the court. Appellant was arrested under the writ, and, failing to give bond as directed by the court, he was incarcerated in jail

and remained there for eight weeks up until the trial of the present proceedings below. Appellant filed a petition for modification of the order committing him to jail, and alleged in the petition that he was unable to comply with the order of the court and asked to be discharged. This petition was heard by the chancery court, and a decree was entered denying the relief prayed for, and an appeal has been prosecuted to this court.

On the trial of the issues below appellant was introduced as a witness in his own behalf and undertook to give an account of the loss of the money he had on hand at the time the decree against him was rendered. He claimed that the money had been partly lost and partly spent, and was all gone at the time he was arrested, except the sum of $300 one-half of which he had since spent in expenses of this litigation, and the remaining $150 he tendered to appellee's counsel in open court, and that sum was accepted by counsel. He testified that in November or December, 1919, he had between $2,500 and $3,000 in the Bank of Black Rock at Black Rock, Arkansas, and that he drew it out of the bank, and that he left Walnut Ridge and took the youngest boy with him and went to Heber Springs. He stated about being sick there and the amount of money he spent on himself and on the child, and went from there to Hot Springs for treatment, and he stated the amount of the expenses of that trip. He testified then that he went from there to Springfield, Missouri, and that the sum of $1,500 was stolen from his pocket while he was in a large gathering of people at a show or entertainment of some kind. He testified also that he gave three of the older children $750, and placed it in the bank at Black Rock and that he gave another of the children $300, but he got that back from the child, and this was the sum out of which he paid appellee's counsel the sum of $150.

Appellant's account of the loss of $1,500 is not convincing, and we can not say that the testimony does not support the chancellor's conclusion that appellant had not lost the money, but still had it in his possession. Ap-

pellant admitted that he had the money in his possession at the time of the decree, and it devolved upon him to account for it, and the chancellor was not bound to accept as true his unsupported statement that it had been stolen from him. That being true, the chancellor was justified in refusing to discharge him from custody without producing the money and paying it over in accordance with the previous orders of the court.

Under our statutes the common law practice of issuing writs of *ne exeat* is abolished, but the statutes provide adequate remedy for the enforcement of decrees for alimony and maintenance in divorce cases. Crawford & Moses' Digest, sections 3506, 3509. Those statutes authorize imprisonment, both as punishment for refusal to obey the orders of the court and to compel obedience of such orders. But imprisonment is, as was said by Judge RIDDICK, speaking for the court in *Ex parte Caple,* 81 Ark. 504, "only justified on the ground of wilful disobedience to the orders of the court, and, so soon as it is made to appear that the defendant is unable to comply with the orders of the court, he should be discharged." The imprisonment can not be made perpetual for recalcitrancy; and when it becomes manifest that further punishment will not compel obedience, then it is the duty of the court to refrain from further punishment, otherwise it would convert the exercise of the court's power into an instrument of imprisonment for debt or would constitute the imposition of unusual and cruel punishment. The court found, however, upon what appears to be sufficient evidence that appellant had not spent the money, that it was still in his possession and unacounted for, and the court was justified in assuming that appellant could be compelled by further punishment to produce the money. We cannot say, therefore, that the conclusion of the court was unsupported by the evidence or that there was an abuse of the court's power.

The decree is therefore affirmed.

McCOLLUM v. NEIMEYER.

Opinion delivered April 4, 1921.

1. LIMITATION OF ACTIONS—PLEADING.—In an action at law upon a contract to purchase corporate stock on demand the statute of limitations is purely a matter of defense which even the defendant is not bound to plead, and the plaintiff is not bound to set forth in his complaint the existence of facts which will show that he is barred from maintaining the action, in response to a motion to require him to make his complaint more specific.
2. PLEADING—MOTION TO MAKE COMPLAINT MORE SPECIFIC.—Plaintiff may not complain of the granting of a motion to make his complaint more specific where he did not stand on his complaint, but undertook to comply with the order of the court.
3. LIMITATION OF ACTIONS—COMPLAINT HELD NOT TO SHOW BAR.—A complaint alleging that ten years previously plaintiff was induced by defendant to purchase stock in a corporation, that said purchase was upon the understanding that defendant would repurchase the stock at any time that plaintiff desired him to do so, and that thereafter on several occasions, at intervals of less than three years and continuing up to within two years of the bringing of this action defendant verbally and personally accepted, ratified and affirmed said agreement to repurchase, *held* not to show affirmatively that plaintiff's cause of action was demurrable as barred by the statute of limitations.

Appeal from Pulaski Circuit Court, Third Division; *A. F. House,* Judge; reversed.

Troy W. Lewis, for appellant.

On the former appeal this court held that a cause of action was stated and that the facts do not affirmatively show that no facts exist which would take the action out of the statute bar. 219 S. W. The complaint here is good as held on the former appeal. The complaint does not affirmatively show that the action is barred, and an action at law did not lie. 31 Ark. 684; 34 *Id.* 164; 49 *Id.* 253; 116 *Id.* 233.

The contract was fundamentally one to repurchase the stock from McCollum, an employee, some time in the future at his election. Limitation can not be raised by demurrer, as the complaint does not affirmatively show that the action is barred. 105 Ark. 293.

Kinsworthy, Henderson & Kinsworthy, for appellee.

The complaint, as amended, fully states the appellant's cause of action, and, the promise being a verbal one, it falls within the bar of the statute. C. & M. Digest, § 6095. An oral waiver of the statute of limitations, or a promise not to plead it, need not be in writing. 19 Am. & Eng. Enc. Law 322; 132 Mo. 524; 85 Tenn. 561; 1 Wood on Limitations, p. 76; 10 Humph. (Tenn.) 176; 132 Ind. 111; 215 S. W. 631; 11 Ark. 30.

Wood, J. This action was brought by the appellant against the appellee on January 29, 1919, to recover the sum of $1,500. The appellant alleged in substance that on April 8, 1909, he was induced by the appellee, who was the president and a large stockholder of A. J. Neimeyer Lumber Company, a corporation, to purchase a block of its stock, for which he paid the sum of $1,500; that said purchase was made upon the understanding with the appellee that he would repurchase the stock at any time appellant desired him to do so, and in the meantime would pay appellant six per cent. interest per annum on the amount he had invested; *that thereafter on several occasions at intervals of less than three years, and continuing up to within two years of the bringing of this action, the appellee verbally and personally acknowledged, ratified and affirmed said agreement to repurchase;* that on the 28th of February, 1918, the appellant demanded of the appellee that he repurchase the stock in fulfillment of his agreement, which appellee refused to do, to the appellant's damage in the sum of $2,500.

The appellee demurred to the complaint on the ground that it showed upon its face that it was barred by the statute of limitations. The demurrer was sustained. The appellant stood upon his complaint, and the court rendered a judgment dismissing the same, from which is this appeal.

This is the second appeal of this cause. *McCollum* v. *Neimeyer,* 142 Ark. 471. On the first appeal the complaint was substantially the same as that above set

forth, except that it did not contain the following clause: "That thereafter, on several occasions, at intervals of less than three years, and continuing up to within two years of the bringing of this action, the defendant (appellee) verbally and personally acknowledged, ratified and affirmed said agreement to repurchase. On the former appeal before the above clause was added to the complaint we held that the the complaint stated a cause of action, saying: "This is a suit at law, and the statute of limitations could not be raised by demurrer, unless it affirmatively appeared in the complaint that no facts existed which exempted the action from the operation of the statute." On remand of the cause the appellee moved to require the appellant to make the complaint more specific. This motion was sustained, and the clause above quoted was added over the objection of appellant.

The question for decision on this appeal is whether or not the complaint as it now stands, containing the above clause, states a cause of action. In other words, do the allegations of the complaint now show affirmatively that the cause of action stated therein is barred by the statute of limitations? In actions at law on contracts of the character set forth in appellant's complaint, the statute of limitations is purely a matter of defense which even the defendant is not bound to plead. Therefore, the appellant was not bound to set forth in his complaint the existence of facts which would show that he was barred from maintaining the action by the statute of limitations. The court erred in granting the motion of the appellee requiring the appellant to make his complaint more specific in an effort to have appellant set forth therein matters which would show affirmatively that the appellant was barred by the statute of limitations, and which would enable the appellee to avail himself of the statute by a demurrer.

The original complaint was sufficiently definite and certain, and, as we held on the former appeal, stated a cause of action. The appellant, however, is not in an

attitude to complain of this ruling of the court because he did not stand on his complaint, but undertook to comply with the order of the court requiring him to make the same more specific by adding to his original complaint the clause above quoted. Therefore, the question recurs as to whether such clause states affirmatively the existence of facts which show that the appellant is barred by the statute of limitations. Section 6965 of Crawford & Moses' Digest, provides: "No verbal promise or acknowledgment shall be deemed sufficient evidence in an action founded on contract whereby to take any case out of the operation of this act, or to deprive the party of the benefits thereof."

In *Burnett* v. *Turner,* 105 Ark. 293, construing this statute, we said: "It is equally well settled by the authorities that an oral waiver of the statute of limitations, or promise not to plead it, does not fall within the statute above quoted, and need not be in writing. The suspension of the statute by reason of a promise not to plead it is based on the doctrine of estoppel, and, in order for it to be effective, the promise must be an express one not to plead the statute, or the language of the promise must be such as clearly evinces an intention not to do so upon which the creditor has a right to rely. Otherwise it could not be said that he was estopped by the conduct of his debtor, and the rule does not apply."

The clause in the complaint under review states that, "up to within two years of the bringing of this action, the defendant, A. J. Neimeyer, verbally and personally acknowledged, ratified and affirmed said agreement to repurchase." This language does not show that the appellee expressly or impliedly promised not to plead the statute of limitations; nor can it be said that the language quoted evinces an intention on the part of the appellee not to plead the statute of limitations. The clause quoted does not set forth what words were spoken or the circumstances under which the agreement to repurchase was acknowledged, ratified and affirmed. Therefore, whether the appellee expressly or impliedly promised not

to plead the statute of limitations, or whether, by any language he used in "acknowledging, ratifying and affirming the agreement to repurchase," he evinced an intention not to plead the statute, is not affirmatively shown by any of the allegations in the complaint. In this respect, the complaint is precisely the same as it was on the former appeal. In other words, the complaint still does not show affirmatively the existence of facts which would bar the appellee from maintaining the action. The fact that appellee "verbally and personally acknowledged, ratified and affirmed" said agreement to repurchase does not show that he expressly promised that he would not plead the statute of limitations, or that he in any manner by his conduct led appellant to believe that he would not set up the statute in bar of the action.

The clause in the complaint under consideration does not negative the existence of grounds of avoidance of the operation of the statute of limitations. If these grounds really exist, they are matters to be developed by the testimony on the issue as to whether the action is barred by the statute of limitations when that issue is properly pleaded, which has not yet been done. The court erred in sustaining the demurrer and in dismissing appellant's complaint. The judgment is, therefore, reversed and the cause is remanded with directions to overrule the demurrer.

COBLENTZ & LOGSDON v. L. D. POWELL COMPANY.

Opinion delivered April 4, 1921.

1. APPEAL AND ERROR—PRESUMPTION IN ABSENCE OF BILL OF EXCEPTIONS.—In the absence of a bill of exceptions setting forth the facts on which the cause was heard, every presumption must be indulged in favor of the judgment of the court below.

2. CORPORATIONS—FOREIGN CORPORATION DOING BUSINESS IN STATE.—The taking of an order for law books by the traveling salesman of a foreign corporation, which order was transmitted to the corporation and accepted by it and the books shipped to the purchasers under a contract by which the title was retained in the seller

until the purchase money was paid, was not the "doing of business in the State," in contemplation of Crawford & Moses' Digest, § 1826.

3. SALES—REMEDIES OF SELLER.—Upon the failure of the purchasers to pay for books, title being reserved in the seller, the latter had the right either to bring replevin for the books or to waive the reservation of title and affirm the sale by suing for the debt, in which case it could impound the books under Crawford & Moses' Digest, §§ 8729, 8730.

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

Pinnix & Pinnix, for appellants.

1. This case falls within the familiar elementary rule that the seller of personal property who has reserved title until the purchase money is paid may upon default retake the property and thereby cancel the debt or may sue to recover the debt and thereby affirm the contract. 88 Ark. 99; 113 S. W. 1023. The contract in question was conditional, the purchase price must be paid, or the property might be retaken. The option belonged to appellee as vendor, and not to appellants as vendees. The debt was absolute if appellee elected to treat it as such. When appellants discontinued their payments on account, appellee could either retain the property as its own or sue for the price, but it could not do both. It was for appellee to elect. 3 Johns. Chy. 416; 18 N. Y. 552. It could not recover the price and also retake possession of the goods sued. 24 R. C. L., p. 491, § 785; 27 L. R. A. (N. S.) 220; 83 Wis. 31; 35 Am. St. Rep. 17 and note; 10 *Id.* 487-494 and notes; 38 *Id.* 626; 146 U. S. 42; 84 Fed. 80; 62 Conn. 25.

2. A man can not have a lien on that which he owns. 118 U. S. 663; 93 *Id.* 664; 72 *Id.* 5 Wall. 307; 102 U. S. 235; 48 Ark. 273; 49 *Id.* 63; 55 *Id.* 642; 60 *Id.* 133; 100 *Id.* 403; 97 *Id.* 432. The title to the property remains in the seller, and the transaction is an intrastate one and can not be enforced in this State. 136 Ark. 55.

J. S. Butt, for appellee.

Appellee was not "doing business in" this State. 60 Ark. 120; 115 *Id.* 166; 125 *Id.* 413. The contract was made and the goods delivered in a foreign State. 100 Ark. 403; 108 *Id.* 442; 111 *Id.* 640. See, also, 117 *Id.* 496; 78 *Id.* 529.

Appellee had the right to take the property and hold it subject to the order of court. Kirby's Digest, § 4967.

WOOD, J. This is an action by the appellee against the appellants to recover the sum of $257.65, the purchase price of certain law books which the appellants purchased of the appellee. By consent of the parties the cause was heard before the trial court sitting as a jury. The judgment of the court recites that the cause was heard "on the following evidence: The contract for the purchase of the books in controversy, the affidavit for issuance of attachment to enforce vendor's lien thereon, the writ issued thereunder, the return of the officer on the said writ, and the agreed statement of the facts in the case signed by the attorneys representing the respective sides."

The agreed statement of facts in the transcript is as follows: "It is agreed between J. S. Butt, attorney for plaintiff, and T. W. Rountree, attorney for defendants, that the plaintiff is a foreign corporation.

"It is further agreed that said plaintiff has not complied with the law of the State authorizing foreign corporations to do business in the State.

"It is further agreed that the books upon which the claim sued on is based were contracted for in the State of Arkansas, or rather that the order was taken in the State by a traveling man representing the plaintiff.

"It is agreed that the books were shipped by plain- and the express paid by plaintiff.

"It is further agreed that the contract expressly provided that the title should remain in the plaintiff until they were paid for.

"That said plaintiff has never parted with the title to such books. It is further agreed that all the books

claimed by plaintiff to have been shipped have been except volume 22 of Encyclopedia of Procedure, and defendants offer to return books."

The court found, as recited in the judgment, as follows: "That the debt herein sued on was for the purchase money due on the two sets of books sold defendants by the plaintiff, towit, Encyclopedia of Evidence, and Standard Encyclopedia of Procedure, and that the said books were at the time of the issuance of the writ in the hands of the purchasers thereof, and were levied on by the officer serving said writ and are at this time in the hands of the officer as shown by his return, and that the plaintiff is entitled to a lien thereon for the amount due, and that there is now due the plaintiff the sum of $264.01." The court thereupon entered a judgment in favor of the appellee against the appellants in the sum of $264.01, and ordered the books sold and the proceeds thereof credited on the judgment. From that judgment is this appeal.

There is no bill of exceptions brought into this record setting forth the contract, the agreed statement of facts, the affidavit for the vendor's lien, the writ issued thereunder, and the return of the officer on the same, upon which the cause was heard as recited in the judgment of the court. In the absence of a bill of exceptions setting forth the above facts upon which the cause was heard, every presumption would have to be indulged in favor of the judgment of the trial court, and its judgment would have to be affirmed for that reason if there were no other. But, even if there were a bill of exceptions showing the facts as set forth in the alleged agreed statement, and setting forth the contract, and the proceedings to impound the property, the judgment would still have to be affirmed. The taking of an order from the appellants by the appellee's traveling salesman for certain books which order was transmitted to the appellee and accepted by it and the books shipped to the appellants under a contract by which the title was reserved in the appellee until the purchase money was paid, is not

the doing of business in this State in contemplation of act of May 13, 1907, page 744, Crawford & Moses' Digest, § 1826; see also § 1832.

The contract for the sale of these books was consummated when the order therefor was accepted by the appellee at its home office in a foreign State and the books delivered there to the transportation company for shipment to the appellants. When this was done, the appellee lost all control over the books except the owner's rights and remedies in case the appellants failed to pay for the books and thus to comply with the conditions upon which they were purchased. The case differs in all essential particulars on the facts from the case of *Hogan* v. *Intertype Corp.,* 136 Ark. 58, and cases there cited upon which the appellants on this point rely. Conceding that the facts were as stated in the agreed statement, the sale and purchase in this case was wholly a transaction of interstate commerce, and not in violation of any of our statutes forbidding foreign corporations to do business in this State except in compliance therewith.

Upon the failure of appellants to pay the purchase price and thus to comply with the conditions upon which the sale was made, the appellee either had the right to elect to bring replevin under its reservation of title and recover the books sold by it, or it could waive this right and sue to recover the debt and affirm the sale. *Butler* v. *Dodson,* 78 Ark. 569; *Bowser Furn. Co.* v. *Johnson,* 117 Ark. 496. The appellee has elected in this case to pursue the latter remedy, and, having done so, its choice to pursue this course is not inconsistent with the rights given it as a vendor under chapter 156, Crawford & Moses' Digest, to impound the property while the same is in the possession of the vendee and to hold the same subject to the order of the court. See sections 8729-30, Crawford & Moses' Digest, and cases cited under the latter section.

The judgment is correct, and it is therefore affirmed.

INTERNATIONAL HARVESTER COMPANY OF AMERICA v. LAYTON.

Opinion delivered April 4, 1921.

1. APPEAL AND ERROR—ABSENCE OF MOTION FOR NEW TRIAL.—In an action against two defendants, in which judgment was rendered for plaintiff against one defendant and in favor of the other defendant, where plaintiff appealed from the adverse judgment against him and the losing defendant cross-appealed, the judgment against the latter will be affirmed in the absence of a motion for new trial by the cross-appellant; the errors complained of not appearing of record.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A general finding of the trial court, sitting as a jury, in favor of the defendant, will be sustained if there is any substantial evidence to sustain any of the grounds of defense set up in the answer.
3. PARTNERSHIP — RELEASE OF PARTNER — EVIDENCE.—In an action against partners for a balance alleged to be due on an account, evidence *held* to sustain a finding that plaintiff released one of the partners from liability on dissolution of the partnership.
4. PARTNERSHIP—RELEASE OF PARTNER.—Where a creditor of a partnership, with knowledge that the partnership had been dissolved, made a settlement with one of the partners and accepted his notes in full payment, the other partner was released.
5. APPEAL AND ERROR—CONCLUSIVENESS OF COURT'S FINDING.—Even though a finding of a trial court sitting as a jury is against the decided preponderance of the evidence, it is not the province of the Supreme Court on appeal to determine where the preponderance of the evidence lies, as this court must give the evidence its strongest probative force in favor of the court's finding.

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

J. C. Floyd, for appellant.

1. The court erred in refusing to enter judgment against Ernest Layton or J. B. Melton & Company for the sum claimed. Layton held himself out as a partner to Powell, and is liable as a partner so far as creditors are concerned. 2 Ark. 346; 99 *Id.* 602; 139 S. W. 544; 32 Ark. 733; 87 *Id.* 123; 5 *Id.* 61; 2 *Id.* 34; 93 *Id.* 301; 80 *Id.* 33. This case does not fall within the rule in 29 Ark. 512; 24 *Id.* 12; 23 *Id.* 411. See 20 L. R. A. 595 and note.

2. Partners are liable jointly and severally for the firm debts. 4 Ark. 164; 37 Am. Dec. 777; 21 Ark. 186; 21 *Id.* 411.

Appellees can not avoid the contracts signed by the firm by reason of the alleged misundertsanding as to their character. They were perfectly plain and unambiguous. If not read, they had the right to do so, and should have done so, as they had the opportunity. 6 R. C. L. 624, note 20. If the contracts are void for an alleged mistake, acceptance of the goods and appropriation of them raised an agreement to pay for them. 6 R. C. L. 989, § 357. A retiring partner remains liable for all existing debts of the firm unless the creditors consent to the retirement and agree to look to the other members of the firm for payment. 20 R. C. L. 981, § 215; 30 Cyc. 612; 117 Ala. 611; 92 Ga. 350; 63 Kan. 453. See, also, 9 L. R. A. (N. S.) 77; 114 Ala. 536; 19 Mont. 200; 37 L. R. A. 515; 61 Am. St. Rep. 498; 47 Pac. 995-6; 62 Neb. 478; 84 N. Y. Supt. 934; 47 W. Va. 201; 24 S. E. 991.

Mere knowledge upon part of the creditor of the dissolution of the firm and of the changed relation is not enough. 67 Mo. App. 45; 30 Ohio C. C. 389; 27 Am. Rep. 464; 8 Watts 485; 47 W. Va. 201; 34 S. E. 991.

Mere notice by a retiring partner after dissolution that the continuing one would pay the debts does not release him in the absence of an agreement by the creditor. 9 L. R. A. (N. S.) 79; 73 Ill. App. 266; 29 Mich. 332.

Appellant is not estopped, as no release was given, and there is no evidence to sustain the plea of estoppel. It was error to refuse to enter judgment against Ernest Layton, a member of the firm.

Williams & Seawel, for appellee, Ernest Layton.

The finding in favor of Ernest Layton was general, in a law case, and the finding is as conclusive as the verdict of a jury, as the evidence is legally sufficient to sustain it. 56 Ark. 621; 53 *Id.* 161; 136 *Id.* 3; 132 *Id.* 45. No declarations of law were asked or made and the presumption is that the court correctly applied the law to

the facts. 111 Ark. 190; 55 *Id.* 329; 112 *Id.* 47. Appellant's motion for a new trial presents only the question of the sufficiency of the evidence, and it is sufficient. 101 N. W. 776; 30 Cyc. 472. The findings and judgment are amply supported by the evidence.

Appellant is estopped as against Ernest Layton. 64 Ark. 627; 99 *Id.* 260; 131 *Id.* 77.

J. H. Black, for cross-appellant, J. B. Melton.

There was a settlement between appellant and cross-appellant upon an account stated in which appellant was paid in full. Appellant accepted the benefits of said settlement and is estopped from repudiating it, and the notes given by J. B. Melton are outstanding. Appellant at no time offered to place J. B. Melton *in statu quo.* Appellant could not accept the benefits of the settlement with notice of the facts and afterward not be estopped from repudiating it. 50 Ark. 458; 78 *Id.* 603; 88 *Id.* 363; 10 R. C. L., par. 22; 93 Ark. 252; 98 *Id.* 269. It was error to render judgment against cross-appellant.

WOOD, J. This action was brought by the appellant, International Harvester Company, a corporation of Wisconsin, authorized to do and doing business in this State, against appellees J. B. Melton & Co., a partnership, composed of J. B. Melton and Ernest Layton. The complaint alleged that the appellees entered into certain written contracts with appellant to purchase wagons, trucks and other farm machinery and supplies upon the terms and conditions of the contracts, which were made exhibits to the complaint. Appellant alleged that there was a balance due it on account under these contracts of $1,329.99, for which it asked judgment.

Melton and Layton filed separate answers, in which they set up the same defenses. They admitted that they were partners doing business at Yellville, Arkansas, under the firm name of J. B. Melton & Company. They alleged that the business of the firm was buying and selling dry goods and groceries. They denied that the firm as

such was dealing in farming implements, wagons, and hardware, and alleged that neither member of the firm was authorized to enter into a contract with the appellant for that purpose, and denied that they executed the contracts which form the basis of the account set forth in the complaint. They set up that the contract entered into with appellant was an agency contract, under the terms of which they were to sell wagons, trucks, farming implements and supplies upon a commission basis. They alleged that they were not indebted to appellant in any sum on the account. They further set up that on the 27th day of May, 1916, the partnership was dissolved, Melton taking over and continuing the business with appellant; that the appellant was notified of such dissolution, and it released the appellee Layton from any liability on the contract and turned over all of its property of every character in the hands of the former partnership to Melton, and made arrangements with him to continue the agency business and accepted his notes in settlement of all amounts, then due. Layton alleged that the account sued on was created after the dissolution of the partnership, and after he had been released by the appellant, and that the appellant was estopped by its conduct from asserting any claim against him. Melton alleged that the appellant, after the dissolution of the partnership, accepted the individual notes of J. B. Melton in settlement of the balance of the partnership indebtedness, and that he had since fully liquidated all the indebtedness due by him to the appellant.

The contracts, which were exhibits to the complaint, were identified and introduced in evidence. They are signed J. B. Melton & Co. by J. B. Melton, and by appellant through W. W. Nelson, General Manager. There was testimony on behalf of the appellant tending to prove that the contracts were entered into as alleged in the complaint; that the appellee Layton authorized Melton to enter into the contracts for the firm and that the orders and net sales contracts, out of which the alleged indebtedness evidenced by the account was incurred, were signed

J. B. Melton & Co., by J. B. Melton. There was testimony on behalf of the appellee Layton tending to prove that he did not authorize Melton to enter into the contracts as alleged and to sign the name of the firm to such contracts; that the contract that he authorized Melton to sign was merely a contract by which J. B. Melton & Co. was to sell appellant's wagons, trucks, farming implements and supplies as agents, on a 15 per cent. commission.

By consent of all parties, the cause was submitted to the court sitting as a jury, and the court found that Melton was justly indebted to the appellant in the sum claimed in its complaint, and also found that the appellee Layton was not liable to the appellant in any sum. The court thereupon entered a judgment in favor of the appellant against Melton for the amount claimed and also in favor of the appellee Layton against the appellant for costs. The appellant filed its motion for a new trial against appellee Layton, which was overruled, and appellant duly prosecutes this appeal. The record as abstracted does not show that Melton filed any motion for a new trial in the court below. After the lodging of the transcript Melton took a cross-appeal in this court.

1. The judgment in favor of the appellant against Melton must be affirmed for the reason that it does not appear from this record that he moved for a new trial. The errors of which he here complains should have been called to the attention of the trial court in a motion for a new trial. On an appeal taken in a law case, where the errors complained of do not appear from the record and there is no motion for a new trial, there is nothing before this court for its determination. See *Gardner* v. *Miller,* 21 Ark. 398; *Hamilton* v. *State,* 62 Ark. 543, and other cases cited in 1 Crawford's Digest, Appeal and Error, 179, sec. 116 (D), "Motion For a New Trial."

2. There was a general finding in favor of the appellee Layton. Therefore, if there is any substantial evidence to sustain any of the grounds of defense set up in his answer, the verdict of the trial court sitting as a jury

will be sustained. *Dixon & Co.* v. *Scroggins,* 136 Ark. 33; *Mueller* v. *Coffman,* 132 Ark. 45. One of the defenses of appellee Layton was that, after his partnership with Melton was dissolved, the business of J. B. Melton & Company with the appellant was settled, by mutual consent, and said business was turned over to Melton, and appellee Layton was released by the appellant from all liability to it on account of said business.

Conceding that the undisputed testimony proved that the contracts were entered into by the appellant with Melton and Layton, as partners under the firm name of J. B. Melton & Company, yet it also proves that this partnership was by mutual consent dissolved. J. B. Melton testified concerning the settlement with appellant after the dissolution of the partnership in part as follows: The wagons arrived after appellee Layton had retired from the firm. Shortly thereafter, Harry Hill, who was a traveling salesman for the appellant, was in Yellville, and while the wagons were still at the station witness talked with him about the dissolution of the firm and told him that Layton was out, and that witness was not able to handle the wagons, and that he was going to another town. Hill told witness to pay the wagons out and do the best he could with them. Witness paid the freight and took them out. Hill told witness that they did not want to ship the wagons back. Witness had the conversation with Hill while the firm of J. B. Melton & Co. was taking inventory and selling out to one Mr. Nanny.

Layton testified that Hill, a representative of the appellant, was present while they were taking the inventory and knew that his firm was closing out. Hill asked witness if they were fixing to sell out and witness told him that they were—they were taking an inventory then. Hill said to witness that Melton would continue the line and that he would not consider witness in it in any way whatever—that witness would be out of it; that he would turn the business over to Melton. Witness asked Hill about the commission on some stuff they had sold and about $140 freight, and Hill told witness to settle with Mr.

Melton on that, and it would be satisfactory. Witness replied, "All right," and Hill, without any solicitation, told witness that he could consider himself out. Witness relied on that, and didn't have anything further to do with the company. The firm of J. B. Melton & Co. was dissolved in May, and no demand was made on witness for the debt in controversy until the 28th of the following December.

Nanny testified that he bought out the firm of J. B. Melton & Company, and that while they were taking the inventory Hill tried to get him to form a partnership with Melton for the purpose of handling the business of appellant. Witness talked over the business of appellant with Hill and told him that he didn't want any partner. Hill told witness that Ernest Layton wanted it, but he was not going to let Ernest have it and preferred that witness and Melton have it as partners. Hill told witness that he was going to let Melton have it.

W. B. Crabb, who was in the employ of the appellant as "block-man," was sent to Yellville in the fall for the purpose of making a settlement with J. B. Melton & Co. for the goods that they had purchased of appellant during the year 1916. He testified that the settlement was made with Melton, who informed witness that there had been a dissolution of the firm, and that Layton had no further connection with it. Witness made the settlement as far as he could make it, but told Melton that the company would not accept a settlement from him as final without the signature of the company. The bookkeeper had already made out and delivered to them a stated account. Witness added to it some credits, and all the charges were made out at the office by the bookkeeper from the books of the appellant. The testimony of Crabb further shows that the settlement called for the signing of certain notes; that these notes were signed by Melton. He told Melton that the best he could do would be to effect the settlement and to send it in to the company for its approval; that witness was sure that they would not accept it, as they did not; that witness had no authority

to accept it for the company. Witness took six notes in making the settlement stated. Witness took the notes in payment of the account. Witness was asked if in making the settlement with Melton he was making it with him individually, and answered, "Yes, but he was treating it as the company's business." He knew at the time that Layton and Melton were claiming that the partnership had been dissolved, and that Melton was claiming that the wagons and the agency had been turned over to him individually, and that Layton had nothing further to do with it. There was considerable more testimony of this witness to the same effect, which it is unnecessary to set out in detail.

Melton was recalled and further testified that the account that was rendered to him and which he signed was made out against J. B. Melton; that the characters "& Co." were not on the account stated at the time same was rendered to him. In regard to the statements of Crabb, he testified that he told him that the best he could do would be to give him what money he had and his notes. Crabb replied that was all right. Witness gave him his check for $250 and witness' notes for the balance. Witness denied that Crabb said at the time that the settlement would have to be subject to the approval of the general manager. Witness understood from the fact that Crabb had the account of the company and from his conversation that he had authority to settle the matter. Witness understood when he executed the notes that it was done in settlement of the matter. Crabb did not ask witness to sign the company's name to the settlement.

There was further testimony tending to prove that the appellant cashed the individual check of J. B. Melton and forwarded the notes to its collection department, which in turn sent them to the Bank of Yellville for collection and allowed them to remain there until after one of them was past due without making any demand upon Layton for the payment of these notes.

We have reached the conclusion that the court was warranted in finding from the above testimony that the

appellant had released the appellee Layton from all liability under the contracts made with J. B. Melton & Company. The above testimony was legally sufficient to warrant a finding that the appellant had knowledge of the fact that the partnership between J. B. Melton and Ernest Layton had been dissolved, and that the appellant made a settlement with Melton and accepted his individual notes in payment of the balance due on the contracts between appellant and the firm of J. B. Melton & Co., and thereby released the appellee Layton. Even though such finding of the court were against the decided preponderance of the evidence, it is not our province on appeal to determine where the preponderance lies. Under the often announced rule of this court, we must give the evidence its strongest probative force in favor of the court's finding. *Gossett* v. *Gossett,* 112 Ark. 47.

It follows that the judgment of the court is correct, and it must be affirmed. It is so ordered.

STATE EX REL. ROSENSTEIN v. HOOVER.

Opinion delivered April 4, 1921.

1. PARENT AND CHILD—EFFECT OF SURRENDER OF CUSTODY OF CHILD.—While a parent may surrender the custody of his child to another so as to make the latter's custody legal, yet the gift is not irrevocable, and in all controversies subsequently arising the matter of controlling importance is the interest and welfare of the child.
2. INFANTS—CUSTODY OF CHILD.—In deciding the question of awarding the custody of a child, the court seeks to promote its physical, mental and moral development.
3. INFANTS—CUSTODY OF ORPHAN.—In a proceeding to determine the custody of an orphan girl eleven years old, it appeared that the father had given the custody of the child five years before to appellee, who was not related, but was attached, to the child, and was properly educating and caring for her; that the child was intelligent and capable of judging for herself. *Held* that the child's custody will be left with appellee, rather than with an aunt living in another State, who had never done anything for the child, and had not even written to her.

4. INFANTS—CUSTODY OF ORPHAN CHILD.—In determining the right to the custody of an orphan child, the court will consult the child's inclination if it is of sufficiently mature age to judge for itself; and while the court will not listen to mere whims, it should consider the child's feelings, affections and probable contentment in the future.

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

W. B. Cowan, for appellants.

The custody of the child is controlled by the best interest, present and future well-being, of the little girl. In *habeas corpus* cases the courts are not bound to deliver a child to the claimant or any other person, but will act in their sound discretion as the best interest of the child requires. 78 Ark. 193; 80 *Id.* 461; 89 *Id.* 501; 102 *Id.* 93; 82 *Id.* 461; 4 Hun 582; 16 Pickle 227; 22 *Id.* 549; 50 Miss. 413. In applying the rule, the court will treat the fact that the child wishes to remain where it is only as a circumstance of the case—not controlling. 78 Ark. 193; 50 Miss. 413. Evidence that the father gave the child to respondent is only a circumstance and not binding on any one. 102 Ark. 93; 104 *Id.* 206. The evidence shows that it is best for the well-being of the child that the custody be given to appellants. 97 S. W. 49; 37 Ark. 30. 82 Ark. 461, is peculiarly in point. As to the wishes of the child, see 78 Ark. 193; 50 Miss. 413. The wishes of the child are not controlling, but it is to the best interests of the child that it should be with her aunt and grandmother.

Geo. D. Hester and *E. W. Brockman,* for appellee.

1. The last domicile of the father, deceased, constitutes and remains the domicile of a minor child and can not be changed by the child's acts until it reaches majority. 16 Ark. 377; 72 *Id.* 299; 116 *Id.* 361. These cases are applicable, as Zula May's mother has been dead several years.

2. In *habeas corpus* cases for custody of a child, courts are not bound to deliver the child to any claimant

or other person, but after investigation of all the circumstances act as the welfare of the child requires; if the infant be of sufficient discretion, the court will consult its personal wishes. 50 Ark. 351; 78 *Id.* 193. The evidence shows that from past and present acts and circumstances it is best for the child to remain with appellee, and the finding of the chancellor should be affirmed.

HART, J. This case comes before us on certiorari to review the judgment of the circuit judge of Lincoln County giving to Mrs. Sallie Hoover the custody and control of Zula May Palmertree, a girl eleven years old. The facts are as follows:

Zula May Palmertree was born in September, 1908, and her father, Thomas A. Palmertree, and her mother went to Memphis while she was an infant. The father and mother separated several times and finally the father moved to Arkansas. The mother kept the child until her death, about the 8th day of January, 1915. Soon after that the father had the child sent to him in Lincoln County, Arkansas. The child was then about six years of age. In a short time after the child was brought to Arkansas, the father gave her to a son of Mrs. Sallie Hoover where she remained about one month. The father then thought of placing the child in an orphan's home, but, at the instance of Mrs. Sallie Hoover, he gave the child to her when she was about six years old, and the child remained in her custody until her father's death about five years later.

Mrs. Sallie Hoover was a witness for herself. According to her testimony, the father of Zula May Palmertree gave her the child and told her that she could have the child as long as she lived. Mrs. Hoover is now fifty-nine years of age and resides with two unmarried sons and an unmarried daughter, on a farm. She does not own any land herself, but her two sons each have a farm comprising a hundred acres of good land. They have a good school in the neighborhood from six to nine months

during the year. Zula May has been sent to this school and is now ready for the fifth grade. She has worked in the fields some, but has attended school regularly. Mrs. Hoover has become very much attached to the child and loves her like one of her own children. The relatives of the child have never given her anything since she has been in the custody of Mrs. Hoover. Zula May's father left her an insurance policy of $1,500 and a very small amount of personal property when he died. He resided in Lincoln County near Mrs. Hoover all the time she had possession of Zula May. He drank and gambled some, but was regarded as a kind-hearted man and loved his daughter.

Several witnesses who lived in the neighborhood testified that Mrs. Hoover was an excellent woman and had cared for Zula May as if she was her own child. Two of these witnesses said that the father of Zula May had told them that he intended for Mrs. Hoover to have Zula May and did not intend that she should be raised by his sister in Memphis, who is one of the petitioners for the custody of the child in this case.

Zula May Palmertree was a witness in the case. According to her testimony, she is eleven years old and lives with Mrs. Sallie Hoover in Lincoln County, Arkansas. She has lived with Mrs. Hoover about five years. She thinks a great deal of Mrs. Hoover and is treated well by her. She remembers living with Mrs. Lela P. Rosenstein a little while. She did not live with her father after the death of her mother. Mrs. Hoover's sons treat her as if they were her own brothers, and Mrs. Hoover's daughter treats her like a sister. She would rather live with Mrs. Hoover than to go with Mrs. Rosenstein. Mrs. Hoover has never whipped her and has always treated her well. She attends church and Sunday school, which is about one mile away. Mrs. Hoover goes to Sunday school and is a member of the church. Her sons and daughter go to church.

Mrs. Lela P. Rosenstein was a witness for herself. According to her testimony, her brother, Thomas A.

Palmertree and his wife did not get along well together. They frequently separated, and she kept Zula May during the periods of their separation. After the father left Memphis, the mother continued to reside there and kept Zula May with her. Finally the mother was taken sick, and, realizing that she was about to die, gave Zula May to Mrs. Rosenstein. After Mrs. Palmertree died, the father sent for Zula May and had her brought to Arkansas. This was some five years before he died. Mrs. Rosenstein did not see Zula May any more after she sent her to Arkansas until she filed her petition in the present case after Zula May's father had died.

Mrs. Rosenstein was divorced from her first husband in the fall of 1914, and married her present husband soon thereafter. Her present husband is a merchant and worth about $35,000 and has a good income. He has a good residence and is well able and suited to have the care and custody of Zula May.

Other witnesses testified that Mr. and Mrs. Rosenstein had only one child; that they loved children and were well able to provide for Zula May. Mrs. Rosenstein's mother lived with her, and they both loved Zula May. Mr. Rosenstein promised to bring up Zula May at his own expense and save her insurance money and the accumulated interest for her. In this connection it may be also stated that Mrs. Hoover said that she did not want Zula May's money; that all she wanted was the child.

The authority of a parent over his child has been generally said to arise from the duty he is under to maintain, protect and educate it. Hence the weight of authority, and the adjudicated cases in this State sustain the doctrine that the right of a parent to the custody of a child can not be defeated by a mere parol gift of the child by the parent to another. While a parent can by agreement surrender the custody of the child so as to make the custody of him to whom he surrenders it legal, yet the gift is not irrevocable, and in all controversies subsequently arising the matter of primary and con-

trolling importance is the interest and welfare of the child. *Washaw* v. *Gimble,* 50 Ark. 351; *Coulter* v. *Sypert,* 78 Ark. 193; *Clark* v. *White,* 102 Ark. 93 and cases cited; *Mantooth* v. *Hopkins,* 106 Ark. 197 and case notes to 6 A. & E. Ann. Cas. at p. 939, and Ann. Cas. 1915 B, 1015 at 1019. Hence, in deciding the delicate question of awarding the custody of a child, the court seeks to promote its physical, mental and moral development.

In the instant case both parties have expressed a willingness to rear the child at their own expense and have declared their great love for the child. Mrs. Rosenstein is an aunt of the child and her husband is a well-to-do business man in the city of Memphis, Tennessee. They have only one child, and they expressed themselves as willing to rear Zula May at their own expense and to give her the amount of insurance left her by her father with the accumulated interest when she reaches full age. They have the reputation of being kind-hearted people and are well respected by their friends and acquaintances. They had not seen the child for five years before filing the petition for her custody in this case.

On the other hand, Mrs. Hoover, while poorer in this world's goods, lives with two unmarried sons, who have good farms and are taking care of her. It has been urged that they might marry and leave Mrs. Hoover to shift for herself. The family is shown, by the record, to be a very affectionate one, and there is nothing to indicate any separation of them. Zula May testified that Mrs. Hoover's children appear to love her as if she was their own sister. It might with equal propriety be said that the Rosensteins might grow tired of her and place her in an orphanage or other institution. They live beyond the jurisdiction of the court, and it would have no way of compelling them to care for her.

Another thing to be considered is that ties of affection have grown up between Mrs. Hoover and the child. The father saw fit to place her in the custody of Mrs. Hoover. While he was addicted to drink, the evidence shows that he was a kind-hearted man and loved his

daughter. He evidently thought that he was acting for her best interest in giving her to Mrs. Hoover. So far as the record discloses, Mrs. Rosenstein did not write to Zula May after she came to Arkansas or make any effort to induce the father to return the child to her, although, if she had made any inquiry, she could have ascertained that the father had given the child to Mrs. Hoover. The child testified that she wished to continue to live with Mrs. Hoover. She has been sent regularly to school and to church. Her testimony shows that she is intelligent and is capable of judging to some extent for herself. Courts will consult the inclination of an infant if it be of a sufficiently mature age to judge for itself. 2 Kent's Com. (14 ed.), p. 194. Of course the court should not listen to the mere whim of the child, but it should consider the child's feelings, its affections, and its probable contentment in the future. The record discloses that both parties love Zula May and would try to make her happy; and are capable of taking care of her.

When we consider, however, that her father was a resident of this State and chose to give her to Mrs. Hoover, coupled with the fact that Zula May has lived with Mrs. Hoover for five years, and that the warmest feelings of affection have sprung up between them and now exist, the court is of the opinion that the circuit judge did not err in awarding the custody of Zula May to Mrs. Hoover.

The judgment will therefore be affirmed.

WALKER v. WALKER.

Opinion delivered April 4, 1921.

1. EXEMPTIONS—HUSBAND'S LIABILITY FOR WIFE'S ATTORNEY'S FEE.—A husband's liability for attorney's fee of his wife in a divorce suit is statutory (Crawford & Moses' Dig., § 3506), and not a "debt by contract," within Const., art. 9, § 1, exempting personalty of an unmarried person, as against "debts by contract."

2. EXEMPTIONS—WAGES OF LABORERS.—Crawford & Moses' Digest, § 3506, exempting the wages of laborers and mechanics for sixty

days from seizure by garnishment or other legal process, was intended to limit the right of exemption to debts by contract, as provided by Const., art. 9, § 1.

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

STATEMENT OF FACTS.

On the 4th day of May, 1920, Laura Walker obtained a decree of divorce and a judgment for the sum of $25 for attorney's fee, and $6.75 costs of suit against Rube Walker. Subsequently in the same chancery court she caused a writ of garnishment to be issued against the Missouri Pacific Railroad Company, to collect said sums.

Rube Walker filed a schedule, claiming the amount owed him by the Missouri Pacific Railroad Co., together with all the other property owned by him did not exceed $200. He further stated that he was an unmarried man, a resident of Arkansas, and that the amount owed him by said railroad company was the wages due him by said company for the preceding sixty days. He claimed that the railroad company owed him the sum of $44.50.

The court disallowed his claim of exemptions and quashed the writ of supersedeas which had been issued by the clerk. To reverse that decree, Rube Walker has prosecuted this appeal.

D. B. Sain, for appellant.

The court erred in disallowing the claim of exemption. The time wages of appellant, a laborer, are exempt from seizure by garnishment or other legal process. Act November 27, 1875; 52 Ark. 91. The statute is remedial and should be liberally construed in favor of the debtor. 38 Ark. 112. There is no authority by statute or common law authorizing a garnishment based on a decree of the chancery court.

A. F. Auer, for appellee.

The Constitution only allows the right of exemption to debts by contract, and the allowance of attroney's fees to a wife in a divorce case is purely statutory and

not founded on contract. 84 Ark. 187; 122 *Id.* 579; 33 *Id.* 688; 184 S. W. 64. There is no merit in the appeal.

HART, J. (after stating the facts). Section 3506 of Crawford & Moses' Digest provides that during the pendency of an action for divorce or alimony, the court may allow the wife maintenance and a reasonable fee for her attorneys, and enforce the payment of the same by orders and executions and proceedings as in cases of contempt.

In *Kincheloe* v. *Merriman,* 54 Ark. 557, the court, in referring to this statute, said that an allowance under it was in the sound discretion of the court, and, before the court would make the allowance, the wife must show merit.

The court further held that in this State an attorney can not recover against the husband in an action at law for services rendered the wife in a suit for divorce. The reason given was that prosecuting or defending a suit for divorce has no relation to her protection as a wife. The liability is therefore purely statutory, and is not a debt by contract within the meaning of article 9, section 1 of the Constitution of 1874, which provides, in effect, that the personal property of any resident of this State, who is not married, in specific articles to be selected by such resident, not exceeding in value the sum of $200, in addition to his wearing apparel, shall be exempt from seizure on attachment or sale on execution or other process from any court, issued for the collection of any debt by contract.

It will be noticed that, although marriage is a civil contract, yet the allowance in favor of the wife for attorney's fee against her husband is, under the authority cited above, statutory and is not founded upon a contract, express or implied, within the meaning of the Constitution.

But counsel for appellant claims that the exemption should have been allowed under section 5546 of Crawford & Moses' Digest relating to the exemption of time wages of laborers. The section, in substance, prescribes

that the wages of all laborers and mechanics, not exceeding their wages for sixty days, shall hereafter be exempt from seizure by garnishment, or other legal process, provided that the defendant in any case shall file with the court from which such process shall be issued, a sworn statement that the sixty days' wages claimed to be exempt, is less than the amount exempt to him under the Constitution of the State, and that he does not own sufficient other personal property, which, together with the said sixty days' wages, would exceed in amount the limits of said constitutional exemption.

In *Porter* v. *Navin,* 52 Ark. 352, in construing this section, the court held that the right to claim the exemption is limited to persons entitled to the exemption under the Constitution, and does not extend to nonresidents. The court said that the statute only gave the laborer the right to claim as exempt wages which are less than the value of the personal property exempt to him under the Constitution, and thus manifests the intent to limit the right of exemption to those entitled to exemption under the Constitution.

As we have already seen, the Constitution only gives the right of exemption to debts by contract, and the allowance for attorney's fees to the wife in a divorce proceeding is purely statutory and not founded on contract.

Therefore, the court properly disallowed the claim of Rube Walker for exemption, and the decree will be affirmed.

ROBBINS v. FULLER.

Opinion delivered April 4, 1921.

1. FRAUDULENT CONVEYANCES—BULK SALES LAW—STORE NOT A "FIXTURE."—Under the Bulk Sales Law (Crawford & Moses' Dig., § 4870), rendering void the sale in bulk of any part, or of the whole stock, of merchandise and the fixtures pertaining to the conduct of a mercantile business otherwise than in the ordinary course of trade, unless the provisions of that act are complied with, *held* that a store building in which a mercantile business is conducted is not a "fixture" within the statute.

2. FRAUDULENT CONVEYANCES—KNOWLEDGE OF INSOLVENT'S CONDITION.—A finding that certain conveyances from an insolvent son to his father of land for inadequate consideration were fraudulent will be sustained where the circumstances warranted the inference that the father at the time of the purchase knew of his son's insolvent condition.

3. VENDOR AND PURCHASER—TITLE BOND—EFFECT.—The effect of an agreement to sell land and the execution to the purchaser of a bond for title is to create a mortgage on the land in favor of the vendor to secure the balance of the purchase price; the purchaser becoming the equitable owner.

4. VENDOR AND PURCHASER—ASSIGNMENT OF CONTRACT.—Where a purchaser of land under an executory contract directed the vendor to execute deed to his father, the effect of the transaction was an assignment of the purchaser's equitable interest to his father.

5. FRAUDULENT CONVEYANCES—EFFECT OF CONVEYANCE VOLUNTARY IN PART.—Where a conveyance is only constructively fraudulent, as where it is in part voluntary, it will be allowed to stand as security for the money advanced by the grantee to pay off incumbrances.

6. FRAUDULENT CONVEYANCES—CONVEYANCE IN PART VOLUNTARY.—While a deed to a father of his insolvent son's land for an inadequate consideration is fraudulent as to the son's creditors, it will be allowed to stand as security for the amount paid by the father on the purchase price of the land; but, on the son's creditors reimbursing the father for the amount so paid, the land will be sold for the benefit of the creditors.

Appeal from Montgomery Chancery Court; *J. P. Henderson,* Chancellor; affirmed.

STATEMENT OF FACTS.

C. M. Fuller and others brought this suit in equity against W. O. Robbins and B. Robbins to set aside the sale by W. O. Robbins to B. Robbins, of lots 2 and 3, in block 22, in the town of Womble, as in violation of the bulk sales law. Subsequently the complaint was amended so as to allege that the sale of said lots was made with the intent to hinder and defraud the creditors of W. O. Robbins in the collection of their debts against him.

The defendants denied the material allegations of the complaint.

According to the testimony of W. E. Womble, W. O. Robbins made a contract with him to purchase lot number 2, in block 22, in the town of Womble, and Womble executed to Robbins a bond for title. A storehouse was situated on the lot, and Robbins carried on a mercantile business in it. Subsequently Robbins borrowed some money from Womble and gave him a mortgage on the building that was on the lot, and, in order to make him more secure, surrendered to him the bond for title. Womble, however, felt that he was under obligations to make a deed to W. O. Robbins upon the payment of the purchase price and the mortgage indebtedness. In January, 1919, B. Robbins, the father of W. O. Robbins, proposed to Womble that he would pay off his son's debt if Womble would make a deed to the lot to him. Womble agreed to do this if it was all right with W. O. Robbins. W. O. Robbins also agreed to it, and then Womble executed a warranty deed to the lot to B. Robbins. B. Robbins paid to Womble $425, which was the balance due Womble by W. O. Robbins. The lot and building was worth about $800 at the time Womble executed the deed to B. Robbins. Womble was threatening to foreclose his lien on the building and lot at the time B. Robbins procured him to make the deed to the lot to him. In January, 1920, the property was worth $1,000. Lot 3, in block 22, in the town of Womble was worth $150 or $200, in January, 1919.

Another witness testified that W. O. Robbins borrowed $410 from him in the fall of 1918, and told him that he would be closed up if he could not borrow some money.

A witness stated that W. O. Robbins' store was close to his store, and that B. Robbins was at the store of W. O. Robbins almost daily, and that he frequently saw father and son in close and apparently earnest conversation.

Other evidence showed that Robbins was insolvent all during the month of January, 1919, and that he closed

his business on account of insolvency on about the first of February, 1919.

According to the testimony of B. Robbins, in addition to the sum of $425, which he paid Womble when he bought said lot 2 on which was situated the storehouse in which his son carried on his business, he also paid his son an additional consideration of $85. He had, also, gone on the note of his son at the bank for $500 and later had to pay off this note. His son was indebted to him at the time he purchased said lot 2, on the 5th day of January, 1919. On the same day he bought the adjacent lot, which is number 3, and which is vacant. He bought lot 3 from W. O. Robbins and agreed to allow him $50 on his indebtedness as the purchase price.

The chancellor found that W. O. Robbins was still the equitable owner of said lots numbers 2 and 3, in block 22, in the town of Womble, Arkansas, and that B. Robbins, having paid to W. E. Womble the balance of the purchase price for lot number 2, stood in the position of an equitable assignee to the extent of $425, the amount paid to W. E. Womble.

The court further found that the creditors of W. O. Robbins might subject said property to the payment of their debts, and that the deed from W. O. Robbins to B. Robbins to said lot 3 should be canceled.

It was therefore decreed that B. Robbins should have a lien on lot 2 for $425, and that, upon payment of said amount by the creditors, lots 2 and 3 should be sold for the payment of their debts.

The creditors, who are the plaintiffs in this action, tendered B. Robbins in open court the sum of $425 which B. Robbins refused. The plaintiffs kept the tender good by paying that amount in United States currency into the registry of the court.

The case is here on appeal.

Gibson Witt, for appellants.

When all the facts and circumstances in this case are considered, it is clear that B. Robbins had a clear,

legal right to purchase both lots, and that he paid full value for them.

Inadequacy of price alone is not sufficient to establish fraud. 118 Ark. 229. It is the intent that makes the conveyance fraudulent, and the fraudulent intent must be participated in by both parties. 31 Ark. 554; 41 *Id.* 316; 63 *Id.* 232.

A creditor may purchase of an insolvent debtor in satisfaction of his debt. 60 Ark. 425; *Ib.* 63, 412. At the time B. Robbins purchased lots 2 and 3, no one thought W. O. Robbins was financially embarrassed, so far as the evidence discloses. The decided weight of the testimony shows that B. Robbins was by far the largest creditor of W. O. Robbins, and that B. Robbins did nothing to hide or conceal his transactions, and that he had a moral and legal right to purchase lot 3 on his own account.

Isaac L. Autrey, for appellees.

1. No sufficient abstract was filed by appellant.

2. The sale of lots was void, under act 88, Acts 1913.

3. Under the amendment to the complaint the sale of the lots should be canceled as in fraud of creditors. 73 Ark. 174; 71 *Id.* 161; 86 *Id.* 225; 56 *Id.* 73.

Every voluntary conveyance of property by an embarrassed debtor is fraudulent as to existing creditors. 50 Ark. 46. If he is insolvent, the persumption of fraud is conclusive. 52 Ark. 493; 55 *Id.* 116; 59 *Id.* 614; 69 *Id.* 224; 76 *Id.* 509.

Where the title to land passes by delivery and acceptance of a deed of conveyance, the same can not be revested in the grantor by surrender or cancellation of the deed. 80 Ark. 11; 21 *Id.* 80; 42 *Id.* 170; 43 *Id.* 203; 52 *Id.* 493; 53 *Id.* 509.

When the owner sells land, takes the notes of the vendee for the purchase money and executes a bond for title to the vendee, the effect is to create a mortgage on the land to secure the purchase money. 13 Ark. 533; 27 *Id.* 61; 29 *Id.* 357; 34 *Id.* 126; 14 *Id.* 633. See, also, 15

Id. 188; 91 *Id.* 33; Browne on Statute of Frauds, § 229; 7 Cranch. 176.

HART, J. (after stating the facts). It is first insisted that the conveyance of lot 2 on which the store building was situated was void because it was in violation of our bulk sales law. Under it the sale in bulk of any part of, or the whole stock of merchandise and the fixtures pertaining to the conduct of any such business otherwise than in the ordinary course of trade is void against the creditors of the seller, unless the provisions of the act in regard to such sale are complied with. Crawford & Moses' Digest, section 4870.

It is contended that the storehouse is a fixture under the statute. The statement of the proposition negatives its soundness, and we need only say that the statute refers to the trade fixtures connected with the business and not to the building in which the business is carried on. The building itself is a part of the ground on which it is situated.

It is also sought to set aside the conveyance of lots 2 and 3 in block 22 in the town of Womble, on the ground that they were made in fraud of creditors, and in this contention we think counsel is correct.

In regard to lot 3, but little need be said. W. O. Robbins made a deed to it to his father, B. Robbins, on the 5th day of January, 1919, and closed his store on account of insolvency on the first of February of the same year. His father allowed him $50 for the lot to be applied on the indebtedness which the son owed the father. The evidence showed the lot was worth from $150 to $200. The father visited the store of his son almost daily, and father and son were seen in frequent and apparently earnest conversations.

It is fairly inferable, under the circumstances, that the insolvent condition of the son must have been known to the father at the time he made the purchase, although the father denies this to be the fact. Therefore, the court was correct in holding the conveyance fraudulent. *Den-*

nis v. *Ball-Warren Commission Company,* 72 Ark. 58, and *Godfrey* v. *Herring,* 74 Ark. 186.

The chancellor was also correct as to his finding with regard to lot 2. This was the lot upon which the storehouse in which W. O. Robbins carried on his business was situated.

W. E. Womble, who sold the property to W. O. Robbins, testified that it was worth $800. For the reasons above given, B. Robbins must have known that his son was insolvent at the time that it was agreed that the deed to said lots should be made to him upon the payment to Womble of the balance of the purchase money. The transaction was had at a time when Womble was threatening to foreclose his lien and when the undisputed proof shows that W. O. Robbins was insolvent. The only other consideration paid was the sum of $85 which B. Robbins said that he allowed to his son for Womble on the son's indebtedness to him.

W. O. Robbins owed Womble $425 as balance of the purchase money. When Womble agreed with W. O. Robbins to sell him lot 2 and executed to him a bond for title, the effect of the contract was to create a mortgage upon the lot in favor of Womble to secure the balance of the purchase money. *Manwaring* v. *Farmers' Bank of Commerce,* 139 Ark. 218. When W. O. Robbins purchased lot 2 and received a bond for title from Womble, he became the equitable owner of the lot, and his executory contract was assignable in equity. *Corcorren* v. *Sharum,* 141 Ark. 572.

Therefore when he agreed that Womble should make the deed to his father upon the payment by the latter to Womble of the balance of the purchase price, the effect of the transaction was the assignment by W. O. Robbins of his equitable interest in the lot to his father. The lot was worth substantially more than the balance of the purchase price due upon it, and the sale under the circumstances detailed above was in fraud of the creditors of W. O. Robbins. See, in addition to the authorities above cited, *Wilks* v. *Vaughan,* 73 Ark. 174.

B. Robbins paid the balance of the purchase price at the time the conveyance was executed to him. The payment was made with money of his own, and he had an equity to be substituted to the rights of Womble to that extent.

It is well settled that when a conveyance is only constructively fraudulent as, for instance, where it is in part voluntary—it will be allowed to stand as security for the money advanced by the grantor to pay off incumbrances.

In *Boyd* v. *Dunlap,* 1 Johns. Ch. 478, Chancellor Kent states the law on this question as follows: "A court of law can hold no middle course. The entire claim of each party must rest and be determined, at law, on the single point of the validity of the deed; but it is an ordinary case, in this court, that a deed, though not absolutely void, yet, if obtained under inequitable circumstances, should stand only as a security for the sum actually due. * * * A deed, fraudulent in fact, is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent."

In *Clements* v. *Moore,* 6 Wall. U. S. 299, Justice Swayne states the law as follows: "When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to, while it scans the transaction with the severest scrutiny, looks at the facts, and, giving to each its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others it allows a security to stand for the amount advanced upon it. In others it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid full value, and the property may have passed beyond the reach of the court, it regards him as trustee, and charges him accordingly.

When he has honestly applied the property to the liabilities of the seller, it may hold him excused from further liability. The cardinal principle in all such cases is that the property of the debtor shall not be diverted from the payment of his debts, to the injury of the creditors, by means of the fraud."

Many other cases of proving the rule are cited in a case note to 8 A. L. R. at pp. 535-536.

As we have already seen, lot 2 was worth at least $800, and the father only agreed to pay the balance of the purchase price, which was $425, and the sum of $85 to his son. Under the circumstances there was a considerable inadequacy of price, and the court correctly allowed the deed to stand as security only for the $425 and ordered the lot sold in payment of the creditors of W. O. Robbins upon their reimbursing B. Robbins for the amount advanced by him.

The plaintiffs, who are the creditors of W. O. Robbins, deposited $425 in the registry of the court upon the refusal of B. Robbins to accept that amount when it was tendered to him.

It follows that the decree must be affirmed.

HENSLEE v. MOBLEY.

Opinion delivered April 11, 1921.

1. CONTRACTS—DEFECTIVE HIGHWAY WORK—EVIDENCE.—In a suit by a subcontractor for the amount due him from the original contractor for highway improvement work, evidence *held* not to sustain the chancellor's finding that the subcontractor's work did not substantially comply with the contract.
2. CONTRACTS—FORFEITURE OF SUBCONTRACT.—A contractor for improvement of a highway can not forfeit a subcontractor's contract if his work substantially conforms to the contract, though minor defects had to be corrected.
3. CONTRACTS—RECOVERY OF EXTRA COSTS FROM SUBCONTRACTOR.—Where a contractor committed the first breach of the contract with his subcontractor by wrongfully withholding payments due on account of the subcontractor's refusal to correct defects in the work for which the subcontractor was not responsible, he

can not recover from the subcontractor, after the latter's refusal to continue the work, the cost of completing it in excess of the contract price.

4. CONTRACTS—DEDUCTION OF EXPENSE OF COMPLETING WORK.—Where a subcontractor was bound to correct certain minor defects in his work, he was chargeable with the actual cost of making such repairs, but it was error to allow an amount therefor largely in excess of the cost thereof.

5. APPEAL AND ERROR—REFUSAL TO SUSTAIN GARNISHMENT PREJUDICIAL.—The erroneous refusal of the court to sustain plaintiff's garnishment of funds due to defendant contractor from a highway improvement district was prejudicial where it did not appear from the record whether the amount so paid into court was sufficient to pay all the claims, since, unless the plaintiff obtained priority in that manner, he might not recover the full amount of his debt.

6. HIGHWAYS—GARNISHMENT OF FUNDS OF DISTRICT.—A subcontractor is entitled to garnish the funds due the principal contractor from a highway improvement district where it appears that the work has been completed and that the district has no claim against the contractor.

7. COSTS—RIGHT TO RECOVER.—A subcontractor who recovered from the principal contractor a substantial part of the amount claimed to be due should not be required to pay the costs of the suit, though the contractor was allowed deductions for correcting certain minor defects in the subcontractor's work.

8. CONTRACTS—BURDEN OF PROVING ADDITIONAL EXPENSE.—In an action by a subcontractor for the amount due under his contract, the burden is on the principal contractor to establish his right to deduct the extra cost of completing the work to conform to the contract, and he can not recover an additional amount as increased expense of furnishing rock to complete the work where the record fails to show the amount thereof.

9. GARNISHMENT — WHEN EQUITABLE GARNISHMENT SUSTAINED.—A stipulation that a certain highway contractor had not sufficient funds or property with which to discharge his indebtedness to another creditor established his insolvency, essential to sustain an equitable garnishment of funds due the contractor from the district.

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

Caldwell & Triplett, for appellant.

1. The court erred in holding (1) that retained percentages of a contractor in the hands of a road district

are subject to garnishment. Road districts are not subject to garnishment. 90 Ark. 236; 31 *Id.* 387; 56 *Id.* 451.

2. Appellant should have had priority in the funds of the district for the reason that the facts in this case are the facts in the Plummer case. 90 Ark. 236.

3. Appellant did not breach the contract. Mobley had no right to refuse to pay Henslee's estimates. 152 Ill. 59; 30 L. R. A. and note; 88 Ark. 422, 491; 38 *Id.* 174; 78 *Id.* 336, 341; 64 *Id.* 228.

A few defects in the work did not justify the withholding of payments, where there is a percentage retained until final completion of the work. The contractor, notwithstanding such defects, recovers the contract price, less the cost of correcting the defects. 105 Ark. 356.

4. The evidence shows a substantial compliance with the contract and performance by appellant, and Mobley's demands were unwarranted.

5. The costs should not have been adjudged against appellant, and it was error to do so, as this suit was thrust upon him in spite of his willingness at all times to comply with his contract, as shown by the engineers and by his continuing at work after Mobley's breach, until forced off the work. Appellant is entitled to payment for $7,663.36 and interest and his costs.

Carmichael & Brooks, for appellee.

McCULLOCH, C. J. Cotton Plant Road Improvement District No. 1 of Woodruff County was organized for the purpose of improving a public road running west from the corporate limits of the town of Cotton Plant to the Prairie County line. The road was to be drained and graded and covered with a crushed rock base and then topped or surfaced with asphaltum in accordance with the plans and specifications prepared by the engineer of the district and approved by the State Highway Commission.

Appellee, R. Mobley, entered into a contract with the improvement district in August, 1917, to construct the improvement on stipulated terms and prices, and in September, 1917, appellee entered into a subcontract with appellant for the latter to do the work of clearing and grubbing preparatory to the construction of the road, the removal of fences and other obstructions, the grading of the roadbed and hauling, spreading, filling and rolling of the crushed rock used as a base, thus preparing the road for the asphalt top. Appellant was also to haul and place the material for culverts. In other words, appellant contracted to do all the work of constructing the improvement in accordance with the plans and specifications except the work of laying the asphaltum top, which was to be done by appellee himself. The contract between appellant and appellee specified the terms and prices, and that it was to be done in accordance with the contract of appellee with the improvement district and under the directions and supervision of the engineer. The contract provided for monthly estimates of the work to be made by the supervising engineer, and payments to be made thereon, retaining fifteen per centum until the completion of the contract, in accordance with a similar provision in appellee's contract with the improvement district. Appellant proceeded with the work shortly after the execution of the contract and pursued it until the following August when a controversy arose between the parties as to alleged defects in the work done by appellant. The work began at the corporate line of the town of Cotton Plant and proceeded westward by stations numbered from zero upward. At the time appellant quit work he had completed his work on the road up to and including station 433 and the asphalt had been placed on the road up to and including station 111. The remainder of the work was thereafter completed by appellee. Payments were made to appellant on the estimates, exclusive of the retained percentage, up to the estimate made on August 6, 1918, for the July work which appellee refused to pay to appellant on the ground

that his work was defective and not up to the standard specified in the contract. Appellee refused to pay the amount called for in this estimate unless appellant would go back over the work and remedy the alleged defects. Appellant contended that he had done the work in accordance with the specifications, with the exception of certain minor matters which will be referred to later, and he refused to go back over the work for the purpose of bringing it up to the standard of the contract. His contention was then and is now that the defects in the roadbed were caused by delay of appellee himself in failing to follow up the work and put on the asphalt before the roadbed was worn away by traffic and bad weather. At this point of the controversy appellant did not quit work, but instituted the present action in the circuit court of Woodruff County against appellee to recover the amount due on the estimate for the July work and also for the retained percentage on the work for the months prior thereto. Appellant continued to work until some time in November, 1918, when, on account of lack of funds and the continued refusal of appellee to make payments until appellant should, pursuant to demand, go back over the work and remedy the alleged defects, he quit the job altogether, and the suit also embraced the claim of appellant for work done under the contract subsequent to July, 1918, as well as the amount alleged to be due prior to that time.

It was alleged in the complaint that appellee broke the contract by refusing, without justification, to make payments in accordance with the terms thereof. Appellee answered, denying that he had broken the contract, but alleged, on the contrary, that appellant committed the first breach by failing to do his work in accordance with the terms of the contract and in refusing on demand to go back over the work and remedy the defects. Appellee alleged that the defects were caused by the failure on the part of appellant to grade the road up to the height specified in the plans and by failing to lay sufficient rock for the base and to properly roll the same and by fail-

ure to cut the ditches as specified. He also alleged that it was the duty of appellant, under the contract, to go back over the work and grade up to the shoulders of the embankment. Appellee presented a counterclaim against appellant for the cost of curing the defects and also for the extra cost of completing the road after appellant quit work. Appellant alleged in his complaint that appellee was insolvent, and at the commencement of the action sued out a writ of garnishment and caused the same to be served on the improvement district.

James & Echols, a firm of merchants at Cotton Plant, filed an intervention in the cause against appellant asking for judgment against the latter in the sum of $1,175.90 with interest, and interventions were also filed by the Standard Oil Company of Louisiana and the Southern Trust Company of Little Rock, asserting claims against appellee Mobley, and the last-named intervener set forth an assignment to it by appellee of the funds due by the improvement district.

The cause was transferred to the chancery court on motion of appellee, and without objection from any of the other parties. The cause proceeded to final decree in which the claim of appellant against appellee was adjudged in the sum of $7,983.92, but the court found that appellant had broken the contract, and that appellee was entitled to a set-off against said amount in the sum of $4,931.62, leaving a balance due by appellee to appellant of the sum of $3,052.30, for which a personal decree was rendered in favor of appellant against appellee. The court also decreed in favor of James & Echols against appellant for the recovery of its account of $1,175.90, and also rendered decrees in favor of the other interveners against appellee. The court also directed the improvement district, as garnishee, to pay into court the sum due by the district to appellee under the contract, and decreed that appellant and said interveners share *pro rata* in accordance with the amount of their respective claims, in the distribution of said funds.

The court in its recital of the findings in the face of the decree listed the following items as constituting the credits to which appellee was entitled as a counterclaim against appellant's debt, as follows:

For additional stone to bring up base up to even grade	$1,042.92
For completing grading and open ditches	3,242.90
For excavation (John Rollers)	407.92
For clearing and grubbing	137.14
For fence moving	89.94
For culverts	10.80

Appellant Henslee is the only party who is prosecuting an appeal, and the correctness of the court's finding as to the amount of his claim against appellee is not questioned. The only controversy here with respect to the status of the account between the parties arises upon the counterclaim of appellee, and this involves primarily a determination as to which of the parties committed the first breach of the contract. Appellant quit work before completing the road in accordance with the terms of his contract, and he seeks to justify himself in this action by showing that appellee broke the contract by refusing to make payments in accordance with the terms thereof. On the other hand, appellee contends that appellant broke the contract by refusing without just cause to comply with its terms. After careful consideration of the testimony in the voluminous record before us, we have reached the conclusion that the chancellor erred in his finding that appellant committed the first breach of the contract.

There is a conflict in the testimony as to whether at the time appellee refused to pay appellant for the July estimate the work had been imperfectly done by appellant, or, in other words, that he had not performed the work in accordance with the contract up to that time. Appellant conceded at the time the controversy arose and concedes now that there were minor defects in his work which he was willing to rectify so as to bring the work up to the standard of perfection specified in the contract, but he was unwilling to accede to the unwar-

ranted demands of appellee that he go back over the work and repair damage to the roadbed which had resulted from the wear of traffic and weather during the period of delay caused by appellee himself in the failure to promptly put on the asphalt top.

The principal point in the controversy between the parties at that time was as to who should dress the shoulders of the roadbed on that part of the work which appellant had already done and for which estimates had been made. The contention of appellant was that he had graded the road up to the proper standard, and that it had worn down by traffic and weather, and that under the contract he was not compelled to repair that damage. The testimony tends to show that most of the damage to the roadbed was done by the exposure of the roadbed to traffic and to bad weather without the asphalt top being on it. According to the preponderance of the testimony, the work done by appellant under the supervision of the engineer was substantially in compliance with the terms of the contract. The testimony of the engineers who inspected the work shows that and they only claimed that there were minor defects in the work—that it was done substantially in accordance with the contract. The testimony also shows that the work was passed by the engineers and estimates handed in for the purpose of paying the subcontractor, without any objection made to the work. This does not mean that the work was, so far as concerns the rights of the improvement district, finally accepted so as to preclude the district from raising the question of the sufficiency of the work, but it was a strong circumstance to show in this controversy that appellant had substantially performed the work, otherwise he would not have been entitled to a preliminary estimate for the purpose of collecting for the work he had done. The testimony shows that it was not customary for the engineers to estimate the work unless it was done in substantial compliance with the terms of the contract. There is testimony also by disinterested engineers and contractors, who have had considerable ex-

perience in work of this sort, that it was not customary, in the absence of a specific contract on the subject, to require a subcontractor to go back over his work, which had been estimated and received, for the purpose of dressing up the shoulders of the graded road. The testimony shows that the repairing of such defects falls on the principal contractor for the reason that the subcontractor, when he completes his part of the work in accordance with the contract, is entitled to compensation at the contract price. If damage to the work occurs from any source before the work is finally accepted by the owner, the loss falls on the principal contractor. It is not claimed that there is any clause in the contract between appellant and appellee which specifically required him to go back over the work for the purpose of repairing damage done after he had completed his work. There was also a controversy about the ditching, and appellant concedes that he had not completed the ditching, but claims that part of it was incomplete because of the fact that appellee had left rock along the space where the ditches were to be dug.

Appellee had the right to insist on appellant correcting the defects in his work, but, inasmuch as the work was substantially done in accordance with the contract, he could not rightfully demand anything more, and, since his demands upon appellant were unwarranted, he can not claim a forfeiture by reason of appellant's failure to correct the minor defects which appear to have existed in the work. Appellee is, of course, entitled to credit for the cost of correcting the defects in appellant's work, and since appellee was entitled to have the work done at the prices specified in his contract with appellant, he is now entitled to credit for the advance costs which he was required to pay over and above the contract price.

The items in appellee's counterclaim must be divided into two classes, one for the cost of performing additional work left undone by appellant prior to the time he quit, and the other for the costs of the completion

of the road in accordance with appellant's contract. The latter class of items must be excluded, for, since we have reached the conclusion that appellant did not commit the first breach of the contract, he is not liable for the additional cost of completing the road. The items of cost for the completion of appellant's work on that part of the road on which appellee put on the asphalt top—*i. e.*, the stations from 0 to 111, inclusive—were deducted from appellant's prior estimates and must therefore be excluded from the present consideration. The first item in the list allowed by the court is the sum of $1,042.92 for additional stone used in bringing up the base of the road to the standard of the contract. We are of the opinion that the testimony is sufficient to show that this was necessary in order to complete the rock base, but the court allowed an excessive amount. The price of the work was fixed according to the quantity of rock used and the distance it had to be hauled. There had been a decided advance in the cost of this kind of work between the date of appellant's contract and the date this work was done by appellee in order to remedy the defects. But the advance was not, according to the testimony of disinterested witnesses, sufficient to justify the prices which appellee charged and which the court allowed. For instance, under appellant's contract he was allowed $1.40 per cubic yard on a haul of from two to three miles, whereas appellee charged $3.60 per cubic yeard. The testimony of disinterested witnesses shows that at that time $1.85 was a fair price for that work. The same proportion exists throughout the whole of appellee's account for the cost of doing the additional work. Computing this work according to the prices fixed in the testimony of disinterested witnesses, the amount which appellee should be allowed is $201.80, and the allowance will be reduced to that amount.

The next item allowed by the chancellor is the sum of $3,242.90 for "completing grading and opening ditches." The court must have included in this item the additional work of completing the road after appellant

quit, for there is no testimony to justify the conclusion that anything like that amount of work was done on that part of the road which appellant had passed as complete. All of this work was done on a yardage basis, and, of course, appellee was entitled to credit for all the additional work of completing that part of the road which appellant had passed at the difference between what appellant's contract price was and the advance cost of doing it at that time. A statement of the account made by Mr. Mashburn, the engineer of the road district, shows that there were 41,336 cubic yards of earth up to and including section 433, and that appellant had handled 39,397 cubic yards before he quit. Appellee could only have handled the difference between these two amounts, which would be 1,936 cubic yards. Appellant was to be paid, under the contract, twenty-four cents per cubic yard and it cost appellee, according to the testimony, forty cents per cubic ward to have the work done, a difference of sixteen cents per cubic yard, at which price appellee is entitled to compensation. This would amount to $309.76, for which appellee is entitled to credit. The item of $10.80 for culverts is not contested by appellant. All the other items are for work done to complete that part of the road which appellant had not worked on, and for the reasons already stated appellee is not entitled to make any claims against appellant for that. The aggregate of the items for which we find appellee is entitled to credit is $522.52, which leaves a balance due appellant of $7,461.40, with interest from September 11, 1918, as fixed by the court.

It is also contended that the court erred in refusing to sustain appellant's garnishment against the road district, and we are of the opinion that this contention should be upheld. Counsel for appellee answer that this is not important for the reason that the court ordered the district to pay the balance due to the contractor into court and then ordered it distributed to the different claimants in this action. But the record does not show how much was paid in under this order, as the court

made no specific finding as to the amount due to the contractor; it can not be determined whether there is a sufficient amount to pay appellant the full amount of his debt if he is to share the proceeds *pro rata* with the other creditors. It therefore becomes material to adjudicate the question of the right of appellant to an equitable garnishment of the funds, for, unless he obtains priority in that manner, the full amount of his debt may not be recovered. It is conceded that appellee is insolvent, and that appellant has no other means of securing payment except by subjecting to its payment the funds due from the improvement district.

The application of the principles announced by this court in the case of *Plummer* v. *School District,* 90 Ark. 236, establishes appellant's right to priority through the remedy of an equitable garnishment. He is, according to the doctrine of that case, entitled to priority in payment, because the commencement of his action was prior in point of time to that of the other creditors. The point is made that the amount due from the improvement district is for the retained percentage. Conceding that this is not subject to garnishment until the liability of the district for its payment matures by the completion of the work, it appears in this case that before the final decree the work had been completed and there was no further reason for withholding the retained percentage of the contract price. In fact, the court ordered the funds turned into court and distributed among the creditors. Appellee is in no attitude to raise the question that the rights of the improvement district would be invaded by compelling it to answer a garnishment for the retained percentage.

It is also contended that the court erred in decreeing the payment of a portion of the costs against appellant, who recovered below a substantial sum. If the decree of the court had been correct in adjudicating the rights of the parties in other respects, then it would have been just and equitable to impose a portion, if not all, of the costs on appellant. The court found

that appellant had broken the contract and was liable for the aggregate amount of the items set forth in appellee's cross-complaint. If this conclusion were found to be correct, then we would sustain the chancellor in his decree for costs, but, since we have reached the conclusion that appellant did not break the contract and is entitled to the recovery of the contract price of his work after deducting the cost of correcting the minor defects, then it follows that he should not be required to pay any of the costs of the litigation. It comes down to simply a question of appellant recovering less than he sued for, and that affords no reason why he should not be entitled to recover his costs expended in the litigation.

The decree is therefore reversed and the cause remanded with directions to enter a decree in accordance with this opinion, awarding appellant recovery of the amount herein specified against appellee and giving his claim priority in the distribution of the funds paid over by the improvement district.

OPINION ON REHEARING.

McCULLOCH, C. J. It is contended now that, since we allowed appellee a credit of $201.80 for the additional cost of hauling and spreading rock for the base, we ought also to have allowed him credit for the cost of the rock, for the reason, as it is claimed, that it was necessary to furnish additional rock to supply the shortage of earth in bringing up the grade to the standard provided in the contract. We failed on the original consideration of the case, and fail now, to find any testimony to warrant an allowance for the cost of furnishing additional rock. The conflict in the testimony was to advanced cost of hauling and spreading the rock. The burden was on appellee to prove the additional cost of supplying omissions in the work of appellant, and he showed that, on account of advanced cost of labor, he had to pay more than the contract price with appellant, and he claimed and was allowed for this difference. The testimony of expert engineers introduced as witnesses by appellant was directed

to that point. That was the point of controversy between counsel in presenting the case on the original hearing. It was not claimed, as we understood the respective contention of counsel, that additional rock had been furnished, but that appellant had not used enough rock in the base and had not properly spread it.

We see no reason now for changing the conclusion on the original hearing.

Again, it is contended that the garnishment should not have been sustained for the reason that the insolvency of appellee was not proved. Appellant's counsel asserted in their brief that appellee's insolvency was conceded, and counsel for appellee did not dispute the assertion. We now find in the record an express admission of facts which established appellee's insolvency. There is a stipulation to the effect that appellee had not sufficient funds or property with which to discharge his indebtedness to a certain creditor to whom he had assigned his claim under the contract against the road district. This made out a case of insolvency without other proof of that fact. This was an equitable garnishment, and proof of insolvency was essential to a resort to that remedy. This action was originally instituted at law, and the garnishment could not have been sustained, but the cause was transferred to the chancery court, and the remedy of garnishment thus became available. *Hayes-Thomas Grain Co.* v. *Wilcox Cons. Co.,* 144 Ark. 621.

We have held that in a suit in equity against a public agency, such as a school district or an improvement district, there may be a garnishment of funds of the district, and that in a suit against the creditor of an improvement district the district is subject to equitable garnishment; but in either case insolvency is the basis of the equitable remedy. *Plummer* v. *School District,* 90 Ark. 236; *Sallee* v. *Bank of Corning,* 134 Ark. 109; *Bayou Meto Drainage District* v. *Chapline,* 143 Ark. 446.

Our attention is called to the fact that, in reversing and remanding the cause, we failed to state, in express

words, at least, that the claim of James & Echols against appellant should be allowed out of the funds in court, as awarded by the court. There was no controversy between appellant and James & Echols on that point, and our directions to the chancery court implied that that part of the original decree should be carried out. It is so directed now.

The rehearing is therefore denied.

INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION v. SANDERSON.

Opinion delivered April 11, 1921.

1. APPEAL AND ERROR—HARMLESS ERROR.—The erroneous admission in evidence of a check, objected to as being in the nature of a compromise, was harmless where it was apparent that the check was intended to cover an amount admitted to be due, and that the jury could not have accepted it as an admission of liability for a greater amount.
2. INSURANCE—RECOVERY ON POLICY—ATTORNEY'S FEE.—Insured, suing on a health policy, was not entitled to the statutory penalty and attorney's fee on recovering an amount less than sued for.

Appeal from Miller Circuit Court; *George R. Haynie,* Judge; reversed in part.

Robert M. Haines, of DesMoines, Iowa, and *Arnold & Arnold,* for appellant.

1. The verdict of the jury is contrary to the law and the evidence. The law of this case is settled by the former appeal. 222 S. W. 51. The evidence is not substantially the same and is not sufficient to sustain the verdict. Appellee Sanderson was not compelled to remain continuously and strictly within the house within the meaning of the policy from July 5, 1918, to January 1, 1919, and admits liability for $175. This case is not inconsistent with the law in 99 Me. 390; 59 Atl. 535.

A stipulation in a policy that there can be no recovery except during continuous confinement to the house is reasonable and valid where the rate of premium

is based on the unlikelihood of such confinement. 110 N. E. Rep. 972. The policy calls for no indemnity for partial disability; there must be a total disability.

2. The court erred in giving instruction No. 3 for appellee and in refusing No. 4 for appellant and in admitting testimony as to the compromise. 85 Ark. 337.

3. It was error to render judgment for the penalty and attorney's fees. 92 Ark. 378; 93 *Id.* 84. Also in the amount of the attorney's fees. Acts 1905, c 115; 88 Ark. 550.

M. E. Sanderson, for appellee.

1. The question of law was settled on the former appeal. There is no error in the instructions, and the verdict is supported by the evidence.

2. The penalty and attorney's fees properly allowed. 92 Ark. 378 is not in point. 17 A. & E., p. 809.

McCULLOCH, C. J. The facts in this case are fully recited in the opinion of this court on a former appeal (*Interstate Business Men's Acc. Assn.* v. *Sanderson,* 144 Ark. 271, 222 S. W. 51). The evidence adduced at the two trials is not materially different. It is an action to recover on an insurance policy "against loss of time by disease not due to accidental injury." There are two clauses in the policy, one provides insurance in case of disability at $50 per week for not exceeding twenty-nine weeks "in the event that the disease shall compel the insured to remain continuously and strictly within the house for a period of exceeding two full weeks and be under the constant treatment of a regular physician;" the other clause provides insurance of $15 for the first week and $20 per week for eight succeeding weeks "in the event the disease shall compel the insured to refrain from performing every act of business and be under the constant treatment of a regular physician." Appellee sued for the maximum amount allowed under the second clause of the policy ($175) and for the sum of $1,250, being for twenty-five weeks under the first clause of the policy. There was a recovery for the full amount.

The principal contention on the present appeal is that the evidence is not sufficient to warrant the recovery under the first clause, in that it does not show that appellant was confined within the house as specified in the policy. We decided on the former appeal that the evidence was legally sufficient to warrant a submission of the issue to the jury, and, as before stated, the evidence is not materially different as adduced in the two separate trials. Appellant admitted liability for the maximum amount under the second clause of the policy, but the admission was based upon appellee's illness after he went to Texas. This is the same period which appellee claims confinement within the house, and for which the jury allowed the full amount sued for under the confinement clause of the policy.

On the last trial of the cause the jury also allowed the maximum amount recoverable under the second or nonconfinement clause, and it is now insisted that the testimony is not legally sufficient to support the finding that appellee was compelled by illness "to refrain from performing every act of business" prior to the time he went to Texas. Of course, appellee could not recover under the two separate clauses for the same period of time, as it is obvious from the language of the policy that liability under the two clauses should not cover the same period. After a careful consideration, we have reached the conclusion that appellant is correct in its contention that the evidence is not sufficient to show that appellee's disease compelled him to refrain from performing every act of business. The evidence shows that he was seriously ill during the period mentioned before he went to Texas, but that he went to his place of business nearly every day and remained there nearly the whole of the business hours and performed the usual duties of his occupation. It is true that this was done under adverse circumstances, as appellee was seriously ill at the time. But the evidence establishes the fact beyond question that appellee's disability at that time was partial and

not total, and the policy does not insure against partial disability.

Error of the court is assigned in permitting appellee to testify concerning the tender to him by appellant of a check drawn for the sum of $200 in payment of the claim. The ground of objection is that the check was sent in the nature of a compromise, and for that reason, under well settled rules of evidence, the testimony was incompetent. We are of the opinion that the testimony was not competent, but we think it was not prejudicial under the peculiar circumstances of this trial. Appellant in the pleadings admitted liability in the sum of $175 under the second clause of the policy for appellee's illness during the period of his stay in Texas. After the proof was sent in, appellant mailed a check to appellee for $200, accompanied by a letter which failed to say anything about a compromise. Other writing introduced in evidence shows that the check was made out for $200 through mistake, as it was intended only to cover the maximum under that clause of the policy, but the mistake of making the check for $200 instead of $175 arose by reason of the fact that appellee held another policy under which the maximum was two hundred dollars. It is clear, therefore, from an inspection of all the papers introduced that appellant did not offer the $200 as a payment in part of an amount in excess of the maximum amount allowable under the nonconfinment clause, and that the jury could not have accepted this as an admission of liability for a greater amount than the maximum under the nonconfinement clause. The error of the court in allowing this testimony was therefore not prejudicial.

The objection now urged against instruction number three given by the court at the instance of appellee should have been specifically pointed out at the time the instruction was offered, but it appears that there was only a general objection, which is insufficient to raise the question now presented.

It follows that the judgment must be affirmed as to the amount of $1,250 recovered under the first clause of

the policy, but the judgment for the additional amount of $175 under the second clause must be reversed, and, as the testimony is fully developed, it is necessary to remand for a new trial. This reduction of the judgment in favor of the appellee is less than he sued for, and he is therefore not entitled to recover the penalty and attorney's fee, and the judgment for penalty and attorney's fee is also reversed.

ROBNETT v. COTTON STATES LIFE INSURANCE COMPANY.

Opinion delivered April 11, 1921.

1. INSURANCE—NONPAYMENT OF PREMIUMS—FORFEITURE.—A life insurance policy based on the consideration of the payment of the premiums when they fall due is forfeitable for nonpayment of such premiums, though there was no provision in the policy declaring a forfeiture for that cause.
2. INSURANCE—"BLUE NOTES"—VALIDITY.—"Blue notes," or notes accepted by a life insurance company for the amount of premiums due on the policy, which provide for the continuance of the policy in force until the due date of the notes, are valid.
3. INSURANCE — NONPAYMENT OF PREMIUM NOTE.—Where a "blue note," accepted by an insurance company as the balance of a life insurance premium, provided that it was so accepted on the express agreement that if it was not paid on the due date the company could retain the cash already paid as compensation for having continued the insurance, such provision was inconsistent with the contention that the cash payment should be applied to extend the life of the policy beyond the due date of the note.
4. INSURANCE—GRACE FOR PAYMENT OF PREMIUM.—A provision in a life policy giving thirty days' grace for the payment of any premium does not extend a similar period of grace for the payment of a premium note, accepted by the company on condition that the policy should be forfeited if the note was not paid when due.
5. INSURANCE—FORFEITURE OF POLICY—WAIVER.—The fact that an insurance company waived its right to forfeit the policy for nonpayment of the first "blue note" given by the insured for an annual premium when it fell due by accepting a second note did not constitute a waiver of the right to forfeit the policy for nonpayment of the second note when it fell due nor estop it from asserting such forfeiture.

Appeal from Arkansas Circuit Court, Northern District; *W. B. Sorrells,* Judge; affirmed.

Chapline & Morrison, for appellant.

The court erred in directing a verdict for appellee.

The terms of an insurance contract are construed strictly against the insurer, since the policies are issued on printed forms prepared by the insurer, and the insured has no voice in the preparation. 217 S. W. 462. An insurance company is not required to declare a forfeiture on the failure of the insured to pay a premium note when due, but the rule is different where the policy merely provides that on insured's failure to pay the premium within a specified time after it becomes payable the company shall be at liberty to cancel it without further notice. In such cases the policy does not become void merely by nonpayment of the premium, but remains in force until *affirmative action* is taken by the company to cancel it. 112 Ark. 171; 3 Cooley's Briefs on Ins., p. 2278. The general rule has no application here, for the policy contains no mandatory provision, and no affirmative action was taken by the company until after the tender of the balance due on the premium.

Forfeitures are odious in the eyes of the law, and a default in payment of a life premium does not forfeit a policy where there is no stipulation to that effect. 159 Ill. 476; 6 Jones, L., 51 N. C. 558; 7 Ohio Dec. 118. There is no express stipulation for forfeiture in the policy because of failure to pay the annual premium on the date fixed, nor any provision of like import from which an inference might be drawn that a failure to pay the premium *ad diem* would automatically cancel or render the policy void. 84 Neb. 682; 19 A. & Eng. Ann. Cases 59-64. See 93 U. S. 24; 21 U. S. (1 ed.) 789. The policy here did not lapse but continued in force until affirmative action was taken to declare a forfeiture, and none was ever taken before the tender, and the company is now estopped.

The automatic cancellation in the note is in direct conflict with the terms of the policy. Payment of an annual premium is not a condition *precedent* but *subsequent* only. 104 U. S. 303; 144 *Id.* 430-51.

Part payment (as here), accepted by the company after maturity, waives a forfeiture. 25 Cyc. 870, note b.; 41 S. W. 680.

Where there is a conflict between the policy and the note, the policy governs. 4 Mo. 386; 36 Okla. 733; 44 L. R. A. (N. S.) 376.

After a company has once waived its right to declare a forfeiture, can not subsequently avail the effects of such waiver. 53 Ark. 494; 19 Cyc. 872.

The evidence shows payment of the first and second annual premiums. A note marked paid is conclusive. 104 Ark. 367. The tender was made within the customary period made by agreement and the company is estopped from declaring the policy lapsed. 104 Ark. 288; 62 Ga. 250.

Appellant is entitled to judgment for the amount sued for and interest, penalty and costs and attorney's fees. 133 Ark. 223.

Holmes & Canale and *C. E. Pettit,* for appellee.

Appellant complains (1) because the court enforced the provisions of the "blue note" and (2) because the trial court did not hold that the company waived the lapse of the policy. Our own court, and practically all others, have decided adversely to the contentions of appellant. The "blue note" has been often upheld. 104 Ark. 288; 220 S. W. 803; 89 S. E. 445; 86 N. E. 928; 177 Fed. 842; 228 U. S. 364. See, also, 74 Ark. 508; 75 *Id.* 25; 85 *Id.* 337.

WOOD, J. This is an action brought by the appellant against the appellee to recover the sum of $5,000 on a policy of life insurance issued by the appellee to the husband of appellant, and in which the appellant was the beneficiary. The appellant set up the policy, alleged the

death of the insured and a compliance with all the terms of the policy necessary to create liability against the appellee.

The appellee answered and denied that the insured had complied with the terms of the policy by paying the second annual permium, and set up that the policy was forfeited because of that fact. The undisputed testimony showed the issuance of the policy by the appellee to the husband of appellant, and that the appellant was the beneficiary in the policy; that the insured was dead, and that the appellant was entitled to recover on the policy, provided the provisions of the insurance contract as to the payment of premiums had been complied with. The testimony on that issue is substantially as follows: The annual premium on the policy was $154. The first premium was paid. The second was due October 19, 1919. At that time the insured was unable to pay the second premium, and he arranged with the appellee to extend the time for the payment of this premium by paying the sum of $14 in cash and executing a note for the balance of $140, dated October 20, 1919, and payable on or before January 1, 1920. When the note became due, the insured was still unable to pay. After several letters had passed between the insured and the appellee with reference to the payment of the note evidencing the balance due on the second premium, the insured paid to the appellee the further sum of $100 in cash and executed the following note:

"$42.36. January 30, 1920.

"On or before March 1, 1920, after date without demand or notice I promise to pay to the order of the Cotton States Life Insurance Company forty-two and 36/100 dollars at its home office in Tupelo, Miss., value received, with interest at the rate of six per cent. per annum. This note is accepted by the said company at the request of the maker as balance on premium on the following express agreement: That, although no part of the premium due on the 19th day of October, 1919, on the policy No. 3103, issued by said company on the life

of Allie E. Robnett, has been paid, the insurance thereunder shall be continued in full force until midnight of the due date of said note; that, if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that, if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made; that said company has duly given every notice required by its rules or by the laws of any State in respect to said premium, and in further compensation for the rights and privileges hereby granted the maker hereof has agreed to waive, and does hereby waive, every other notice in respect to said premium or this note, it being well understood by said maker that said company would not have accepted this agreement if any notice of any kind were required as a condition to the full enforcement of all of its terms."

After receiving the above note the appellee mailed the insured the former note, which was marked paid. On the 23d day of February, 1920, the appellee wrote to the insured as follows:

"Your premium extension note for $42.36 (which includes accrued interest) given on account of policy No. 3103 in this company will be due March 1, 1920, and payable at this office. Please remit promptly, as this obligation provides that the policy will lapse unless payment is made by the date due."

This letter was received at the postoffice at Almyra, Arkansas, in due course. The insured at that time, however, was not at his hime in Almyra, and the appellant did not personally receive the notice until March 3, 1920.

On March 4, 1920, the appellee received from appellant through one Paul W. Daniels of Stuttgart, Arkansas,

a check for $42.64, dated March 3, 1920, drawn on the Exchange Bank of Stuttgart, Arkansas, signed by H. G. Miens, which was tendered in payment of the blue note above mentioned, and on March 4, 1920, the appellee returned the check in a letter to Daniels which was received by him on March 5, 1920. In the letter to Daniels the appellee stated that it refused to accept the check for the reason that the policy ceased to be in force at midnight on March 1, 1920, at which time also the note of the insured automatically according to its terms ceased to be a claim against him—that the policy had lapsed. In this letter the appellee enclosed a blank for reinstatement, and stated that it would be pleased to reinstate the policy upon proper settlement of the premium and satisfactory evidence of the good health of the insured. On March 6, 1920, the insured died, and on March 8, 1920, the appellee first heard of his death.

Among others, the policy contained the following provision:

"If any premium shall not be paid on or before the date when due, and if there be no indebtedness to the company, the insurance will automatically continue from said due date as term insurance during the term, including the period of grace, specified in column three (3) of the accompanying table."

The accompanying table showed that, upon the nonpayment of the premium when due at the end of one year, the insurance was automatically continued for one month. There was a grace of one month for the payment of all premiums except the first. The policy was nonforfeitable from the date of issue except for *nonpayment of premiums*. The payment of premiums in advance on the 19th day of October of every year continued the policy in force during the life of the insured for twenty years, after which the policy was continued during the life of the insured without further payment. The plan of premium payments could be changed so that premiums might be paid in quarterly or semi-annual installments, or changed from such form to annual, on any an-

niversary of the policy by application in writing to the home office of the company. In case of default in the payment of any premium or interest the company would reinstate the policy at any time * * * upon written application by the insured to the company at its home office with evidence of insurability satisfactory to the company and the payment of all premiums that would have been paid in the intervening time if no default had been made, etc. The policy had no cash reserve or loan value until after the beginning of the third policy year.

The court instructed the jury over the objection of appellant to return a verdict in favor of the appellee, to which ruling the appellant duly excepted. The verdict was returned as directed, and a judgment was rendered in favor of the appellee from which is this appeal.

While there is no provision in the policy expressly declaring a forfeiture or that the policy shall lapse or be null and void in case of the nonpayment of premiums at their due dates, yet the various provisions of the policy concerning the payment of premiums show clearly that such payments at the date when due were essential to the continuance of the contract of insurance. These payments were a consideration for the contract, and, unless they were made at the time specified therein or their payment at such time waived by the appellee, there was no enforceable contract of insurance beyond the term provided for in the policy. The first premium was paid, and under the policy the insurance automatically continued for one month after the due date of the second premium, whether such premium was paid or not. Beyond this term, inasmuch as the policy at that time had no cash reserve or loan value, whether or not the insurance was to continue and for how long until the second premium was paid, was a matter purely to be determined by the contract between the parties, if they entered into a contract concerning it. This they did by the execution on the part of the insured, and the acceptance on the part of the company, of what is commonly known in insurance terminology as "blue notes." The validity of these blue

notes, or notes of like character, providing for the extension of time of the payment of premiums and the continuance of the insurance contract during such time, have been frequently recognized and upheld by our own and other courts. *Citizens' National Life Ins. Co.* v. *Morris,* 104 Ark. 288; *N. Y. Life Ins. Co.* v. *Allen,* 143 Ark. 143. See, also, *American Life Ins. Co.* v. *Hornbarger,* 85 Ark. 337; *Fidelity Mutual Life Ins. Co.* v. *Bussell,* 75 Ark. 25; *Jefferson Mutual Life Ins. Co.* v. *Murray,* 74 Ark. 508; *Slocum* v. *N. Y. Life Ins. Co.,* 228 U. S. 364; *N. Y. Life Ins. Co.* v. *Slocum,* 177 Fed. 842; *White* v. *N. Y. Life Ins. Co.,* 86 N. E. (Mass.), 928; *Hudson* v. *Knickerbocker Life Ins. Co.,* 28 N. J. Eq. 167; *Simms* v. *Jefferson Standard Life Ins. Co.,* 89 S. E. 445. It would unduly extend this opinion, and it is not necessary, to review here the various cases cited by learned counsel in their excellent briefs to support their respective contentions.

The blue note set forth in the statement evidences the contract between the parties for the extension of the time for the payment of the second premium. The insured signed the blue note and was bound by its terms. The undisputed testimony shows that the insured did not comply with its terms, and therefore the appellee is not liable unless it waived noncompliance on the part of the insured, or by its conduct has estopped itself from claiming that the policy was not in force at the time of the insured's death. While the note recites on its face that it is accepted by the company "as balance on premium," its further recitals show that it was so accepted upon the "express agreement" that, if the note was paid on or before the date it became due, such payment of the note together with the cash previously paid would be accepted by the company as the payment of the premium; but, if the note was not paid on or before the due date, then the company was to retain the cash already paid as compensation for having continued the insurance, notwithstanding the failure to pay the premium, from the time the premium was due, October 19, 1919, until the due date of the note, March 1, 1920.

The contract was one which the parties had the right to make, and it is certainly unambiguous in its provisions. In *White* v. *New York Life Ins. Co., supra,* the Supreme Court of Massachusetts, in construing a note which in principle can not be distinguished from the note in controversy, said: "The note was not paid, and for that reason by virtue of the agreement it ceased to be a claim against the maker. The $31.25 in cash was treated as a consideration for the privilege which the insured had enjoyed, and the rights of both parties with reference to the policy were precisely the same as if this note had never been given and the payment in cash had never been made." See, also, to the same effect, *Simms* v. *Jefferson Standard Life Ins. Co., supra.*

The appellant contends that the $114 cash received by the appellee should be considered as a part payment on the annual premium, but this contention is contrary to the provisions of the blue note in controversy as we construe it. Appellant further contends that, if he is mistaken as to this, then the $114 cash should at least be applied as a quarterly or semi-annual payment in order to extend the life of the policy. But this contention is likewise contrary to the provisions of the blue note as well as to the provision of the policy, which provides that the plan of premium payments can be changed to quarterly or semi-annual payments by application of the insured in writing to the home office of the company. This was not done. Besides, the parties have expressly provided in the blue note that the cash received should be considered, in the event of the nonpayment of the note, as part compensation or consideration for continuing the insurance and the rights and privileges of the insured under the policy during the period of extension.

Counsel also contend that the provision of the policy allowing one month's grace for the payment of premiums would have the effect of extending the time for the payment of the premium one month after the due date of the blue note. But this contention can not be sustained for the reason that the blue note covers the provision for

grace contained in the policy and extends the time for the payment of premiums for longer than one month. See *Bank of Commerce* v. *N. Y. Life Ins. Co.,* 54 S. E. 643; *Missouri State Life Ins. Co.* v. *Fry,* 130 Ark. 424.

The only remaining question then is, Did the appellee waive the nonpayment of the blue note when it was due, or has it by its conduct estopped itself from setting up that the note was not paid? The testimony shows that, at the request of the insured, about the time the second premium became due the appellee allowed the insured to pay the sum of $14 in cash and to execute a blue note for the balance of the second premium similar to the one above set forth, extending the time for the payment of the premium to January 1, 1920, and after this note became due the insured and the appellee had considerable correspondence concerning it, which finally resulted in the execution of the second blue note. The correspondence with reference to the first blue note and the execution of the last blue note undoubtedly show that the appellee waived the payment of the first blue note when the same was due and extended the time of the payment of the second premium until March 1, 1920, as expressed in the last blue note upon the terms therein specified. But because the appellee waived the nonpayment of the first blue note and further extended the time of the payment of the second premium to March 1, 1920, as evidenced by the last blue note, is no reason for saying that the appellee waived the nonpayment of the last blue note at the time same was due, or that its conduct with reference to the prior blue note was such as to justify the insured in believing that the appellee would not insist upon the payment of the second blue note at the time same was due, and that its conduct was such as to justify him in failing to pay this note when it was due. On the contrary, while the appellee was not required to notify the insured of the date when this note was due, it nevertheless did write to him on February 23, stating in the letter that the note would be due March 1, 1920, and requesting him to remit

promptly, as his obligation provided that "the policy will lapse unless payment is made by the date due."

In *Citizens' Life Ins. Co.* v. *Morris, supra,* we quoted from Mr. Cooley, as follows: "Indulgence on one or two, or a very few, occasions is certainly insufficient to show a custom or course of dealing which will justify the insured in believing that indulgence will, as a matter of course, be granted as to subsequent premiums." When the company extended the period of grace for the payment of the second premium as provided in the first blue note and then again extended the time for the payment of such premium as provided in the second blue note, the insured presumably was in good health; at least there was nothing in the record to the contrary. But the insured died a few days after the due date of the last blue note, and the testimony shows that he was sick three weeks before he died, so he must have been critically ill at the time the last blue note was due.

The continuance of the policy under the provisions of the first blue note on the failure to pay the second premium when due, and likewise upon the failure to pay the first blue note when it became due, the insured then being in good health, certainly would not estop the appellee from refusing to continue the policy when the second blue note became due, at which time the insured was seriously ill. *Thompson* v. *Ins. Co.*, 104 U. S. 259. See, also, *Thompson* v. *Fidelity Mutual Life Ins. Co.*, L. R. A. (N. S.) 1041. It follows that the ruling of the court in directing a verdict in favor of the appellee is correct, and the judgment is therefore affirmed.

FAIR STORE NO. 32 *v.* HADLEY MILLING COMPANY.

Opinion delivered April 11, 1921.

1. APPEAL AND ERROR—CREDIBILITY OF WITNESS.—The credibility of a witness, whose testimony in the present case is contradicted by his testimony in a prior suit, is for the jury, and not the court.

2. APPEAL AND ERROR—VERDICT.—It is only where the facts proved in evidence are contrary to some well-known law of nature or mathematics and the like that it is demonstrated beyond controversy that the verdict is based on what is untrue, and what can not be true; in such cases the Supreme Court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict.

3. APPEAL AND ERROR—VERDICT.—Where the testimony in a case related to matters, situations and conditions which might or might not have existed, the evidence in regard thereto is of a substantial character, and sufficient to support a verdict.

4. EVIDENCE—PAROL EVIDENCE RULE.—In a suit by a seller of flour for the buyer's breach, where the contract was partly written and partly printed, one of its terms reciting, "Specifications one week before date of shipment," parol evidence for defendant buyer that the contract was not to become binding unless the specifications were made by it was inadmissible as varying the written contract.

5. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.—In an action by the seller of flour for the buyer's breach, it was not an abuse of discretion to deny the defendant a new trial for newly discovered evidence where defendant had notice of the evidence two months before the trial, and did not exercise due diligence in procuring it.

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

STATEMENT OF FACTS.

The Hadley Milling Company sued the Fair Store No. 32 to recover damages in the sum of $148.50 for the breach of a contract for the sale of flour by the former to the latter.

The parties entered into a written contract for the sale of the flour, which reads as follows:

"Contract between the Hadley Milling Company, Olathe, Kansas, and ship to Fair Store at England, Arkansas:

When, 30 days, f. o. b. .....

Terms: Arrival draft, B. L. attached.

Through, Bank of England.

No. bbls.	Brand.	Size Pkg.	Price
210	White Rose Basis	48	11.30

"Specifications one week before date of shipment.

"These goods are sold at prices, on terms, and time of shipment specified above, and are not subject to change or countermand without the written consent of both parties. Should either party refuse to fulfill their part of this transaction, the other party shall buy or sell as the case may be, charging the loss to the defaulting party. No verbal conditions or modifications are valid. Shipping instructions to be furnished ten days before shipping date. This order is subject to confirmation by the Hadley Milling Company at their Olathe office.

"The Fair Store No. 32, Buyer,
"C. R. Wood, Salesman."

The plaintiff company received the order and confirmed it.

The defendant refused to send in specifications to the plaintiff. Hence this lawsuit.

The jury returned a verdict for the plaintiff, and from the judgment rendered the defendant has appealed.

Troy Pace, for appellant.

1. There is a total lack of evidence to support the verdict.

2. Before an instrument of writing as evidencing a contract becomes binding and enforceable, it must have been executed and delivered as a completed contract. Parol evidence is admissible to show that a writing signed and delivered for the purchase of goods was not in fact signed and delivered as a completed contract, but was conditional only. Our court so holds, and it is sustained by the great weight of authority. 100 Ark. 360; 225 S. W. 326; 140 *Id.* 132; 48 S. E. 768. See, also, 82 N. W. 258; 104 Mo. 549; 104 N. W. 1069; 50 S. E. 262; 75 Pac. 643; 71 Am. St. 235. The writing was ambiguous, and parol testimony was admissible.

Morris, Morris & Williams, for appellee.

1. The evidence fully sustains the verdict.

2. The general rule as to the measure of damages was properly applied here. 92 Ark. 116. A new trial

was properly refused, as the verdict is not against the clear preponderance of the evidence. 6 Ark. 86; 94 *Id.* 567.

3. Where the contract provides for the buyer to furnish shipping instructions, his failure to do so constitutes a breach of contract and excuses the seller from making shipment. 207 S. W. 72; 1 N. Y. Supp. 351; 50 N. H. 307; 126 Ill. 294; 75 S. W. 959; 89 *Id.* 544.

HART, J. (after stating the facts). It is first contended that there is no substantial evidence to support the verdict as to the amount of damages sustained by the plaintiff.

The contract provided that, should either party refuse to fulfill it on his part, the other should buy or sell, as the case might be, charging the loss to the defaulting party. Thus the contract itself fixed the method of ascertaining the damages resulting from a breach of it.

The plaintiff is a corporation. Its secretary and treasurer gave his deposition in the case, and testified that the plaintiff purchased wheat with which to manufacture the flour that it had contracted to sell to the defendant; that the same was manufactured into flour and sold to other parties at a loss of $148.50. He gave the names of the firms to which the flour was sold, the amount purchased by each firm, and their places of business.

Prior to bringing this suit, the plaintiff had assigned its claim to another person, and the assignee had brought suit on the claim. The treasurer of the plaintiff gave his deposition to be used on the trial of that case. In it he testified that the plaintiff had purchased wheat with which to fill the order of the defendant at the time it accepted the order, but that the wheat was held in the elevator and sold on December 12, 1917. He said that it was never manufactured into flour at all. Subsequently that suit was dismissed, and the present one instituted.

On his cross-examination in the present case the witness was asked to explain the inconsistency between his

testimony as shown by the two depositions. He attempted to explain the inconsistency between them, but his explanation is not satisfactory.

It can not be said, however, that his testimony in the present case has no probative force. His credibility was a question for the jury, and they might have believed his testimony in the present case, and disbelieved his testimony in the former case. It is only where the facts proved in evidence are contrary to some well known law of nature or mathematics and the like that it is demonstrated beyond controversy that the verdict is based upon what is untrue, and what can not be true. In such cases the court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict. Where the testimony relates to matters, situations and conditions which might or might not have existed, the evidence in regard thereto is of a substantial character, and, if believed by the jury, is sufficient to support the verdict. *St. L. S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428.

Counsel for the defendant offered to prove at the trial that the contract sued on was not signed by the defendant and delivered to the salesman of the plaintiff as a completed contract, but that it was delivered to the agent of the plaintiff upon an agreement between such agent and the defendant that the contract was not to become binding until and unless specifications of the shipment of the flour were made.

The court excluded this testimony from the jury, and the ruling of the court is now assigned as error calling for a reversal of the judgment.

To support his contention, counsel relies on the cases of *American Sales Book Co.* v. *Whitaker,* 100 Ark. 360, and *Standard Sewing Machine Co.* v. *Rainwater,* 146 Ark. 81. We do not think that either of those cases has any application to the case at bar. In the first mentioned case, appellee was permitted to prove that there was a parol agreement that he could return the goods in the event they did not prove to be satisfactory after a thirty-days' trial. It was objected that such testimony

would add to or vary the terms of the written contract. The court held, however, that it was competent to show by parol testimony that it was understood between the parties that the written instrument, although signed, should not be a binding contract until certain precedent conditions should be fulfilled. In other words, the court said that the parol testimony was admissible to show that the written instrument was not delivered as a concluded contract, but was to be held pending the thirty days' trial of the goods to ascertain if they were satisfactory. In the latter case the parol testimony was admitted to show that the sale was not unconditional, but that there was a writing attached to the signed contract, making it a conditional contract. Under the terms of the condition referred to, the seller agreed to put on a sewing machine sale for the buyer and help the buyer until all the machines were sold satisfactory to him. It was further agreed to remove all machines unsold after sixty days.

It will be observed that in neither of these cases did the parol testimony tend to contradict or vary the terms of the written agreement. It only tended to show that the sale was not an unconditional one, but was made upon the conditions shown by the parol evidence.

In the present case the record shows an essentially different state of facts. The contract was partly written and partly printed. One of the written terms was the following: "Specifications one week before date of shipment." The parties wrote this into the contract, and the evident purpose was to provide that the specifications should be a part of the contract, and that they should be given to the plaintiff one week before the plaintiff was required to ship the goods. To allow the defendant to prove by parol evidence that the contract was not to become binding "until and unless specifications of the shipment of flour were made" would be to contradict or vary the terms of the written contract. The written contract having provided that specifications should be made, it is evident that this provision of the contract would be varied by allowing the defendant to prove that the contract

was not to become a binding one unless the specifications were made by it. Therefore, the offered testimony came within the well-known rule that parol evidence should not be admitted to contradict or vary a written contract and the court properly refused to allow it to go before the jury.

It is also insisted that the court erred in not granting a new trial on account of newly discovered evidence. The secretary of the plaintiff company testified at the trial that the flour intended for the defendant was sold at a loss on certain days to certain other firms by its traveling salesman. The newly discovered testimony was to the effect that this traveling salesman would testify that the flour sold to the firms mentioned above was sold by him to them in the usual course of business, and that it was not the flour intended for shipment to the defendant.

The deposition of the secretary of the plaintiff was taken on the 14th day of June, 1920, and the trial of the case was had on the 16th day of August, 1920. The defendant's place of business was at England, Arkansas, and the trial was had at Lonoke, Arkansas. Each place was only about twenty miles from Little Rock, where the traveling salesman referred to resided. He was well known to the manager of the defendant. The defendant was put on notice as to the plaintiff's claim in the matter when the deposition of its secretary was taken on the 14th day of June, 1920. Therefore, it had two months within which to ascertain the truth about the matter. This it could easily have done by talking with, or writing to the traveling salesman of the plaintiff at Little Rock. Not having done so, the defendant can not be said to have exercised due diligence in the matter. It is not even shown by this evidence was not discovered before the trial.

Therefore, the trial court did not abuse its discretion in refusing the defendant a new trial on this account. *Hughes* v. *Sebastian County Bank,* 129 Ark. 218; *Webb* v. *Kansas City Southern Ry. Co.,* 137 Ark. 107; *Williams*

v. *Williams,* 112 Ark. 507; *Dickie* v. *Henderson,* 95 Ark. 78.

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

SMITH v. MABERRY.

Opinion delivered April 11, 1921.

1. CURTESY—HUSBAND'S ESTATE.—Upon the death of a wife, her husband became tenant by the curtesy of her land for his life.
2. ADVERSE POSSESSION—LIFE TENANT AND REMAINDERMAN.—The possession of a husband as tenant by the curtesy, or of his grantee, is not adverse to the wife's heirs, and limitation does not run against such heir until the death of the life tenant.
3. ADVERSE POSSESSION — CONVEYANCE BY LIFE TENANT.—An attempted conveyance by a life tenant of the fee does not work a forfeiture of the life estate or start limitations running against the owners of the reversion.
4. LIFE ESTATE—LACHES OF LIFE TENANT.—The laches of a tenant by the curtesy would not prevent recovery of the land by the wife's heirs after the death of the life tenant.
5. EQUITY — LACHES.—The doctrine of laches has no application where the plaintiffs, though suing in equity, are not seeking equitable relief, and the action is not barred by the statute of limitations.

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

STATEMENT OF FACTS.

A. F. Maberry brought an action in the circuit court against Ira Smith and Christine Nelson to recover forty acres of land situated in Woodruff County, Arkansas.

The defendants answered, setting up title in themselves, pleaded the statute of limitations, and invoked the doctrine of laches. They asked that the cause be transferred to the chancery court, which was done.

After the cause was transferred to equity, it was tried upon an agreed statement of facts, as follows:

On October 1, 1845, the land in controversy was granted by the United States to Charles Newman and a

patent was issued to him. On October 2, 1865, after his death intestate, the heirs of Charles Newman conveyed said land to Elizabeth Newman. Elizabeth Newman married Thos. J. Bentley and died in 1866, leaving surviving her Thos. J. Bentley, her husband, and her infant daughter, who was the issue of said marriage, and who is now Ada Bentley Morrison. Thos. J. Bentley died on the 25th day of July, 1919. On the 24th day of January, 1919, Ada Bentley Morrison executed a special warranty deed to said land to A. F. Maberry. The deed recites that it is made in lieu of a lost deed, dated August, 1884. Some time prior to 1876, J. W. Aiken went into possession of said land, claiming to be the owner thereof, and remained in possession until his death, about the first of the year 1876.

On May 2, 1876, the probate court ordered the administrator of the estate of J. W. Aiken, deceased, to sell the land for the purpose of paying the debts of his estate. There were no bidders at the first sale, and the land was duly advertised for sale again in the manner provided by statute. Thos. J. Bentley became the purchaser at said sale upon paying the purchase price thereof, and on April 27, 1877, the administrator executed to him a deed to the land. Subsequently Thos J. Bentley and wife executed a warranty deed to said land to DeWitt C. Ashley, which was duly filed for record. DeWitt C. Ashley and wife, by warranty deed, conveyed said land to William Hysmith, and this deed was duly filed for record. William Hysmith died in 1885, and his wife became administratrix of his estate. The probate court granted her an order to sell the land for the purpose of paying the debts of her deceased husband. E. Copeland became the purchaser at said sale, and the sale was duly approved by the court. E. Copeland conveyed the land to Jane Hysmith and she died in June, 1900. Under the terms of her will, the land was devised to Christine Nelson, Ira Smith and others, who in turn conveyed their interests to Christine Nelson and to Ira Smith. Ira Smith and Christine Nelson took possession

of the land in 1904, and have been in possession of it ever since. Their grantors have been in possession of it since 1876 up to that time.

The chancellor found that the plaintiff, A. F. Maberry, has the legal title to the land and was entitled to the immediate possession thereof. It was decreed that said plaintiff have and recover from the defendants, Ira Smith and Christine Nelson, said land and his costs.

The defendants have appealed.

Bogle & Sharp, for appellants.

1. Plaintiff in ejectment must recover on the strength of his own title and not upon the weakness of defendant's. 76 Ark. 244, 477. Elizabeth Newman was married to Thos. J. Bentley in 1865 and died in 1866, leaving surviving her husband and one child, Ada. This was prior to the Constitution of 1868 and of 1874 and under the common law. Thos. J. Bentley took estate by curtesy initiate in her property. 17 C. J., pp. 416-417. Bentley never abandoned his rights. After the adoption of the Constitution of 1874 the homestead right of Ada Bentley became superior to the curtesy right of her father, for she was yet a minor, and had no right to bring suit. 54 Ark. 9. Thos. J. Aiken was in possession in 1876 and prior thereto. His possession and that of those claiming under him has not been disputed. There was no abandonment by him or those claiming under him.

2. Appellee is barred by limitation and laches. 45 Ark. 25; 1 English Rep. 14; 13 Ark. 291. Where the statute makes limitations, must create also the exceptions; the courts can make none. 113 U. S. 449; 68 Ark. 449. Appellee is barred by laches. 22 Ark. 263. See, also, 64 Ark. 345; 54 *Id.* 580; 72 *Id.* 101, 451; 83 *Id.* 490; 101 *Id.* 230. See, especially, 121 Ark. 613. The chancellor erred in his findings. 49 Ark. 75; 70 *Id.* 483.

Harry M. Woods, for appellee.

1. Thos. M. Bentley had an estate by curtesy initiate in his wife's realty, and no right of action accrued

to appellee until the death of the holder of the life estate and the statute did not begin to run until the death of the life tenant, and there is no bar by limitation. 53 Ark. 400; 115 *Id.* 400; 79 *Id.* 408.

2. Appellee is not barred by laches. This is settled by the agreed statement of facts. No right of action accrued to Maberry until the death of the life tenant. The suit was brought in apt time.

HART, J. (after stating the facts). The record shows that on October 1, 1845, the land in question was granted by the United States to Charles Newman and a patent was issued to him. After his death intestate in October, 1865, his heirs conveyed said land, by deed, to Elizabeth Newman. She married Thos. J. Bentley, and in 1866 died, leaving surviving her Thos. J. Bentley, her husband, and infant daughter, the sole issue of their marriage. The infant daughter who was the issue of the marriage of Elizabeth Newman with Thos. J. Bentley is now Ada Bentley Morrison. On the 24th day of January, 1919, the latter executed a special warranty deed to A. F. Maberry. So that it will be seen that the legal title to the land is in A. F. Maberry.

The defendants and other grantors have been in possession of the land since some time prior to 1876 and claim title to the land by adverse possession. Their claim is not tenable. Thos. J. Bentley did not die until the 25th day of July, 1919. In 1866 he became tenant by the curtesy, and by virtue thereof he obtained an estate in the land for his life. *Neelly* v. *Lancaster,* 47 Ark. 175. It is true he conveyed his interest in the land to the grantors of the defendants, but he did not die until the 25th day of July, 1919.

It is well settled in this State that prior to the death of a tenant for life, neither his possession nor the possession of his grantee is adverse to the remainderman or reversioner. Hence the statute of limitations does not begin to run against the remainderman or reversioner until the death of the life tenant. The reason is that no

one can be in default in not bringing an action which he could not have maintained, if brought; and that no statute of limitations can commence to run until the time comes when the person claiming title or right of possession can successfully maintain his action. Neither the possession of the life tenant nor his grantee can by any possibility become adverse to the reversioner or remainderman for the reason that such possession is not an interference with the rights of the latter. *Jones* v. *Freed,* 42 Ark. 357; *Moore* v. *Childress,* 58 Ark. 510; *Gallagher* v. *Johnson,* 65 Ark. 90; *Ogden* v. *Ogden,* 60 Ark. 70, and *Stricklin* v. *Moore,* 98 Ark. 30.

It is contended, however, that the facts of this case constitute an exception to the general rule. The record shows that J. W. Aiken was in possession of the land when he died the first of the year 1876. It is not shown what paper title, if any, he had. As already seen, he could not have acquired title against the remainderman by adverse possession.

The probate court ordered the land of Aiken to be sold for the payment of his debts. Thos. J. Bentley became the purchaser at the sale and entered into possession of the land. He conveyed the land by warranty deed to DeWitt C. Ashley. The deed purports to convey the fee in the land. This, it is claimed, constituted an abandonment by Thos. J. Bentley of his life estate and puts the statute of limitations in motion. During the continuance of the life estate of Bentley, possession by his grantee under a deed purporting to convey the fee would not be adverse to the remainderman, so that the statute of limitations would be set in motion against him because the remainderman would have no right of action to recover the possession of the land during the continuance of the life estate. As said in *Christie* v. *Gage,* 71 N. Y. 189, the conveyance by the tenant for life of a greater estate than he possessed does not work a forfeiture, and the remainderman after the conveyance, as before, has no right to possession during the continuance of the life estate. See, also, *Pickett* v. *Pope,* 74 Ala. 122; *Pendley* v. *Madi-*

son's Admr., 83 Ala. 484; *Mallus* v. *Snowman,* 21 Me. 201; *Stevens* v. *Winship,* 1 Pick. 318; 11 Am. Dec. 178; *Jackson* v. *Mancius and Vanderheyden,* 2 Wend. (N. Y.) 357; *Barrett* v. *Stradl,* (Wis.) 9 Am. St. Repts. 795; *Mettler* v. *Miller,* 129 Ill. 630, and *Constantine* v. *VanWinkle,* 6 Hill (N. Y.) 177, and case note to 19 L. R. A. at p. 841.

Counsel for the defendants also invoke the doctrine of laches as a defense to the suit. It is well settled that the estate of the heirs of the wife as remainderman is distinct from that acquired by her husband as tenant by the curtesy. Hence they can not be affected by any act of the life tenant or his grantee.

The rule is stated by Chief Justice Kent in *Jackson* v. *Schoonmaker,* 4 Johns. N. Y., p. 390, at 402, as follows:

"Neither a descent cast, nor the statute of limitations, will affect a right, if a particular estate existed at the time of the disseisin, or when the adverse possession began, because a right of entry in the remainderman can not exist, during the existence of the particular estate; and the laches of a tenant for life will not affect the party entitled. An entry to avoid the statute must be an entry for the purpose of taking possession, and such an entry can not be made during the existence of the life estate." (Citing cases.)

In Tiedeman on Real Property (2 ed.), par. 400, it is said: "The tenant can not do anything to defeat a vested remainder; a disseisin of the tenant affects the remainder in no manner. Nor can the possession of the tenant be deemed adverse to the remainderman, either for the purpose of preventing the latter from conveying his interest or with a view to defeat it under the statute of limitations, unless the possession be continued after the termination of the particular estate. The statute of limitations does not begin to run until the remainderman takes effect in possession."

The rule was recognized by this court in *Lesser* v. *Reeves,* 142 Ark. 320, where the court held that the doctrine of laches has no application where the plaintiffs are not seeking equitable relief, and the action is not

barred by the statute of limitations. To the same effect, see *Anders* v. *Roark,* 108 Ark. 248, and *Galloway* v. *Battaglia,* 133 Ark. 441.

There is nothing in the record tending to show that the defendants were induced to change their condition with respect to the land by any conduct on the part of the plaintiff, and the plaintiff is not guilty of laches.

It follows that the decree must be affirmed.

PATTERSON v. ROGERS.

Opinion delivered April 11, 1921.

1. CONTRACTS—RESTRAINT OF TRADE.—Contracts in partial restraint of trade will be upheld unless they result in the creation of a monopoly.
2. GOOD WILL—CONTRACT NOT TO ENGAGE IN BUSINESS.—An agreement by the seller of a business not to engage therein, in order to be enforced, must be definite and certain as to the extent to which trade or business is restrained, so that it may appear to what extent the rights of the public have been infringed.
3. GOOD WILL—SALE OF BUSINESS.—One who sells his business with its good will must in good faith do nothing which directly tends to deprive his purchaser of the benefits and advantages of the purchase.
4. GOOD WILL—SALE OF BUSINESS—EFFECT.—An agreement not to engage in the same business is not to be implied from mere sale of the business with its good will or from loose expressions of the seller during the negotiations for the sale indicating a purpose not to re-engage in the business he is selling.
5. GOOD WILL—SALE—RIGHT TO RE-ENTER BUSINESS.—Where the purchasers of a milling business saw fit to rely on general expressions of the seller as to his intention not to re-engage in the business, without providing therefor in the written contract, they will be held to have taken the chance that the seller might later change his plans, in which event he would not be precluded from re-entering business.

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

Rice & Rice and *J. W. Nance,* for appellants.

There was no written contract regarding the sale of the property, good will and established business, and the court erred in its findings. Nor was there any oral agreement on these points. Appellants certainly understood that Rogers was selling them, not only the property, but all that was inseparably connected with it—the good will and the long-established business in the community. 9 Cyc. 246. There was a partial failure of consideration, and the chancellor erred in dismissing appellant's cross-bill. 62 Ark. 101; 91 *Id.* 367; 95 *Id.* 387. The contract was reasonable and enforceable and not void as against public policy. 112 Ark. 126; 9 Cyc. 738; 23 Ark. 196; 18 A. & E. Ann. Cases 433.

Duty & Duty and *McGill & McGill,* for appellee.

1. As the good will existed only in connection with the business, it is presumed it passed with the other assets sold, unless expressly reserved. 12 R. C. L. 985. While contracts in general restraint of trade are invalid as against public policy, contracts ancillary to the sale of a business are valid and enforceable. 127 Ark. 590; 5 *Id.* 318; 6 R. C. L. 786; 112 Ark. 126. The question whether appellant had the right to go back in the milling business in Rogers is involved. 12 R. C. L. 990; 60 Penn. St. 458; 100 A. D. 584. The good will passed with the other assets, unless expressly reserved. 12 R. C. L. 985. While contracts in general restraint of trade are invalid, yet contracts that are ancillary to the sale of a business and the good will thereof, with proper restrictions as to time and place, are valid and enforceable. 127 Ark. 590; 112 *Id.* 126; 6 R. C. L. 786. While the rule is, in some jurisdictions, that one who sells the good will of his business is precluded from setting up a competing business, the general rule is that, in the absence of an express covenant, there is nothing to prevent the seller from re-establishing in the same business, provided he does nothing to injure the good disposition of the public toward the old place of business, or impair any of the advantages which the

purchaser has acquired by the purchase of the good will of the old customers in the vicinity. 12 R. C. L. 988. See, also, note to Ann. Cases 1914 B 587; 29 *Id.* 582 and note; 118 Md. 29.

2. The contention that the mill property was sold for $7,000 and the good will for $3,000 is not supported by the evidence.

3. The measure of damages is the injury which the buyer has sustained. There can be no recovery, in the absence of evidence showing that the good will of the business was injured by defendant's wrongful act. 12 R. C. L. 996-7; 20 Cyc. 1282-3; 131 La. 204; Ann. Cases 1914 A and note; 92 S. W. 1104; 108 Ala. 451; 42 Ohio St. 474; 54 Am. St. 177; 112 Ark. 126.

There was no testimony that any actual damages had been suffered by appellants.

4. The testimony fails to show that Rogers was inspired by ill-will or intended to breach the contract. The evidence shows that appellants made a splendid trade, and there is no error in the findings and decree.

SMITH, J. W. J. Rogers operated a general milling business in the city of Rogers under the name of the Rogers Milling Company. He sold the property, good will and business to R. B. Patterson and three associates, who are the appellants here. The sale was made July 18, 1918, for the consideration of $10,500, of which sum $2,500 was cash in hand paid. The balance was evidenced by a note due one year after date, bearing eight per cent. interest. A payment of $1,000 was made on the note on January 2, 1919, and on August 1, 1919, an additional payment of $5,000 was made. This suit was brought at law to collect the balance, but on motion was transferred to equity.

The execution of the note was admitted, but, by way of defense, it was alleged that Rogers was a successful and experienced miller, and his plant had an established good will and business, and a part of the consideration for the note sued on was an oral agreement by Rogers

not to build or operate, or to become interested in the building or operation of, another mill in the city of Rogers, and that the good will of the business and the agreement on the part of Rogers not to re-enter the milling business were worth $3,500; that Rogers, in violation of his agreement, had erected another mill and was engaged in operating the same and transacting a general milling business, to the injury of the defendants in the sum of $3,500; and there was a prayer for judgment in accordance with these allegations.

Rogers testified in his own behalf, and denied that there had been any agreement on his part not to re-enter the milling business in Rogers. He stated that he went to Colorado for his health, and after a year's absence returned and re-entered the milling business.

John Putnam was one of the four who formed the copartnership for the purchase of the mill and who signed the note sued on. Putnam conducted the negotiations leading up to the purchase, and was the principal witness for the defendants. He stated he understood the mill had cost about $7,000, and he told Rogers $10,500 was too much for the property; but Rogers insisted that the price was reasonable, as the mill was running in good shape and had a good business. Putnam further testified that Rogers stated his physician had advised him to go West for his health, and that he was forever through with public business if he could sell his mill. This witness repeated these representations to his associates, all of whom testified that they were induced to buy by reason of the fact that they were getting the mill with its good will and business, and that they proceeded on the assumption that they would have no competition in business, at least none from Rogers.

This court has in more than one case upheld contracts in partial restraint of trade; but in doing so we have recognized that the contract is of such character that the rights of the public may be involved; and where the contract results in the creation of a monopoly, it is

void as contrary to public policy. *Wakenight* v. *Spear & Rogers,* 147 Ark. 342; *Shapard* v. *Lesser,* 127 Ark. 590.

The courts, therefore, require that such contracts be definite and certain as to the extent to which trade or business is restrained, so that it may appear to what extent the rights of the public have been infringed before lending aid to their enforcement.

The Supreme Court of Pennsylvania in *Hall's Appeal,* 60 Pa. St. 458, a case in which one undertaker had bought the business of another, including the good will of the business, said: "As the alleged agreement is in restraint of trade, its existence should be established by clear and satisfactory evidence in order to justify the court in restraining its breach by injunction. There should be no doubt or uncertainty in regard to its terms, or the consideration upon which it was founded."

One who sells his business with its good will must in good faith do nothing which directly tends to deprive his purchaser of the benefits and advantages of the purchase. But it is said in the note to the case of *Brown* v. *Benzinger,* 84 Atl. 79, A. & E. Ann. Cas. 1914 B 582, that the rule is well settled that the vendor of the good will of a business may, in the absence of a restrictive agreement, engage in a competing business. Cases are there collected supporting the text of the note.

The reasons generally assigned for the rule are that it is quite usual for one to sell his business, while agreements not to engage in the same business are exceptional; and, as such agreements result in at least a partial restraint of trade, they are not to be implied from the mere sale of the business with its good will or from loose expressions of the seller during the negotiations for the sale indicating a purpose not to re-engage in the business he is selling. The rule, as stated in 12 R. C. L. 988, is as follows: "But the more generally accepted doctrine is that, in the absence of an express covenant, there is nothing to prevent him from re-establishing himself in the same business, provided he does nothing to injure the good disposition of the public toward the old place of business,

or to impair any of the advantages which the purchaser has properly acquired by the purchase of the good will of the old customers in the same vicinity."

Appellee was not asked to agree not to re-enter the milling business in Rogers as a condition upon which the purchase would be made; nor is it contended that he agreed not to go into business again. There is no allegation or proof of fraud. After selling the mill Rogers did go West, as he had said he intended to do, where he remained for about a year. The purchasers saw fit to rely on general expressions by the vendor as to his future intentions, without incorporating those statements into the contract of sale, and they must therefore be held to have taken the chance that the seller might later change his plans, in which event he would not be precluded from re-entering business, as he did not so expressly agree.

It follows that, while Rogers has no right to do anything which would impair the value of the business, and the good will thereof, sold by him to appellants, he did not bind himself not to re-enter the milling business, and his act in doing so can not, therefore, be the subject-matter of an action for damages, and the decree of the court below is therefore affirmed.

AMERICAN RAILWAY EXPRESS COMPANY v. MACKLEY.

Opinion delivered April 11, 1921.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—In a case of conflicting evidence, the jury's verdict in favor of the plaintiff must be accepted as true on appeal.
2. MASTER AND SERVANT—LIABILITY FOR SERVANT'S ACT.—The test of a master's liability for the act of a servant is, not whether a given act is done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business.
3. MASTER AND SERVANT — LIABILITY FOR KILLING BY SERVANT.—Where, in a dispute concerning a shipment, plaintiff accused defendant express company's driver of lying, and subsequently the

driver armed himself, and returned to plaintiff's place of business for the purpose of obtaining a receipt and payment of the express charges, and demanded an apology from plaintiff's husband and in connection therewith shot him, the demand for an apology was no part of his employment; and the express company was not liable.

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

Mehaffy, Donham & Mehaffy and *King, Mahaffey & Wheeler,* for appellant, and *A. M. Hartung,* general attorney, of counsel.

1. The master (appellant) was not liable for the unauthorized tort of the servant. He was not acting within the scope of his employment. 255 S. W. 597; 133 Ark. 327; 131 *Id.* 411; 136 *Id.* 123; 119 *Id.* 28. His act was not done in the prosecution of the master's business, and the master was not liable.

2. The argument of plaintiff's attorney, Mr. Parks, to the jury, was improper and prejudicial.

3. The verdict is excessive. 65 Ark. 619; 89 *Id.* 522; 106 *Id.* 177; 115 *Id.* 101.

4. The court erred in its instructions for plaintiff Nos. 1, 5 and 6. No liability was shown by the evidence. 75 Ark. 589; 225 S. W. 597. The act was not committed in the prosecution of the master's business. This is the test. 77 Ark. 606; 23 Neb. 582; 40 Ark. 323; 84 *Id.* 193; 93 *Id.* 397; 111 *Id.* 208; 132 *Id.* 282; 96 S. W. 1073; 113 Pac. 386; 107 Ala. 233; 115 Ark. 288; 153 S. W. 694. The rulings of this court are sustained by all the text writers. See Sh. & Redf. on Neg. (6 ed.), § 148; Clark & Skyles on Law and Agency, § 502; 2 Cooley on Torts (3 ed.), § 627; Wood on Master and Servant (2 ed.), p. 585, § 307.

Tillman D. Parks and *James D. Head,* for appellee.

1. The express company was liable for the acts of its agent; he was acting on the master's business, and was done in the course of his employment. 93 Ark. 397; 75 *Id.* 579; 115 *Id.* 288; 59 S. E. Rep. 189; 93 Fed. 936; 222 *Id.* 889; 82 N. W. 304; 93 N. W. 598; 135 Ind. 524;

113 S. W. 429; 21 Am. Rep. 597; 2 Cooley on Torts (3 ed.), § 630, p. 1024; 21 Am. Rep. 597; 175 Fed. 61; 242 *Id.* 926; 231 *Id.* 926; 143 S. W. 555; 57 So. Rep. 718; 64 N. Y. 136; 125 S. W. 925; 182 *Id.* 981; 7 S. E. Rep. 411; 25 *Id.* 565.

2. The verdict is not excessive. 71 N. Y. 531; 118 Ark. 36; 77 *Id.* 1; 93 *Id.* 183; 135 *Id.* 56; 115 *Id.* 308; 216 S. W. 1057; 153 S. W. 651; 76 Ark. 377; 106 *Id.* 177; 82 *Id.* 504.

SMITH, J. On and prior to the 7th day of March, 1919, Jeff Hines was in the employ of the appellant express company in the city of Texarkana as a driver, and delivered the perishable express, which included consignments of flowers. Peter W. Mackley was a florist in that city, and his wife worked in his place of business. On the afternoon of March 7 a shipment of flowers from Neosho, Missouri, was delivered by Hines to the floral shop. Mackley was absent at the time, and his wife was in charge. The flowers were in a damaged condition, and Mrs. Mackley asked when they had been received, and Hines answered by giving the number of a train on which they had been shipped. Mrs. Mackley asked Hines why he wanted to tell a lie about the flowers, as the train on which he said they had arrived did not pass through Neosho. While the controversy was going on, Mrs. Mackley telephoned the agent of the express company, who sent his subagent, one Stuckler, over to the floral company, and, about the time Stuckler arrived, Mackley, who had also been called by his wife, came into the shop, and Mackley and Stuckler agreed on an adjustment of the damage to the flowers by reason of the delay in the delivery thereof. In the meantime Hines left the premises of the floral company in the course of his business without having taken the receipt of the floral company for the flowers and without having collected the charges on the express.

On the next afternoon Hines returned to the floral company for the purpose of collecting the charges on the

shipment and of taking the receipt of the floral company therefor. Mackley walked to the front of the store to sign the receipt in the book of the express company provided for that purpose and to pay the charges on the shipment of the previous day. There was nothing about signing the book or paying the charges over which Mackley and Hines could disagree or did disagree. The signing of the book was a perfunctory act which Mackley was performing when the trouble arose which forms the basis of this litigation. Mackley had written the words "Peter W. Mack" without having quite finished the "k," when Hines referred to the dispute with Mrs. Mackley on the day before. Mrs. Mackley and her friend, a Miss Van Treese, were seated in the rear of the shop, and heard the word "apologize" spoken in a tone loud enough to attract their attention. Upon looking up Mrs. Mackley saw that her husband's hands were in the air, and that Hines had a pistol pointed in her husband's face. She started at once to her husband's assistance, and in going to him passed a drawer in which her husband kept a pistol. She picked the pistol up and continued on her way. She testified that she had never shot a pistol and did not intend to shoot Hines, but that it was her intention to give her husband the pistol so that he could defend himself, but before she could do so Hines shot and killed Mackley and shot and seriously injured her.

Two suits were brought against Hines and the express company, one being by Mrs. Mackley in her own right, and the other by her as administratrix of her husband's estate. There was a recovery in each case; but upon appeal here the cases have been briefed together.

Hines gave a different version of the shooting, and claims to have fired in self-defense. But we must, of course, accept Mrs. Mackley's version as true in view of the jury's verdict. Hines was tried and given a long term sentence in the penitentiary for the shooting.

Hines testified that Stuckler offered to go to the floral company and collect for the shipment and obtain the receipt; but he declined the service. No attempt was

made to show, however, that any representative of the express company knew that Hines contemplated renewing the difficulty of the day before. Hines testified that he revolved in his mind, after he went to bed that night, what Mrs. Mackley had said to him, and he determined to demand an apology from her husband. With this thought in mind he borrowed a pistol from a friend. The pistol had only one cartridge—an old one—in the cylinder, so Hines bought new cartridges and loaded the pistol. Hines had no duties which required him to go armed, and he had only armed himself the day of the shooting; and there is no contention that any other employee of the express company was advised of that fact.

In the preparation of the respective briefs counsel have, through their research, collected many cases dealing with the liability of the master for the unauthorized tort of the servant committed during the course of his employment. It would be a work of supererogation to attempt to review these cases. The subject is one which has frequently engaged the attention of this court, and the law on the subject is thoroughly well settled. A very recent case is that of *Wells Fargo & Company Express* v. *Alexander,* 146 Ark. 104.

The Alexander case, *supra,* collects a number of our cases on the subject. In addition to the cases cited in the Alexander case, *supra,* see also other cases more or less recent as follows: *Healey* v. *Cockrill,* 133 Ark. 327; *C., R. I. & P. Ry.* v. *Womble,* 131 Ark. 411; *C., R. I. & P. Ry. Co.* v. *Gage,* 136 Ark. 123; *St. L., I. M. & S. Ry. Co.* v. *Lavensduskey,* 87 Ark. 540; *St. L. & San Francisco R. Co.* v. *Van Zant,* 101 Ark. 586; *St. L., I. M. & S. Ry. Co.* v. *Robertson,* 103 Ark. 361; *Arlington Hotel Co.* v. *Tanner,* 111 Ark. 337; *E. L. Bruce Co.* v. *Yax,* 135 Ark. 480; *St. L., I. M. & S. Ry. Co.* v. *Robinson,* 95 Ark. 39; *Mayfield* v. *St. L., I. M. & S. Ry. Co.,* 97 Ark. 24; *St. L. & S. F. R. Co.* v. *Rie,* 110 Ark. 495; *Pine Bluff & A. R. Ry. Co.* v. *Washington,* 116 Ark. 179; *St. L., I. M. & S. Ry. Co.* v. *Tukey,* 119 Ark. 28.

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

In the case of *St. L., I. M. & S. Ry. Co.* v. *Grant,* 75 Ark. 579, 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 a tort, whether authorized or not."

Appellee cites and relies on the case of *Bryeans* v. *Chicago Mill & Lbr. Co.,* 132 Ark. 282. In the second appeal of this case (*Chicago Mill & Lbr. Co.* v. *Bryeans,* 137 Ark. 341), an application of the law of the case, as announced in the first opinion, was made to the facts as developed at the second trial. It was the duty of the servant who committed the tort in that case to prevent nonemployees from interfering with employees in the discharge of their employment, and the shooting in that case grew out of the act of the servant in discharging that duty. The defense was made by the master in that case that the killing grew out of a private quarrel. We there said:

"In one of the latest cases upon this subject we said: 'No hard and fast rule has been or can be prescribed by which to determine what acts are within the scope of a servant's employment. Each case is governed by its own particular facts, under certain general rules of law.' Cooley says: 'Where a servant acts without reference to the service for which he is employed, and not for the purpose of performing the work of the employer, but to effect some independent purpose of his own, the master is not responsible for either the acts or omissions of the servant.' Cooley on Torts, 1032; 26 Cyc. 1536. Conversely, when the servant acts with reference to the services for which he is employed and for the purpose of performing the work of his employer, and not for any

independent purpose of his own, but purely for the benefit of his master, it is generally held, under such circumstances, that the acts so done are within the scope of the servant's employment."

We can not make the law of the subject plainer. The difficulty in that case, as in this, and in most cases of this character, is in determining whether or not the servant has stepped aside from the employment; whether he was undertaking to discharge the duties of his employment, however erroneous or mistaken his conception of his duties may have been; or whether he is pursuing his own plans and purposes which have no relation to his employment?

Applying this test, we think there is no liability in this case. The matter over which the difficulty arose had been settled twenty-four hours before. The company had admitted its liability, and had agreed to discharge that liability. The settlement was mutually satisfactory, and was final. There would have been no trouble but for the fact that Hines thought an apology was due him for what Mrs. Mackley had said the day before. His demand for an apology was made during his employment; but it was no part of his employment. It was in no manner necessary for him to obtain this apology to discharge his employment, and his act in demanding it must be attributed to a feeling of personal resentment, or injured pride, or some other emotion impelling him to rashness, of which the master was not advised and for which the master was not responsible, because it was a matter in which the master had no concern.

The judgment of the court below must therefore be reversed, and the cases will be dismissed.

HUMPHREYS, J. (dissenting). Even if it be conceded that an express company is liable to third parties for only such torts as their servants may commit that grow out of, or have relation to, the particular business being transacted at the time by the employee for the master,

I can not agree with the conclusion of the majority that the tort committed by Hines in the instant case was independent of, or disconnected from, his agency. He shot and killed Peter W. Mackley and wounded Mrs. Chloe Mackley while obtaining a receipt and collecting the charges on a shipment of flowers, over which a controversy had arisen the day before, in the course of which Hines had been charged with falsifying as to the train on which the shipment arrived. While it is true the amount of damage caused by the delayed shipment was agreed upon the day before the tort was committed, the transaction, out of which the dispute arose, leading to the commission of the tort was not closed, and during the continuation of the same transaction and before completed, Hines renewed the controversy by demanding an apology for what had been said to him in the course of the dispute the preceding day. The tort resulted on account of the quarrel begun one day and continued the next, growing out of and relating to the same business transaction, which transaction was clearly within the scope of the agent's authority; and I think, on that account, the appellant is clearly liable for damages resulting from the tort.

I therefore dissent from the judgment of reversal and dismissal in each case.

JACKSON v. BARNES.

Opinion delivered April 11, 1921.

VENDOR AND PURCHASER—RIGHT TO RESCIND SALE.—Where a vendor of land agreed that, if the title was not approved by the vendee's attorney, the vendor would pay the costs of a suit to quiet title, the vendee, by taking possession and cutting sixty-three trees in reliance upon the vendor's bringing a suit to remove defects pointed out by the vendee's attorney, did not accept the title as it stood, and, upon the vendor's failure to bring such suit, could sue for the value of property given in exchange, instead of suing on the covenants of warranty.

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

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

1. The Omaha property was valued too high by the lower court.

2. Appellants have not broken their contracts. A merchantable title was furnished as per contract. A reasonable time after defects are found, or pointed out, to cure them. 128 Ark. 361; 126 *Id.* 498; 120 *Id.* 69; 119 *Id.* 418.

3. Appellee having entered into possession is not entitled to the relief sought. Where a purchaser has been let into possession and continued without interruption, under a paramount title, he is not, in the absence of fraud, entitled to equitable relief from the payment of the purchase money on the ground of defect of title. He must seek his remedy at law on the covenants of his deed, etc. Appellee entered into possession and is not entitled to recover until evicted. 24 Ark. 456; 21 *Id.* 588; 38 *Id.* 202. A purchaser under a deed with covenants of warranty who has entered into possession can not, so long as he retains possession, deny the vendor's title or refuse to pay the price. 24 Ark. 61; Hempstead 502; 3 Pet. 43; 1 Nott & McCord 373; 27 Ark. 588; 47 *Id.* 296. Under these decisions appellee is entitled to no relief in this suit.

Williamson & Williamson, for appellee.

Appellants have broken their contract. The assumed modification of the original contract by the "supplemental" contract is void as to appellee, as he did not sign it; and if he made any such agreement, it is void within the statute of frauds. 69 Ark. 513; 91 *Id.* 133.

No contract is binding without a consideration to uphold it. 26 Ark. 160; 70 *Id.* 232. No benefit accrued to appellee nor loss or damage to appellants, and there was no consideration for the assumed agreement. 101 Ark. 28.

The land is wild and unimproved. The mere cutting of timber is not possession such as to require ejectment. The cases cited by appellant are cases of adverse possession under warranty deed. Appellee never accepted the deed nor title. 49 Ark. 266; 88 *Id.* 318; 84 *Id.* 587. On the whole case the decree is equitable and just.

SMITH, J. On April 20, 1918, Jackson and Vreeland, the appellants, contracted with T. B. Barnes, the appellee, to convey to him a merchantable title to 240 acres of land in Desha County, for the sum of $9,000, a portion of which was to be paid by the conveyance of certain lots in the city of Omaha, Nebraska. On May 25 a supplemental agreement was entered into, wherein it was provided that the abstract of the title should be examined by Guy C. Reed, the attorney for Barnes; and, if the title was not approved by Reed, then appellants "agree to pay necessary costs of suit brought in district court of Desha County to quiet said title, including attorney's fee."

The abstract was submitted to Reed, who rejected the title. No suit was ever brought to confirm the title. Appellants say the suit was not brought because they were led to believe the title would be accepted without confirmation, as Barnes had taken possession of the land by cutting timber. Barnes denied he ever agreed to accept a title not approved by his attorney, and he testified that he supposed a confirmation suit would be brought, as he signed papers for that pupose prepared by appellants' attorney. He admitted cutting sixty-three trees, which measured 4,454 feet, but he testified that when he did this he "supposed a perfect title was forthcoming;" but when he found that suit had not been brought at the term of the court to which it was agreed the suit should be brought, he treated the contract as at an end and so advised appellants.

Appellants took charge of the Omaha property and sold it to innocent purchasers without notice of the terms under which it had been sold, the sale being made subject to certain outstanding incumbrances. The court

fixed the value of the Omaha property at $3,400, whereas appellants received only $1,700 at the sale made by them, and this finding of value is one of the questions raised on this appeal. The testimony on this subject is conflicting; but we are unable to say that the finding of the chancellor is clearly against the preponderance of the evidence.

We think the testimony does not support the contention that appellants had the right to assume that appellee was satisfied with the title and was willing to accept it as it stood. Nor do we agree with counsel for appellants that appellee is relegated to a suit upon his covenants of warranty contained in the deed prepared and tendered by appellants, as having accepted the land. We think there was no such taking possession as amounted to an acceptance. It is true some timber was cut, but this was done on the assumption that a merchantable title would be tendered and that the necessary steps to perfect the title had been taken. The acceptance was conditional, the condition being that the title contracted for would be furnished, and that was never done.

No objection to the value of the timber as found by the court was made. Appellants were allowed credit for the value of the timber in the decree fixing the value of the Omaha property for which judgment was rendered.

We think the court's finding that a merchantable title was not furnished as required by the contract is not clearly against the preponderance of the evidence, and the decree of the court below is therefore affirmed.

TRIESCHMANN v. BLYTHEVILLE STEAM LAUNDRY.

Opinion delivered April 11, 1921.

1. LANDLORD AND TENANT—OPTION OF PURCHASE.—A provision in a lease that the lessee should have an option during the life of the lease to purchase, and that if the lessor desired to sell he would give the lessee the preferential right to buy at a price named, was an option to purchase, and not an executory contract to convey

2. SPECIFIC PERFORMANCE—OPTION CONTRACT.—Where a lessee of land having a legal right to convert an option to buy into an executory contract of sale suffers the lessor to sell the property to another, the remedy of the lessee is not specific performance, but an action at law for breach of the contract.

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

M. P. Huddleston, R. E. Fuhr and *J. M. Futrell,* for appellant.

1. Complainant must have the equitable title before he can call for specific performance.

2. Possession imputes knowledge to all persons of the possessor's title.

3. The option here was no more than a standing offer to sell, and, unaccepted, created no right, title or claim to the lands in the laundry company.

4. If the offer had been accepted by the laundry company prior to the sale to Trieschmann, it would have acquired the equitable title which would have been protected against all persons having notice.

5. An agreement by one party can not be enforced against a third party except when such third party had made an agreement to that effect.

That Trieschmann had no actual knowledge of the option purchase is fully sustained by the testimony. He had neither actual nor constructive notice.

The laundry company did not exercise its option prior to the sale, and it was error to decree specific performance. 1 Pom., Eq. Jur., §§ 105, 366-7-8.

The finding of the chancellor is against the preponderance of the testimony. The case should be reversed on the law and the facts.

Little, Buck & Lasley, for appellee.

Appellant purchased with full notice of appellee's rights and is bound. 39 Cyc. 1756; 6 L. R. A. 205; 31 Cyc. 1592-5; 2 Pom., Eq., §§ 666, 675; 57 U. S. (Law. Ed.) 1310. See, also, 10 Cyc. 1064, 1963; 49 Neb. 618; 61 S. W. 889.

As to "reasonable notice," see, also, 52 Am. Rep. 822. Due notice was given, as the evidence shows. The burden was on appellant and he has failed to meet it.

SMITH, J. The Blytheville Laundry Company filed its complaint against M. N. Nunn and J. W. Trieschmann, praying for the specific performance of a contract executed by Nunn, as lessor, to the Blytheville Laundry Company, a corporation, as lessee, dated January 25, 1917. The defendant, Nunn, filed an answer, denying all the material allegations of the complaint. Trieschmann filed a separate answer, denying the material allegations of the complaint, and alleging that his codefendant, Nunn, desired to sell the premises described in the lease contract, the same being the building used by the laundry company in the operation of its business, and in compliance therewith notified the plaintiff of his desire to sell and gave the plaintiff the preferential right to purchase, but plaintiff refused to exercise its option and declined to purchase.

The lease contained the following provisions: "It is further understood and agreed by and between the parties hereto that the lessee shall have the option, at any time during the life of this contract, but not during the extension thereof, unless mutually agreed to by the parties hereto in the renewal contract, to purchase said premises for the sum of $3,500, and the lessor agrees, upon the exercising of said option by the lessee, or upon notice from the lessee that it desires to purcahse the same for the sum of $3,500, to execute a good and sufficient warranty deed therefor, conveying the said property to the lessee, or to any one whom it may designate; and it is further understood and agreed by and between the parties hereto that, in the event the lessor desires to sell and dispose of said building, he shall give the lessee the preferential right to purchase the same at and for the sum of $3,500, and shall notify it and give it the first opportunity to acquire said premises."

The court found that, at the time Trieschmann purchased the property from Nunn, the laundry company was in the actual possession of the property, and that Trieschmann was, therefore, affected with notice of the right of the laundry company to purchase the property at any time prior to January 25, 1922. Trieschmann had no notice except that resulting from the actual possession of the premises by the laundry company. The court decreed specific performance upon the payment to Trieschmann of the sum of $3,500, and this appeal is from that decree.

It appears that one Mott, a banker, was the secretary and treasurer of the laundry company, and had acted for it in the negotiations leading up to the execution of the lease; and it was to him that Nunn gave notice of his intention to sell. Mott testified that he accepted the offer, but before a reasonable opportunity was afforded him to consummate the purchase a sale was made to Trieschmann.

Mott testified, however, that he treated the offer as a personal one, and that his acceptance was for his personal benefit; and, because of Mott's attitude toward Nunn's offer to sell, the laundry company insists that it was never given the option to buy. Nunn denied that the offer was accepted by Mott, and stated that he sold to Trieschmann, after Mott, acting for the laundry company, had refused to exercise its option.

But a case for specific performance is not made, even though we accept Mott's statement that he offered to buy. His offer was for himself, and not for the laundry company. The writing set out above is not an executory contract to convey land. There was here only an option to purchase. It is true the contract gave an option to buy, which continued during the life of the lease. But, so far as that feature of the contract is concerned the contract was unilateral. There was no obligation on the part of the laundry company to buy. It could buy or not, as it pleased. The failure of Nunn at any time during the life of the lease to afford the laundry company the

opportunity to exercise its option would have constituted a breach of the contract. But the laundry company could acquire an equitable interest in the land only by exercising its option. Under the contract it had the right at any time during the lease to acquire the equitable title by offering to buy; but it did not acquire this equitable title until it exercised its option.

At section 501 of James on Option Contracts the following statement of the law appears:

"On this subject one line of decisions (the weight of authority) holds that an option contract to purchase does not vest any estate, legal or equitable, in the optionee prior to his election to purchase. This, it is said, results from the nature of the option contract in that thereby the optionor does not sell the property, nor does he thereby agree to do so, but sells to the other party the right merely of an election to buy, and therefore the rule that a vendor under an agreement of sale holds the title in trust for the vendee, and that the vendee holds the purchase money in trust for vendor, does not apply to option contracts.

"There is another line of decisions which seems to hold to the contrary, but it occurs to us the well considered of these decisions hold merely that, when the option is supported by a consideration, the optionee acquires a right, by timely election, to enforce a conveyance of the property as against a purchaser or encumbrancer with notice.

"However, there might be a case where a transaction, taking on the form of the option, is such as to vest in the optionee an equitable right or estate in the property." See, also, *Swift* v. *Erwin,* 104 Ark. 465.

The laundry company had the legal right at any time during the life of the lease to convert an option to buy into an executory contract of sale, in which event a right to a decree for a specific performance would have arisen. But the laundry company suffered a sale of the property to be made before it exercised its

option to buy, and while it had only an option to buy, its remedy, therefore, consisted in an action at law for the breach of the contract. The distinction in the rights of the laundry company before and after exercising its option to buy is shown at sections 367 and 368 of Pomeroy's Equity Jurisprudence in the discussion of the effect of an executory contract at law and in equity.

As the laundry company did not exercise its option prior to the sale, it acquired no equitable title to the land, and the court should not, therefore, have awarded a decree for specific performance. The decree is, therefore, reversed and the cause remanded with directions to dismiss the complaint for want of equity.

MALONE v. HOLLY GROVE LUMBER COMPANY.

Opinion delivered April 11, 1921.

1. MECHANICS' LIEN—NOTICE TO OWNER.—The ten days' notice to the owner of the land provided for by Crawford & Moses' Digest, § 6917, where a person other than the original contractor wishes to avail himself of the mechanics' or materialman's lien, does not apply if the owner himself purchased the material or employed the labor.
2. MECHANICS' LIEN—EVIDENCE.—In a suit to recover for material furnished to erect a building, evidence held to sustain a finding that the material was sold directly to the owner, and not to the contractor.

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

Bogle & Sharp, for appellant.

S. S. Jeffries, for appellee.

HUMPHREYS, J. Appellee, Holly Grove Lumber Company, a partnership composed of Rue Abromson and B. G. Wellborn, instituted suit against appellant in the Monroe County Chancery Court to recover judgment against him for material furnished to erect a building on lot 1 in block 9, in Blackton, Arkansas, and to enforce

a lien upon said property under act No. 146 of the Acts of the Legislature of 1895, securing liens to mechanics, laborers and others, upon property improved.

Appellant filed an answer, denying that appellees furnished him the material to erect the store building in question, and that he was entitled to a lien for same on the property in question.

The cause was submitted to the court upon the pleadings, the deposition of B. G. Wellborn and exhibits thereto attached, offered on behalf of appellee, and the deposition of J. V. Malone and a copy of a delivery receipt of the Missouri Pacific Railroad Company for certain materials, offered on behalf of appellant, from which the court found that appellant was indebted to appellee in the sum of $530.83 for material that entered into the construction of the building, and $57.18 for roofing that did not enter into the construction of said building, for which amounts judgment was rendered against appellant and a lien for $530.83 declared on said lot. This appeal is from the findings and decree, and the cause is here for trial *de novo*.

The facts, in substance, are as follows: Appellant owned the lot in question, and, in January, 1919, employed A. B. Carrier to construct a store building on the lot for either $1,000 or $1,100, with the understanding that the contractor was to furnish all labor and material. On January 23, the contractor called at the store of appellee, in the town of Holly Grove, and told B. G. Wellborn that he had an order for him. He gave B. G. Wellborn a list of the material, and, without inquiry as to the price, told him to ship it to J. V. Malone at Blackton, Arkansas. The bill of material was charged on the books and shipped to appellant at Blackton on the 23d day of Janaury, and arrived there on the 25th. Appellant signed a delivery receipt to the railroad company for the material, which showed on its face that he was the consignee and that it was waybilled from Holly Grove. The material was used in the construction of the store building on the lot in question. On January 28,

a one-sixth flue thimble for the building was mailed and charged to appellant. On March 1, a front for the store building was sold to appellant by W. K. Wellborn, who was at the time salesman for appellee, which was charged to appellant on the books by appellee and shipped to him directly from Little Rock. In response to a statement of the entire account mailed to appellant by appellee, he wrote the following letter on April 9, 1919:

"Mr. Wellborn: I am enclosing you a check for the roofing and front that I bought from you, hoping this will be satisfactory. Now, in reference to the car of lumber: If you sent me a statement, I don't know anything about that. I never bought any lumber from you. If it is the car of lumber that Carrier sent here, a part of it is here, some of it was used in my house, and the balance left here, so if that is what you sent statement here for, you can get it any time. It was so sorry that I would not allow it to go into the house. I will try to go down to Holly Grove as soon as I can and see you about this.

"Yours respectfully, J. V. Malone."

On April 21 thereafter, B. G. Wellborn wrote to appellant as follows: "Mr. J. V. Malone, Blackton, Ark. Dear Sir: We are holding your check with the memorandum statement, as you said you were coming down in a few days, but, for fear that you have been so busy at this time, we thought best to write about it, so as not to have any misunderstanding. You failed to enclose paid expense bill for freight charges on the front, which is very necessary for us to have to get proper credit from the shipper. You also deducted for extra lumber that was used in the front, and this extra lumber that was needed, as your carpenter explained, was shipped by us without any charge to you whatever. You deducted for hinges, which is as agreed, also the five per cent. is all right. Now, you say that you don't know anything about the other lumber, some you could not use; we would be glad to have you ship that back to us and we will credit your account, or as it will cost us about five dollars a thousand to have this shipped here, we will deduct this

charge per thousand feet if you could use this, and send me a check to balance the account.

"B. G. Wellborn."

The lien of appellee was filed in the clerk's office on the 18th day of May, 1919, and the suit to enforce the lien was commenced on the 28th day of January, 1920. No notice of the intention to file the lien was given to appellant.

B. G. Wellborn testified that he sent appellant an invoice of the materials and monthly statement of the bill, the receipt of which was not acknowledged until April 9, as per letter heretofore set out.

Appellant testified that he received no invoice for the goods and no monthly statements of account from appellee, except the statement of April 1, to which he replied on April 9; that he advanced the money to his contractor to pay the freight on the car of materials, but had nothing to do with it himself, being of the opinion that his contractor had purchased and shipped them in himself; that he settled with his contractor in full by paying him more than the contract price; that the contractor informed him that he had bought the materials at Heber Springs; that the only items he purchased from appellee were a store front and paper roofing, and that he sent a check to appellee to cover the amount on April 9, which appellee refused to present for payment.

Appellant contends for a reversal of the decree on the ground that appellee failed to give the ten days' notice to appellant before filing the lien in accordance with the requirement of section 6917 of Crawford & Moses' Digest. The notice to the owner of the land provided for in the statute does not apply if the owner himself purchased the material, or employed the labor. The issue presented to and determined by the chancery court was whether, in the capacity of contractor, A. B. Carrier purchased the material, or whether, as agent, he placed the order with appellee for appellants. The chancellor found that the material was sold to appellant by order of A. B. Carrier. He based this finding upon the evidence

of B. G. Wellborn, corroborated by the delivery receipt to the railroad company signed by appellant, which showed on its face that appellant was the consignee and that the material was waybilled at Holly Grove. The fact that the material was charge to, shipped to, and received by, appellant and the testimony that an invoice and monthly statements were sent to appellant are strong corroborative circumstances that it was sold directly to said appellant on the order of A. B. Carrier. It can not be said by us, after a very careful consideration of the whole evidence, that the finding of the chancellor was contrary to a clear preponderance of the testimony.

The decree is therefore affirmed.

BAIRD v. STREET PAVING IMPROVEMENT DISTRICT NO. 1.

Opinion delivered April 11, 1921.

1. MUNICIPAL CORPORATIONS—PETITION FOR IMPROVEMENT DISTRICT.—A petition for the organization of an improvement district in a city or town need state the nature of the improvement only in general terms, and therefore a petition describing the improvement as macadamizing, grading, graveling, paving, curbing or guttering the streets mentioned was sufficient.
2. MUNICIPAL CORPORATIONS—PETITION FOR IMPROVEMENT DISTRICT.—A preliminary petition for a street improvement district which authorizes the improvement to be made with such material as may be determined, for the purpose of macadamizing or graveling the designated streets, contemplates material of the general character used in macadamizing or graveling streets.
3. MUNICIPAL CORPORATIONS—PETITION FOR IMPROVEMENT DISTRICT.—A petition for a street improvement may ask for a macadamized or graveled street with curbs and gutters as a single improvement.

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

J. W. Johnston, for appellant.

The description of the improvement to be made, all of which are set out in the complaint, is too indefinite and uncertain, hence void, and the court erred in sustain-

ing defendant's demurrer to the complaint. 118 Ark. 119; 115 *Id.* 594; 59 *Id.* 344; 116 *Id.* 167; 130 *Id.* 44.

Strait & Strait, for appellee.

There is no uncertainty of description in the contemplated improvements. They are correctly and fully enumerated, and the descriptions sufficient, and the court properly sustained appellee's demurrer. 105 Ark. 68; 59 *Id.* 344; 103 *Id.* 269; 97 *Id.* 334. See, also, 31 Iowa 31; 2 Page & Jones on Taxation, 869; 8 Wash. 317; 183 Ill. 57; 138 Cal. 364; 119 Ill. 509; 28 Conn. 363; 41 N. E. 374; 115 Ark. 94; 135 *Id.* 317; 95 *Id.* 496; 102 *Id.* 306. A general description is sufficient.

HUMPHREYS, J. This is an appeal from a decree of the Conway Chancery Court, sustaining the sufficiency of the proceedings establishing Street Paving Improvement District No. 1 of Morrilton, Arkansas.

Appellant, a property owner of the district, attacked the validity thereof on the ground that the petitions for the organization of, and the ordinances creating and establishing the district, failed to certainly and definitely describe the improvements to be made.

The preliminary petition, required by section 5649 of Crawford & Moses' Digest, described the improvements contemplated, as follows: "The said improvement district as above described to be organized for the purpose of macadamizing, grading, graveling, paving, curbing, guttering or improving with such material as may be determined."

The petition for the establishment and organization of the district under section 5652 of Crawford & Moses' Digest described the improvements to be made as follows: "We respectfully petition and ask that the following improvements contemplated be made in said district, of the nature, kind and character, towit: Macadamizing, grading, graveling, paving, curbing, guttering or improving in such a manner and form as provided and shown by the estimates, plans and specifications prepared

and on file be made and constructed on the following streets."

The ordinance passed by the city council creating the district and fixing the boundaries thereof provided that the improvements to be made should be "grading, graveling and macadamizing, surfacing, paving, curbing or guttering the streets therein mentioned."

This court ruled, in the case of *McDonnell* v. *Improvement Dist. No.* 145, *Little Rock,* 97 Ark. 334, that the petitions provided for in sections 5649 and 5652 of Crawford & Moses' Digest for the organization of improvement districts in incorporated towns and cities need not make particular specifications of the things to be done in order to make the improvements. It was said in that case: "All that is required is that the nature of the improvement be specified in general terms, so that the purpose of the organization may be set forth in the proceedings. Much must, of course, be left to the discretion of the commissioners in forming the plans for the improvement and making the estimates of the cost thereof." The ruling in that case was reaffirmed in *Board of Improvement of Paving Dist. No.* 7 *of City of Fort Smith* v. *Brun,* 105 Ark. 65. Under the ruling in those cases, the description in the petitions now before us described the proposed improvements with sufficient certainty and definiteness. The petitions and ordinances provide for paving the streets described, by macadamizing or graveling them, as well as for curbing and guttering said streets. It is true that the petitions contain a provision authorizing the improvement to be made with such material as may be determined, but that necessarily means material of the general character used in macadamizing or graveling streets. Appellant makes the further specific contention that, under the descriptive language used, it is impossible to determine whether all improvements therein designated are to be made, or, if not all, what particular improvements so enumerated shall be made. We understand the language to mean that the board of improvement shall either macadamize

or gravel the streets, one or the other. We also understand the descriptive language to mean that, in addition to paving proper, the streets shall be curbed and guttered; so the paving, curbing and guttering constitute a single improvement. This court said in the case of *Board of Improvement of Paving Dist. No. 7 of City of Fort Smith* v. *Brun,* 105 Ark. 65, that, "If the improvement of the street is authorized, and to make such improvement it is necessary to grade, macadamize and curb the street, the work undertaken is in fact but one improvement, although parts of the work are called by different names." The property owners in the petition before us have clearly elected to pave the streets described by graveling or macadamizing them, as well as to curb and gutter said streets by the creation of one district. This they had a right to do, under the ruling announced in *Bottrell* v. *Hollipeter,* 135 Ark. 315, and in other cases of this court cited therein.

No error appearing, the decree is affirmed.

HUDSON v. UNION & MERCANTILE TRUST COMPANY.

Opinion delivered April 11, 1921.

1. INSANE PERSONS—TIME FOR APPEAL.—Crawford & Moses' Digest, § 2140, allowing to an insane person a right of appeal within six months after removal of his or her disabilities, applies as well to a suit brought by an insane person as to one brought against him.
2. INSANE PERSONS—VALIDITY OF DECREE AGAINST.—Where plaintiff brought suit to set aside a sale under mortgage on the ground that she was insane at the time of its execution, and defendant by way of cross-complaint set up that the loan secured by the mortgage was used to pay valid liens on the land, and asked that such liens be foreclosed, which was done, the decree was not void for want of an answer to the cross-complaint, which was in the nature of an equitable defense, and did not necessarily call for an answer from the plaintiff's guardian.
3. JUDICIAL SALES—RIGHTS OF PURCHASER UNDER ERRONEOUS DECREE.—A stranger purchasing under a judicial sale based upon a decree erroneous but not void acquires rights which will be protected.

4. INSANE PERSONS—LOANS—SUBROGATION.—Under the doctrine of subrogation, one lending money to an insane woman to buy land may have a lien thereon for the amount of such purchase money, but it was error to declare a lien therefor in his favor on other land owned by her.

5. INSANE PERSONS—CONTRACTS—VALIDITY.—The contracts of insane persons may be set aside though made at their instance without notice of their infirmity for a fair consideration and without fraud or imposition.

6. INSANE PERSONS—CONTRACTS—RESCISSION.—An insane person may rescind a note and mortgage executed by her without restoring or offering to restore the consideration received, provided it is no longer in her possession or control.

7. INSANE PERSONS—RIGHTS IN LAND ERRONEOUSLY SOLD.—Where money was loaned to an insane person, which in part was used to pay off a lien on land owned by her, and part in making payment on other land bought by her and discharging a lien on the latter land, though a sale of both tracts for the entire amount was erroneous, she will not be entitled to restitution of the land purchased by a stranger, but where one of the tracts brought more than the lien against it, she will be entitled to a proportionate part of the purchase money.

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

W. A. Cunningham, for appellant.

The decree was rendered upon the cross-complaint of E. G. Thompson and no answer to this cross-complaint was ever filed by a guardian or guardian *ad litem* of Ada Sims, a person of unsound mind. This was reversible error. 104 Ark. 193; 105 *Id.* 11. Mrs Sims was insane and was not bound for the purchase price of the lands. She should be allowed to recover her lands or the purchase price with interest, less the amount of the lien at the time the deed of trust then was executed to Thompson.

Stayton & Stayton and *Gustave Jones,* for appellees.

1. The appeal was not perfected in time and should be dismissed. C. & M. Digest, § 2131; 104 Ark. 379; 119 *Id.* 235.

2. Being the moving party, represented by regular guardian, appellant is bound by the judgment and de-

cree. 55 Ark. 22; 98 *Id.* 151-155; 105 *Id.* 440. The appeal should be dismissed. Evidence *dehors* the record to establish a waiver by appellant of the right of appeal. 53 Ark. 514; 106 *Id.* 292; 85 *Id.* 30; 97 *Id.* 373; 92 *Id.* 242.

3. There is no evidence of fraud or overreaching or inadequacy of consideration. At the time of the decree, Mrs. Sims was in possession of the property purchased by the money obtained from appellee Thompson and enjoying the benefit thereof. This case is ruled by 115 Ark. 430. See, also, 104 Ark. 187; 105 *Id.* 5; 135 *Id.* 440-4.

Where infants by guardian or next friend go into court to assert their rights, they are under the eye of the court and enjoy its care and protection and the conclusions reached are as binding upon them as upon persons *sui juris*. 55 Ark. 22. Mrs. Sims was the moving party, and the statute affords her no relief. 98 Ark. 151, 155. Appellant has had her day in court and is bound by the decree as a person *sui juris*. 49 Ark. 399; 85 *Id.* 272; 70 *Id.* 415; 103 *Id.* 67.

HUMPHREYS, J. This is an appeal by Ursel Hudson, as next friend for Ada Sims, from a decree rendered in the Jackson Chancery Court on November 2, 1915, against Ada Sims, in a suit brought in said court by V. G. Richardson, as guardian for the person and estate of the said Ada Sims, a person of unsound mind, against the appellees. V. G. Richardson, Ada Sims' regular guardian, died May 13, 1918. The prayer for appeal was filed January 11, 1921. The suit was to set aside a mortgage given by Ada Sims, widow, on the 23d day of February, 1914, to E. G. Thompson, agent, and Wm. N. Dunaway, trustee, on 200 acres of land in said county, to secure a loan in the sum of $3,000, due two years after date.

The facts developed in the trial of the cause are substantially as follows: Ada B. Sims owned in her own right the north half of the southwest quarter, and the north half of the southwest quarter of the southwest quarter of section 34, township 9 north, range 2 west, upon which there was a mortgage lien for $500 and in-

terest, in favor of Anna M. Volkmer. Her sister, Mrs. D. S. Stansbury, owned the south half of the northwest quarter and the south half of the southwest of the southwest quarter of said section, upon which there was a mortgage lien for $1,000 and interest, in favor of E. G. Thompson. On February 6, 1914, Mrs. D. S. Stansbury sold and conveyed the 100 acres of land owned by her, heretofore described, to her sister, Ada B. Sims, for $3,000. In order to pay the liens upon the several tracts of land and to pay a part of the purchase money she owed Mrs. Stansbury for the portion bought from her, she borrowed from E. G. Thompson, agent, through the instrumentality of Gustave Jones, the sum of $3,000, on the 23d day of February, 1914, and executed the mortgage, or deed of trust, sought to be canceled, to Wm. N. Dunaway, as trustee for E. G. Thomuson, agent, on the entire 200-acre tract—the 100 acres owned by her as well as the 100 acres purchased from her sister. Out of the proceeds of the $3,000, Mrs. Sims paid $520.83 in satisfaction of the Volkmer mortgage, $1,006.66 in satisfaction of the E. G. Thompson mortgage against the land purchased from her sister, Mrs. Stansbury, and the balance to Mrs. Stansbury on the purchase money for the 100 acres bought from her. Mrs. Stansbury at the time took a second mortgage to secure the unpaid purchase money. According to the weight of the evidence, Ada Sims was insane at the time she executed the note and mortgage for $3,000, but her condition was unknown to any of the appellees. On the 8th day of April, 1914, the said Ada Sims was adjudged to be insane by the county court of Independence County, and V. G. Richardson was appointed guardian of her person and estate on the 11th day of May, following. The $3,000 mortgage in question was breached by failure to pay interest, and the trustee advertised and sold the entire 200-acre tract under the terms of sale provided in the mortgage. This suit was then instituted to set aside the sale and cancel the debt and mortgage on the ground of the insanity of the said Ada B. Sims at the time she executed

the mortgage or deed of trust. All the appellees answered, and, in addition to a denial of the material allegations of the bill, it was charged in the separate answer and cross-complaint of E. G. Thompson that the $3,000 loaned by him and secured by the mortgage in question, on the 200-acre tract of land, was used to liquidate mortgage liens upon the land at the time and to pay a part of the purchase money for the land purchased by Mrs. Sims from Mrs. Stansbury, and, on that account, he asked that a lien be declared on the land for the amount advanced, and for a foreclosure of the lien to pay the amount. A summons was issued on the cross-complaint and served upon the guardian of Ada Sims, who had instituted the suit.

The court found that Mrs. Sims was without capacity to contract at the time she executed the mortgage, but that her condition was unknown to any of the appellees, and that the money loaned by E. G. Thompson to her was used to liquidate existing liens on the several tracts of land and to pay a part of the purchase money for the 100-acre tract bought from her sister, and decreed a lien for the amount loaned, with interest, upon the entire 200-acre tract and ordered a sale thereof to pay the indebtedness. The sale was made, at which B. W. Jones, who was not a party to the cause, purchased the land for $3,600, which was reported to and confirmed by the court.

The appellees filed a motion to dismiss the appeal on the ground that the time elapsed for taking an appeal on the 2d day of November, 1916. At the time the decree was rendered, the general statute governing appeals allowed one year from the rendition of the decree within which to take an appeal; later, the statute was amended so as to allow only six months. A ruling on the motion was withheld until the final submission of the cause, and appellees now insist on a dismissial for the reason assigned in the motion. It is contended that, because appellant, through her regular guardian, instituted the suit, she was the moving party and was bound by the decree

of the court as a person *sui juris,* and was therefore compelled to appeal within the year period. Section 2140, Crawford & Moses' Digest, the general statute covering appeals to the Supreme Court, reads as follows: "An appeal or writ of error shall not be granted, except within six months next after the rendition of the judgment, order or decree sought to be reviewed, unless the party applying therefor was an infant, or of unsound mind at the time of its rendition, in which cases an appeal or writ of error may be granted to such parties, or their legal representatives, within six months after the removal of their disabilities or both." It will be observed that no distinction is made in the statute between persons of unsound mind on account of being plaintiffs or defendants in a suit. This court said, in the case of *Evans* v. *Davis,* 146 Ark. 595, that the statute, "permits an appeal to be taken by a person of unsound mind within six months after the removal of such disability." The motion to dismiss is overruled.

Appellant's first contention is that the decree was void because rendered on the cross-complaint of E. G. Thompson, to which no answer was filed for the *non compos mentis,* either by the regular guardian or by a guardian *ad litem.* The matter set up in the so-called cross-complaint of E. G. Thompson was in the nature of an equitable defense to appellant's bill asking for a cancellation of the debt and mortgage and did not necessarily call for an answer from a guardian of a party to the suit. The court had jurisdiction of the subject-matter and parties, so, if any errors were committed in the rendition of the decree, it was erroneous and not void. *Boyd* v. *Roane,* 49 Ark. 397. The decree ordering the sale not being void, B. W. Jones, who bought the land at the judicial sale, acquired rights as a purchaser which will be protected. *Buford* v. *Briggs,* 96 Ark. 150; *Dodson* v. *Butler,* 101 Ark. 416; *Evans* v. *Davis, supra.*

Appellant's next and last contention is that the court erred in failing to return appellant the purchase price

of the 100 acres of land which she owned individually before purchasing the 100 acres from her sister, Mrs. Stansbury, less $520.83 with accrued interest, which was paid out of the $3,000 loan made to her by E. G. Thompson, agent.

Appellees say that this contention presents a new or different issue, not determined in the lower court. Not so. This issue was determined adversely to the contention of appellant in the court below when the court, under the doctrine of subrogation, allowed E. G. Thompson the proceeds from the sale of Ada Sims' individual lands to repay the money advanced to her to buy other lands. We think it was error, under the doctrine of subrogation, to impose a lien upon appellant's individual lands for money advanced or loaned to her with which to purchase the 100-acre tract from her sister. In further reply, appellees say that, according to the weight of authority, unless the parties can be restored to their original positions, courts will not set aside contracts made with insane persons at their instance, without notice of the infirmity, if the contracts were for a fair consideration and without fraud or imposition. The mortgage contract between Ada Sims and E. G. Thompson was set aside by the trial court on the ground that Ada Sims was insane at the time she executed it, and E. G. Thompson prosecuted no appeal to this court from that decision. Again, the doctrine contended for by appellee is not in accordance with the doctrine adopted by this court. In the case of *Henry* v. *Fine*, 23 Ark. 417, after deciding that contracts of this character made with insane persons without notice of the infirmity might be avoided at their instance, the court ruled that, in order to avoid the sale, it was not necessary to pay or tender the consideration paid by the purchaser. The doctrine there announced was reaffirmed in the later case of *George* v. *St. L., I. M. & S. Ry. Co.*, 34 Ark. 613, in which this court disapproved an instruction incorporating the doctrine contended for by appellee in the instant case. It is unnecessary to determine where the weight of authority lies

since this court has announced the doctrine that an insane person may rescind a contract of this character without restoring or offering to restore the consideration received. It goes of course without saying that, if the insane person had the possession or control of the consideration received, he would be required to restore it before a rescission would be decreed, but, if the insane person had parted with the consideration, no such requirement is a necessary prerequisite to canceling the contract. It was proper for the trial court, under the doctrine of subrogation, after setting the contract aside, to charge Ada Sims' individual land for money advanced or loaned to her by E. G. Thompson to liquidate valid, subsisting liens upon that particular land.

While appellant can not have restitution of her individual tract of land which passed at the sale to the purchaser, B. W. Jones, she is entitled to restitution of a proportionate share of the proceeds of the sale. For example: If her individual 100-acre tract was of equal value with the 100 acres purchased from her sister, then she should have, by way of restitution, $1,800, one-half of the purchase price of the 200-acre tract, less the amount used out of the loan to pay the Anna Volkmer mortgage with interest thereon to the date the purchase money was paid into court for distribution.

For the error indicated, the decree is reversed and the cause remanded with directions to proceed in accordance with this opinion.

COCHRELL v. STATE.

Opinion delivered April 18, 1921.

1. HOMICIDE—EVIDENCE OF PREVIOUS QUARREL.—In a prosecution of a woman for killing her husband, where she claimed to have killed him in self-defense, and she was permitted to detail her troubles with her husband and his cruel treatment and threats for a considerable period of time, it was not error to exclude the testimony of a witness concerning an altercation between defendant

and her husband several months prior to the killing; there being no evidence to connect it with the killing.

2. CRIMINAL LAW—CROSS-EXAMINATION—NECESSITY OF OBJECTION.—Assigned error in the overruling of an objection to a question asked defendant on cross-examination is not reviewable where no exception was saved to the court's ruling.

3. HOMICIDE—SUFFICIENCY OF EVIDENCE.—In a prosecution for murder, evidence held to sustain a conviction of murder in the second degree.

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

Caldwell, Triplett & Ross, for appellant.

1. It was error to refuse to permit Mrs. McFall to testify concerning an alleged previous difficulty or quarrel between appellant and her husband.

A trial court should not make assertions which show to the jury what the court thinks of the testimony. The jury should be the sole judge of the evidence. 51 Ark. 147.

2. Mrs. McFall was not permitted to testify for appellant after appellant offered to show by the witness actual acts of violence committed by deceased upon appellant, and thus self-defense and justification in the killing. The testimony of Mrs. McFall showing these acts of violence by deceased would corroborate the testimony of appellant and should have gone to the jury. 51 Ark. 147.

J. S. Utley, Attorney General, and *Elbert Godwin,* Assistant, for appellee.

1. Counsel for appellant never objected nor excepted to any questions or answers relative to the questions propounded to the witness by the court. 130 Ark. 111; 129 *Id.* 316.

2. A general objection to instructions *in gross* will not be considered if any of them are good. 105 Ark. 15, 555. A general objection to instructions *en masse* is insufficient if any one of them is correct. 73 Ark. 315; 75 *Id.* 182; 76 *Id.* 41, 482; 78 *Id.* 7; 86 *Id.* 103. Errors in instructions must be specifically objected to and the er-

rors pointed out. 93 Ark. 521; 128 *Id.* 594; 2 R. C. L. 94-5.

3. The evidence substantially sustains the verdict. 135 Ark. 117; 136 *Id.* 385.

McCULLOCH, C. J. Appellant was indicted for killing her husband, Wheeler Cochrell, and on the trial of the case was convicted of murder in the second degree.

Appellant and her husband were living in a rooming house in Pine Bluff owned by appellant, and early in the morning of July 6, 1920, other persons living in the house heard pistol shots in the room occupied by appellant and her husband. There were three shots fired, according to the testimony introduced. One of the witnesses occupying a room across the hall testified that immediately after she heard the shots appellant came out into the hall and exclaimed that she had "hurt her boy." Other persons, hearing the noise, ran into the room and found Wheeler Cochrell lying on the floor groaning. A police officer, who had been telephoned for, soon came while Cochrell was still lying on the floor, and Cochrell stated in the presence of appellant that "she," pointing to appellant, "shot me full of holes for nothing." Appellant made no reply, though asked by the officer if she had anything to say. They laid Cochrell on the bed, and he expired in a few minutes thereafter. The witnesses found two pistols lying on the bed—one a 38-calibre and the other a 32-calibre. The larger pistol was full loaded and the smaller one had two unexploded cartridges in it, two exploded cartridges and one chamber was empty. Four bullet holes were found in Cochrell's body. A physician who examined the body after Cochrell's death gave his opinion that the wounds were inflicted with a 32-calibre pistol. Appellant testified in the case and admitted that she shot her husband two or three times, but claimed that she fired the shots in self-defense. She testified that her husband had been mistreating her for a considerable length of time, that he had endeavored to force her to make a will in his favor and to take out life insurance

payable to him, and threatened to kill her if she continued to refuse to do so. She stated that on the morning of the killing he renewed his efforts to induce or force her to execute the will and take out insurance and again threatened to kill her and came into the room where she was and with a drawn pistol declared he would kill her, when she fired the shots. Appellant was permitted to relate all of the details of her troubles with her husband and his cruel treatment and threats from the beginning.

The first assignment of error urged here for reversal of the judgment relates to the court's refusal to permit a Mrs. McFall to testify concerning an alleged difficulty or quarrel between appellant and her husband. The record shows that appellant's counsel asked the witness to state whether or not she had, on "an occasion some time prior to the killing," witnessed a difficulty "at night or in the morning" between appellant and her husband. The prosecuting attorney objected to the question, and the court stated to counsel that the testimony would be admitted if it could be connected with the killing or shown that it led up to the killing. The witness then stated that she could relate such an occurrence which took place "several months before the killing," and the court excluded the statement. This circumstance was too remote from the killing to be admissible as throwing any light on the tragedy, and the ruling of the court in excluding it was correct.

The next assignment of error relates to the action of the court in propounding a question to appellant on cross-examination concerning her alleged disposition of her husband's belt and trousers which he wore when shot. No exceptions were made to the ruling, and this assignment can not be considered. These are all of the assignments urged for reversal.

The evidence is sufficient to sustain the verdict, and we find no error in the proceedings. Affirmed.

CLEAR CREEK OIL & GAS COMPANY v. FORT SMITH SPELTER COMPANY.

Opinion delivered April 18, 1921.

1. PUBLIC SERVICE COMMISSION—REVIEW OF ORDERS.—Under Acts 1919, p. 411, the Corporation Commission acted in a *quasi*-judicial capacity in the matter of public utility rates, and its orders affecting property rights are subject to review by the courts in such manner as may be prescribed by the Legislature.

2. CONSTITUTIONAL LAW—PUBLIC UTILITY—PREFERENTIAL CONTRACTS.—If a company incorporated to supply gas was not a public utility at the time of contracting with smelting companies to furnish them gas, giving them a preferential right to be supplied, and the contracts were not entered into in anticipation of the company becoming a public utility, but were merely private undertakings concerning a subject-matter over which the State had no control, such contracts were valid, and the obligations thereof could not be impaired by any State regulation.

3. GAS—IMPAIRING OBLIGATIONS OF CONTRACTS.—An oil and gas company not a public utility could not impair the obligations of its own preferential contract to furnish gas, valid at the time of its execution, by subsequently engaging in the operation of a business subject to the State's control.

4. GAS—AUTHORITY TO OPERATE AS PUBLIC UTILITY.—Where a gas company by its charter was authorized to operate as a public utility in the production, transportation or sale of natural gas, but was not limited to such operation, and was not bound so to operate, and it elected not to do so, it could enter into preferential private contracts not subject to public control or regulation.

5. CORPORATIONS—LEGISLATIVE CONTROL.—It is not within the power of the Legislature to declare the operation of a business which is private in its nature to be public service and subject to public control.

6. GAS—GAS COMPANY AS PUBLIC UTILITY.—A gas company authorized by its charter to operate as a public utility, but not bound to do so, did not become such by virtue merely of Crawford & Moses' Digest, § 3969, empowering public utilities to exercise the power of eminent domain, the company having done nothing pursuant to the terms of that statute or in any other respect to make itself a public utility.

7. EMINENT DOMAIN—PRIVATE BUSINESS.—The Legislature can not confer on a private business the power of eminent domain, which can be exercised solely for the benefit of the public.

8. EVIDENCE—MATTER OF COMMON KNOWLEDGE.—It is a matter of general knowledge that natural gas is a commodity which is usually developed for the purpose of distribution to the public.

9. GAS—CONTRACTS IN CONTEMPLATION OF BECOMING PUBLIC UTILITY.—Preferential contracts by a gas company to supply natural gas to several smelting companies, though executed before the gas company began operating as a public utility, *held* to have been made in contemplation of operation as a public utility by the gas company, and therefore to be subject to regulation by the Corporation Commission.

10. APPEAL AND ERROR—PRESUMPTION IN FAVOR OF JUDGMENT.—On appeal from a judgment of the circuit court dismissing a petition by a gas company to fix a new schedule of rates for the use of natural gas, there is no presumption that the lower court found the old rates to be reasonable; such judgment being based on the erroneous conclusion that the preferential contracts between the gas company and the appellees were beyond the control of the Corporation Commission.

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

Hill & Fitzhugh, for appellant.

The record shows that the Corporation Commission was right, and the court erred in dismissing the petition, and the order of the commission should be placed in force. Appellant was a public service corporation from the beginning, and all these parties dealt with it as such, subject to the rights of the State to regulate the rates made by it. 176 Cal. 499; 169 Pac. 59; 251 U. S. 228. Condemnation proceedings can not be had in favor of a private use; the right must be public. 57 Ark. 359; 64 *Id.* 357; 97 *Id.* 86; 97 *Id.* 495; 99 *Id.* 61. The right of taking property by eminent domain may be conferred upon a pipe line company constructing a pipe for oil or gas. 1 Wyman on Public Service Corp., §§ 59, 71; 176 Cal. 499. Under act 911 any corporation engaged in transmitting oil or gas in pipe lines is deemed a pipe line company and as such is assessed for taxation by the Arkansas Tax Commission. C. & M. Dig., §§ 3969 to 3970. Under the Arkansas laws appellant was a public service corporation. 94 U. S. 155; *Ib.* 162; 219 U. S. 467; 34 L.

R. A. (N. S.) 671; 248 U. S. 372; 39 Sup. Ct. Rep. 117; 105 Atl. Rep. 551; act 571, Acts 1919, § 5; 100 S. E. Rep. 551; P. U. R. 1920 C, 160 to 183; *Ib.* 1919 D, p. 252; *Ib.* 1920 E, 911; 4 S. C. Rep. 170. See, also, 9 Am. Law Rep. Ann., p. 1165; 56 Ore. 468; 229 U. S. 397.

If the Clear Creek Company was not a public service corporation at the time it made the contracts in question, it was such at the time the Corporation Commission made the order regulating the rates in lieu of the contract rates. 175 Pac. 466 does not sustain appellees in their contentions. See 251 U. S. 228, which is in point.

Daily & Woods and *Mehaffy, Donham & Mehaffy,* for appellees.

The Clear Creek Company was not a public service corporation at the time of the execution of the contracts. Cases in 169 Pac. Rep. 59, 61-2 are not in point. 175 Pac. 466.

The contracts between respondents and the Clear Creek Company were purely private contracts and not subject to control, and the order of the Corporation Commission was a legislative act prohibited by our Federal and State Constitutions. 211 U. S. 210, 53 Law Ed. 150. The establishment of a rate is the making of a rule for the future and a legislative act not judicial in kind. If the Clear Creek Company was a public service corporation when we contracted with them, the State had the right to regulate it, and the State had no power to impair the obligation of a contract between purely private parties. The Corporation Commission has wholly misinterpreted its powers under the act creating it. The findings of the circuit court on conflicting evidence are very persuasive at least. 125 Ark. 138. The findings are not against the clear preponderance of the evidence and should be sustained. 120 *Id.* 118. On the whole case, both on the law and facts, the judgment is right.

McCULLOCH, C. J. Appellant is a domestic corporation, organized for the purpose of "sinking wells, bor-

ing for, providing and transporting crude oil and natural gas, coal, asphalt and any other minerals which may be found in the development of their property," and, asserting itself to be a public utility in the operation of its business of producing, transporting and distributing natural gas, it filed its petition before the Arkansas Corporation Commission on May 13, 1920, praying that a new schedule of rates for the use of gas by smelters and other like consumers be fixed at ten cents per thousand cubic feet. Appellant also filed a petition against appellees, Fort Smith Spelter Company, Arkansas Zinc & Smelting Corporation and Athletic Mining & Smelting Company, three corporations who are customers of appellant as consumers of gas in manufacturing plants, praying for modification of the contracts with appellees for supplying gas, and the latter filed their response in the proceedings before the commission in which they claimed that appellant was not a public utility, and that they (appellees) were receiving gas from appellant under private contracts which were not subject to control by the commission. There was a hearing before the commission, the result of which was that the petition of appellant for the regulation of rates was granted by the commission over the protests of appellees, but the rate was fixed on a graduated scale according to the amount of gas consumed, and the rate so fixed is approximately nine cents per thousand cubic feet. Appellees then carried the proceedings before the circuit court of Pulaski County by appeal as provided in the statute creating the Arkansas Corporation Commission and regulating its proceedings (Acts 1919, page 411), and on the hearing in that court there was a general finding against appellant on the petition and by the judgment of the court the petition was dismissed. An appeal has been prosecuted to this court.

Section 27 of the act referred to provides that there may be an appeal to the circuit court from orders and decisions of the commission, and that said circuit court shall have the power to "vacate or modify any such order found unreasonable or unlawful, or contrary to the evi-

dence; but no new evidence may be adduced by either party in said court, it being hereby expressly made the duty of all parties to present to the commission all evidence on which they may wish to rely in the event of an appeal to the said circuit court, and all appeals shall be tried upon the record made in the proceedings before the commission."

Section 28 of the act provides for an appeal to the Supreme Court, and that on the hearing of such appeal "the Supreme Court shall be governed by the procedure, and reviewed in the manner which is now or may hereafter be prescribed by law governing appeals from chancery courts."

We need not concern ourselves about the particular form of the remedy prescribed by the statute, for that question is not discussed here by counsel. It is sufficient merely to observe that the commission acts in a *quasi*-judicial capacity, and its orders affecting property rights are subject to review by the courts in such manner as may be prescribed by the Legislature. The name given to the method of review by the Legislature is not important, since it is clear that the purpose of the statute was to provide for a review by the circuit court on the record made before the commission, and also provide for an appeal to this court, which latter provision is merely declaratory of the right of appeal conferred by the Constitution.

The real point of the controversy between the parties is whether the contracts between appellant and appellees for the sale and purchase of gas were executed by appellant when it was not acting in any public capacity, as contended by appellee, or whether appellant was from the start a public service corporation and the contracts attempted to confer preferential rights to appellees as consumers. Learned counsel for appellees candidly concede that, if appellant was organized as a public service corporation and at the time of the execution of these contracts it was operating as such public utility in the production and distribution of gas, the contracts were

void, so far as they undertook to confer special privileges upon appellees, and that the schedule of rates for prices of gas is subject to control by the Corporation Commission, even though the statute authorizing such regulations was not passed until after the contracts were executed. It is unnecessary, therefore, to cite authorities on that question. Such authorities are cited on the briefs of counsel.

There is little, if any, conflict in the testimony, so far as we regard it as material.

Appellant was organized as a corporation in July, 1914, for the purposes already recited in the foregoing quotation. Soon after its incorporation, it acquired leases on a large body of land (30,000 acres or more) in Crawford County, Arkansas, and began explorations for gas. This was in what subsequently became known as the Kibler field, and appellant brought in its first well in November, 1915, with the initial capacity of 12,000,000 cubic feet per day. It had no market for its gas at that time and was seeking a market. Fort Smith and Van Buren, the only two cities of any considerable size in that locality, were already being supplied by a gas distributer which obtained gas from another field. Appellant began negotiating with persons who were seeking locations for manufacturing plants and made its first contract with two individuals, Buck and Kerr, who were succeeded in their rights under this contract by appellee Fort Smith Spelter Company. This contract was in writing, duly executed on March 17, 1916.

The contract is lengthy, and provides, in substance, that appellant should proceed to develop the gas field in which it had leases on approximately 30,000 acres and expected to procure more leases, and furnish the contracting parties with gas to be used in a smelting plant to be thereafter located at South Fort Smith, the price to be paid for the gas being specified at four cents per thousand cubic feet; and further provided that, after the first 160 days from the date of the contract, appellant would furnish thereunder gas in quantities which the con-

tracting consumers were to receive up to 5,000,000 cubic feet per day, and that the said parties should have the right to increase the amount up to 12,000,000 feet a day. It provided that the contracting purchasers should "have the first call upon the gas" produced by appellant from any lands in the counties mentioned, or any other territory which might be acquired by appellant, and that the rights of said parties to be supplied with gas should be prior and superior to any contract or agreement made by appellant with others. There is also a clause in the contract giving the contracting purchasers the right to regulate the percentage flow of gas. Another clause in the contract worthy of mention provides that, if the plant of the contracting purchasers should cease to yield a reasonable profit of six per cent. on the capital invested, appellant should make a reasonable reduction on the price of gas, and that, if appellant should sell any gas to any other consumers, except churches, schools, hospitals or charitable institutions, "at a less rate of price than governs this contract, then in such event second party shall pay for all gas consumed on a price basis equal to such lower price or prices during the entire time they are in effect." Still another clause provides that in case of loss by the contracting purchaser on account of fire, explosion, storm, strikes, etc., said party should not be required to accept or pay for any more gas than was actually consumed.

At the time of the execution of this contract appellant had still only one well, but it proceeded thereafter with the further development and up to September, 1916, had brought in ten wells in the Kibler field. It had not contracted with any other person or corporation for the furnishing of gas, but it had obtained franchises from the incorporated towns of Alma, Conway and Clarksville to furnish gas to the inhabitants of those towns. It is not shown that appellant operated under these franchises, and they appear to have been subsequently abandoned. The Kibler field was situated northeast of the city of Van Buren, and the plants of appellees were, un-

der their contracts, to be located, and were subsequently located at South Fort Smith, a suburb on the south side of the corporate limits of the city of Fort Smith except the plant of appellee, Arkansas Zinc and Smelting Corporation, which was established near Van Buren. In order to transport the gas from the field to the location of these plants it was, of course, necessary to lay pipe lines, and appellant constructed a ten-inch line from the field to the plant of appellee, Arkansas Zinc and Smelting Corporation, thence through Van Buren to Fort Smith and through that city to the suburb on the south where the manufacturing plants were located, a distance of about twenty miles from the gas fields. Appellant obtained franchises from the cities of Van Buren and Fort Smith on March 25, 1916, and April 3, 1916, respectively, to distribute and sell gas to the inhabitants of those cities.

The contract between appellant and appellee, Arkansas Zinc & Smeltering Corporation, was executed on May 3, 1916, but it is shown that the negotiations were begun much earlier and resulted in a written memorandum concerning the terms of the contract as early as March 17, 1916, the formal contract being reduced to writing and signed by the parties on May 3, 1916. In this contract it is provided that the purchasing contractor should advance funds to appellant in the sum of $45,000, to be used in the construction of a pipe line, and that said purchaser should, subject to the prior contract with the Fort Smith Spelter Company, have the next call for gas produced by appellant and supplied through the pipe line, at the same price as that specified in the contract with the spelter company. Appellant entered into a similar contract with appellee Athletic Mining & Smeltering Company, dated November 8, 1916, subject to the prior contracts with the other appellees. Under these contracts the Fort Smith Spelter Company has been taking gas at the rate of 3,800,000 cubic feet per day; the Arkansas Zinc & Smelting Corporation had been taking gas at the rate of from 1,250,000 to 1,500,000 cubic feet per day, and the Athletic Mining & Smeltering Company had been taking

gas at the rate of from 3,500,000 to 4,000,000 cubic feet per day. As the Kibler field became depleted, according to the proof, an adjoining field, only a few miles distant, known as the Williams field, was developed, and appellant brought in its first well in January, 1919, and subsequently brought in other wells in that field, and has been furnishing gas to its customers from both fields. Appellant subsequently made contracts with nineteen other manufacturing plants at Fort Smith, but the parties to those contracts have not intervened in these proceedings.

The testimony adduced by appellant tends to establish the fact that the rate specified in these contracts with the parties mentioned is not remunerative, and the evidence is sufficient to support the finding of the commission fixing the rate at approximately nine cents per thousand cubic feet for use by the manufacturing plants. The circuit court made no finding as to the reasonableness of the rate charged. Its ground for dismissing appellant's petition was necessarily based on the conclusion of that court that under the evidence these contracts were controlling and could not be abrogated by any regulations of the Corporation Commission.

If appellant was not a public utility at the time these contracts with appellees were entered into and the contracts were not entered into in anticipation of appellant becoming such a public utility, but were merely private undertakings concerning a subject-matter over which the State had no control, then such contracts were valid, and the obligations thereof could not be impaired by any State regulation. Neither could appellant impair the obligations of its own contract valid at the time of its execution by subsequently engaging in the operation of business subject to the State's control. To permit that would be to allow the impairment of the contract by indirection, which could not be directly done. We are not aware of any authorities holding to the contrary on this proposition, and we deem it unnecessary to cite any authorities in support of it.

It was within the charter rights of appellant to operate a business as a public utility in the production, transportation or sale of natural gas, but it was not limited to such operations as a public utility and was not bound to so operate. It was authorized to do business in the production, transportation or sale of the commodities named, other than as a public utility. The question, therefore, is not merely whether appellant was authorized to operate as a public utility, but whether it elected to do so under the power thus conferred. It had a right to exercise those powers or not to do so, and, in the event of its election not to do so, it could enter into private contracts not subject to public control or regulation. In other words, appellant was not necessarily a public utility because its charter authorized it to become one in the operation of its business, nor was it under its charter a public service corporation merely by the operation of a private business of the kind enumerated.

Section 1 of a statute of this State, enacted by the General Assembly of 1905 (Acts of 1905, page 577, Crawford & Moses' Digest, section 3969), reads as follows:

"Pipe lines—right-of-way. Any corporation organized by virtue of the laws of this State, for the purpose of developing and producing mineral oil, or petroleum, or natural gas in this State, and marketing the same, or transporting or conveying the same by means of pipes from the point of production to any other point, either to refine or to market such oil, or to conduct such gas to any point or points to be used for heat or lights, may construct, operate and maintain a line or lines of pipes for that purpose along and under the public highways and the streets of cities and towns, with the consent of the authorities thereof, or across and under the waters and over any lands of the State and on the lands of individuals, and along, under or parallel with the rights-of-way of railroads, and the turnpikes of this State; provided, that the ordinary use of such highways, turnpikes and railroad rights-of-way be not obstructed thereby, or the navigation of any waters impeded; and that just com-

pensation be paid to the owners of such lands, railroad rights-of-way, or turnpikes, by reason of the occupation of such lands, railroad rights-of-way, or turnpikes by the said pipe line or lines."

It will be observed that this statute does not declare that corporations organized for the purposes mentioned therein shall be public utilities. It does not undertake to classify them as such, but merely provides that corporations organized for those purposes may construct, operate and maintain a line or lines of pipes for that purpose along and under public highways, etc.," and may exercise the right of eminent domain for the purpose of condemning property to be used as a right-of-way. The purpose of the statute was merely to confer the right of eminent domain on a class of corporations when operating as public utilities which had not theretofore possessed such right. The purpose of the act, declared in the caption, is "to confer the right of eminent domain upon companies developing the mineral oil and natural gas resources of the State." It is not within the power of the law makers to declare the operation of a business which is private in its nature to be public service and subject to public control. That was so decided by the Supreme Court of the United States in the case of *Producers' Transportation Co.* v. *R. R. Commission,* 251 U. S. 228. In that case the court said: "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can consistently do with the due process of law clause of the Fourteenth Amendment. * * * On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public

has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public regulations."

This was said in a case involving a statute of the State of California in many respects similar to our own statute quoted above, and the Supreme Court of California announced the same conclusion in regard to this statute as was later declared by the Supreme Court of the United States. (*Producers' Transportation Company* v. *Railroad Commission of California,* 176 Cal. 499.) The California court in disposing of the matter in that case said: "Neither by the provision of the act in question nor the provision of the Constitution can the State subject private property to a public use, nor confer authority upon the Railroad Commission to assume control of private pipe lines engaged in the transportation of crude oil. Neither by act of the Legislature nor by declaration of the State Constitution can private property be taken for public use without compensation therefor. * * * Where, however, the owner of property voluntarily devotes it to a public use, he in effect grants to the public an interest in such use, and to the extent of the interest so devoted to the public, the public may insist upon a voice in the control and regulation thereof."

The same principle was, in substance, announced by the Supreme Court of the United States in the case known as the *Pipe Line Cases,* 234 U. S. 548. In that case there was involved the interpretation of an act of Congress extending the authority of the Interstate Commerce Commission over persons and corporations "engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines," and the court decided that the Standard Oil Company was subject to that provision as a public carrier, notwithstanding the fact that it only transported oil which under its own requirements was to be sold to itself by the producer. The court decided, however, that another corporation which only trans-

ported oil from one State to another through its own pipe lines from its own well to its own refinery was not a common carrier within the meaning of that statute.

Our conclusion is, therefore, that appellant did not become a public utility merely by force of the statute itself, without anything being done pursuant to the terms of that statute or in any other respect to make itself a public utility. But the conclusion is inevitable from the proper construction of the statute that, if a corporation organized for the purposes of carrying on the business mentioned in the statute takes advantage of the terms of the statute, it becomes a public utility subject to the State's control. *Pulaski Heights Land Co.* v. *Loughborough,* 95 Ark. 264. The statute does not declare such corporations to be public utilities merely because they operate the business mentioned, but they can not exercise the powers conferred under that statute without being public utilities. If a business so conducted is entirely private, it is not within the power of the Legislature to confer upon it the power of eminent domain, as that is a power which can be exercised solely for the benefit of the public. Wyman on Public Service Corporations, § 71; *Ozark Coal Co.* v. *Pa. Anthracite Rd. Co.,* 97 Ark. 495. This was the effect given to the California statute by the Supreme Court of that State in the decision just referred to. That court upheld the decision of the Railroad Commission of the State in assuming jurisdiction of a corporation operating a pipe line because of the fact that the corporation had "availed itself of the right of eminent domain in condemning property for the right-of-way over which it constructed its pipe line." The court said: "To our minds this must be deemed conclusive evidence of a dedication of such property to public use, since it could not have exercised such right other than in 'behalf of a public use.' "

According to the evidence adduced before the commission in the present case, appellant had not exercised the right of eminent domain under this statute for the purpose of obtaining a right-of-way for its pipe line, but

the evidence is entirely convincing that it was making preparations to do so, and these contracts on their face, and especially in the light of the testimony adduced with respect to the attitude of the parties at that time, necessarily contemplated the exercise of the right of eminent domain by appellant in equipping itself for the performance of the contracts. The gas field was about twenty miles from the place where the gas was to be delivered to the parties under these contracts. The only available means of transportation was, of course, by pipe lines running from the field to the point of delivery, and this pipe line necessarily would cross railroads and public highways and would cross the Arkansas River. Even if it be conceded that it was within the range of possibility to find some other means of transporting the gas from the field to the point of delivery without condemning a way over private property and without the granting of permits to use the public highways, it certainly was not practicable or reasonable. Nor was it reasonable to expect that the parties had in contemplation some such extraordinary means of transportation. The only reasonable conclusion is that the parties, when they contracted for delivery, meant that it was to be done by a pipe-line which was to be constructed in the exercise of the right of eminent domain over private property in case private grants could not be obtained, and over and along the public highways of the county. It is, therefore, certain that these contracts, though executed before appellant began operating as a public utility, were made in contemplation of such operations by appellant, and were intended as preferential contracts extended to the appellees in priority of any rights of the public.

Shortly after the execution of the first contract, and even before the other contracts were entered into, appellant pursued its preparations for the construction of a pipe line by the exercise of eminent domain under the statute and did in fact acquire a right-of-way under this power. And another significant fact is that it constructed a pipe-line for service under these contracts which was

of a size deemed necessary in order to serve the public as well and to furnish equipment for the transportation of all the gas from the field. The second contract specified the size of the pipe-line, and, while the first contract contained no such specification, the proof shows that it was known at that time and understood that the pipe-line was to be of a size sufficient to serve all who might wish to obtain gas at the points of delivery along the pipe-line.

There are other facts in this case which indisputably stamp these contracts as being made in contemplation of the entrance of appellant upon the operation of a business which was public in its character and was intended as a preferential right against the public. In the first place, it is a matter of general knowledge that natural gas is a commodity which is generally developed for the purpose of distribution to the public. It is not usually handled commercially as the subject-matter of private contracts. Appellees, in contracting with appellant, were bound to know that the developments were for the purpose of sale of gas publicly to all consumers within the radius of appellant's business operations. They were bound to take notice of the fact that appellant had obtained a charter authorizing it to carry on business as a public utility. They knew, as recited in their contracts, that appellant had acquired leases for production of gas in a tremendous area of land and the contracts provided that appellant should acquire more leases and that the contract should cover any other leases thereafter obtained. In other words, the contracts were made in contemplation of very extensive operations by appellant, probably far in excess of the demands of each of these contracting consumers, and that necessarily meant that appellant would have to seek a market for the remainder of the gas produced, and that the market would be at the points of delivery along its pipe-line, which was to be used as equipment for service under these contracts. The acquisition by appellant of franchises in several towns and cities, while not shown to be within the actual knowledge of appellees, were matters of such common notoriety

as appellees are presumed to have known of them. When these facts are considered in connection with the potent fact in the case that appellant was preparing at that time to exercise its power under the statute as a public service corporation, the conclusion is irresistible that these contracts were intended as preferential ones, and all rights under them must yield to the superior right of the public to regulate such corporations, and the contracts constituted, in effect, an invasion of the public right, though not such in express terms. *Pipe Line Cases,* 234 U. S. 548. It has been decided by this court that the State had the power, even under statutes enacted subsequent to the execution of contracts, to impose regulations which have the effect of changing the terms of contracts in regard to rates for public services. *Camden* v. *Arkansas Light & Power Co.,* 145 Ark. 205.

We have not overlooked the decision of the Supreme Court of California in the case of *Allen* v. *Railroad Commission,* 175 Pac. 466, cited and relied on so confidently by learned counsel for appellees. We do not, however, think that that case is at all controlling in the present case. There was no indication in that case of the intention on the part of the court to impair the effect of the previous decision in the case we have cited. In that case there were private contracts intended as merely conferring private water rights to numerous parties, and the only circumstance which tended to establish the corporation under consideration as a public utility was the fact that it had been furnishing water to a small town or village which consumed less than three per cent. of the volume of water handled by the company. The court held that under the facts of that case there was no dedication of the bulk of the water handled to the public use. There was no element in that case, as was in the previous decision of that court cited, and in the present case, of the corporation having accepted the terms of a statute which necessarily made it a public service one.

Our conclusion is that the circuit court erred in dismissing the petition of appellant. It is contended by

counsel for appellees that, irrespective of the law of the case as herein declared, the circuit court is presumed to have found from the evidence a state of facts, with respect to the reasonableness of the rates sought to be established by appellant in the schedule filed with the commission, which sustains the judgment, and that we ought to affirm the judgment unless we find it to be unsupported by the evidence. The fact, however, that the court dismissed the petition of appellant, instead of modifying the rates fixed by the commission, is convincing that the court did not base its judgment on any finding as to the reasonableness or unreasonableness of the rates, but on the conclusion erroneously reached that the contracts between the parties were beyond the control of the commission. It is undisputed that the contract rate is now nonremunerative and unreasonable, but the parties are entitled to a finding by the trial court on the issue as to the reasonableness of the rate fixed by the commission—that is to say, a finding based on the evidence adduced before the commission. The judgment is therefore reversed, and the cause remanded for further proceedings.

HUMPHREYS, J. (concurring). I concur in the conclusion reached by the majority that appellant corporation was a public utility at the time it entered into the contracts between it and appellees, but upon entirely different grounds.

I think it extremely doubtful, in the state of the evidence reflected by this record, if the power existed in appellant corporation to elect as between its private and public status, that such election had been made at the time the contracts were entered into. At that time franchises had not been granted to appellant to furnish gas to the general public in the nearby cities of Van Buren and Fort Smith. Appellant did not possess a pipe line and had not attempted to exercise the right of eminent domain to acquire a right-of-way for one. The contracts on their face contain preferential clauses which point unerringly to the fact that it was in the minds of the par-

ties that appellant corporation was at the time a private corporation. Such clauses as these in a contract with a public utility would have rendered the contract void. I can hardly conceive that parties of such intelligence as these entered into a contract carrying clauses which necessarily rendered the contract, from its very inception, void. The parties were certainly attempting to enter into a valid contract and could have done so only upon the theory that appellant was a private corporation, and not a public utility.

The character of business conducted by appellant was subject to regulation by the State, and, being subject to such regulation, the State might at any time convert such a corporation into a public utility by conferring upon it the power to exercise the right of eminent domain. Such right could not be conferred upon a private corporation any more than upon a private person; so the very act of conferring the right of eminent domain upon a private corporation, organized for the purpose of developing and marketing natural gas in the State, converts it *eo instanti* into a public corporation. The power to exercise the right of eminent domain, and not the exercise thereof, is the mark which stamps its character upon it. My interpretation therefore of section 3969 of Crawford & Moses' Digest is that all corporations, theretofore or thereafter incorporated for the purpose of developing, producing and marketing natural gas in this State, are public utilities. Immediately upon the passage of that act, the right to exercise eminent domain vested in such a corporation and did not remain in abeyance until such corporation elected to exercise it. Any corporation organized thereafter for such purpose became invested with such power, and the power did not remain in abeyance until it chose to exercise it. The character of a corporation must be tested by its powers, and not the exercise of them. If a corporation has the power to exercise the right of eminent domain, it is necessarily a public corporation. So long as it is a private

corporation, it can not possess such power. Interpreting the statute as I do, appellant was a public utility by virtue of the law at the time it entered into the contracts, as it appears from the undisputed evidence that it was organized for the purpose of producing and marketing natural gas in this State.

By request, I note Mr. Justice WOOD in agreement with this concurring opinion.

WORTHEN v. SMITH.

Opinion delivered April 18, 1921.

1. BROKERS—COMMISSION—INSTRUCTION.—In an action for a broker's commission, an instruction that if the broker and purchaser were associated in business engaged in buying and selling real estate as partners at the time of the sale of the land by the owner to the purchaser, the broker could not recover his commission, *held* under the evidence to be abstract.
2. APPEAL AND ERROR—ABSTRACT INSTRUCTION—PREJUDICE.—The giving of an abstract instruction is erroneous and calls for a reversal of the judgment unless it can be seen that no prejudice could have resulted from the error.

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

Rowell & Alexander, for appellant.

The court erred in giving instruction No. 2 requested by appellant. It was abstract, unsupported by the evidence, misleading and prejudicial. 70 Ark. 441; 74 *Id.* 19; 78 *Id.* 177; 80 *Id.* 260; 88 *Id.* 454; 96 *Id.* 614; 117 *Id.* 593.

DeWitt Poe and *Williamson & Williamson,* for appellees.

1. If the objected to instruction was abstract, it was not prejudicial but harmless. 59 Ark. 431, 440; 103 *Id.* 307; 88 *Id.* 204. The testimony of Smith and appellant was in irreconcilable conflict, and the jury believed Smith, and the verdict is conclusive. 116 Ark. 82; 80 *Id.* 284; 75 *Id.* 37; 81 *Id.* 605. The evidence is not all in the record,

and this court will not review its sufficiency. 54 Ark. 159; 58 *Id.* 134; 80 *Id.* 75; 136 *Id.* 378; 1 Crawford's Digest, col. 1, p. 232.

2. Those who hold themselves out to the public as partners are bound by their acts and estopped. 99 Ark. 602; 93 *Id.* 301. The record is incomplete, as certain documents are missing, and this court will not review the verdict.

McCULLOCH, C. J. Appellant, Worthen, instituted this action against appellees, C. A. Smith and David Frinks, to recover a sum of money alleged to be due as commission on a sale of real estate. It is alleged in the complaint that appellees entered into a written contract with appellant authorizing the latter to sell a farm in Desha County owned by appellees for a sum mentioned and upon stipulated terms and agreed to pay a commission for making the sale; that he produced a purchaser ready, willing and able to buy the farm on the specified terms, but that appellees refused to consummate the sale and refused to pay the earned commission. Appellees answered the complaint, setting forth several defenses. In the first place, it was denied that there was any contract between the parties for the sale of the farm, it being alleged in the answer that the writing exhibited with appellant's complaint was signed by appellee Smith without authority of his co-appellee Frinks, and that the writing was delivered to appellant upon the express condition that it should not become a contract between the parties until it was subsequently ratified by Frinks. It was also alleged in the answer that the prospective purchaser produced by appellant was one who was in partnership with appellant in the purchase of the land, and for that reason appellees are not compelled to consummate the sale, and that appellant is not entitled to the commission. The case was tried before a jury, and the verdict was in favor of appellees.

According to the undisputed testimony, appellees owned a farm in Desha County containing 561 acres and

appellee Smith signed the name of "Smith & Frinks" to the writing delivered to appellant, which authorized him to sell the farm at a price mentioned therein, and that it contained an agreement to pay a commission of ten per centum of the price. Frinks was not present when the contract was executed by Smith and was absent from the State on account of ill health. Appellant testified that Smith represented to him that he was authorized to sign Frinks' name. On the other hand, Smith testified that he had no authority to sign Frinks' name to the contract or to make a contract for the sale of Frinks' interest in the land, and that he did not undertake to do so, but that he signed the contract with the distinct understanding that it was conditioned upon a subsequent confirmation by Frinks and was not to take effect unless Frinks so confirmed it. Frinks also testified that Smith had no authority from him to enter into a contract for the sale of the land, and that he (Frinks) refused to approve the contract with appellant as soon as it was brought to his attention. It is seen from this recital of the testimony that there is a sharp conflict on the issue as to whether or not the writing was delivered to appellant conditionally and was not to become a binding contract until approved by Frinks. This issue was submitted to the jury on appropriate instructions, and the finding must be taken as settling the issue against appellant by the verdict of the jury.

Appellant testified that he was engaged in the business of selling real estate on commission; that the office he occupied at Watson in Desha County was the one maintained by Mr. James Gould, who was engaged in the real estate business under the name of the Delta Land Company; and appellant further testified that he had no interest in the Delta Land Company except that he sold land for that concern on commission the same as he did for others. Gould is the person with whom appellant negotiated the sale of the land of appellees. Appellant testified that he negotiated the sale with Gould and communicated that fact to appellee Smith, who refused to

consummate the sale. Mr. Gould testified that he was in the real estate business under the name of the Delta Land Company, which was not incorporated, and maintained an office at Watson; that appellant Worthen was under contract to sell lands for the Delta Land Company on a commission basis, but had no interest in his (Gould's) proposed purchase of the lands of appellees. Mr. Gould testified that he tried to purchase the land for his son who had just been discharged from the army and had some money to invest, and that appellant had no interest whatever in the purchase. During the cross-examination of appellant while on the witness stand, he was asked to identify an office card of the Delta Land Company on which appeared the names of "James Gould, Secretary," and "W. W. Worthen, Manager." Appellant conceded the authenticity of the card, and testified that he was manager of the company's office and sold land for the company on commission.

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

"If you find from the evidence that plaintiff and James Gould, the party to whom plaintiff claims to have sold the property, were associated in business engaged in buying and selling real estate as partners at the time of the sale by plaintiff to said Gould, then your verdict will be for the defendant Smith, unless you further find that this particular sale was excluded from their other transactions."

The sole ground urged here for reversal is that the instruction copied above was an abstract one without any testimony to support it, and that it constituted prejudicial error for the court to give it. We have concluded that the contention of counsel is correct in this respect, and that the instruction is without any testimony to support it and is prejudicial, or at least was calculated to prejudice the rights of appellant before the jury in determining the issues of fact. There is no testimony whatever that there was a partnership existing between appellant and Mr. Gould, or that appellant was interested

with Mr. Gould in the purchase of this land. The office card introduced in evidence tends to prove nothing further than the fact that appellant had some sort of a business arrangement there with Mr. Gould in operating the real estate business under the name of the Delta Land Company. It does not tend to prove that there was a partnership or any community of interest between Gould and appellant in the purchase of this land. Appellant testified that he merely made sales of land for the Delta Land Company on a commission basis. Gould testified to the same fact, and stated that appellant had no interest in this purchase and that he (Gould) was buying the land for his son. Gould is a disinterested witness, and there is nothing to show that he has any interest in the result of this case, which is one for the recovery of the commission alleged to be due. Gould does not claim to have any binding contract for the purchase of the land, and he is not affected by the result of this suit.

It is contended by counsel for appellees that, even if the instruction was abstract, it was not prejudicial, and does not call for a reversal of the judgment. We can not agree to this, because it has often been held by this court that the giving of an abstract instruction is erroneous and calls for a reversal of the judgment unless it can be seen that no prejudice could have resulted from the error. Numerous cases on this subject are cited on the brief of counsel. The jury may have assumed from this instruction that the court was holding that the evidence was legally sufficient to justify a finding that appellant was interested with Gould in the purchase, and they may have assumed from the giving of this instruction that they were at liberty to draw the inference from the language of the office card introduced in evidence that appellant was interested with Gould. Learned counsel for appellees argue here that the evidence was sufficient, and doubtless the counsel who tried the case below made the argument to the jury. For aught we know to the contrary, the verdict of the jury may have been founded on this particular feature of the case.

For the error in giving this instruction the judgment must be reversed and the cause remanded for a new trial. It is so ordered.

SOUTHERN TRUST COMPANY *v.* AMERICAN BANK OF COMMERCE & TRUST COMPANY.

Opinion delivered April 18, 1921.

1. BANKS AND BANKING—FORGED INDORSEMENT OF CHECK—LIABILITY OF DRAWEE.—The payee of an unaccepted check can not maintain an action upon it against the bank on which it is drawn, and the unauthorized payment by the bank on a forged indorsement does not constitute an acceptance.
2. BANKS AND BANKING—LIABILITY ON FORGED INDORSEMENT.—Where a bank, by direction of a depositor, issued a cashier's check to a creditor of such depositor, but, through negligence or mistake, delivered the check to another person who impersonated the payee, and the bank subsequently paid the money out on a forged indorsement of the check by the person to whom the check had been delivered, the bank did not become liable to the creditor; there being no acceptance of the check.

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

S. L. White, for appellant.

At the time garnishment was served on appellee it had money in its hands for the purpose of paying Smith and it had never been paid out on his check or order and Smith had a right of action against the bank. 69 Ark. 43; 216 S. W. 717; 5 Cyc. 548; 92 Tenn. 154; 183 S. W. 684. See, also, 70 Penn. Sup. Ct. 34. The exact question here has been settled by this court. 98 Ark. 1; 100 *Id.* 537; 133 *Id.* 498. Appellee is indebted to Smith and (2) between Smith and appellee there was and is privity. Smith could maintain suit against appellee, and appellant acquired this right against appellee. Appellee still has in its hands money deposited to pay Smith. This was a trust fund for Smith against which it issued its own checks or obligations, which have never been paid

Smith but paid some one else on forged indorsements, and appellee has recourse on the banks that cashed them.

Moore, Smith, Moore & Trieber, for appellee.

The transmittal of the telegraphic orders to and the receipt by the bank in no way operated to create any relation of privity between the bank and Sam Smith or Sam W. Smith. The bank paid the money to the party designated and charged it to him. The fact that the order was sent direct to the bank, instead of the payee, created no difference in legal effect. 130 Pac. 29. The precise question here has been determined by this court. 98 Ark. 1; 100 *Id.* 537; 133 *Id.* 498. The giving a check upon a bank is not assignment *pro tanto* to the payee upon which he can bring suit against the bank for payment, there being no privity between the drawee bank and the holder or owner af the check until the check is accepted. 133 Ark. 498 and cases *supra.* See, also, 136 Pac. 935; 79 S. W. 968. This case is ruled by 100 Ark. 537 and 133 Ark. 498.

MCCULLOCH, C. J. Each of the parties to this appeal is a banking corporation doing business in the city of Little Rock. Appellant obtained a decree in the chancery court of Pulaski County on October 11, 1920, for the recovery of the sum of $9,655.55 against Sam W. Smith and Arthur Nicholl, and later sued out a writ of garnishment directed to appellee commanding the latter to answer what funds and property of Sam W. Smith it held in its possession. Appellee answered that it had no property or funds of Smith in its possession, and appellant filed a reply, which framed the issue tried by the lower court, resulting in a decree of the court discharging appellee as garnishee.

The primary question in the case is whether or not Sam W. Smith had a right of action against appellee, for appellant's right to recover from the garnishee is dependent upon the right of Smith, one of the defendants in the judgment. The material facts are undisputed.

Nicholl was the Little Rock agent of Shepherd & Gluck of New Orleans, and Smith had dealings with Shepherd & Gluck through Nicholl whereby Shepherd & Gluck became indebted to Smith on January 9, 1920, in the sum of three thousand and fifty-six dollars and fifty-six cents. Shepherd & Gluck had a checking account with appellee, and on the date last mentioned they sent to appellee from their office in New Orleans a code telegraphic message directing appellee to pay to Sam Smith the sum of $3,056.56, and charge the same to their account. The telegram also stated that they were transferring to their credit at appellee's bank the sum of $3,000 from another bank in Little Rock to cover the draft. Before the receipt of this telegram by appellee, Nicholl telephoned to appellee's assistant cashier, who handled such matters, stating that he (Nicholl) was expecting that appellee would receive a wire that day from Shepherd & Gluck to pay Sam Smith $3,056.56 and asked that he be informed by telephone when the message came, and when the message came the assistant cashier telephoned the information to Nicholl, who replied that he would send Smith around to the bank at once to receive the money. This employee of the bank was a witness in the case and testified that he did not know Smith and so informed Nicholl, but that the latter described Smith to him, and a few minutes afterward a man came into the bank representing himself as Sam Smith and produced a note from Nicholl identifying him as Sam Smith and directing that the sum be paid to him. The assistant cashier, not doubting that the individual who presented himself was Sam Smith, gave him what is termed a cashier's check for said amount, *i. e.,* a check signed by the cashier on that bank for the amount specified. The individual who received the check was not, according to the testimony, the Sam W. Smith who was entitled to receive it, but he afterward deposited the check with another bank in Little Rock, who presented it to appellee, and it was collected, the check having been properly indorsed by someone under the name of Sam Smith.

There was another transaction of precisely the same kind which took place on February 19, 1920, involving the sum of four hundred twenty-nine dollars and seventy-two cents. In this instance the man presenting himself as Sam Smith was sent around to the bank by Nicholl with a note identifying him, directing the payment of the sum to him, the same as in the former instance. Sam W. Smith testified as a witness in the case, and it is shown by his testimony that he had never received either of the amounts specified above, which were due him originally by Shepherd & Gluck, and which sums were specified in the two messages above.

The telegraphic message from Shepherd & Gluck can only be treated either as a private direction from the former to the latter as their agent, or as the equivalent of a written check or order for the payment of the money. In neither event was there any privity between Smith, the payee, and appellee, the drawee of the check, so as to give Smith a right of action against appellee for the recovery of the amount. We think that the message was the equivalent of a written check for the payment of the money, and that its effect was the same as if it had been delivered to Smith, instead of being sent direct to appellee. Treating it in this way, the check did not operate as an assignment of the funds, so as to empower Smith to sue for the amount. It has become the settled doctrine of this court, announced in repeated decisions, that the payee of an unaccepted check can not maintain an action upon it against the bank on which it is drawn, and that the unauthorized payment by the bank on a forged indorsement does not constitute an acceptance. *Sims* v. *American National Bank,* 98 Ark. 1; *Rogers* v. *Farmers Bank,* 100 Ark. 537; *State* v. *Bank of Commerce,* 133 Ark. 498. In thus holding to this rule we have followed the Supreme Court of the United States in the case of *First National Bank* v. *Whitman,* 94 U. S. 343, and what appears to be the great weight of American authority. The case of *Schaap* v. *First National Bank,* 137 Ark. 251, is in no wise against this rule, and

the facts of that case are distinguished from the facts of the other cases now cited. In the Schaap case a bank other than the drawee bank cashed checks upon unauthorized endorsements and collected the same from the drawee bank. We held that the owner of the checks had a right to repudiate the endorsement without repudiating the collection, which was for his benefit, and that he could recover from the collecting bank the amount received on the checks from the drawee bank.

In reaching that conclusion, we said with reference to the other decisions and the Whitman case, *supra,* this: "In that case the court held that payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check, so as to authorize an action by the real owner to recover its amount as upon an accepted check. We do not think that our holding in our own cases above cited or the holding in the Whitman case is in conflict with our holding in the present case. * * * As we have already seen, Slates, the agent of the plaintiff, had no right to indorse the checks in the plaintiff's name, and the plaintiff's right to the checks remained precisely as it was before Slates undertook to endorse them for him. The checks therefore, when received by the defendants, were the property of the plaintiff, and in that case he may, as we have seen, ratify the action of the banks in receiving the checks and collecting their proceeds without ratifying the unauthorized act of his agent in indorsing the checks in the name of the principal."

But counsel for appellant, conceding such to be the rule of our court, contends that the issuance of the cashier's check in the name of Smith, the true owner of the original check, was equivalent to an acceptance of the original check and converted the funds into a deposit to the credit of Smith, the real owner. The frailty of this contention is that, while the bank, through negligence or mistake, delivered to another person, who falsely impersonated Sam W. Smith, the check which was intended for the said Smith, yet the bank delivered the check to the particular individual it intended to receive it and paid

it on the indorsement of that person. The fact that a mistake was made in delivering it to the wrong person does not alter the material circumstance that the bank paid the money out on the check to the person to which it had originally delivered it, and it was therefore not liable to the real owner. The case in this respect is ruled by our decision in the recent case of *Cureton* v. *Farmers' State Bank,* 147 Ark. 312. In that case a depositor gave a check through mistake to one who was falsely impersonating the man whose name was written in the check as payee, and, in a suit by the depositor against the bank to recover the amount of money paid out on the forged indorsement, we held that there was no liability for the reason that, notwithstanding the mistake of the depositor in giving the check to the wrong person, the bank had paid it out to the person to whom the depositor had given the check. The same rule of reasoning is, by analogy, applicable to the facts of this case for, notwithstanding the fact that appellee made a mistake in giving the check to the wrong person, it paid the funds out to that person on the check, and it can not be said that the delivery of the check to another person would constitute a deposit of the funds in the name of the party to whom the original check belonged. See, also, following cases: *First Nat. Bank* v. *Bank,* 170 N. Y. 88; *Slattery & Co.* v. *Bank,* 186 N. Y. Supp. 679; *Robertson* v. *Coleman,* 141 Mass. 231; *Heavey* v. *Com. Nat. Bank,* 27 Utah, 222. 101 Am. St. 966. By no process of reasoning can it be said under these circumstances that the true owner of the original check can affirm the receipt of the cashier's check by the impostor and thereby become the owner of the deposit. If there could be any theoretical ratification at all by the owner of the original check, it was merely a ratification of the act of the false impersonator in receiving the check, and, if there be such a ratification, he could look alone to that person for reimbursement. Certainly the act of the bank in giving the cashier's check to the false impersonator could not be

ratified so as to constitute the bank the holder of the deposit for the benefit of the owner of the original check. The act of the bank in delivering the cashier's check to the false impersonator was of the same effect as if it had paid the money directly, instead of giving a check to the impersonator, and for the reasons stated in our former decisions such a payment can not be treated as an acceptance of the check.

Our conclusion is, therefore, that the decree of the chancellor is correct, and the same is affirmed.

HART, J. (dissenting). It seems to me that the principles of law decided in the cases cited in the majority opinion, when applied to the facts presented by the record, warrant a reversal of the judgment.

This court has held that there is no privity of contract between the holder of a check or draft which has been paid by the drawee bank upon the forged indorsement of the payee, which would entitle him to bring suit against the drawee bank, and that its action in the payment of such draft does not constitute an acceptance thereof which releases the drawer from its payment. *Sims* v. *American National Bank of Fort Smith*, 98 Ark. 1, and *State* v. *Bank of Commerce*, 113 Ark. 498.

So in this case, if Shepard & Gluck had drawn a draft on the American Bank of Commerce & Trust Company in favor of Sam Smith for the amount they owed him, and this draft had been persented to the bank by another Sam Smith and cashed, the bank would not have been liable to the real Sam Smith. Because the bank paid the draft on a forged indorsement of the payee's signature to a person not authorized to receive the money, it does not follow that the bank promised the payee to pay the money again to him, on the presentation of the check by him for payment.

In the instant case, however, the facts are essentially different. Shepard & Gluck in each instance telegraphed the bank at Little Rock to pay a stated sum of money to Sam Smith and charge their account with it. Shepard

& Gluck actually transmitted the money to the bank. The bank drew a cashier's check in favor of Sam Smith and credited the man supposed to be Sam Smith with the amount represented by the check. The account of Shepard & Gluck was charged with the amount. The issuance of the cashier's check charging the amount to the account of Shepard & Gluck fixed the liability of the bank. The issuance of a cashier's check by the bank charging the amount to the account of Shepard & Cluck constituted an accepted order for the money.

Neither do the facts of this case bring it within the rule announced in *Cureton* v. *Farmers' State Bank,* 147 Ark. 312. If Shepard & Gluck had drawn a check on appellee bank in favor of Sam Smith and delivered it to an impostor, who had presented it to the bank and obtained payment thereon, the case in question would be applicable. In such a case the bank would pay the check to the person the drawer of the check had intended it to pay, although the drawer of the check had made a mistake and had drawn the check to the wrong person. The facts in the present case are altogether different. Shepard & Gluck did not draw a check in favor of Sam Smith and deliver it to the supposed Sam Smith who in turn presented it to the bank for payment. But Shepard & Gluck directed the bank to pay Sam Smith, their debtor, and the bank paid the money out to another person. It did not pay the money to the person whom Shepard & Gluck directed it to pay.

Therefore, the bank, having charged the amount to Shepard & Gluck, is liable to the real Sam Smith, or his assignee.

FERGUSSON v. FERGUSSON.

Opinion delivered April 18, 1921.

1. WILLS—INTENTION—CONSTRUCTION.—All the provisions of a will should be construed together in order to give effect to the manifest intention of the testator as shown by the language of the will in the light of the surrounding circumstances.

2. TRUSTS—AUTHORITY OF TRUSTEE TO EXECUTE MORTGAGE.—Under a will conveying the testator's property to his son in trust for the son's children, giving the trustee full power and authority to sell and dispose of all property, and to manage, handle and deal with it the same as in his discretion may seem best, the trustee was authorized to mortgage a farm to procure necessary funds to operate it.

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

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellee to enjoin him from mortgaging the land described in the complaint.

The complaint alleges that the appellants are the owners of the land described therein which appellee holds in trust for them by virtue of a will executed by their grandfather and duly probated after his death. A portion of the will in question is as follows:

"I give, devise and bequeath to my son, John P. Fergusson, as trustee, all the property of every nature and kind, real, personal, and mixed, of which I may die seized or possessed, or in which I may have an interest at the time of my death. To have and to hold unto the said trustee for the following uses and purposes:

"Said trustee shall invest $10,000 in real estate, such investment to be agreed upon by the trustee and my brother, Van L. Fergusson. The title to said property shall be taken in the name of the trustee, but the management of the place shall be left to my brother, Van, who shall have all the rents and profits and emoluments arising from the said property and its use for the use of himself and my mother, Laura J. Kincheloe. Upon the death of either my mother or my brother, the rents, profits, and emoluments of said land shall thereafter belong to the survivor of them. Upon the death of both my brother and my mother, the rents, profits and emoluments of the land shall revert to the trustee. The trustee shall pay $50 on the first day of each month to my brother, Van L. Fergusson, during the time between my

death and the purchase of the $10,000 worth of real estate, but such payments shall cease when the real estate is purchased and turned over to my brother. If the real estate so purchased shall prove unprofitable, the trustee shall have the power, with and by the consent of my brother, Van, to sell said property and reinvest the proceeds in other property which shall thereupon be delivered to my brother and used by him the same as above stipulated for the original investment. During the time between the sale of one piece of property and the purchase of another, the trustee shall pay over to my brother, Van, $50 on the first day of each month.

"I give and bequeath to said John P. Fergusson, as trustee, full power and authority to sell, and dispose of any or all of the property bequeathed to him, and to manage, handle, and deal with the same as in his discretion may seem best. He is to hold the same for the use and benefit of his children, John Wright Fergusson and James McFerrin Fergusson, and all other children which may hereafter be born to him. At the death of my said son, all property remaining in his hands as trustee shall immediately vest in his children, share and share alike. During his life, my said son may use and expend the rents, profits, income and emoluments of said property for maintenance, support, and education of his children in such a manner as to him shall seem best, and may invest the surplus at his discretion, and, upon his death, the division of the property then remaining in his hands as trustee shall be equal among his children without taking account of the amount theretofore expended for the use of each child."

The record shows that appellee and his father each owned an undivided one-half interest in the land described in the complaint; that the father devised his interest to appellee in trust as set out in the will above; that 497 bales of cotton were raised on the place during the year 1920, and that appellee was unable to sell them to any advantage on account of existing conditions; that it was necessary to borrow money with which to run the

place during the present year; that he desires to borrow money and run the place in the way in which it has been run during past years and in which other places of similar character in that vicinity are operated; that it is highly essential that the place be cultivated in order to prevent great deterioration of the land and the improvements thereon; that the laborers on the place would leave and it would be very difficult to get them back and to restock the place with farming implements, feed and mules.

The chancellor found that under the terms of the will of J. W. Fergusson, deceased, appellee was authorized to mortgage the land in question. The chancellor further found that it was to the best interest of the trust estate and of appellants that the loan contemplated be made, and that such action was necessary to preserve the property from waste.

It was, therefore, decreed that the complaint of appellants be dismissed for want of equity, and that appellee be authorized to borrow the money to enable him to cultivate the land in question for the current year.

The case is here on appeal.

Danaher & Danaher, for appellants.

Under the terms of the will the trustee had no power to mortgage the trust estate. The word "mortgage" is not used in the will, and the words "sell and dispose of" do not include the power to mortgage. 31 Cyc. 1080.

The appellee, *pro se.*

The cases cited by appellant do not apply, as the case here is different. The will gives the trustee power "to sell and dispose of" the lands and to manage, handle and deal with same as his discretion may deem best, and this includes the power to mortgage. 39 Cyc. 382; 115 Ill. App. 284; 124 Iowa 296; 15 La. Ann. 386; 3 Tenn. Chy. 124; 62 Tex. 642.

HART, J. (after stating the facts). In *Heiseman* v. *Lowenstein,* 113 Ark. 404, the court held that a mere power given to a trustee, under a will, to sell and con-

vey the trust property, does not include the power to mortgage it. The court, however, in that case adhered to the cardinal principle that, in construing a power, the intention of the donor is of paramount importance and recognized that the power to sell in connection with other language used may include the power to mortgage. All the provisions of the will should be construed together in order to give effect to the manifest intention of the testator, as shown by the language of the will in the light of the surrounding circumstances.

Applying this test to the will in the present case, we are of the opinion that the intent of the testator was to give his son, as trustee under the will, power to mortgage the property as well as to sell and convey it. The terms of the will show that the testator reposed great confidence in his son. It gave him power to sell the real estate if it should prove unprofitable and invest the proceeds in other property. Then he uses this language: "I give and bequeath to said John P. Fergusson, as trustee, full power and authority to sell, and dispose of any and all of the property bequeathed to him, and to manage, handle, and deal with the same as in his discretion may seem best. He is to hold the same for the use and benefit of his children, John Wright Fergusson and James McFerrin Fergusson, and all other children which may hereafter be born to him."

The power to manage and deal with the land for the benefit of the sons of the trustee and the grandsons of the testator was the primary object of the creation of the trust and the paramount duty of the trustee. The father confided the full management and control of the property to his son for the benefit of his grandchildren, and left him to use his best judgment and discretion in the matter. Under the power conferred by the will, if he thought it would be to the advantage of the children for him to sell and dispose of the land, he had the power to do so. In connection with the power to sell and dispose of any or all of the property, he was given the power to manage, handle, and deal with the same as in his discretion may

seem best. This included the power to improve and operate the farm and necessarily called for the exercise of discretion in the premises. In the exercise of this discretion appellee deemed it to the advantage of the beneficiaries that he procure the necessary funds to operate the farm by mortgaging the land. The language used shows that the testator intended to invest the trustee with broad and discretionary powers in the control and management of the property in order to make the land productive and profitable to the objects of his bounty. Otherwise, the trustee might be compelled to sell the land for the payment of the debts already incurred, even though this course would be ruinous to the best interests of all parties concerned, and even though it might be greatly to the advantage of the beneficiaries for the trustee to retain the management of the farm and incur further indebtedness in making the present crop. These views are supported by the following cases: *Hamilton* v. *Hamilton* (Iowa), 128 N. W. 380; *Kent* v. *Morrison* (Mass.), 10 L. R. A. 756; *Faulk* v. *Dashiell,* 62 Tex. 642, 50 Am. Repts. 542; *Lardner* v. *Williams,* 98 Wis. 514; *re Phillip Lueft, Jr.* (Wis.), 7 L. R. A. (N. S.) 263; *Roberts* v. *Hale,* 124 Iowa 296; *Funkhouser* v. *Porter* (Ky.), 107 S. W. 202; *Loebenthal* v. *Raleigh,* 36 N. J. Equity 169, and *Hamilton* v. *Mound City Mutual Life Ins. Co.,* 3 Tenn. Chy. Repts. 124.

It follows that the decree must be affirmed.

FERGUSON *v.* GUYDON.

Opinion delivered April 18, 1921.

1. ESTOPPEL—REPRESENTATION.—Where plaintiff informed defendant that he contemplated purchasing land and asked if defendant had a vendor's lien thereon, and defendant replied that he had not, and that plaintiff would be safe in purchasing it, and, relying upon that representation, plaintiff purchased the land, an equitable estoppel in plaintiff's favor was created.

2. ESTOPPEL—ELEMENTS OF EQUITABLE ESTOPPEL.—An equitable estoppel requires, as to the persons against whom the estoppel is claimed, opportunity to speak, duty to speak, failure to speak, and reliance in good faith upon such failure.

3. ESTOPPEL—EVIDENCE.—A finding of the chancellor that a vendor told one purchasing from the vendee that he had no lien on the property *held* not against the preponderance of the evidence.

4. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A finding of fact by a chancellor will not be disturbed on appeal unless against the clear preponderance of the evidence.

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

STATEMENT OF FACTS.

Jesse Guydon brought this suit in equity against S. W. Ferguson and J. L. Simpson to set aside a decree in their favor against I. W. Carter in the same chancery court to foreclose a vendor's lien on certain property in the city of Clarendon, Monroe County, Arkansas, and to quiet his title in said property.

The defendants denied all the material allegations of the complaint, and defended on the ground that they had a vendor's lien on said property for the unpaid purchase money.

The material facts are as follows: Jennie Teasley owned the property in controversy and exchanged it to I. W. Carter for certain property owned by him. By his direction she executed a deed to the property to S. W. Ferguson and J. L. Simpson on February 12, 1919. She lived on the property at the time she executed the deed, and it was known as the Jack Brown place. In a few days Carter told her that he had bought the property back and wanted to sell it to Jesse Guydon. She saw Jesse Guydon and made an agreement to sell the place to him for $600. On the 24th day of February, 1919, S. W. Ferguson and J. L. Simpson conveyed said property to I. W. Carter and their wives relinquished their dower in the deed which recited that it was executed in consideration of $150 paid by I. W. Carter and $300 evidenced by his promissory note bearing interest at 10 per cent,

and due on the 20th day of November, 1919. The deed was duly filed for record on the same day. On the 24th day of February, 1919, I. W. Carter executed a deed to said property to Jesse Guydon, and it was filed for record on the 28th day of May, 1919. The deed recited a cash consideration of $200 and the balance in two notes for $100 and $300 due, respectively, on the 20th day of May, 1919, and the 20th day of November, 1919. The first note for $100 was duly paid by Jesse Guydon to I. W. Carter in person when it became due. The second note for $300 was paid by Jesse Guydon to Jennie Teasley for Carter about the time it became due.

According to the testimony of Jennie Teasley, when Jesse Guydon came to pay the second note, she asked Carter if he had paid Ferguson & Simpson all the purchase price for the place and found out that Carter owed a balance of $300 on the purchase money. She loaned Carter $50 and directed him to take this, together with $220 which Guydon had paid for him on the purchase price of the lots and go to Ferguson and finish paying for the lots. Carter left her house, and she watched him go toward Ferguson's store. That night he came back and showed her a receipt signed by S. W. Ferguson as follows: "Received of I. W. Carter in full up to date." Carter left town that night and has not been heard of since. He is reputed to be dead.

According to the testimony of Lee Guydon and Jesse Guydon, the former is the father of the latter. When Jesse Guydon began to negotiate for the purchase of the property in question from I. W. Carter, he learned that S. W. Ferguson had a vendor's lien upon it for the unpaid purchase money. The father and son approached Ferguson on the street and told him that the son contemplated purchasing the property from Carter and asked him if he had any lien on it. Ferguson replied that he did not have any lien on the property, and that they would be perfectly safe in purchasing it from Carter so far as he was concerned. Relying on this assurance from Ferguson, the son went ahead and completed his contract

for the purchase of the property. They did not find out that there was any lien on the property for the unpaid purchase money until they had finished paying for it in November, 1919, and Carter had left for parts unknown.

S. W. Ferguson was a witness for himself. According to his testimony, he did not know that Jesse Guydon had purchased the property in controversy from I. W. Carter and did not tell him and his father that he had no lien on the property for the purchase money. He and Simpson deposited the note which Carter gave them for the unpaid purchase money with a bank in the city of Clarendon as collateral security and paid their note to the bank in the early part of January, 1920. Carter never at any time paid them any part of the $300 note which he gave them for the balance of the purchase price for the property in question. After Carter left they brought a suit against him to foreclose their vendor's lien on the property and obtained service by the publication of a warning order on the ground, that he was a nonresident of the State. They obtained a decree of foreclosure prior to the institution of the present action. No personal service was obtained on Carter in that action, and Jesse Guydon was not a party to it.

The chancellor found the issues in favor of the plaintiff, and it was decreed that the lien retained in the deed executed by S. W. Ferguson and J. L. Simpson to I. W. Carter to the property in question be canceled, and that the title to said property should be quieted and confirmed in the plaintiff, Jesse Guydon, free from all claims of the defendants, S. W. Ferguson and J. L. Simpson, under and by virtue of the lien retained in their deed to I. W. Carter.

The defendants have appealed.

Bogle & Sharp, for appellants.

The findings of the chancellor on the question of equitable estoppel are against the clear preponderance of the evidence. 97 Ark. 49; 65 N. W. 604; 83 Fed. 725-34; 21 C. J. 1120; 54 Ark. 499; 49 *Id.* 218. Ferguson is

not estopped by any misrepresentations of facts, as they did not exist at the time of the alleged misrepresentations. There must be a motive. 83 Fed. 733. There must be a false representation of existing facts or fraudulent concealment of same intended to be acted upon, and there was not. 16 Cyc. 726, 732; 53 Ark. 196; 54 *Id.* 508; 48 *Id.* 426; 18 Wall. 255, 271; 117 U. S. 567, 580; 2 Pom., Eq. Jur., 686-8; 89 Ark. 349-53; 93 U. S. 335.

The burden was on appellee to show that the note had been paid. 67 Ark. 69; 64 *Id.* 466; 123 *Id.* 261.

Lee & Moore, for appellee.

Appellee was misled to his injury and has suffered loss, and this constitutes equitable estoppel. 39 Ark. 131; 33 *Id.* 465; 48 *Id.* 409; 89 *Id.* 349. The rule as to equitable estoppel is well settled and sustained. 33 Ark. 465; 39 *Id.* 134; 125 *Id.* 150; 99 *Id.* 260; 128 *Id.* 409; 131 *Id.* 82.

The findings of the chancellor are sustained by the clear preponderance of the testimony.

HART, J. (after stating the facts). It may be stated at the outset that S. W. Ferguson and J. L. Simpson obtained a decree of foreclosure of the unpaid purchase money against I. W. Carter in the same chancery court in which the present suit is pending. This decree was obtained by the publication of a warning order against Carter, and the decree was entered of record before the present suit was instituted. Jesse Guydon was not a party to that suit and is in no wise bound by the decree entered therein. His rights must be determined by the record in the present case.

The record in the present case shows that the deed from S. W. Ferguson and J. L. Simpson to I. W. Carter was executed on the 24th day of February, 1919, and the deed recites unpaid purchase money in the sum of $300 due by Carter which is evidenced by his promissory note of the same date as the deed, and due on the 20th day of November, 1919. Jesse Guydon also obtained his deed from Carter on the 24th day of February, 1919.

According to the testimony of himself and his father, they had heard that S. W. Ferguson had a lien on the property. They met Ferguson on the street and asked him if he had a lien on the property for the unpaid purchase money, giving as a reason for asking that Jesse contemplated purchasing it. Ferguson replied that he had no lien, and that they would be safe in purchasing the property so far as he was concerned. This testimony, if true, is sufficient to create an equitable estoppel in favor of Jesse Guydon against the defendants, S. W. Ferguson and J. L. Simpson.

It has been well said that an equitable estoppel requires as to the persons against whom the estoppel is claimed, opportunity to speak, duty to speak, failure to speak, and reliance in good faith upon such failure. *Fagan* v. *Stuttgart Normal Institute,* 91 Ark. 141; *Cox* v. *Harris,* 64 Ark. 213; *Rogers* v. *Galloway Female College,* 64 Ark. 627; *Gill* v. *Hardin,* 48 Ark. 409, and *Thompson* v. *Wilhite,* 131 Ark. 77.

This rule was recognized in *Scott* v. *Orbison,* 21 Ark. 202, where the court held that if a vendor, having an equitable lien upon land for the purchase money, induces a third person to believe that he does not look to the land, but to other means for payment, and, in consequence thereof, he purchased the land, the vendor will be estopped from setting up his vendor's lien.

Again this rule was recognized in a vendor's lien case in *Wilson* v. *Shocklee,* 94 Ark. 301, but the estoppel was denied because the facts did not warrant its application. But it is strongly insisted that the evidence is not sufficient to warrant a finding in behalf of the plaintiff in this respect. Counsel for the defendants point to the fact that Ferguson in positive terms denied that he had made any such representations to Lee and Jesse Guydon, or that he would have any motive in saying that he had no vendor's lien on the property for the unpaid purchase money when, as a matter of fact, he did have such a lien.

There does not seem to have been any motive on either side to have deceived the other. It would have been easy for Jesse Guydon to have protected himself if he had known that Carter owed Ferguson $300 as a balance of the purchase money of the property. He could have seen that the money he paid Carter in November, 1919, was applied by the latter toward the payment of the unpaid purchase money due to Ferguson.

We are confronted with a finding in behalf of the plaintiff by the chancellor, and it can not be said that his finding is against the preponderance of the evidence. According to the uniform current of decisions in this State, the findings of fact made by a chancellor will not be disturbed on appeal unless they are against the preponderance of the evidence.

Therefore the decree will be affirmed.

BLAIR v. CLEAR CREEK OIL & GAS COMPANY.

Opinion delivered April 18, 1921.

1. MINES AND MINERALS—OIL AND GAS LEASE—ABANDONMENT.—If it was the duty of an oil and gas lessee to drill a protection well on the leased land to prevent it from being drained by wells on adjoining tracts, his refusal to drill would constitute an abandonment of the contract, and equity would afford relief.
2. APPEAL AND ERROR—OBJECTION TO JURISDICTION NOT RAISED BELOW.—The objection that equity had no jurisdiction can not be raised for the first time on appeal.
3. EQUITY—ADMINISTERING COMPLETE RELIEF.—When equity has acquired jurisdiction of a matter in a suit for one purpose, all matters in issue will be adjudicated and complete relief afforded.
4. MINES AND MINERALS—OIL AND GAS LEASE—DUTY TO EXPLORE.—Where an oil and gas lease authorizes the lessee to elect to pay a yearly rental, instead of drilling a well, the lessors can not recover damages for failure of the lessee to commence exploration for gas; but, where the lessee commences to explore for gas, it must exercise due diligence in drilling, and there is an implied covenant on its part to do so.

5. MINES AND MINERALS—ACCEPTANCE OF RENTAL.—Acceptance of delayed rental by an oil and gas lessor precludes him from forfeiting the lease for failure to develop the lease during the term covered by the delayed rental.

6. MINES AND MINERALS—OIL AND GAS LEASE—IMPLIED COVENANT TO PROTECT LESSOR.—Where a landowner leases to another the exclusive right to drill for oil and gas for a stipulated period of time, there is an implied covenant on the part of the lessee to protect the lessor against drainage, at least by wells drilled by him on adjoining property which will necessarily draw the gas from the lessor's land, and, in default of such protection wells being drilled by the lessee, the lessor may recover damages.

7. MINES AND MINERALS — OIL AND GAS LEASE — FAILURE TO SINK WELLS—DAMAGES.—Though the damages recoverable by an oil and gas lessor from their lessee on account of draining the land of gas through wells on adjoining property without drilling protection wells on the leased lands may be difficult of determination and ascertainment, this fact is no bar to relief.

8. MINES AND MINERALS—LIABILITY FOR PROPORTIONATE SHARE OF GAS.—An oil and gas lessee which violated its implied covenant to drill protection wells on the leased land to prevent its drainage through wells drilled by lessee on adjoining tracts is liable to the lessors for their proportionate share of the gas taken from the wells drilled by the lessee so near the boundary of the lease as to draw off the gas underneath their land.

9. APPEAL AND ERROR—REVERSAL—REOPENING FOR FURTHER TESTIMONY.—Where a chancery case was not fully developed, the cause will, on reversal, be remanded with directions to take additional testimony.

10. MINES AND MINERALS—FAILURE TO SINK WELLS—MEASURE OF DAMAGES.—In a suit by oil and gas lessors to cancel the lease on the ground that the lessee was drawing off the gas from their land through wells drilled on adjoining land, without drilling protection wells on the leased lands, the measure of damages is the amount of royalty that the lessors should receive from the quantity of gas drawn from the leased premises.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; reversed.

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellees to cancel a gas lease on the ground that appellees were drawing off the gas from appellants' land by means of wells drilled on adjacent lands near appellants'

boundary lines, and for damages resulting thereform. Appellee defended the suit on the ground that there was no liability under the terms of the lease upon which the suit is based.

The material facts are as follows:. What is known as the Kibler gas field was explored in the fall of 1915, and the first well was drilled by appellee in November, 1915. On the 24th day of November, 1915, E. T. and Mary Blair leased to appellee, Clear Creek Oil & Gas Company, 27 acres of land to be explored for oil and gas in the center of what is known as the Williams field, which is adjoining the Kibler field. Appellants leased to appellee the twenty-seven acres of land for the term of five years and as long thereafter as oil or gas might be produced in paying quantities. Appellee had the exclusive right to explore the land for oil and gas. If gas was found, it was provided that the lessee should pay the lessors one-eighth of the net proceeds of the sale of the gas. The lease further provides that, in case no well drilling operations for oil, gas, or other minerals is begun on the land within one year, all rights and obligations under the lease shall cease upon notice in writing being served on the lessee by the lessors, unless the lessee shall elect to continue the leasse in force by paying to the lessors an annual rental of $100, until a well is drilled, provided that when such well is drilled the above provided-for rental shall cease.

The Kibler field was first developed and most of the gas drawn from it. In the fall of 1918, the Williams field was explored for gas, and the first producing well was brought in some time in November or December of that year. Appellee had leases on the land west and north of the Blair land, known respectively as the Greig and Bryant lands. Appellee drilled two wells on the Greig land. The first well was drilled in the spring of 1919, and is about 400 feet northwest of the northwest corner of the Blair land. A second well was then drilled about 350 feet west of the Blair land and about one-quarter of a mile south of the first well. Appellee also,

in the spring of 1919, drilled a well on the Bryant tract, about 500 feet north of the Blair land. All of these wells produce gas and draw gas from the Blair land.

The testimony of experts shows that the Williams field is uniform in character, and that the gas producing sand is equally porous, and that gas will be drawn along all the radii of a circle of which the well is the center for a quarter of a mile.

The lessors and the lessee construed their lease to mean that payment of the reserve rental for delay in drilling should be made quarterly in advance. On the 4th day of June, 1919, the lessors wrote the lessee a letter calling attention to the fact that they had drilled wells on an adjoining tract near the boundary line of the 27-acre tract in question, and that the wells were producing a large amount of gas; that much of the gas coming from these wells was drawn from under the land of the lessors, and they demanded that the lessee should protect them by drilling a well at an early date on their land. The lessee failed or refused to comply with this demand, and on the 28th day of July, 1919, the lessors wrote the lessee another letter that the lease on the land in question had been canceled, because of the failure of lessee to drill protection wells on the land of the lessors as requested in their former letter.

Testimony was also introduced by appellants tending to show the amount of gas taken from the wells on the adjoining lands.

According to the testimony of appellee, it did not drill the wells on the adjoining lands for the purpose of drawing gas from the land of its lessors. In developing a gas field, it is necessary to take leases on large areas of land, and the drilling must necessarily be delayed on some of the land, and for this reason the leases provide for an annual rental for the delay. Appellee had only two sets of drilling machinery and was drilling wells on the land leased by it in the Williams field as fast as it was practicable after gas had been discovered in that field and a producing well brought in.

On the 3d day of November, 1920, the chancellor found the issue as to the cancellation of the lease in favor of appellants, but found against them on the question of damages. A decree was therefore entered of record, canceling the lease of appellants to appellee, but dismissing their cause of action for taking gas from their land through wells on the adjoining land by appellee.

The appellants have duly prosecuted an appeal to this court.

C. M. Wofford and *E. L. Matlock,* for appellants.

The court erred in refusing to allow appellants to recover damages for breach of the implied covenant to drill protecting wells against drainage. Thornton's Law of Oil and Gas, §§ 104, 121; 176 Pa. St. 502; 49 Ind. App. 602; 96 N. E. 19; 238 Ill. 397; 87 N. E. 381; 107 S. W. 609; 162 Ind. 395; 68 N. E. 1020.

Hill & Fitzhugh, for appellees.

Appellants had no remedy in equity, and their remedy, if any, was an action at law for damages. The lessor (plaintiff) could not claim and receive royalty under the lease and claim damages for alleged violation thereof during the same period.

The acceptance of rentals shows she was relying on the lease and is estopped from claiming that the lease was violated, or that she was entitled to damages during the period covered. 11 L. R. A. (N. S.) 419, note; L. R. A. 1917 A, p. 171.

That lessor can not complain of failure to drill during the period that he has accepted rentals for delay is well established by all the Federal authorities. 140 Fed. 801; 237 U. S. 856. Under these authorities plaintiff can recover no damages, and the court erred in canceling defendant's lease.

HART, J. (after stating the facts). The record in this case shows that appellee drilled three wells which produced gas on adjoining tracts of land so near to the boundary lines of appellants that the wells are drawing

the gas from underneath their land and in time will draw it all away. The only practical way to offset this is to drill protection wells on the land of appellants. It made no effort to drill protection wells. The lease does not contain any protection clause. The doctrine of protection is new in this State and arises from the fluid underground situation of either oil or gas.

On the part of appellants, it is claimed that when oil is drawn from underneath land by wells drilled near the boundary line which will obviously drain the land, there is an implied obligation on the part of the lessee to sink the number of wells necessary to protect the demised tract.

Counsel for appellants insist that, appellee having failed and refused to drill the protection wells as requested by appellants, or to account to them for the gas drawn from their land, the refusal constitutes a breach of the contract and entitles appellants to declare a forfeiture and to sue for the damages resulting therefrom.

Counsel for appellee contend that appellants had no remedy in equity, and that their remedy, if any, was an action at law for damages. In the first place, it may be said that, if it was the duty of appellee to drill a protection well, and it refused to do this, its refusal would constitute an abandonment of the contract, and equity would afford relief.

In the case of *Mauney* v. *Millar,* 134 Ark. 15, the court held that where the sole benefit of a contract results from a continued performance of the contract (such as to develop a mine, to operate it, pay royalties or to divide the proceeds), where one party completely abandons the performance thereof, equity will give relief by canceling the contract. For a partial breach the parties will be remitted to their remedies at law.

Moreover no objection was made or exceptions saved to the jurisdiction of the chancery court, and, under the repeated decisions of this court, the objection that equity had no jurisdiction can not be raised for the

first time on appeal. *Apple* v. *Apple,* 105 Ark. 669, and cases cited.

It is well settled that, when equity has acquired jurisdiction of a matter in a suit for one purpose, all matters in issue will be adjudicated and complete relief afforded. *Horstmann* v. *LaFargue,* 140 Ark. 558.

This brings us to the question of whether there was an implied covenant in the lease to protect appellants against drainage, and, if so, what is the measure of damages recoverable for drainage through wells operated on other lands adjacent to appellants' boundary lines.

The lease provides for a term of five years, and as long thereafter as gas is produced in paying quantities. The consideration for the first year is $1, and for each succeeding year that operation or exploration is delayed the lessee shall pay a yearly rental of $100 for the delay. The lease expressly authorizes the lessee to elect to pay a yearly rental, instead of drilling. Hence, the lessors can not recover damages for failure of the lessee to commence exploration for gas. If, however, the lessee commences to explore for gas, it must exercise due diligence in drilling, and there is an implied covenant on its part to do so. *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167. See, also, *Lawrence* v. *Mahoney,* 145 Ark. 310.

In the application of this principle, counsel for appellee contend that there was no implied covenant on the part of appellee to sink protection wells on the land of appellants. They contend that the rule only applies where the lessee has in part developed the leased premises and produced wells. To support their contention they cite the case of *Carper* v. *United Fuel Gas Co.* (W. Va.), L. R. A. 1917 A, p. 171. In that case it was held that the lessor is not entitled to recover damages for failure to drill offset wells to prevent drainage, while the lessee exercises his optional right to pay money in lieu of drilling, and the lessor accepts it.

The court did hold, however, that there was an implied obligation on the part of the lessee to drill a well for protection against drainage, upon necessity therefor,

and the lessor's demand for such action, within any rental period for which rent has been paid, with notice of intention to refuse to accept further rentals, and the right in the lessor to declare a forfeiture of the lease for noncompliance with such demand would afford full and ample protection from such losses.

We think it perfectly sound to say that the acceptance of delayed rental precludes the lessor from forfeiting the lease for failure to develop during the term covered by the delayed rental. In such a case the lessor still has the gas and has received the reserved rent for the delay in drilling.

In a case like the present one, however, the facts are essentially different, and a forfeiture of the lease would not afford adequate protection to the lessor. The lessee has the sole and exclusive right to drill. Should the lessee fail to drill a protection well after a producing well has been brought in near the lessor's boundary lines on adjacent lands, such well might draw off a material portion of the gas under the lessor's land before he could declare a forfeiture and procure some one else to drill an offset well.

The record shows that drilling wells is very expensive, and is only undertaken where the lessee has a large area of acreage in a block. It is a matter of common knowledge that the landowner is not equipped with machinery for drilling and could not purchase such machinery on short notice, if able to do so. Hence, when he leases his land to another with the exclusive right to drill for oil and gas on it for a stipulated period of time, there is an implied covenant on the part of the lessee to protect the land at least from wells drilled by him on adjoining property which will necessarily draw the gas from the lessor's land. If there had been no lease on his land, the lessor could have had all the time during which the wells were drilled on adjoining land to have arranged for the drilling of an offset well on his land in case a producing well was brought in on the adjoining land which would draw the gas off his own land. Of course,

if he failed to make such an arrangement, the loss would fall upon himself. In case, however, he has leased his land to another and has given the lessee the exclusive right to drill on his land for gas, it is obvious that the mere right of forfeiture in case the lessee would not drill a protection well would not afford him adequate relief. The practical test is to be found in the question, are the outside wells, as for example, the wells on the Grieg and Bryant tracts, draining the Blair land to such an extent that, if the wells on the Grieg and Bryant tracts were operated by a third party, appellee as lessee of the Blair tract, would find it good management to put down protection wells to save its own leased territory from exhaustion? If so, then good faith to its lessors would require it to put down the protection wells that the lessors might get their royalties under the lease, or at least be protected from having the gas drawn from their lands. In this connection we quote with approval from the case of *Carper* v. *United Fuel Gas Co., supra*, the following: "To say the lessor intended to permit the oil and gas in his land to be withdrawn from it otherwise than through wells drilled on it under the lease, and thus to let it go to other persons for nothing, as an incident of his procurement of a small money rental for two, five, or ten years, would be inconsistent with reason, and contrary to the legal principles governing the relation of landlord and tenant or licensor and licensee. For the rental reserved, he is neither selling his oil or gas, nor relinquishing his ownership thereof, nor consenting to severance or abstraction thereof. He expects it to remain in the land until the rental period ends, whether it ceases by the drilling of a well or expiration of the term. Nor can it be doubted that the lessee contemplated the same result. Neither could have intended that he should take out the mineral through wells on other lands. The words of his lease contemplate his extraction of the oil and gas through wells to be drilled by him on the land, and so emphatically deny any such intent on his part. The rental is for delay, not destruction. If, by the negligence

or misfeasance of a tenant, the demised property is materially injured, he is liable for the resultant damages, and the landlord may recover the amount thereof from him within the term, notwithstanding he has paid the rent or is bound to pay it. *Moses* v. *Old Dominion Iron & Nail Works Co.,* 75 Va. 95, 102. If a tenant commit waste, an action lies against him. The landlord is not limited to his rent as compensation. In these cases there need not be an express covenant against waste, nor an express agreement to pay the resulting damages. They are implied, if not expressed."

The contract is a lease of the land for the purpose of drilling for oil and gas for the period of time designated therein, and the lessee has a vested right to the possession of the land to the extent reasonably necessary to perform the terms of the agreement on his part. Therefore there is an implied covenant on the part of the lessee to protect the lessor against drainage, and, in default thereof, the lessor may recover damages.

We think this view is supported by the authorities cited below, and in any event that it is in accord with the better reasoning on the question. *J. M. Guffey Petroleum Co.* v. *Jeff Chaison Townsite Co.* (Tex. Ct. Civ. App.), 107 S. W. 609; *Powers* v. *Bridgeport Oil Co.* (Ill.), 87 N. E. 381; *Kleppner* v. *Lemon* (Penn.), 35 Atl. 109; *Culbertson* v. *Iola Portland Cement Co.* (Kan.), Ann. Cas. 1914 A, p. 610; *Harris* v. *Ohio Oil Co.* (Ohio), 48 N. E. 502; *Kelley* v. *Ohio Oil Co.,* 57 Ohio St. 317, 39 L. R. A. 765; *Kellar* v. *Craig,* 126 Fed. 630 and Thornton on Oil and Gas (3 ed.), vol. 1, par. 109 and vol. 2, par. 882.

What is the measure of damages recoverable for drainage through wells operated by defendants on their lands near the plaintiffs' boundary line may be difficult of determination and troublesome to ascertain, but that is no bar to relief in such cases. For example, suppose in the present case the record should show that appellee had drilled wells on the adjacent lands near to the boundary lines of appellants for the very purpose of drawing the gas from underneath their lands through

these wells, it is obvious that such conduct of the appellees would be fraudulent and actionable. Or suppose, as in the case of *Millar* v. *Mauney,* 142 Ark. 486, the evidence had showed that the formation on the leased land was of such a character that it was not practicable to drill through it, but that the gas could be best drawn from underneath the land by drilling a well on the adjacent land outside of the leased premises and the wells on the Bryant and Greig tracts has been drilled by appellees there on this account, the failure on the part of the lessee to pay the royalty agreed upon would be actionable. In either of the supposed cases the measure of damages would be the same as in the cases of a breach of an implied covenant to protect the demised premises against drainage. To hold otherwise would to be deny relief in a just case because of the difficulty of ascertaining the amount of loss suffered by the wrongful action of the offending party.

It appears from the record that expert witnesses acquainted with the gas field may testify with reasonable accuracy as to the number of wells which should have been drilled on the leased land for protection from drainage. Such witnesses might also testify with reasonable accuracy as to the quantity of gas obtained from the wells. They did say that the sand in which the gas was found was sufficiently porous that a well would draw from underneath the ground gas for a distance of a quarter of a mile in all directions. The record in the case also shows that the three wells operated by appellee on the adjacent tract will in due course of time draw all the gas from underneath the land of appellants. The lessee under the facts disclosed by the record, is liable to the lessors for their proportionate share of the gas taken by the wells drilled so near their boundary lines as to draw off the gas underneath their land. There is no reason why it can not be ascertained with reasonable certainty what quantity and quality of gas has been and will be taken from appellant's land through the wells drilled and operated by appellee on the adjoining land. *Culbertson* v.

Iola Portland Cement Co. (Kan.), Ann. Cas. 1914 A, p. 610, 125 Pac. 81.

This is a new question in this State, and it does not appear that the testimony on the measure of damages was fully developed. Therefore, upon the remand of the case, the chancery court is directed to allow either party to take additional testimony on this point within a reasonable time to be allowed by the court or the chancellor thereof, if the parties shall be so advised. *Tankersley* v. *Norton,* 142 Ark. 339; *Rushing* v. *Horner,* 135 Ark. 201; *Bank of Des Arc* v. *Moody,* 110 Ark. 39, and *McClintock* v. *Robertson,* 98 Ark. 595.

For the error in refusing to allow appellants to recover damages against appellee for the breach of the implied covenant to drill protection wells against drainage, the decree will be reversed and the cause remanded for further proceedings in accordance with the opinion.

OPINION ON REHEARING.

HART, J. We adhere to our original opinion that there was an implied covenant on the part of the lessee to sink a protection well or wells on the land of the lessor, and that it can not escape liability for the breach of its implied covenant to protect the lines of the leased premises on the ground that the damages for the breach are difficult of exact ascertainment. Because the nature of the inquiry makes it practically impossible to ascertain with certainty the exact amount of the lessor's damage, is no reason why the lessor should not have an action for damages for breach of the implied covenant. It is true the law does not permit a witness to speculate or conjecture as to probable damages, yet experienced persons who are acquainted with the gas-bearing conditions of the lands in the locality of the leased premises can give an opinion as to the amount of gas drawn off the premises and lost by the failure of the lessee to comply with its implied covenant. The rule is that, while the law will not permit witnesses to speculate or conjecture as to possible or probable damages, still the best evidence of which

the subject will admit is reasonable, and there is often nothing better than the opinion of well-informed persons upon the subject under investigation. Chamberlayne on Modern Evidence, vol. 3, §§ 2331-32, and *St. L., I. M. & S. Ry. Co.* v. *Brooksher,* 86 Ark. 91.

From the evidence already taken, it would seem that the sand-producing gas on the leased premises and the land adjacent thereto is of uniform character, and that expert witnesses can with a reasonable amount of certainty tell the amount of gas that will be drawn from the leased premises by the wells dug near the boundary line by the lessee on the adjacent premises. When the amount of gas that will be drawn from the leased premises is ascertained, the amount of damages to be recovered can be readily fixed by the royalty that the lessor was to receive.

The evidence in the record shows that the lessee never intended to sink protection wells, and it claims that, under the terms of the lease, it was not required to do so. The lessee drilled three gas wells, one after the other, near the lessor's boundary lines on adjacent premises. This shows that it never intended to drill a protection well or wells on the leased premises. The evidence also shows that these wells would draw gas from a quarter of a mile in all directions, and that the character of the gas-bearing sand was such that the gas would all be drawn off of the leased premises by these wells. Hence, under the evidence disclosed by the record, the measure of damages in the present case will be the amount of royalty that the lessors should receive from the quantity of gas which has been or may hereafter be proved to have been drawn from the leased premises. The question of what time would constitute due diligence or delay in drilling protection wells does not arise in the present case, because, as we have already explained, the record shows that the lessee never intended to sink such wells.

It follows that the motion for rehearing will be denied.

EDGAR v. BROWN.

Opinion delivered July 1, 1918.

1. APPEAL AND ERROR—NECESSITY OF ENTRY OF JUDGMENT.—Where no judgment has been entered dismissing an appeal from the county to the circuit court, it devolves on aggrieved party to see that the judgment is entered in order to appeal therefrom.
2. APPEAL AND ERROR—DISMISSAL OF APPEAL—PRESUMPTION.—Where a judgment of the circuit court dismissing an appeal from the county court does not recite the matter set up in the motion nor whether the hearing was on the motion or testimony adduced at the hearing, but simply states that after hearing the court, being sufficiently advised, doth adjudge a dismissal of the appeal, and the motion to dismiss is not brought into the record by bill of exceptions, it will be presumed that the dismissal was upon facts which justified it.

Appeal from Craighead Circuit Court; *W. J. Driver*, Judge; affirmed.

H. M. Mayes, for appellants.

Lamb & Frierson, for appellees.

HUMPHREYS, J. Appellants prosecuted an appeal to the Craighead Circuit Court from the Craighead County Court establishing Drainage District No. 13 in Craighead County, Arkansas, on the 2d day of July, 1917. The transcript was filed in the circuit court on November 22, 1917, and on November 23 thereafter a motion was filed by appellees to dismiss the appeal. It seems that the motion was sustained, and the appeal dismissed, but no formal judgment of dismissal was entered of record.

Appellants also prosecuted an appeal from the judgment of the Craighead County Court, rendered September 5, 1917, fixing the assessments on the property in the district. The transcript was filed in the circuit court of said county on January 2, 1918. A written motion was filed on January 3, 1918, to dismiss the appeal from the judgment fixing said assessment. The formal judgment was entered on January 3, 1918, dismissing the appeal. In the judgment dismissing the appeal it was recited that the motion and arguments thereon were heard. The record fails to show whether it was heard upon the face of

the motion or upon evidence. The motion itself does not appear in the transcript.

Appellees insist, with reference to the first appeal, that, no judgment having been entered dismissing same, there was nothing to appeal from. This court has said that: "If the judgment or decree has been omitted from the record, it is within the rights of the losing party to move for an entry of it, and it is his duty to do so if he desires to appeal from it. It devolves upon him to take whatever steps are necessary to perfect his appeal." *Chatfield* v. *Barrett,* 108 Ark. 524.

Appellees have called the court's attention to the fact that their written motion to dismiss the second appeal does not appear in the transcript. The judgment of dismissal does not recite the matters set up in the motion, nor whether the hearing was on the face of the motion or testimony adduced at the hearing. It simply states that, after hearing, the court, being sufficiently advised, doth adjudge a dismissal of the appeal. If the motion had been brought into the record, it may have shown that the parties appealing were not aggrieved or may have set up some other matter which warranted the court in dismissing the appeal. If it was heard upon evidence, the facts may have warranted a dismissal of the appeal. In the case of *Armstrong* v. *Lawson,* 128 Ark. 39, a motion was filed to dismiss an appeal prosecuted to the circuit court from the probate court of Cross County. The motion in that case did not appear in the record. Time was given to prepare and file a bill of exceptions, presumably because the case was heard upon evidence. The bill of exceptions was not filed. This court ruled: "In the state of record just prescribed, we are compelled to indulge the presumption that the court's ruling in dismissing the appeal was based upon facts which justified it." We think the rule applied in that case is applicable to the case in hand. It is impossible to tell on the record before us whether the dismissal was warranted. Appellants should have perfected the record by incorporating the written motion for dismissal, and, if heard upon evi-

dence, should have brought the evidence into the record by bill of exceptions.

On the state of record before us, we must presume in favor of the orders of dismissal and affirm the case. It is so ordered.

HALE v. ROAD IMPROVEMENT DISTRICT NO. 1.

Opinion delivered April 18, 1921.

1. APPEAL AND ERROR—CONTENTS OF BILL OF EXCEPTIONS.—On appeal from a judgment dismissing a cause, the bill of exceptions should incorporate the motion to dismiss and any testimony thereon.
2. APPEAL AND ERROR—PRESUMPTION FROM SILENCE OF BILL OF EXCEPTIONS.—Upon appeal from a dismissal of a cause, where the bill of exceptions does not show the motion to dismiss and what, if any, evidence was heard in the court below, it must be assumed that the trial court's ruling is correct.
3. APPEAL AND ERROR—QUESTIONS NOT RAISED BY BRIEFS.—Though appellee does not call attention to the absence of a motion for new trial and bill of execptions, the rules of the court require that error assigned for reversal be properly presented by the record.

Appeal from Mississippi Circuit Court, Osceola District; *R. H. Dudley,* Judge; affirmed.

J. T. Coston, for appellant.

Sections 4 and 11 of act No. 380, Acts 1919, p. 1666, are to be read and construed together. It was the duty of the board to assess damages, and the landowner to commence an action for damages within twelve months for damages. The act should be construed as a whole and the purpose of the Legislature carried into effect. 158 S. W. 962-3; 202 *Id.* 833; 25 R. C. L., § 285; 56 Ark. 137.

Davis, Costen & Harrison, for appellee.

It was the duty of the board to assess, not only the benefits accruing to the land, but all damages. Act 380, Acts 1919, §§ 4 and 9. See, also, 212 S. W. 366; 215 *Id.* 614; 140 Ark. 241, 249-50. The court was correct in holding that section 4 was only to provide a remedy for the landholder where the change was made after the assessment of benefits to the land.

SMITH, J. Appellant is the owner of lands in Road Improvement District No. 1 of Mississippi County, which was created by act 380 of the Acts of the General Assembly of 1919 (volume 2, Road Acts, page 1666). The commissioners of the district filed a petition in the county court, praying authority to open a road through one tract of appellant's land and to widen an old road through other tracts of his land. The county court made the order prayed for, and at the same time approved the plans of the commissioners for the improvement and the assessments of benefits. In returning the assessments of benefits the commissioners awarded no damages for the new road or for the additional right-of-way taken in widening the old road. Within six months thereafter appellant commenced this action by presenting a claim for damages in the county court, and upon the hearing of the claim the county court awarded compensation for damages to the land traversed by the new road, but denied compensation for the additional right-of-way taken in widening the old road. An appeal was prosecuted from that order to the circuit court. The judgment of the circuit court is as follows:

"On this day, January 11, 1921, this cause coming on to be heard on the motion of the defendant to strike this cause from the docket, and the court, being sufficiently advised, doth sustain said motion.

"It is therefore considered, ordered and adjudged that this case be stricken from the docket. To which ruling and judgment of the court the plaintiff excepted at the time and prayed an appeal to the Supreme Court, which was granted."

The motion to dismiss, which the court below sustained, does not appear in the transcript, and there is no motion for a new trial or bill of exceptions. We do not know, therefore, upon what allegations or testimony the court's action was based. The motion itself, and any testimony which may have been offered on the hearing thereof, should have been incorporated in a bill of exceptions. *Adkinson* v. *State,* 142 Ark. 34; *Johnson* v. *State,* 142 Ark. 402.

We must assume that some showing was made to invoke a ruling of the court; and we must presume that a correct ruling was made in the absence of the motion to dismiss and a bill of exceptions showing what was heard in the court below. *Van Hoozer* v. *Hendricks,* 143 Ark. 463; *Armstrong* v. *Lawson,* 128 Ark. 39; *Billingsley* v. *Adams,* 102 Ark. 511; *Laramore* v. *Radford,* 135 Ark. 494; *St. Louis, I. M. & S. Ry. Co.* v. *Murphy,* 38 Ark. 456.

Appellee does not call attention to the absence of a motion for a new trial and bill of exceptions; but the rules of procedure of this court require us, before reversing a judgment of the court below, to see that the error assigned for the reversal is properly presented by the record in the case.

The record in the case of *Edgar* v. *Brown, ante,* p. 314, was identical with the one now before us. In that case we said: "The judgment of dismissal does not recite the matters set up in the motion, nor whether the hearing was on the face of the motion or testimony adduced at the hearing. It simply states that, after hearing, the court, being sufficiently advised, doth adjudge a dismissal of the appeal. If the motion had been brought into the record, it may have shown that the parties appealing were not aggrieved, or may have set up some other matter which warranted the court in dismissing the appeal. If it was heard upon evidence, the facts may have warranted a dismissal of the appeal. * * * It is impossible to tell on the record before us whether the dismissal was warranted. Appellant should have perfected the record by incorporating the written motion for dismissal, and if heard upon evidence should have brought the evidence into the record by a bill of exceptions."

On the state of the record before us we must presume in favor of the order of dismissal and affirm the case, and it is so ordered.

OPINION ON REHEARING.

SMITH, J. Counsel, in petition for rehearing, attempts to distinguish the instant case from that of *Edgar* v. *Brown, supra,* by stating that here the motion to dismiss

was oral, while there it was in writing. It does not appear from the record before us, whether the motion was oral or in writing; but, assuming that the motion on which the court acted was oral, the reasoning of the court in *Edgar* v. *Brown* is still applicable. The point is that there was a motion to dismiss the appeal, and some showing must have been made to have invoked that action by the court. Testimony may have been heard which warranted that action. Counsel says that no competent testimony could have been heard on that motion; but in this he is mistaken, as appears from what we said in *Edgar* v. *Brown, supra.*

Looking only to the record before us, it appears that the appeal from the county court was dismissed, and, as it does not affirmatively appear that the court erred in making that order, the petition for rehearing is overruled.

BOLTON *v.* MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered April 18, 1921.

1. JUDGMENT—RES JUDICATA—PLEADING.—A plea of former adjudication, to be available, should be pleaded by answer as a defense, and should set out the facts upon which it is based, and the issue is not properly raised by a motion to dismiss which does not recite the facts upon which the plea is based.
2. JUDGMENT—RES JUDICATA.—In a suit against a railway company for personal injuries sustained by plaintiff prior to the passage of the Federal Control Act, a former judgment holding that the government was not liable for a claim against a railroad company accruing prior to the time when the Director General took possession of the railroads did not bar a subsequent action against the railroad company to recover for such injuries.
3. EVIDENCE—JUDICIAL NOTICE—JUDICIAL PROCEEDINGS.—Courts can not take judicial notice of their own records in other causes pending therein, even between the same parties, and of course will not take notice of the records of other courts.

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

Oscar H. Winn, for appellant.

The motion to dismiss on ground of former adjudication should not have been sustained, because (1) the

defendant here is not the same party as in the former case. Walker D. Hines, Director General of Railroads, and the Missouri Pacific Railroad Company are not the same parties defendant, and (2) it does not affirmatively appear that the matter in dispute was the same issue tried. 13 N. W. 708; 59 Iowa 545; 94 U. S. 608 (Law. Ed.), vol. 24, 214; 34 Cyc. 1666.

The case was never tried on its merits; in the former case the question only as to proper parties was determined. 61 N. E. 954. To make a matter *res judicata,* there must be a concurrence of four conditions—identity of the thing sued for, identity of cause of action, identity of persons and of quality in the persons for or against whom the claim is made. 34 Cyc. 1666 (foot note); 216 S. W. 3; 91 Ark. 394. None of the cases cited by appellee are in point.

Thomas B. Pryor and *Ponder & Gibson,* for appellee.

1. The court properly sustained the motion to dismiss on the ground of former adjudication; the cause of action, the subject-matter and the parties are the same and the issues the same. 23 Cyc. 1215; 20 Ark. 85; 23 Cyc. 1253.

2. The judgment on demurrer is conclusive. 2 Black on Judgments, §§ 707-8; 91 Ark. 394; 97 *Id.* 450; 96 *Id.* 87. See, also, 66 Ark. 336; 41 *Id.* 75.

3. Appellant can not recover for alleged injury which happened while the railroad was in hands of a receiver. 18 Am. St. Rep. 60; 69 *Id.* 206; 22 *Id.* 56; 164 Ark. 366; 1 Elliott on Railroads, § 526; 33 Cyc. 338.

4. No motion for new trial was filed, and there is no bill of exceptions. The appeal should be dismissed. 21 Ark. 398; 27 *Id.* 506; 64 *Id.* 483; 93 *Id.* 85.

SMITH, J. On May 17, 1920, Clifton Bolton, a minor, by Robert Bolton, his father and next friend, sued the Missouri Pacific Railroad Company for damages for personal injuries received by him. The injury com-

plained of occurred July 6, 1916. The following motion to dismiss was filed by the railroad company:

"MOTION TO DISMISS ON GROUND OF FORMER ADJUDICATION.

"Comes the defendant and moves the court to dismiss the action of the plaintiff herein, because it was a party to a former suit filed in this court in which all the matters that are now set up and complained of were in issue, and the court sustained a demurrer to that complaint, which was affirmed by the Supreme Court of this State; and that there are no new matters arising, and that all of the issues and questions have been adjudicated, and the plaintiff is bound thereby."

This motion was sustained, and the cause dismissed, and this appeal is prosecuted to reverse that action.

The plea of former adjudication is one which, to be available, should be pleaded by answer as a defense. *Adams* v. *Billingsley,* 107 Ark. 38. The answer tendering that plea should set out the facts upon which it is based, and the issue is not properly raised by a motion to dismiss which does not recite the facts upon which the plea is based.

The case which is said to be determinative of the instant case is that of *Bolton* v. *Hines,* found reported in 143 Ark. 601; the insistence being that in the former case both Walker D. Hines, as Director General, and the Missouri Pacific Railroad Company were parties defendant. Such, however, is not the fact. The only defendant in that case was Walker D. Hines, who was sued in his capacity of "Director General, Missouri Pacific Railroad Company, Successor of B. F. Bush, Receiver St. Louis, Iron Mountain & Southern Railroad Company."

The fact alleged in the complaint, as shown in the opinion in *Bolton* v. *Hines, supra,* was that Bolton was injured before Hines, as Director General, assumed charge of the railroad, and the point decided was that the act of Congress giving the government control of the railroads of the county did not make the government liable for a claim against a railroad accruing prior to

the time the Director General took possession; that the railroad company was liable on causes of action accruing prior to that time.

It is insisted for the affirmance of the judgment of the court below that on the date of the alleged injury the railroad was being operated by the St. Louis, Iron Mountain & Southern Railway Company, and that subsequent to said injury that road was sold under a decree of the United States District Court within and for the Eastern District of Missouri, Eastern Division, in a cause therein pending wherein Commonwealth Steel Company was plaintiff and the St. Louis, Iron Mountain & Southern Railway Company was defendant. No such showing is made in the record before us. But it is insisted that this court will take judicial notice of the decree and of the orders thereunder. Counsel is mistaken in this contention. We do not take judicial notice of the decrees and orders of other courts. In 7 Enc. of Evidence, page 1003, it is said: "The general rule is that a court will not take judicial notice of its own records or proceedings in another independent case or proceeding unless required to do so by statute."

We do not have a statute requiring us to take judicial notice of the proceedings of other courts; and in the case of *Murphy* v. *Citizens' Bank of Junction City,* 82 Ark. 131, 11 L. R. A. (N. S.) 616, this court held that "Courts can not take judicial notice of their own records in other causes pending therein, even between the same parties. *Gibson v. Buckner,* 65 Ark. 84; *Watkins* v. *Martin,* 69 Ark. 311; *Hall* v. *Cole,* 71 Ark. 601; 16 Cyc., p. 918, and cases cited." See, also, *Fry* v. *Chicot County,* 37 Ark. 117; *Adams* v. *Billingsley,* 107 Ark. 38.

It follows, therefore, that the action of this court, in affirming the decision of the lower court, which sustained a demurrer in favor of the Director General of Railroads, is not an adjudication of the right to sue the railroad itself for an injury which occurred before the Government assumed control of the railroads.

The judgment of the court below will, therefore, be reversed and the cause remanded.

CURATORS OF CENTRAL COLLEGE *v.* BIRD.

Opinion delivered April 18, 1921.

PARTIES—NECESSITY OF.—A suit brought by the "Curators of Central College," without alleging that they constitute a corporation, and without setting out the names of such "curators," should be dismissed for want of proper parties plaintiff.

Appeal from Clay Circuit Court, Western District; *R. H. Dudley,* Judge; appeal dismissed.

C. L. Daniel, for appellants.

This is a Missouri contract, and the laws of that State govern. Plaintiff signed the note, and appellants were plaintiffs below and appellants here, and appellee is bound, as appellants are the legal holders of the note and entitled to sue. 106 Ind. 523; 47 *Id.* 1; 20 Vt. 509; 8 C. J. 1003, § 1309; 96 Ark. 416; Rev. Stat. of Mo. of 1899, § 894.

Where several promise to contribute to a common object desired by all, the promise of each is good consideration for the promise of the others. 6 N. H. 164; 46 Ill. 377; 5 Pick. 506; 9 Vt. 289; 1 Parsons on Cont. 399-401. The consideration was sufficient, as expenditure of time, labor and money in securing other subscriptions is sufficient consideration. 72 Ill. 247; 57 Ia. 307; 103 N. Y. 600; 48 N. C. (3 Jones L.) 152; 24 Vt. 189. See, also, 24 Mich. 403; 24 Vt. 477; 59 *Id.* 419; 64 Ark. 427.

C. T. Bloodworth, for appellee.

This was a mere offer to make a gift, and neither the subscriber nor the beneficiary were bound until the offer to make the gift is accepted and acted upon by the donee in such manner as to raise a consideration. 64 Ark. 627; 30 *Id.* 186; 25 R. C. L., § 14, p. 1408.

The endowment fund was never raised, and there was no consideration. 8 C. J. 411; 112 N. Y. 517. On

the whole case the judgment is right. The church never proved that they complied with the conditions of the offer.

HUMPHREYS, J. This suit was commenced by "Curators of Central College" against appellee, on September 6, 1920, before L. L. Shemwell, a justice of the peace of Carpenter Township in Clay County, Arkansas, by filing with the justice the following instrument:

"$25.00. Doniphan, Mo., April 19, 1915.

"For the endowment of Central College, Fayette, Mo., in consideration of subscriptions by others to the same fund, I hereby promise to pay to the Curators of Central College the sum of twenty-five ($25.00) dollars, in five equal installments, beginning September 1, 1915.

"L. E. Bird."

"Curators of Central College" failed to appear and prosecute, and the justice of the peace dismissed the suit on the 24th day of September, 1920, from which judgment of dismissal an appeal was taken by "Curators of Central College" to the circuit court of said county.

The cause was submitted to the circuit court sitting as a jury upon the written instrument filed before the justice of the peace and the testimony of appellee, which was as follows:

"I signed the instrument of writing now shown me, and which was sued on in the justice of the peace court. I received no consideration whatever for the contract or agreement. I know that Central College is a school for the education of preachers. I do not know whether any other person or persons signed agreements similar to the one sued on. I never heard of such, and do not know whether any other person or persons paid such subscriptions, if made. I never talked with any one else about the subscription."

The court adjudged that "Curators of Central College" take nothing by reason of the action. From that judgment, "Curators of Central College" have prosecuted an appeal to this court.

Appellee makes the point that suit has not been brought against him by any proper party. It is not al-

leged that "Curators of Central College" is a corporation; nor are the names of the Curators of Central College set out. It goes without saying that suits must be instituted or defended by persons, either natural or artificial. "Curators of Central College" is not a designation or description of any person either natural or artificial. There being no party plaintiff or appellant, there is no cause of action or appeal therefrom pending in this court. The appeal must therefore be dismissed.

FEILD v. WATERS.

Opinion delivered April 18, 1921.

1. JUDGMENT—VACATION AFTER LAPSE OF TERM.—A court with terms fixed by law has no power to vacate a judgment after lapse of the term at which it was rendered, except on the grounds specified in Crawford & Moses' Digest, §§ 1316, 6290.
2. JUDGMENT—OMISSION TO RULE ON MOTION FOR NEW TRIAL.—The fact that the court has omitted to rule on a motion for new trial, or has made an order extending the time for presenting or considering a motion for new trial, does not continue the power of the court over its own judgment to the next term, so as to authorize the court to vacate the judgment.
3. APPEAL AND ERROR—TIME FOR APPEALING.—An appeal not taken within six months from the rendition of the judgment appealed from, as required by Crawford & Moses' Digest, § 2140, will be dismissed.

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

Oscar H. Winn, for appellant.

J. C. Marshall, for appellees.

PER CURIAM. This is a motion made by appellees to dismiss the appeal on the ground that the same was not taken within six months from the rendition of the judgment appealed from, the time prescribed by statute for taking appeals to this court. Crawford & Moses' Digest, § 2140. The action was instituted in the circuit court of Pulaski County by appellees against appellants to recover possession of a certain tract of land, and there

was a trial of the issues before a jury, which resulted in a verdict and a judgment against appellants for the recovery of the land in controversy. The judgment was rendered on January 16, 1920, and appellants immediately filed a motion for a new trial on numerous grounds, among which was an allegation of newly discovered evidence.

That term of the court ended without appellant's motion for a new trial having been ruled on by the court, nor does the record show that any further order was made by the court in the cause until September 25, 1920, a day of the succeeding term, when appellants filed a motion to set aside the judgment on account of the delay of the court in acting on the motion for new trial and the failure of the court to rule on that motion during the former term at which it was rendered. The court thereupon entered the following order:

"On this day the motion in the above cause asking that the judgment therein rendered on the 20th day of January, 1920, be set aside on account of delay in the hearing of the motion for new trial, and the court, being fully advised in the premises, doth find that the hearing of said motion for new trial was delayed on account of an agreement between counsel for plaintiffs and defendants that the trial judge should visit the land in controversy in person before the said motion should be passed upon, and the said delay has been the cause of the statutory time within which defendants have to perfect their appeal in this cause to the Supreme Court.

"It is therefore considered, ordered and adjudged by the court that the said judgment rendered and entered in this cause on the 14th day of January, 1920, be set aside, canceled and held for naught, and the same judgment so entered on said day shall be re-entered as and of the date of September 25, 1920, and the said defendants herein are given five (5) days within which to file their motion for new trial."

On the same day (September 25, 1920) the court entered an order overruling the motion for new trial of

appellants and granting time within which to present and file a bill of exceptions. The appeal was granted by the clerk of this court on March 19, 1921, which was within six months after the rendition of the last order of the court setting aside and re-entering the judgment of the court, but not within six months of the original rendition of the judgment.

A court with terms fixed by law has no power to vacate a judgment after the lapse of the term at which it was rendered, for the court loses control over its own judgments at the end of the term. *Walker* v. *Jefferson,* 5 Ark. 23; *Mayor* v. *Bullock,* 6 Ark. 282; *Rawdon* v. *Rapley,* 14 Ark. 203; *McKnight* v. *Strong,* 25 Ark. 212; *Brady* v. *Hamlett,* 33 Ark. 105. After the lapse of the term the court can set aside its judgment rendered at a former term only on the grounds specified in the statute. Crawford & Moses' Digest, §§ 1316, 6290; *Turner* v. *Vaughan,* 33 Ark. 454; *Malpas* v. *Lowenstein,* 46 Ark. 552; *Johnson* v. *Campbell,* 52 Ark. 316; *Ayers* v. *Anderson-Tully Co.,* 89 Ark. 160; *Terry* v. *Logue,* 97 Ark. 314. The fact that the court has omitted to rule on a motion for new trial, or has made an order extending the time for presenting or considering a motion for a new trial, does not continue the power of the court over its own judgment to the next term so as to authorize the court to vacate the judgment. *Joyner* v. *Hall,* 36 Ark. 513; *Brady* v. *Hamlett, supra; Siloam Springs* v. *McPhitridge,* 53 Ark. 21; *Stewart* v. *Wood,* 86 Ark. 504; *Corning* v. *Thompson,* 113 Ark. 237.

It is not contended that the court set aside the judgment on either of the grounds specified in the statute cited above. The court's order setting aside the judgment, and appellant's motion which must be read in connection with it, show that the sole ground for setting aside the judgment was the fact that the court had not acted on the motion for new trial, which was tantamount to an order of the court at a former term postponing the time for considering the motion. The case of *Corning* v. *Thompson, supra,* is precisely in point in holding that the postponement to a succeeding term of the considera-

tion of a motion for new trial does not preserve the power of the court over the judgment. It is clear, therefore, from the record before us that the order of the court attempting to set aside the judgment on September 25, 1920, was void, and that the appeal to this court was not granted within the time prescribed by the statutes. The appeal is therefore dismissed.

STATE v. ROBERTS.

Opinion delivered April 25, 1921.

1. CRIMINAL LAW—TIME OF APPEAL.—On appeal of the State from a judgment sustaining a demurrer to an indictment for perjury, though the transcript fails to show the date of the judgment, yet where the opening order of court was dated January 3, 1921, and the transcript was filed in the Supreme Court on March 4 following, the appeal was in time.
2. CRIMINAL LAW—CONTENTS OF TRANSCRIPT ON APPEAL.—Rule 20 of the Supreme Court, prescribing the form of transcript in criminal cases, is inapplicable on appeals in criminal cases by the State, so far as it requires the inclusion of things specified in advance of the indictment, where the State is seeking merely to test the correctness of the judgment sustaining the demurrer to the indictment without bringing up the antecedent proceedings.
3. PERJURY—INDICTMENT—FORM OF OATH.—It is unnecessary, in an indictment for perjury to set forth the form of the oath, it being sufficient merely to allege in general terms that the accused was duly sworn, or sworn in accordance with law.
4. PERJURY—INDICTMENT.—An indictment for perjury which alleges in substance, though not in orderly form or apt terms, that defendant, being duly sworn before the grand jury, was asked whether on a certain day he gave a half-gallon jar of whiskey to one W., to which he answered "No", and that such answer was material and was wilfully, unlawfully and corruptly false, was sufficiently definite to put the accused on notice.
5. PERJURY—INDICTMENT—CHARGE OF MATERIALITY OF TESTIMONY.—An indictment for perjury on account of having sworn falsely before the grand jury touching violations of the liquor law was sufficient in charging that the alleged false testimony was material, without alleging facts showing the materiality of such testimony.

6. PERJURY—INDICTMENT—VOLUNTARY TESTIMONY.—An indictment charging perjury before the grand jury in its investigation of violations of the liquor laws was not defective for failing to charge that defendant voluntarily appeared before the grand jury and gave the testimony alleged to be false, as the statute (Crawford & Moses' Dig., § 3122) protects him from the use of his own testimony in the prosecution of a charge against himself.

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

J. S. Utley, Attorney General, and *Elbert Godwin,* Assistant, for appellant.

1. The indictment is not defective, and it was error to sustain the demurrer to it. An indictment for perjury is sufficient when it alleges that the alleged perjured testimony was material, but does not *specify how it was material.* 110 Ark. 549; 97 *Id.* 203. In an indictment for perjury the false testimony for which the defendant is indicted may be shown by the indictment to be material, either by direct averment or by allegations from which the materiality appears. *The rule of pleading is satisfied by a direct averment and with that the question of materiality becomes one of proof of that averment.* It is only where there is no averment of materiality that the indictment is insufficient unless it alleges the facts from which the law infers the materiality. 152 Mass. 577; 110 Ark. 553; 137 Cal. 263; 35 Mich. 491; 182 Ill. 278; 1 Russell on Crimes (1896) 354; 30 Cyc. (Law and Proc.) 1435; 91 Ark. 200-3.

2. The indictment states facts sufficent to give the court jurisdiction of the person of defendant.

3. The indictment is not ambiguous or too indefinite and uncertain. The facts alleged are sufficiently definite, as the indictment contains allegations of the facts constituting the offense in ordinary and concise language such as to enable a person of common understanding to know what is intended, and is sufficient. 73 Ark. 487; 77 *Id.* 321; 93 *Id.* 406; 94 *Id.* 65; 33 Cyc. 1440; C. & M. Digest, § 3028.

4. The indictment alleges that defendant was *duly sworn,* and the demurrer admits it. 17 Ark. 332. It is not necessary to enter upon the record the form of the oath; it is sufficient if it shows that he was *duly sworn.* 34 Ark. 257. See, also, 21 St. Enc. of Proc. 320-1.

5. Defendant can not complain of the failure of the indictment to allege that he voluntarily appeared as a witness before the grand jury or whether he appeared in obedience to a subpoena. C. & M. Digest, § 2588. The indictment is sufficient if the offense is charged in the language of the statute or of similar import. 39 Ark. 216; 40 *Id.* 361; 47 *Id.* 476; 49 *Id.* 499; 71 *Id.* 80; 72 *Id.* 382.

6. The indictment shows and alleges in what particulars the alleged statements were false and how they were material. The rule is satisfied by a direct averment, and the question of materiality becomes one of proof. 91 Ark. 203.

7. The materiality of the testimony is sufficiently alleged. 91 Ark. 203. See, also, 21 St. Enc. of Proc. 322-3.

8. The indictment does allege as a *matter of law* that the statements were unlawfully and feloniously and wilfully and corruptly false. 91 Ark. 200; 110 *Id.* 554.

David L. King, for appellee.

1. Appellant has failed to file the transcript in time as prescribed by law, and it does not comply with the rules of this court. See rules 9, 14 and 18. The transcript was not lodged in this court in sixty days. 29 Ark. 115; 87 *Id.* 17; 94 *Id.* 368.

2. The indictment is defective in not alleging the materiality of the false oath. False swearing about immaterial matters is not perjury. 64 Ark. 474; 61 *Id.* 599. Every material fact to constitute the crime must be alleged in ordinary and concise language so as to enable a person of common understanding to know what is charged. 29 Ark. 165; 38 *Id.* 519; 43 *Id.* 43; 67 *Id.* 308.

3. The indictment is ambiguous, vague and uncertain. It must be definite and certain. It does not allege that the grand jury were sworn according to law. C. & M. Digest, § 2979; 10 Ark. 607; 13 Allen 554; 23 N. J. L. 49; 1 Black 359; 12 Am. St. Rep. 905; 39 Ark. 180.

4. The indictment is insufficient in its allegations as to the crime.

McCULLOCH, C. J. The State appeals from a judgment of the circuit court of the Northern District of Sharp County sustaining a demurrer to an indictment against David E. Roberts for the crime of perjury, alleged to have been committed by giving false testimony before the grand jury of said county in regard to certain matters then under investigation. The indictment, omitting the caption, reads as follows:

"That the said David E. Roberts, in the county and State aforesaid, on the 14th day of July, 1920, then and there on said day at the courthouse at Hardy, Sharp County, Arkansas, being the time and place for the holding of the regular summer term of the circuit court of the Northern District of Sharp County, Arkansas, in July, 1920, the Hon. J. B. Baker, the regular judge of said court, being then and there presiding, and said court then and there duly organized, and said term of said court then and there beginning, and Noel Arnold and fifteen other men having been duly selected and examined on their oath as the law provides, and found competent and qualified as grand jurors, were duly empaneled by said court as grand jurors, by said court, as the grand jury of the said term, and said grand jury was then and there duly instructed as to their duties and charged concerning the criminal laws of the State of Arkansas, and the said Noel Arnold was then and there appointed as foreman of said grand jury and the said grand jury then and there retired to the grand jury room of said courthouse to consider of and perform their duties, and while said grand jury as a body was then and there performing their duties, and said David E. Roberts ap-

peared as a witness before said grand jury on the 14th day of July, 1920, and it became material and within the duty and jurisdiction of said grand jury to inquire of the said David E. Roberts concerning the storing, having, procuring and giving away of certain intoxicating liquors in the town of Hardy, the Northern District of Sharp County, Arkansas, during the month of April, 1920, and the said David E. Roberts did then and there take his corporal oath and was then and there duly sworn as a witness before said grand jury, and said oath then and there duly administered to the said David E. Roberts by the said Noel Arnold, the foreman of said grand jury, who was then and there authorized by law to administer said oath, and after being so sworn and taking said oath the said David E. Roberts did then and there before and in the presence of said grand jury upon the investigation concerning the sale, storing, having and giving away of intoxicating liquor at Hardy, in the Northern District of Sharp County, Arkansas, and being asked if he, the said David E. Roberts, and Jim Wiseman did go to the stock pen in the town of Hardy, Arkansas, on the Sunday night that one Owen Billingsley died in April, 1920, where you, the said David E. Roberts, got one half-gallon fruit jar containing some whiskey and gave it to Jim Wiseman, the said David E. Roberts answered "No," which statement and testimony by the said David E. Roberts in the investigation of the aforesaid was material in the investigation aforesaid, and which statements and answers so made and testified to by the said David E. Roberts as aforesaid were feloniously, wilfully, unlawfully and corruptly false, and known by the said David E. Roberts to be feloniously, wilfully, unlawfully and corruptly false when he, the said David E. Roberts, so made them, against the peace and dignity of the State of Arkansas."

The question first presented is whether or not the State has appealed within the time prescribed by statute—within sixty days after the judgment. The transcript fails to show the date of the judgment, but it does

contain the opening order of court on January 3, 1921, and the transcript was filed in the office of the clerk of this court on March 4, by the Attorney General, which was the sixtieth day after the judgment. The appeal was therefore in time.

It is next contended that the transcript is not complete under rule 20 of this court, which prescribes the form of transcript in criminal cases. This rule provides that in criminal cases the transcript "shall begin with the return of the indictment into court, unless a motion shall have been made to set aside the indictment, in which case the proceedings empaneling the grand jury shall also be copied in the transcript," and that this should be followed by "the indictment, the pleadings by the defendant and subsequent proceedings, as in civil cases." This rule is inapplicable on appeals in criminal cases by the State, so far as it requires the inclusion of things specified in advance of the indictment to which the demurrer has been sustained. The State has a right to test the correctness of the judgment sustaining the demurrer without bringing up the antecedent proceedings, unless the demurrer or other pleading challenges the authenticity and regularity of the indictment.

We proceed then to an examination of the indictment to determine whether or not it is sufficient.

One of the grounds urged by counsel for the accused for sustaining the demurrer is that the indictment does not set forth the form of the oath, but merely states that the accused was "duly sworn as a witness before said grand jury," and that the testimony was given by the accused "after being so sworn and taking said oath." It is unnecessary, in an indictment for perjury, to set forth the form of the oath, it being sufficient merely to allege in general terms that the accused was duly sworn, or sworn in accordance with law. 21 Standard Encyclopedia of Procedure, p. 320. We have held that where the sufficiency of the record in regard to the swearing of the jury is challenged, it is sufficient merely to present a record showing that the jury was duly sworn. *Greenwood* v.

State, 17 Ark. 332; *Anderson* v. *State,* 34 Ark. 257. The same rule applies to an allegation concerning the oath of the accused in a perjury case.

The next ground urged is that the indictment is vague and ambiguous and fails to specifically set forth the matter about which the accused is charged with having sworn falsely. It must be conceded that the indictment is not framed in orderly form or in very apt terms, but it is sufficient under the statute if it contains a statement of facts "in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended." Crawford & Moses' Digest, § 3028. The substance of the charge set forth in the indictment is that in his examination before the grand jury the accused was asked whether or not he had on a certain occasion accompanied one Jim Wiseman to a place mentioned, and then and there procured a jar containing whiskey and gave it to Wiseman, and that the accused falsely and corruptly answered in the negative. It is expressly alleged that the testimony so given was material to the inquiry then being pursued by the grand jury. The gist of the inquiry, as set out in the indictment, concerned the "sale, storing, having and giving away intoxicating liquor" and the alleged answer of the accused expressed a negative answer to the question propounded to him concerning his procurement of such liquor at the time and place and under the circumstances mentioned. We think that the allegations were sufficiently definite to put the accused on notice and to constitute a specific charge of perjury in regard to material matters.

The next question argued is whether or not the indictment is sufficient to charge the materiality of the false testimony. The law is settled in this State that in framing an indictment for perjury it is not essential to set forth facts which show the materiality of the false testimony, and that it is sufficient if the indictment contains an express statement that the false testimony is

material. *Smith* v. *Smith,* 91 Ark. 203; *Loudermilk* v. *State,* 110 Ark. 553.

Lastly, it is said that the indictment is defective in that it fails to charge that the accused appeared before the grand jury and voluntarily gave the testimony set forth in the indictment. Counsel rely, as sustaining this position, on the decision of this court in the case of *Claborn* v. *State,* 115 Ark. 387. In that case, however, the indictment charged that the testimony before the grand jury was given in an examination on a charge against the defendant himself. The court held that under those circumstances the indictment, in order to set out the offense of perjury, must contain an allegation that the accused voluntarily gave the tesimony. The gist of the charge there was that the accused gave false testimony in a case against himself, and we held that in order to constitute a charge of perjury under those circumstances it must affirmatively appear that he waived the privilege of refusing to give testimony which would incriminate himself. The charge, in the present indictment, presents altogether a different question. There is no charge, as in the Claborn case, that an accusation against this defendant was under investigation. Therefore, it was unnecessary to set forth the waiver of his privilege. Under our statutes the grand jury has general inquisitorial powers without being confined to any particular matters submitted for investigation, and, according to the allegations of the complaint in this case, the grand jury was pursüing such investigations in propounding the inquiry to the defendant. The question propounded might or might not have elicited information incriminating the defendant himself. But he could not refuse to answer on that ground, for the reason that the statute protects him from the use of his own testimony in the prosecution of a charge against himself. Crawford & Moses' Digest, § 3122; *State* v. *Bach Liquor Co.,* 67 Ark. 163; *Ex parte Butt,* 78 Ark. 262. The purpose of the inquiry was, as before stated, to ascertain whether or not liquor was procured on the occasion mentioned. If it

developed from the inquiry that some person other than the defendant in this case was guilty of an offense, the testimony of the defendant would become material. But if it be proved that a truthful answer would have disclosed the fact that the defendant himself had committed an offense, or was the sole offender in the transaction, then his own testimony would become immaterial for the reason that it could not be used against himself. The grand jury, however, had the power to pursue the inquiry and propound the particular question to the defendant to ascertain whether or not it would disclose the commission of an offense by some other person, and, as before stated, the fact that it might develop the commission of an offense by the defendant himself does not make it necessary to allege in an indictment that the testimony was voluntarily given. Of course, on a trial of the case it would devolve on the State to show the materiality; and if it appears from such proof that the accused himself was the sole offender in the transaction under inquiry, then his false testimony would not constitute perjury under the statute, unless it further appears that he waived his privilege by voluntarily giving the testimony.

Our conclusion, therefore, is that the court erred in sustaining the demurrer, and the judgment is reversed and the cause remanded with directions to overrule the demurrer.

CARRIGAN v. NICHOLS.

Opinion delivered April 25, 1921.

1. INSURANCE—DELAY IN RETURNING POLICY FOR MISREPRESENTATIONS.—In an action on a note for a premium under a life insurance policy, where defendant claimed that he was induced to apply for the policy by false representations of the insurer's agent, and that he had returned it immediately upon discovering the falsity of such representations, where it appeared that defendant had delayed for more than three months after receiving the policy before returning it, he will be held as matter of law to have accepted it, and to be precluded from disputing his liability for the premium.

2. APPEAL AND ERROR—PREJUDICIAL ERROR—INSTRUCTION.—Where several defenses were interposed in an action on a note, one of which defenses was improperly submitted to the jury, a judgment for defendant based on a general verdict will be reversed; there being no means of ascertaining what feature of the case controlled the jury in its findings.

Appeal from Grant Circuit Court; *W. H. Evans,* Judge; reversed.

E. H. Vance, Jr., and *Andrew I. Rowland,* for appellants.

1. Under the law as announced in 88 Ark. 284, it was the duty of the insured to examine the policy and reject it, if he did not want it, and return it without unreasonable delay. Failing to do this, he is deemed to have accepted it. Under the evidence here, it was error for the court to modify appellants' instruction No. 4 so as to leave it to the jury to say whether or not he had accepted the policy. 102 Ark. 150.

2. Instruction No. 6 for appellee is misleading and prejudicial and conflicts with other instructions given by the court. It is error to give conflicting instructions. 83 Ark. 202; 93 *Id.* 152; *Ib.* 78; 123 Ark. 600; 128 *Id.* 341; 99 *Id.* 383. See, also, 95 Ark. 506; 88 *Id.* 556. Under the law and the evidence, the delay was unreasonable.

D. E. Waddell, Isaac McClellan and *J. S. Utley,* for appellee.

1. The appellee signed the note in controversy as the evidence shows.

2. Appellants were not guilty of such fraudulent misrepresentations as to relieve appellee from payment. The jury found for Nichols, and as the evidence was conflicting the verdict must stand. 138 Ark. 613; *Ib.* 1; 218 S. W. 375; 137 *Id.* 341; 135 *Id.* 499; 134 *Id.* 300; 203 S. W. 271.

3. Under all the evidence the jury found that Nichols did not sign the note and also that appellants were guilty of fraudulent representations that relieved Nich-

ols from payment and the instructions were not conflicting.

McCULLOCH, C. J. This is an action at law to recover the amount of a promissory note alleged to have been executed by appellee to cover the premium on a life insurance policy. Appellant T. D. Carrigan was the soliciting agent of the Bankers' Reserve Life Company of Omaha, Neb., a life insurance company, and he, in connection with his coappellant, A. C. Kennedy, solicited and obtained from appellee an application for a policy of life insurance on appellee's life in the sum of ten thousand dollars. The premium on the policy was $326.10 and the note sued on is alleged to have been executed by appellee to appellants for the amount of said premium. Appellee denies that he signed the note, and that is one of the issues in the case.

The application was forwarded to the company by appellants, and the policy was duly issued and delivered to appellee, who subsequently returned it to the company and refused to receive the policy again or to pay the note. Appellants were entitled to a portion of the first premium as commission for soliciting the insurance, and they paid to the company the amount of the premium to which it was entitled.

Appellee defends the action on the ground, in addition to the one before stated, that he had not signed the note, that appellants falsely represented to him the terms of the policy, and that within a reasonable time after the delivery of the policy to him he discovered the falsity of said representations and immediately returned the policy to the company, refusing to accept it. On the trial of the case each of the appellants testified that appellee signed the note, but the latter testified that he did not sign it. According to the testimony of appellants, there were no misrepresentations concerning the contents of the policy. They testified that the policy was mailed to appellant Kennedy the latter part of August, 1919, and was immediately delivered by Kennedy to appellee, who

accepted it without protest. Kennedy testified that he had several conversations with appellee in regard to the payment of the note, and that appellee made no objections to the policy until some time in February, 1920. Appellee testified that Carrigan represented to him, at the time the application was given, that the policy would contain a provision allowing an immediate cash surrender value "which would make the policy good as collateral security for a loan at any bank," and also that the policy contained a provision for an immediate payment on total disability, and that the loss of an arm, or a leg or an eye would constitute total disability under the terms of the policy. He testified, on his examination in chief, that the policy was sent to him by mail from the home office of the company at Omaha, Nebraska, some time during the month of October, 1919, and that he kept the policy two or three weeks before returning it, which he did by sending through the mail to the home office. He stated that he consulted a banker who told him that the policy was "not worth any more than a blank piece of paper." On cross-examination, however, counsel for appellants produced an original letter of appellee in which he returned the policy to the company. Appellee identified the letter and admitted that he wrote it or caused it to be written. This letter was dated January 22, 1920. Appellee made no attempt to explain the discrepancy between his original testimony in which he stated that the policy was returned in two or three weeks after he received it in October and the contents of this letter which shows that he did not return it until January 22, 1920. The effect of his testimony on cross-examination was to concede that he was mistaken about the time when he returned the policy. According to this view of his testimony, he retained the policy from the time he received it in October until January 22, 1920, a period of more than three months. This, we think, constituted an unreasonable length of time, and he must be deemed to have accepted the policy, which specified on its face the conditions upon which payment would be

made in case of disability, and also contained a statement in detail as to the loan and cash surrender values of the policy from year to year.

It was the duty of appellee to examine the policy within a reasonable time, and his failure to do so must, as before stated, be treated as an acceptance, which precludes him from disputing his liability for the premium. *Griffin* v. *Remmel,* 81 Ark. 269; *Smith* v. *Smith,* 86 Ark. 284. Under some circumstances, it would be a question of fact for the decision of the jury as to what constituted a reasonable time in which to examine a policy and return it if found unsatisfactory, but here we have a case, according to the undisputed proof, where the policy was retained more than three months, and we hold that that constituted, as a matter of law, an unreasonable delay. The court submitted to the jury whether or not the policy was examined and returned within a reasonable time, but we think that under the undisputed evidence, the period of delay being unreasonable, the issue should not have been submitted to the jury.

There was sufficient evidence on the other issue as to whether or not appellee signed the note to justify a submission of it to the jury. We have no means of ascertaining what feature of the case controlled the jury in its findings, so the error in submitting the issue as to the misrepresentations is prejudicial and calls for a reversal of the judgment. The judgment is, therefore, reversed and the cause remanded for a new trial.

FAIR v. BEAL-BURROW DRY GOODS COMPANY.

Opinion dlivered April 25, 1921.

1. COMPROMISE AND SETTLEMENT—CONSIDERATION.—The compromise of a disputed claim furnishes sufficient consideration to uphold the settlement, even though the asserted claim is without merit.
2. COMPROMISE AND SETTLEMENT—EXECUTORY AGREEMENT TO MAKE.—An unexecuted agreement to make a settlement in the future, depending upon certain contingencies which never occurred, was without consideration, and did not constitute a completed and enforceable contract for a settlement.

3. ATTACHMENT—LOSS OF GOODS IN SHERIFF'S HANDS.—Plaintiff in attachment was not liable for goods lost by fire after the sheriff had taken possession, unless plaintiff directly caused the loss, or the loss was caused by the sheriff's negligence to which the plaintiff directly contributed.

4. ATTACHMENT—LOSS OF GOODS IN CUSTODY OF SHERIFF.—In an action by defendants to recover for attached goods lost by fire while in possession of the sheriff under writ of attachment, the burden was on the defendants to prove that the destruction of the goods was through the negligence of the plaintiff.

5. ATTACHMENT—LOSS OF GOODS BY PLAINTIFF'S NEGLIGENCE—EVIDENCE.—In attachment where defendants sought to recover from plaintiff for goods destroyed by fire while in the sheriff's possession under the writ, evidence *held* insufficient to prove that plaintiff's attorney undertook to direct the sheriff as to what disposition he should make of the goods for their safe-keeping and preservation during the sheriff's possession under the attachment.

6. ATTACHMENT—SEPARATE CAUSE OF ACTION AGAINST ONE OF SEVERAL DEFENDANTS.—In a joint cause of action in equity against several defendants, it was error to sustain a separate attachment against one of the defendants on an affidavit introducing a new and independent cause of action against each defendant alone, with which the other defendants were not concerned.

7. TRIAL—ERROR AS TO FORUM—TRANSFER.—Where, in a suit in equity against several defendants, a separate affidavit for attachment based upon a cause of action at law against one only of the defendants was interposed, the court should have treated such defendant's demurrer to the court's jurisdiction as a motion to transfer the separate cause of action to the law court, and transferred it accordingly.

8. APPEAL AND ERROR—HARMLESS ERROR.—Where a stock of goods was attached in an action at law, and the cause was subsequently transferred to equity, though the defendants admitted that they had violated the Bulk Sales Law and therefore were subject to be held liable as receivers, it was not material error to sustain the attachment and direct the property to be sold.

Appeal from Montgomery Chancery Court; *J. P. Henderson,* Chancellor; reversed in part.

Earl Witt and *Gibson Witt,* for appellants.

1. The court erred in holding that there was no settlement or compromise of the matters in controversy between appellants and appellee.

2. The chancellor erred in not sustaining the claim for damages by appellants for loss of the property attached, and appellee should be held liable for the loss by reason of its compromise and settlement.

The chancellor was wrong in holding that there was no settlement but merely a proposition. Compromise of a disputed claim is a sufficient consideration for a settlement. 21 Ark. 69; 43 *Id.* 172; 68 *Id.* 82; 74 *Id.* 270; 99 *Id.* 588; 114 *Id.* 559; 126 *Id.* 327. There was sufficient consideration for a compromise and settlement, and the chancellor's findings as to the effect of the agreement is clearly against the preponderance of the evidence.

Negligence in care of the attached property was shown for which appellee was liable. Where a sheriff acts under the direction or advice of plaintiff or its attorney, and there is negligence and loss, the plaintiff is liable. 4 Cyc. 580; 35 *Id.* 1615; 4 *Id.* 675; 74 Ark. 413; 47 *Id.* 373; 96 *Id.* 444.

A person can not recover from a sheriff for negligence, if he has contributed to the result by his own negligence or that of his attorney employed to supervise the procedure. 55 Cyc. 1637; *Ib.* 1621. The plaintiff in execution has the right to control the execution by himself or attorney and the officer must follow his instructions. The authority of plaintiff must not be exercised to cause the sheriff to omit a statutory duty; if he does he can not take advantage of it. 74 Ark. 412; 47 *Id.* (*Jett* v. *Shinn*); 96 Ark. 446.

The findings of a chancellor are not conclusive on appeal, but only persuasive; and where against the clear preponderance of the testimony they will be reversed. Here they certainly are. 50 Ark. 358; 91 *Id.* 549; 101 *Id.* 510; 104 *Id.* 9; 92 *Id.* 59; 104 *Id.* 488.

3. The demurrer to the complaint should have been sustained. There is nothing stated to give the chancery court jurisdiction. There is no proof to sustain the attachment against Summit. The chancellor erred in sustaining the attachment on the ground of fraud. The Bulk

Sales Law was not intended to provide a separate and additional ground for attachment at law. The remedy is the appointment of a receiver. If the property is sold in bulk without an invoice and notice to creditors, it is *void,* and each purchaser is a trustee for creditors to the extent of his purchase. 123 Ark. 285; 127 *Id.* 296; 135 *Id.* 420; *Ib.* 252-7; 137 Ark. 37.

An attachment remedy is purely statutory, and attachment laws are strictly construed.

4. Stand. Enc. Proc. 323; 1 Ark. 386; 3 *Id.* 502; 28 *Id.* 469; 18 *Id.* 236. A fraudulent motive must prevail in attachment. 31 Ark. 31; 41 *Id.* 316. Insolvency alone is not sufficient, but some ground of attachment must be alleged and proved. 4 Cyc. 414; 42 N. W. 812. Fraud in law or constructive fraud is not sufficient to constitute a fraudulent transfer; there must be actual fraud or fraudulent intent. 4 Cyc. 439. Injury also must be shown to the particular creditor. 63 Ill. 48; 32 Tex. 225; 31 Ill. 17. The creditor who first secures an attachment obtains a prior lien. Under the Bulk Sales Law, the purchaser becomes liable to all creditors *pro rata.* On the whole case great injustice has been done appellants, and the chancellor erred in sustaining the attachment and in failing to hold appellee liable.

Reid, Gray, Burrow & McDonnell, for appellee.

1. There was no agreement or compromise; but, if there was, there is no proof that the alleged breach contributed to the loss of the goods. The burden was on defendants.

2. There was no negligence in caring for the attached property, and in the absence thereof there can be no recovery.

3. The attachment was properly sustained for violation of the Bulk Sales Law, the sale being fraudulent, unlawful and void. 54 Ark. 6; 135 *Id.* 420; 52 *Id.* 30; 135 *Id.* 252; 120 *Id.* 236; 123 *Id.* 285.

This case was tried in chancery and on equitable principles, and the court properly enforced the Bulk Sales

Law. The chancellor found there was no negligence, and his findings are clearly sustained.

WOOD, J. The appellee, a mercantile firm in the city of Little Rock, filed an affidavit for a general attachment in the Montgomery Circuit Court against the appellants, alleging that Summit and Fair were partners and that the firm of Summit & Fair became indebted to the appellee for merchandise; that Summit sold his interest in the firm to Dillard; that Dillard & Fair sold their entire stock of goods and merchandise to Byrd Carter and James Tucker; that Carter & Tucker sold their entire stock of goods and merchandise to Ira Warren. The grounds alleged for the attachment were that the various sales made by the above parties were in violation of the "Bulk Sales Law," act 88 of the Acts of 1913; that the last purchaser, Ira Warren, was disposing of his property with an intent to cheat, hinder and delay his creditors. An order of general attachment was issued and levied, January 20, 1919, on a stock of merchandise which was then in the possession of Warren. Various other creditors of the appellants intervened and set up claims against the appellants. The appellants demurred to the complaint on the ground that the court had no jurisdiction, which demurrer was overruled.

By consent of parties, the cause was transferred to equity. The appellants answered, admitting the transfers of the stock of merchandise as alleged in the complaint, but averred that such transfers were all made in good faith as to creditors and without any intent to cheat, hinder or delay them; that it was the understanding and agreement that the vendee in each sale was to assume the indebtedness of the vendor; that the appellee had ratified these sales and was estopped to complain of any failure to comply with the Bulk Sales Law; that the attachment was wrongfully issued and levied upon the property; that the building which contained the attached stock of mrchandise was locked and the same was burned, and the stock of merchandise under attachment was totally

destroyed, through the negligence of the sheriff having the same in charge, who was acting under the direction of the appellee's attorney; that the value of the merchandise was $3,694; that, before the fire and after the cause was transferred to equity, an agreement was reached between the appellants and the appellee whereby a compromise and settlement was had of the controversy, which was binding upon the appellee, but which it failed to carry out, which contributed to the loss sustained by the appellants in the destruction of the property by fire. The appellants made their answer a cross action against the appellee for damages in the loss of the stock of goods.

On the 4th of November, 1919, the appellee filed another and separate affidavit for general attachment against appellant Summit, alleging that, in addition to what they had already alleged in the former general affidavit, Summit was indebted to the appellee in the sum of $578.50, and that he was a nonresident, and had departed from the State with the intent to defraud his creditors; that he had removed and was about to remove a material part of his property out of the State and had disposed of his property with the fraudulent intent to cheat, hinder and delay his creditors. This affidavit was filed as a part of the original action, and an attachment was issued and levied on some mules, which were released from the attachment on a bond filed in the chancery court by the appellant Summit.

On January 20, 1920, Summit demurred to the affidavit or complaint for attachment against him on the ground that "it was upon a different and separate demand; that the plaintiff had a complete and adequate remedy at law, and that the court was without jurisdiction." The demurrer was overruled.

The appellee filed a reply to the answer of the appellants, denying the allegations thereof. The trial court found that the sales were in violation of the Bulk Sales Law, and for that reason sustained the attachment; that it was not shown by a preponderance of the evidence that

the loss of the stock of goods by fire was caused through the negligence of the appellee; that there was no settlement or compromise of the dispute between the appellants and the appellee; that the separate attachment against W. F. Summit should be sustained. The court thereupon entered a personal decree against the appellants in certain amounts, the correctness of which amounts is not in controversy here. From that decree is this appeal.

1. The appellants contend first that the court erred in holding that there was no settlement or compromise of the matters in controversy between the appellants and the appellee. On this issue the testimony of several witnesses on behalf of the appellants tended to prove the following: The appellants after this action was begun had a contract with one Mr. Eaves, who was one of the credit men and agents of the appellee, to the effect that appellants were to give their notes with security for enough to settle the claims of all creditors; that the appellants had the goods sold to Pendergrass and Lackey, who had agreed to pay cash for the goods at the invoice price ($3,289). Eaves was to come within two weeks after the agreement was entered into to turn over the goods to appellants. Eaves set three or four dates to be at "Simms," the place where the goods were located, but he never came, and appellants were, therefore, not in a position to deliver the goods. The contract was in writing. It was left in possession of the attorney of the appellants and was lost. The reason the contract was not carried out was because Eaves did not come as promised.

The testimony of Eaves on behalf of the appellee was to the effect that, if the appellants would make a note or notes with eight per cent. interest satisfactory to appellee, it would withdraw the suit. The witness promised the appellants that he would be back in two weeks and tried several times to get there, but could not get a conveyance on account of the bad roads. There was no written contract. Witness put down on a piece of paper what appellants must do. Nothing was signed.

"The compromise of a disputed claim furnishes sufficient consideration to uphold the terms of a settlement or compromise, even though the claim be without merit." *Gardner* v. *Ward,* 99 Ark. 588; *Satchfield* v. *Laconia Levee Dist.,* 74 Ark. 270; *Lee* v. *Swilling,* 68 Ark. 82.

But the testimony above set forth does not show either a disputed claim or a settlement. The appellants concede that they owed the amount claimed by the appellee. There was no compromise agreement by which the appellants were to pay and the appellee was to accept less than the appellants owed. The most that can be said of the testimony is that it shows that the appellants and the appellee entered into an agreement by which a settlement was to be made in the future in a certain manner depending upon certain contingencies, none of which occurred. A memorandum of the tentative arrangement for a settlement was made, but not signed by the parties. This tentative arrangement was not based upon any consideration and did not constitute a completed and enforceable contract for a settlement.

The testimony tended to prove that the reason the contract for the settlement was not completed and the settlement made in accordance with the contemplated plan was because appellee's agent was unable, on account of bad roads, to return to Simms at the time promised. But this was wholly immaterial, because there was no liability against the appellee for failure to comply with the terms of the tentative negotiations for a settlement, which did not in law constitute a complete and enforceable contract.

Even if the above testimony were sufficient to establish an enforceable contract for a settlement and that the appellee breached the same, there is no testimony tending to prove that such breach was the proximate cause of any damage to the appellants. Whatever may have been the damage to appellants by reason of the destruction of the stock of goods by fire, there is no testimony tending to prove that the failure of the appellee's agent to return to Simms as promised in any manner

caused or contributed directly to produce the fire which destroyed the goods. These goods at the time of their destruction were *in custodia legis*. Being in the hands of the sheriff, the appellee was not liable for their destruction by fire unless it directly caused the same, or unless the same was caused by the negligence of the sheriff to which the appellee directly contributed.

2. This brings us to a consideration of whether or not there was any negligence on the part of the sheriff in failing to care for the attached property, causing the loss of same, for which the appellee is responsible. The sheriff testified that he took possession of the store under the attachment, locked the same, and asked Judge I. L. Awtrey, the attorney of the appellee, whether he wished the witness to bring the goods to Mount Ida, and the attorney replied, "Just fasten them up in the house and leave them there." Witness told the attorney for the appellee that if they were left over there witness would not be responsible for them; that they would be left there at the appellee's risk. The goods were burned. Witness tried to get insurance, but failed, and advised the attorney of appelllee about it, and the attorney said he would get insurance, and later said that he had done so.

I. L. Awtrey, the attorney for appellee, testified that the sheriff asked him if it would be necessary to bring the goods to Mount Ida, and witness told the sheriff that he did not think it would be necessary to move the goods before court convened; that it was only a few days before court would convene, and that the court would then direct what to do with the goods. The sheriff never asked witness anything about moving the goods after court convened. Witness never told the sheriff that he had insurance on the goods. Witness also stated that he had no recollection that the sheriff said to witness that he would not be responsible for the goods if they were left at Simms, and that they would be left there at the risk of the appellee. On the contrary, witness stated that if the sheriff had made such a statement to witness, witness

would have told him that the law made it his duty to hold attached property subject to the orders of the court.

The burden was upon the appellants to show that the destruction of the goods by fire was through the negligence of the appellee. The chancellor found that the above testimony was not sufficient to show by a preponderance of the evidence that the appellee took charge of the goods, or that its attorney directed the sheriff to leave the goods in the storehouse at Simms at the risk of the appellee. The finding of the chancellor is correct. A preponderance of the evidence does not prove that the appellee's attorney undertook to direct the sheriff as to what disposition he should make of the goods in order for their safe-keeping and preservation after the sheriff had taken possession of the same under the attachment.

3. Did the court err in sustaining the separate attachment against W. F. Summit? The original action was brought against Summit and the other appellants at law by filing an affidavit or complaint for attachment, in which the sole ground alleged for the attachment was the violation of the Bulk Sales Law. Summit and the other appellants demurred to the complaint on the ground that, according to the allegations of the complaint under the Bulk Sales Act, the appellants were receivers, and that the chancery court had no jurisdiction. The court overruled the demurrer. The appellants did not stand on their demurrer, but on the contrary moved the court to transfer the cause to the chancery court, which, with the consent of the appellee, was done.

After the cause was transferred to the chancery court, Summit and the other appellants proceeded to answer the complaint. Later the appellee filed an affidavit for attachment against the appellant Summit, alleging that same was in addition to what had already been alleged by it in the original complaint. The appellant Summit demurred to this affidavit on the ground, among others, that this affidavit was a misjoinder of the cause of action stated therein with the cause of action stated in the original complaint; that the appellee's remedy on

this affidavit was complete at law and that the chancery court was without jurisdiction. The court overruled this demurrer.

The court erred in taking jurisdiction of the separate cause of action against Summit. The separate affidavit for attachment against him introduced a new and independent cause of action against Summit alone. It was grounded upon a different amount from that set forth in the original complaint or affidavit, which was a joint action against all the appellants. The separate affidavit against Summit was for his individual debt. The affidavit was not germane to the original complaint or affidavit and could not properly be considered as an addition thereto or amendment thereof. It stated a cause of action at law against Summit, and the remedy at law was complete. Summit made seasonable objection to the jurisdiction of the court, and did not waive his right to have a law court determine any issues arising on this separate attachment. The chancery court, therefore, erred in assuming jurisdiction and sustaining the separate attachment against Summit. The trial court should have treated Summit's demurrer as a motion to transfer, and should have transferred the cause of action against Summit as set up in this separate affidavit to the law court.

4. Appellants contend, in the last place, that the court erred in holding that the violation of the Bulk Sales Law by them was a ground of attachment. As we view this record, it is unnecessary to decide, and we do not decide, whether a violation of the Bulk Sales Law is a ground for attachment. The cause, though begun at law, was at the instance of appellants transferred to equity. The appellants admitted that they owed the debts, and that each had assumed to pay the same, and that in the sale of the goods impounded by the attachment, they had violated the Bulk Sales Law, act 88, *supra*. In their answer and cross-action, appellants asked that a receiver be appointed as contemplated by the Bulk Sales Law. The property was already in the custody of

the law when the appellants had the cause transferred to the chancery court.

Now, since the stock of goods was destroyed by fire without any negligence on the part of the appellee which would render it liable in damages to the appellants, it is wholly immaterial whether the stock of goods was impounded to be subjected to the appellee's debt through the ancillary process of attachment or through a receivership appointed by the chancery court. The appellants, as the court found, did not prove by a preponderance of the evidence that they had been damaged by the appellee in the impounding of the property through the attachment. Therefore, even if it were conceded that the court erred in sustaining the attachment against the appellants because of a violation of the Bulk Sales Law, this error did not result to their prejudice.

The court erred in assuming jurisdiction of and in sustaining the separate attachment as to appellant Summit. The decree as to him on the cause of action set up in the separate affidavit for attachment against him is reversed, and that action will be remanded with directions to transfer the same to the law court. The decree in all other respects is correct and it is affirmed.

HASKINS v. STATE.

Opinion delivered April 25, 1921.

1. CRIMINAL LAW—CORROBORATION OF ACCOMPLICE.—The corroboration of an accomplice in a criminal prosecution is not sufficient if it merely shows that the offense has been committed and the circumstances of it, but it needs only to be of a character and quality which tends to prove the defendant's guilt by connecting him with the crime.
2. CRIMINAL LAW—CORROBORATION OF ACCOMPLICE.—An accomplice's testimony tending to implicate defendant in the commission of a robbery committed at night was sufficiently corroborated by proof that defendant and the witness were seen together, prior to the commission of the crime, and by the fact that defendant's description of the build and dress of the robber corresponded with the testimony of the accomplice.

3. ROBBERY—INDICTMENT—DESCRIPTION OF MONEY.—An indictment alleging that defendant robbed the prosecuting witness of "$98.28, good and lawful money of the government of the United States," was supported by evidence that he was robbed of $95 in greenbacks and $3.28 in silver.

4. CRIMINAL LAW—ALIBI—INSTRUCTION.—An instruction as to the defense of alibi should tell the jury that if, upon a full consideration of the evidence adduced to prove an alibi in connection with the other evidence, they entertain a reasonable doubt of the defendant's guilt, they should acquit him.

5. CRIMINAL LAW—ALIBI—INSTRUCTION.—An instruction in a prosecution for robbery that, to render an alibi effective as a defense, it must cover the period of time during which the offense is shown to have been committed, so as to preclude defendant's presence at the time and place of its commission, *held* correct.

6. CRIMINAL LAW—ALIBI—INSTRUCTION.—An instruction in a prosecution for robbery that, if the evidence in support of the alibi did not explain the whereabouts of the defendant for the period of time covered in the commission of the crime, the jury should not consider any testimony in support of the alibi, was erroneous, as proof tending to establish an alibi, though not complete, may, with other facts in the case, raise doubt enough to cause an acquittal.

Appeal from Faulkner Circuit Court; *George W. Clark,* Judge; reversed.

STATEMENT OF FACTS.

Martin Haskins was indicted, tried and convicted before a jury of the crime of robbery.

Garland Dickens, the victim of the robbery, was a witness for the State. According to his testimony, he was in the city of Conway, in Faulkner County, Arkansas, on the night of the 14th day of October, 1919. Mitchell Kirkpatrick met him and invited him to go down the railroad track a little ways to get some whiskey. They went down the railroad track about three blocks, and just as they crossed a little bridge on the west side of the railroad a man stepped out from behind a big tree and drew a pistol on them, compelling them to put up their hands. Glenn Stephens was walking behind Dickens and Kirkpatrick. The robber took $98.28 from Garland Dickens. Ninety-five dollars of this was in greenbacks

and $3.28 was in silver. The robber then went through the pockets of Kirkpatrick and took what money he had from him. He only went through one of the pockets of Glenn Stephens. The robber weighed about 120 pounds and appeared to be about the build and size of the defendant. He had on tight-legged pants and a long bill cap. The witness did not remember whether or not he had on a sweater. The robbery occurred about 8 or 9 o'clock at night, and it was very dark.

Mitchell Kirkpatrick corroborated the testimony of Dickens about the robbery, but said that he did not notice the size or appearance of the man who robbed them.

Glenn Stephens was also a witness for the State. According to his testimony, he had known Martin Haskins for about eight years, and they planned the robbery two or three days before it occurred. They went to Little Rock and came back on the Sunday night before the robbery occurred on Tuesday night. On Tuesday night Stephens got with Garland Dickens and Mitchell Kirkpatrick and went down the railroad to where Haskins was hiding. Haskins and Stephens had met that afternoon at the laundry where Haskins worked, and planned that they would commit the robbery. They were to divide the proceeds equally. On the night of the robbery Haskins had on a dark pair of trousers and a cap with a long bill. He had a handkerchief over his face. The robbery occurred between 8 and 9 o'clock at night. Other evidence shows that Stephens and the defendant had been seen together coming from Little Rock on the Sunday night preceding the robbery.

On the part of the defendant it was shown that he left the laundry with his uncle about 7 o'clock on the evening of the robbery and went up town with him. A clerk in a drug store testified that he came in there between 7 and 7:30 o'clock that evening and hung up a black sweater and did not get it any more that night. The witness was positive that it was between 7 and 7:30 o'clock that evening when Haskins left his sweater in the drug store.

A cousin of Haskins testified that he came to his house between 8 and 9 o'clock on the evening of the robbery. He stayed about fifteen or twenty minutes and then left in his father's car. He went to his father's house after some music records and brought them back in about fifteen or twenty minutes. He was gone just about the time it would take a person driving at an ordinary rate of speed to go to his father's house and return.

The mother of the defendant testified that he was nineteen years old at the time the robbery was committed and came home to supper a little after 7 o'clock that evening. The father and mother left and went to a relative's house about 8 o'clock. The defendant then came to the relative's house where his father and mother were and arrived there at about 8:30 o'clock in the evening. Some one wanted some music records, and the defendant's father said he would go for them, and Martin then offered to go for them instead of his father and was gone fifteen or twenty minutes when he returned with the records. The robbery had taken place something like a mile from where they were, and it was not possible that the defendant could have participated in the robbery at the time it occurred.

The jury returned a verdict of guilty, and from the judgment and sentence of the court the defendant has duly prosecuted an appeal.

R. W. Robbins, for appellant.

1. The court erred in admitting improper and incompetent testimony.

2. The argument of the prosecuting attorney was improper and prejudicial. 141 Ark. 448-9.

3. It was error to give instruction No. 1-A. The court had no right to single out any phase of the testimony and instruct the jury relative thereto. 140 Ark. 529. It was an invasion of the province of the jury.

4. There was a fatal variance between the allegations in the indictment and the proof. Description of the property in an indictment for robbery is required to

be as specific as in larceny. 100 Cal. 437. The indictment did not allege that the money taken was gold, silver or paper money, nor the denomination. The property taken must be described with such particularity that defendant may know of what he is accused. C. & M. Digest, § 2506; 18 A. & E. Enc. Law 1220-1. When a particular description of the property taken is given, or where it is described as unknown to the grand jury, the proof must support the allegations or the variance is fatal. 18 Enc. Pl. & Pr. 122; 115 Ala. 83; 5 Mont. 565.

5. There was no corroboration of the testimony of Stephens, the accomplice. 218 S. W. 197; 50 Ark. 534; 36 *Id.* 117.

6. The verdict is contrary to the evidence and the testimony of the accomplice was uncorroborated. *Supra.*

J. S. Utley, Attorney General, and *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. Where there is serious doubt in the law as to whether certain proof is or not permissible, the safe rule is to permit it to go to the jury. 10 R. C. L., p. 862; 92 Ark. 728.

2. The remarks of the prosecuting attorney were not improper nor prejudicial, nor did they transcend the bounds of legitimate argument. 58 Ark. 368; *Ib.* 473; 71 *Id.* 623; 81 *Id.* 173; 94 *Id.* 514; 95 *Id.* 321; 100 *Id.* 232.

3. There was no error in the instruction complained of. The defense was an alibi, and the burden was on defendant to establish it. *Hawthorne* v. *State,* 135 Ark. 247. Taking the instructions all together, they state the law, and the case was fairly submitted to the jury. 59 Ark. 422; 58 *Id.* 353.

4. There was no variance between the allegation in the indictment and proof. C. & M. Dig., § 2410, 3014; 4 Words & Phrases, 3146; 83 Ala. 51. *Greenback* is the popular and almost universal and exclusive name applied to United States paper notes. 4 Words & Phrases, 3165; 23 Ind. 21-3; 2 Ga. App. 633; 72 S. E. 518; 43 Iowa 418.

5. No error in giving instruction 1-A. Stephens was an accomplice, and his testimony was sufficiently corroborated. 36 Ark. 117; 50 *Id.* 534; 97 *Id.* 92. Whether a witness is an accomplice or not is a mixed question of law and fact for a jury, and their finding is conclusive. 51 Ark. 115; *Ib.* 189. Corroboration is sufficient if shown by *circumstances* connecting defendant with the crime. 52 Ark. 180; 1 Enc. of Ev., p. 108.

6. The evidence fully sustains the verdict.

HART, J. (after stating the facts). It is earnestly insisted by counsel for the defendant that there was not sufficient corroboration of the testimony of Glenn Stephens to warrant the jury in finding a verdict of guilty. According to Stephens' own testimony, he was an accomplice, and the statutory requirement is that the testimony of an accomplice shall be corroborated by other evidence tending to connect the defendant with the commission of the crime and the corroboration is not sufficient if it merely shows that the offense has been committed and the circumstances of it. *Cook* v. *State,* 109 Ark. 384, and *Polk* v. *State,* 36 Ark. 117.

It can not be said that the conviction of the defendant rested entirely upon the evidence of Glenn Stephens, the accomplice. There is other evidence tending to connect the defendant with the commission of the crime. The corroboration need only be of a character and quality which tends to prove the defendant's guilt by connecting him with the crime. The testimony on the part of the State tends to show that Glenn Stephens, and the defendant had been seen together returning from Little Rock on the Sunday night before the robbery occurred on Tuesday night. Stephens testified that they began planning to commit a robbery on that occasion. The prosecuting witness testified that the man who robbed him weighed about 120 pounds and was of the build of the defendant. He said that the robber had on tight-legged pants and a cap with a long bill on it. This tallies with the way Stephens described the defendant's

dress on that night. The night was dark, and the witness' description of the robber tallies with the appearance of the defendant and the way he was dressed, and this, together with the apparent intimacy between the accomplice and the defendant, was sufficient corroboration of the testimony of the former. *Brown* v. *State,* 143 Ark. 523.

The next assignment of error is that there was a variance between the allegations of the indictment with regard to the description of the property taken and the proof in the case. The indictment alleged that the defendant "did rob the said Garland Dickens of $98.28, good and lawful money of the Government of the United States of America." Garland Dickens testified that he was robbed of $95 in greenbacks and $3.28 in silver. The term greenback is the common name applied to almost all United States treasury notes and not applied to any particular kind of paper currency. It is the popular name applied to all United States Government notes, and this court has held that where the subject of the robbery charged is lawful money of the United States, the charge is supported by proof that it is the ordinary circulated medium of the country called greenbacks that was taken. *Jenkins* v. *State,* 131 Ark. 312, and *Cook* v. *State,* 130 Ark. 90.

The defense in this case is an alibi, and it is earnestly insisted by counsel for the defendant that the court erred in instructing the jury on this phase of the case. The court first gave the jury the following instruction:

"One of the defenses relied upon in this case, gentlemen of the jury, is an alibi. To use plain and simple English means that the defendant pleads that he was not at the place where the alleged robbery is charged to have been committed. Upon the question of alibi, you are instructed that the burden of establishing an alibi in a criminal prosecution rests upon the accused, and in order to maintain it he is bound to establish in its support such facts and circumstances as are sufficient when considered with all other evidence in the case to create in the

minds of the jury a reasonable doubt, not an imaginary, speculative or captious doubt, but a reasonable doubt of the truth of the charge against him.

"And you are further instructed that an alibi is sufficiently established if the proof in support of such alibi, considered with and taken in connection with all other testimony in the case, creates such a probability of its own truth as to engender a reasonable doubt of the truth of the charge or the guilt of the accused of the specific crime of robbery."

Continuing over the objections of the defendant, the court gave to the jury the following:

"No. 1-A. And you are further instructed, in order for such alibi to be effective, it must explain the whereabouts of the defendant at the time the alleged robbery is claimed to have been committed; and if, after a careful consideration of all the testimony in support of an alibi, that the whereabouts of the defendant are unexplained for such period of time as would be reasonably required to commit the alleged crime, then you should not consider any testimony in support of such alibi."

The last instruction was objected to by the defendant for the reason that it invades the province of the jury and singles out certain testimony. The defendant duly excepted to the action of the court in overruling his objection to the instruction.

The purpose of an instruction in regard to an alibi where that defense is interposed is that the jury may be told in plain terms that if, upon a full consideration of the evidence adduced to prove an alibi in connection with the other evidence they entertain a reasonable doubt of the defendant's guilt, they should acquit him. *Blankenship* v. *State,* 55 Ark. 244; *Woodland* v. *State,* 110 Ark. 15, and *Joiner* v. *State,* 113 Ark. 112.

The first part of instruction No. 1-A was correct in telling the jury that, in order to render an alibi effective as a defense, it must cover the period of time during which the offense is shown to have been committed, so as to preclude the defendant's presence at the time and place

of its commission. The vice of the instruction, however, is in the latter part where it, in effect, tells the jury that if the evidence in support of the alibi does not explain the whereabouts of the defendant for the period of time covered in the commission of the crime, the jury should not consider any testimony in support of the alibi. This was wrong. The proof of an alibi is as much a denial of the crime as any other defense, and proof tending to establish it, though not complete, may, nevertheless, with the other facts of the case, raise doubt enough to produce an acquittal. Evidence of an alibi, though insufficient of itself to establish that defense, should not be excluded from the consideration of the jury. While such testimony may not establish a perfect alibi, and though it may not cover the entire time during which the crime may be shown to have been committed, or so much as to render it impossible that the defendant could have committed the offense, yet it may be considered by the jury in connection with the other evidence, and if, when so considered, it raises a reasonable doubt that the defendant committed the crime, it is the duty of the jury to acquit. The instruction as given invaded the province of the jury. The defendant had only to raise in the minds of the jury a reasonable doubt of his guilt springing out of all the evidence in the case, and the court erred in telling the jury, in effect, that it should not consider any of the testimony in support of the alibi unless the evidence on that point explained the whereabouts of the defendant during the whole period of the time during which the offense was committed.

This is the effect of our decision in *Wells* v. *State,* 102 Ark. 627. There the court disapproved an instruction which told the jury that, unless they found from the evidence that the defendant had established an alibi, it was their duty to convict him. The instruction should have been that, if the proof of the alibi in connection with the other evidence was sufficient to raise in the minds of the jury a reasonable doubt as to the defendant's guilt, then it was their duty to acquit.

While the instruction in the present case does not tell the jury that, unless it should find from the evidence that the defendant has established an alibi, it will find him guilty, it does tell the jury that if the evidence of an alibi does not cover the whole period of time during which the crime was committed, the jury should not consider any of it. The difference is in degree merely, and clearly invades the province of the jury. If it is the duty of the jury to acquit the defendant if the evidence upon the subject of an alibi in connection with the other evidence in the case raises a doubt as to his guilt, then it is manifestly prejudicial to his interests to tell the jury not to consider any evidence on the subject of an alibi unless it covers the whole period of time during which the offense was committed. Although the evidence might not establish a perfect alibi, the jury had a right to consider it with the other evidence in the case; and, if from all the evidence together a reasonable doubt of the defendant's guilt is raised, there should be an acquittal.

The court erred in telling the jury the defendant must produce sufficient evidence to establish his alibi, or else the jury should not consider any of the evidence on this point.

The defendant also assigns as error certain remarks of the prosecuting attorney and also an alleged error of the court admitting certain testimony out of its order. These alleged errors are not likely to occur on a new trial of the case, and for that reason we will not determine them.

For the error in giving instruction No. 1-A, the judgment must be reversed and the cause remanded for a new trial.

HOME MUTUAL BENEFIT ASSOCIATION v. KELLER.

Opinion delivered April 25, 1921.

1. INSURANCE—"INSURABLE INTEREST."—An insurable interest in the life of another is such an interest arising from the relations of the party obtaining the insurance, either as creditor, or as surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life.
2. INSURANCE—"INSURABLE INTEREST."—A son-in-law has no insurable interest in the life of his father-in-law by reason of the relationship merely, nor because the father-in-law had loaned him money, and was kindly disposed toward him.
3. INSURANCE—STATUTE CONSTRUED.—Crawford & Moses' Dig., § 6068, pertaining to the regulation and incorporation of fraternal benefit societies has no application to mutual benefit societies having no lodge system of government.

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

STATEMENT OF FACTS.

I. T. Keller sued the Home Mutual Benefit Association to recover on two benefit certificates issued by the association at his application upon the life of E. W. Moore.

The Home Mutual Benefit Association was incorporated under the laws of the State of Arkansas for the purpose of conducting a life and accident insurance business in this State. I. T. Keller applied to the Home Mutual Benefit Association to issue two benefit certificates to him as the beneficiary upon the life of E. W. Moore, and they issued in the sum of $1,000 each, on the 4th day of May, 1915. At the time E. W. Moore resided with I. T. Keller, who had married his daughter, and had one child by her. E. W. Moore owned the farm on which they resided, and Keller cultivated the land for a part of the crop. Two years later Keller moved to town and borrowed $1,000 from Moore with which to run a garage. Moore moved to town and lived with Keller for a while. Subsequently he married again and died on the 14th day of May, 1920. After he mar-

ried the second time Moore said to his wife that he had loaned Keller $1,000, and that the latter had been as good to him as if he had been his own son. Moore was very much attached to his grandson, who was the son of his daughter and Keller. After Moore died Keller paid to his estate $1,000 which he had borrowed from him. Keller took out the policy as a good investment because Moore was about sixty years of age and resided with Keller at the time the latter took out the insurance.

The jury returned a verdict for the plaintiff, and from the judgment rendered the defendant has appealed.

Norwood & Alley, for appellant.

1. Keller had no insurable interest in the life of Moore, and a verdict should have been directed for defendant. 132 Ark. 461. The mere fact that he is the son-in-law does not give him an insurable interest. 98 Ark. 52; 132 *Id.* 458; 35 L. R. A. 692; 14 R. C. L. 97-8; 33 L. R. A. (N. S.) 941.

2. The court erred in its instructions given and refused.

Pole McPhetridge, for appellee.

Keller has an insurable interest in Moore. Appellee was living with the insured and was a son-in-law and treated as a son and had an interest in Moore's life, and would derive more benefit from his life than his death. 154 Penn. St. 99; 26 Atl. 253; 83 S. E. 1045; 1 Bacon on Life & Acc. Ins. (4 ed.), § 296; *Id.* 300; 104 U. S. 779. A primary interest is not required. 8 Elliott on Cont., § 4068; 172 Ky. 444. 98 Ark. 52, nor 132 Ark. 458 are in point. Act No. 462, Acts 1917, defines those who have an insurable interest, and there is no error in the instructions. The testimony and the law sustain the verdict.

HART, J. (after stating the facts). The defense of the insurance company to the suit is that Keller did not have an insurable interest in the life of Moore, and on this account the policy is void. Hence it is earnestly insisted by counsel for the defendant that the court erred

in not directing a verdict in its favor, and in this contention we think counsel are correct.

What constitutes an insurable interest in the life of another is clearly stated in *Warnock* v. *Davis,* 104 U. S. 775, as follows:

"It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor or of surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously, to protect the life of the insured, than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or of affinity to expect some benefit or advantage from the continuance of the life of the assured, otherwise the contract is a mere wager by which the party taking the policy is directly interested in the early death of the assured."

The rule there announced has been approved by this court. *McRae* v. *Warmack,* 98 Ark. 52, and *Cotton* v. *Mutual Aid Union,* 132 Ark. 458. It is generally held that the connection between son-in-law and father-in-law is not sufficient to create an insurable interest in the latter in favor of the former. *Crismond's Admx.* v. *Jones,* 83 S. E. (Va.), 1045; Ann. Cas. 1917 C, 155 and note; *Rombach* v. *Piedmont & Arlington Life Ins. Co.,* 35 La. Ann. 233, 48 Am. Repts. 239, and *Shea* v. *Massachusetts Benefit Assn.* (Mass.), 39 Am. St. Repts. 475.

In the present case Keller procured the Home Mutual Benefit Association to issue the two benefit certificates sued on to him upon the life of E. W. Moore, his father-in-law. Keller kept the assessments paid until Moore died. Keller had no pecuniary interest in the continuation of the life of Moore. Moore was under no obligation, legal or moral, to support Keller or his family. The benefit certificates sued on were wager policies, and therefore void as against public policy. The mere fact that Moore lent Keller money and was willing to lend him more, coupled with the fact that he was kindly disposed toward him, can be said in no sense to take the case out of the rule that Keller was speculating on the hazard of a life in which he had no interest. The facts in the record of the present case show conclusively that Keller could have no expectation of advantage or benefit in the life of Moore, and the court erred in not instructing the jury that the benefit certificates sued on were wagering contracts and not enforceable in law.

Again it is sought to uphold the judgment upon the authority of the act of 1917, pertaining to the regulation and incorporation of fraternal benefit societies. Crawford & Moses' Digest, § 6068. That act has no application to the present case. By its terms it applies to mutual benefit societies having a lodge system with a ritualistic form of work, and does not purport to apply to a mutual benefit association having no lodge system of government as in the present case. *Acree* v. *Whitley,* 136 Ark. 149.

It follows that the court erred in not directing a verdict for the defendant. Inasmuch as the case has been fully developed, the judgment will be reversed, and the cause of action dismissed.

NUNES v. COYLE.

Opinion delivered April 25, 1921.

1. HIGHWAYS—AUTHORITY OF COMMISSIONERS TO CHANGE ROUTE.—Commissioners of a road improvement district created under Acts 1915, p. 1400, were not authorized to change the route so as to construct a new road for a distance of 3½ miles where the county court had not established the new road, nor the property owners of the district consented to the change.
2. HIGHWAYS—CHANGE OF ROUTE—ESTOPPEL.—A landowner in a highway improvement district created under Acts 1915, p. 1400, was not estopped from questioning the right of the commissioners to make a material change in the route of the road for 3½ miles by reason of the fact that he signed a petition for the district in which he agreed to any change that might thereafter be made by the court or the commissioners.

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

Lake & Lake, for appellant.

1. The commissioners of district organized under act 338, Acts 1915, had no authority to change the location of the public road. The change can only be made by the county court. Art. 28, § 7, Constitution 1874; act No. 338, Acts 1915; 138 Ark. 549; 139 *Id.* 277; 89 *Id.* 513; 118 *Id.* 294; 92 *Id.* 93; 91 *Id.* 274.

2. The proposed change in the route of the road is the adoption of a new route, and only the county road can do this. 133 Ark. 491; 135 *Id.* 102.

Norwood & Alley, for appellees.

The route of the road is not changed at all. It was impracticable to stay with the old road, and the petition authorized the change. The court so found, and the finding will not be disturbed unless clearly against the preponderance of the evidence. 71 Ark. 643; 86 *Id.* 622. The facts are conclusive, and the findings of the chancellor could not be other than they were. The purpose of the order of the county court was to improve the road through the district "along" the public road, etc. As to definition of "*along,*" see 1 Words & Phrases, p. 251. The

judgment below is sustained by the evidence, and the law as laid down by this court in a long line of decisions was followed. The commissioners did not exceed their authority given under the act. 123 Ark. 205 does not bear on this case. See 133 Ark. 491; 135 *Id.* 102. The commissioners acted within their authority. 142 Ark. 509. The decree is sustained by our decisions construing the Alexander Road Law.

SMITH, J. Appellant, who was the plaintiff below, is a landowner in Road Improvement District No. 1 of Polk County. This district was organized on the petition of the landowners under act 338 of the Acts of 1915, page 1400. This suit was brought to enjoin the commissioners and the contractor from proceeding with the construction of the road along the route selected by them. Upon final hearing a temporary restraining order which had been issued was dissolved and the suit dismissed for want of equity; and this appeal is from that decree.

The proposed improvement extends north and south almost entirely across Polk County for a distance of fifty miles, and throughout its course practically parallels the Kansas City Southern Railroad. The petition for the improvement gave the termini of the road and named the various towns and villages through which the proposed improvement would run. The prayer of the petition was granted by the county court, and the construction of the proposed improvement was ordered.

It was alleged, and shown by the testimony, that the public road between Wickes and Grannis crosses the Kansas City Southern Railroad to the west at a point approximately one mile south of Wickes, and runs in a southerly direction along the railroad to a point at Grannis, where it again crosses the railroad to the east. The distance between the two points is estimated to be three and one-half miles. The commissioners, on the recommendation of the engineer, selected a new route for this three and one-half miles along the east side of the railroad. The purpose of this change was to eliminate two

grade crossings of the railroad and to lesson the cost of construction. The testimony on the question of decreased cost is conflicting; but the court found that there would be a saving of nine thousand dollars; and we are unable to say that that finding is against the preponderance of the testimony.

The proposed change shifts the road to the opposite side of the railroad from a quarter to a half mile for a distance of three and one-half miles; and it is admitted that there is no public road along the route selected by the commissioners, and that no order of the county court has ever been made opening up this new road and authorizing this change. The only public road between the two points between which the change was made runs along the west side of the railroad.

The petition for the district, after defining the general course of the road, contains the following recital: "Your petitioners agree to any changes that may hereafter be made by the court or the commissioners of the district in the line of said road, provided that the general purpose of securing an improved highway between the termini mentioned is retained."

Appellant was among the property owners who signed the petition.

The court below made the following finding of fact: "That the entire road, when completed, extends north and south along the line of the Kansas City Southern Railroad; that the old roadbed, along which this improvement is being made, passes through a rough, hilly country for much of the way, and the old roadbed is very crooked, and to remain in the old road would be impractical, and of more expense, and there could not be constructed as good road by so doing, and that some changes in actual location is necessary and for the better, and that the change complained of is a change that should be made, and to do so is a saving instead of an expense."

In defense of this finding and the decree thereon, it is insisted that the act under which the district was created conferred the authority to make such a change as was

here made, and that if this is not true appellant is estopped from raising the question, inasmuch as he had consented in advance to changes in the route of the road by signing the petition.

The decree in this cause must be reversed. In the first place, no order of the county court was obtained laying out the three and one-half miles of new road. We have many times said that new roads could not be established and the burden of their maintenance imposed on the county except by the order of the county court. It is true we have also held that established public roads might be improved whether the county court had so ordered or not. And these holdings are not in conflict. In improving an established road the burdens of the county as a governmental unit are not increased. Those who assume this burden become the allies of the county court, as was said by Judge BATTLE in the case of *Parkview Land Co.* v. *Road Imp. Dist. No.* 1, 92 Ark. 93.

Here there is a laying out of an entirely new road for a distance of three and one-half miles; and that can be done only when the county court has so ordered. *Rd. Imp. Dist. No.* 1 v. *Glover,* 89 Ark. 513; *Sallee* v. *Dalton,* 138 Ark. 549.

We do not mean to hold that the county court could make an order in the instant case changing the road. We do hold that the change could not be made without the order of the county court; but the proposed change can not be made even with the approval of the county court because the property owners have not thereunto consented.

The case of *Pritchett* v. *Road Imp. Dist. No.* 3 *of Poinsett County,* 142 Ark. 509, is decisive of the question stated. We have here a proposed change of route, and not a question of laterals or extensions, and the change proposed is one which has not received the precedent approval of the county court. In the Pritchett case, *supra,* the approval of the court had been previously obtained; but, notwithstanding that fact, in holding against

the authority of the commissioners to change the route we said:

"The further question is then presented whether or not the changes in the route are in conformity with the original plans or whether they constitute an abandonment of the original route and a change to a wholly different route. There was, as before stated, a change in the route by shifting it a distance of one-fourth of a mile, running for a distance of one mile. This necessarily constituted the adoption of a different route, and not merely a slight change in conformity with the original route. It is conceded that this change was made for the purpose of benefiting appellants' lands, which, according to the judgment of the county court, would not have been benefited by the original improvement. This contention of counsel necessarily implies a substantial change in the route. It is, in other words, a substitution of an entirely new route for the one specified in the original plans upon which the petition of property owners was based. That is precisely what we held in *Rayder* v. *Warrick, supra,* could not be done. The laterals contemplated by the altered plans were authorized according to the decision in *Harris* v. *Wallace, supra,* but in testing the validity of the adoption of the new plans we must take them as a whole, for we are not at liberty in this proceeding to discard that which is beyond the statutory authority, leaving intact that part which is within the limits of such authority." See, also, *Phillips* v. *Tyronza Imp. Dist.,* 145 Ark. 487.

The change here proposed is greater than that which we held could not be made in the Pritchett case, *supra.* The proceeding in that case, as in this, was under act 338, Acts 1915, page 1400.

We think appellant is not estopped by the fact he signed the petition from questioning the right of the commissioners to make the proposed change in the route.

The paragraph in the petition quoted above consenting to change of route is in the identical language employed in the case of *Rayder* v. *Warrick,* 133 Ark. 491.

In that case the party who sought to enjoin the change of route had not signed the petition. The objecting landowner here did sign the petition. But that fact is not of controlling importance.

The petition in any event must be construed to conform to the statute under which the parties proceeded. The right to proceed is conferred by the statute, and the authority of those who act for the petitioners is derived from the statute. As was said in *Rayder* v. *Warrick, supra,* the petitioners have no power to legislate or to change the meaning of a provision of the statute; and we must hold that the language of the petition did not confer a power in excess of that granted by the statute.

The change proposed is not one of those minor changes which perfect the general plan, and, as no authority for the change exists, the injunction prayed for should have been granted.

The decree will, therefore, be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

GARRISON v. STATE.

Opinion delivered April 25, 1921.

1. INTOXICATING LIQUORS—INDICTMENT—NAME OF PURCHASER.—An indictment for illegally selling whiskey need not name the person to whom the alleged sale was made.

2. WITNESSES — IMPEACHING ONE'S WITNESS.—Under Crawford & Moses' Digest, § 4186, prohibiting a party from impeaching the character of a witness produced by him, but allowing such witness to be contradicted with other evidence and by showing that he has made statements different from his present testimony, the prosecuting attorney can ask a witness for the State, who testified that no sale of whiskey was made in his presence, whether he had not stated to the prosecuting attorney that morning that he was present when the sale was made, and the testimony of the witness, in reply to such question, that he made that statement, was admissible.

3. CRIMINAL LAW — CROSS-EXAMINATION OF ACCUSED.—It was not prejudicial error to permit the prosecuting attorney to cross-examine the accused as to whether he had been making whiskey for three years, and whether the neighbors were getting tired of his conduct, where accused answered both questions in the negative.

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

Guy L. Trimble, for appellant.

The indictment is insufficient because it does not show the name of the purchaser of the whiskey. 13 Ark. 703; 68 *Id.* 188; 47 S. W. 1015. Only two witnesses testified to the sale, and one of these was discredited, and that discredited the other, and the verdict is not supported by any evidence.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. The indictment was not insufficient because it did not name the purchaser of the liquor (125 Ark. 47), and that objection should be overruled. The law has been changed. A party may now impeach his own witness where it is indispensible. C. & M. Digest, § 4186.

If the witness was impeached, his credibility was a question for the jury, and if believed by the jury it was sufficient to sustain the verdict. 36 Ark. 653; 32 *Id.* 220.

2. The evidence sustains the judgment.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Newton Circuit Court for selling whiskey, and, as a punishment therefor, sentenced to the State penitentiary for a term of one year. From that judgment is this appeal.

The indictment was assailed in the trial court on the ground that it did not name the person to whom the alleged illegal sale of intoxicating liquors was made. Over the objection and exception of appellant, the court sustained the indictment, and it is contended that reversible error was committed in doing so. The conten-

tion is made that, since the offense has been raised to the grade of a felony, it is necessary to allege the name of the purchaser in the indictment, so as to inform the accused of the particular charge he is called to meet. The identical point raised here was before the court in the case of *McNeil* v. *State,* 125 Ark. 47, at which time the court ruled adversely to the contention of appellant. Appellant suggests that this was not a well-considered case, and should be overruled. Subsequent consideration of the rule announced in that case convinced us of its soundness, and it was reaffirmed. *Springer* v. *State,* 129 Ark. 106.

Appellant's next insistence for reversal is that Ober Martin, a witness for the State, was permitted to testify contrary to the first testimony given by him. Dewey Martin, the main prosecuting witness, testified that he bought whiskey from appellant at appellant's home in the presence of Ober Martin. When Ober Martin was placed on the stand by the State, he first testified that Dewey Martin never purchased the whiskey from appellant in his presence, but that Dewey Martin stopped at appellant's home, and, after he came out, witness saw him with some whiskey. Over the objection and exception of appellant, the prosecuting attorney was permitted to ask Ober Martin whether he had not admitted to him, in a conversation that morning, that he was present when Dewey Martin purchased the whiskey from appellant. Ober Martin admitted making the statement, and then testified that he was present when his cousin, Dewey Martin, purchased the whiskey from appellant. Appellant insists that this was an impeachment or contradiction of the State's own witness in a manner contrary to section 4186 of Crawford & Moses' Digest, which is as follows:

"The party producing a witness is not allowed to impeach his credit by evidence of bad character, unless it is a case in which it was indispensable that the party should produce him; but he may contradict him with

other evidence, and by showing that he has made statements different from his present testimony."

This statute, if applicable in criminal cases, allows the party producing the witness, if surprised and prejudiced by the statement made, to show that he had made a different statement from his present testimony. *Doran* v. *State,* 141 Ark. 442. The fact first testified to by Ober Martin was a surprise and prejudicial to the State. Therefore, the question propounded by the prosecuting attorney to the witnesses as to whether he had not made a different statement was clearly admissible as laying the foundation for a contradiction. *Jonesboro, Lake City & East. Rd. Co.* v. *Gainer,* 112 Ark. 477. Of course, it was unnecessary to prove the contradictory statement by other witnesses after Ober Martin admitted making a different statement from that to which he had testified.

Appellant's last insistence for reversal is that the court, over the objection and exception of appellant, permitted the prosecuting attorney to cross-examine him as follows:

"Q. Now, isn't it a fact that you have been making whiskey for three years?

"A. No, sir; I haven't made a drop of whiskey or sold a drop of whiskey.

"Q. As a matter of fact, aren't people out there getting mighty tired of the way you are doing?

"A. No, sir; I don't. * * *"

The appellant answered the questions in the negative, so no prejudice resulted to him on this account.

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

ASHMORE v. NOBLE.

Opinion delivered April 25, 1921.

1. LANDLORD AND TENANT—LEASE OPTION CONSTRUED.—Where an option to lease a building provided that it should be exercisable by notice in writing at any time within two years that the present tenant should vacate the premises, provided that the optionee must exercise the option within ten days from the date of receipt of written notice of vacancy, the right to exercise the option existed if the occupancy was changed within the optionee's knowledge at any time within two years from the date of the option.
2. SPECIFIC PERFORMANCE—DELAY IN EXERCISING OPTION.—Where an option to lease premises provided for its exercise on the vacancy of the building at any time within two years upon ten days' notice, and the optionee delayed for sixteen months after receiving notice of a change of occupancy, relief by way of specific performance will be denied.

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

R. P. Taylor, for appellant.

1. 1. A written contract for the lease of realty is susceptible of specific performance. 25 R. C. L. 283. The fact that it is an option does not displace the right of specific performance. A vendee is entitled to an option contract. 80 Ark. 209.

2. So far as appellant is concerned, there is no ground for distinction between Mrs. Noble and her codefendants. Her title is the common source of appellant's claims and those of Breckinridge and Hays alike. Tenancy by the month may be terminated upon thirty days' notice, in the absence of a showing to the contrary that a different time has been agreed upon. 105 Ark. 127. Here there is no such showing, and notice served on Mrs. Noble serves to oust her codefendants as well as herself.

3. Appellant is entitled to immediate possession. (1) The present tenants are not standing upon a failure of notice, and notice would have been futile, as they stand upon an alleged want of any right in appellant whatever, and (2) there is no affirmative proof that they were not

served with notice; the presumption is that appellant performed his duty and gave notice. 25 Ark. 311.

4. The chancellor's findings as to the provision for notice are clearly erroneous. The proviso in the contract was for the purpose of enabling Mrs. Noble to force for acceptance or rejection of the lease by Ashmore and to expedite his action in that respect.

5. The chancellor erred in fixing the departure of Stutts as the point from which a reasonable time should begin to run. Appellant proceeded within a reasonable time to ask specific performance, and the doctrine of laches does not apply. 103 Ark. 191.

The contract of the vendor in treating the contract as no longer binding fixes the point at which begins the reasonable time allowed the vendee to tender performance. 113 Ark. 433; 20 Ore. 265; 12 L. R. A. 239-43; 25 L. R. A. 253. Delay in seeking specific performance works no harm where there has been continuous acquiesence on both sides, but laches may be imputed to one seeking specific performance from the time when the one against whom relief is sought has indicated by acts or intentions to abandon the contract. 25 R. C. L. 252; 62 Mich. 15; 28 N. W. 744; 9 Tex. 129; 58 Am. Dec. 136-143. See, also, Willeston on Cont., § 689. Failure to speak or act when it is one's duty to do so amounts to action inducing postponement as effectually as any positive statement might do. 103 U. S. 828; 63 Neb. 128; 88 N. W. 171. See, also, 70 Mich. 517; 38 N. W. 555-7; 104 Ga. 157; 30 S. E. 723; 3 Tenn. Rep. 653; 57 Mass 224-8.

Where one of the parties to an executory contract of sale formally gives notice to the other to comply, it is fatal to his right of rescission if he lacks good faith. 126 Ark. 498.

5. Even if Mrs. Noble's waiver of her right to expedite action be held not to be a continuing one, appellant has discharged his obligation. Mere lapse of time is not laches. 83 Ark. 154-160.

While courts of equity by analogy follow the statute of limitations, the defense of laches may be made when the lapse of time is less than the statutory limitation. 25 R. C. L. 257; 158 Cal. 290; 110 Pac. 947; 9 Tex. 129; 58 Am. Dec. 136-142; 124 Ark. 244-270; 15 R. C. L. 1125.

Where a contract has been partially performed and one makes default, the other has a choice of remedies; he may rescind or affirm, but can not do both. If he rescinds, he must return the value received. 72 Ark. 359-64.

No discretion remains in this case to refuse specific performance. The contract was freely entered into for a valuable consideration paid, and it is fair and just in all its provisions and specific performance should be decreed. 16 Ark. 340; 140 *Id.* 384; Pom., Eq. Jur. (3 ed.), § 1404.

M. P. Huddleston, R. E. Fuhr and *J. M. Futrell,* for appellees.

1. An option is not a sale, but only an offer to sell within a limited time, and must be accepted or rejected within such time. No notice to Ashmore was necessary, as no occasion arose for same.

2. It is unnecessary to discuss the questions of law raised by appellant, as appellant had a full and adequate remedy at law.

3. No notice was necessary to be given, as the parties had actual knowledge. Willeston on Contracts, § 57. The house was unoccupied and vacant, and notice was unnecessary and no rights accrued to appellant under his option. Willeston on Cont., § 57. See, also, 68 Md. 21; 11 Atl. 284; 6 Am. St. 417; 135 N. W. 712; 77 Pac. 134; 67 L. R. A. 571; 110 Am. St. 963.

The option here provides that same shall begin, "provided that the premises shall be vacated by the tenant who now occupies them," etc. There was no vacancy; the premises were not vacant. 48 Ark. 82; 8 Words and Phrases, p. 7258; 2 L. R. A. (N. S.) 517 and note. As the

house was not vacant, no rights accrued to appellant, and the decree is right.

HUMPHREYS, J. This is an appeal from the decree in the Greene Chancery Court, dismissing appellant's bill to enforce an option to lease a building in Paragould, owned by appellee, Mrs. Minnie Noble. The option contract was entered into between Mrs. Minnie Noble and E. B. Ashmore on the 10th day of April, 1919, and is, in part, as follows:

"In consideration of $10 now paid by the lessee to the lessor, the receipt whereof is hereby acknowledged, the lessor shall have the option of taking a lease of the premises described as follows:

"The one-story brick building on South Pruet street now occupied as a pool room, in the city of Paragould, Ark., for a term of one year at the monthly rental of $60 per month, and the privilege of extending three (3) years additional at same rental, provided said premises shall be vacated by the tenant who now occupies said premises at any time within two years from the date of this option.

"This option shall be exercisable by notice in writing by the lessee to the lessor at any time within two years from the date hereof that the present tenant shall vacate said premises, and if and when so exercised then the lessor shall grant and the lessee shall accept a lease of the said premises for the said term which shall commence from the date of the exercise of the option, at the said rent, and the said sum of $10 paid for this option shall be applied to the payment of the first month's rent; provided that the lessee must exercise his option within ten days from the date he shall receive written notice from the lessor that said premises will be vacant and ready to be occupied by lessee within said ten days."

At the time the contract was executed the building was occupied by Hugh Stutts, as tenant of Mrs. Noble, at a rental of $50 per month. On May 7 following Hugh Stutts sold his business and equipment to appellees, G.

T. Breckenridge and Sam Hays, who thereafter occupied the building under a monthly rental contract with Mrs. Noble for $75 per month. Appellant obtained knowledge that Stutts had sold and delivered possession of his business and equipment to Breckenridge and Hays a week or ten days after the sale. He occupied an adjoining building to the building in question, for which he paid $30 per month, and, on that account, did not attempt to exercise his option under the option contract until September 20, 1920. Appellant first made a verbal request for the fulfillment of the option contract, and, when Mrs. Noble refused to execute a lease pursuant to its terms, he gave her written notice of his intention to exercise his rights under the option, then instituted this suit for specific performance of the option.

Appellant's contention is that he had a right under the option contract to lease the building at any time within two years from its date after being vacated by the tenant then occupying the building, by giving written notice to the lessor, Mrs. Noble, of his intention to exercise the option, and that it was not incumbent upon him to give written notice of his intention until Mrs. Noble first gave written notice that said tenant had vacated the building. We do not place that construction upon the contract. The two-year period in the contract had relation to the life of the contract, and not the time of the accrual of appellant's right to exercise the option. It is made manifest by the proviso in the first paragraph of the contract set out that the right to exercise the option accrued if the occupancy was changed—of course, with the knowledge of the lessee—at any time within two years from the date of the option. We see nothing in other parts of the contract in conflict with this plain proviso, which is as follows: "Provided said premises shall be vacated by the tenant who now occupies said premises at any time within two years from the date of this option." It is argued that the last proviso in the contract is in conflict with this construction, because, by it, the lessee is not required to exercise his option until

the lessor gives him ten days' written notice that the occupancy had changed. This was not the purpose of the last proviso in the option contract. The purpose of that proviso was to prevent a lapse between the time of the departure of the then tenant and the entry of the optionor, if he desired to take advantage of his option. The last proviso was clearly for the benefit of the lessor, as it permitted her to give the notice which accelerated the right to exercise the option even before the vacancy occurred. Having thus construed the contract, the only remaining question to be determined on this appeal is whether appellant attempted to exercise his option within a reasonable time after his right to specific performance accrued. The rule is that one entitled to specific performance of a contract must proceed to enforce it within a reasonable time. This court, in the case of *Uzzell* v. *Gates,* 103 Ark. 191, quoted approvingly the rule announced by Lord Cranworth to the effect that "specific performance is relief which this court will not give, unless in cases where the parties seeking it come as promptly as the nature of the case will permit." In the instant case, the appellant delayed before taking steps to enforce his option about sixteen months after receiving notice of a change in occupancy of the building in question. In the meantime, without objection or protest on the part of appellant, Mrs. Noble leased the building to others from month to month, at a rental of $75 per month. Appellant's lack of diligence prevents him now from calling on a court of equity for specific performance.

The decree is therefore affirmed.

STUART v. BARRON.

Opinion delivered May 2, 1921.

1. EQUITY—VACATION DECREE AGAINST INFANT.—Under Crawford & Moses' Digest, § 2190, providing that a chancellor, by consent of parties or of their solicitors of record, "may try causes and deliver opinions, and make and sign decrees in vacation," a chancellor may try an action and render a decree in vacation by the consent of all the parties, even though some of them are infants.
2. APPEAL AND ERROR—DECREE ON FORMER APPEAL AS LAW OF THE CASE.—Where a testator left all of his property, consisting of improved farm lands, of timber lands, and of personal property, to his wife in trust for his children, but directed how the farm lands should be distributed among his children, and plaintiff's children brought suit for a distribution of the timber lands and personalty, and treated the trust as finally accomplished with repect to the farm lands already distributed, and asked that they be given an equal division in the remainder of the property, and the Supreme Court decreed to them the relief asked, such decree in effect established as the law of the case that the remainder of the property was to be equally divided and differences in value of the several tracts of farm lands were not to be equalized.
3. APPEAL AND ERROR.—Though appellees' counsel, under a misconception of this court's former opinion, consented to an instruction to the master to make a finding as to the relative values of improved farm lands, this did not bar appellees from objecting to a decree awarding payment of owelty, where no prejudice to appellants resulted from the concession during the progress of the proceeding.
4. APPEAL AND ERROR—FINAL JUDGMENT.—A decree of the chancellor merely declaring the law with respect to the rights of the parties, without awarding any particular property to the parties, was not a final judgment.
5. ATTORNEY AND CLIENT—AMOUNT OF FEES.—The trial court, in fixing the amount of the fees of attorneys for infants, properly considered the amount of the recovery; and where that amount was reduced on appeal, the cause will be reversed with directions to the chancellor to fix proper fees.

Appeal from Greene Chancery Court; *Archer Wheatley*, Chancellor; reversed.

J. F. Gautney, for appellants.

1. The decree of April 7, 1919, is void for want of jurisdiction. 81 Ark. 440-462. Where a complaint shows

no cause of action and tenders no issue, a judgment thereon is a nullity, no matter how attacked. 62 *Id.* 439; 9 Lea (Tenn.) 68; 21 L. R. A. (N. S.) 481. It is void even on collateral attack. 11 L. R. A. (N. S.) 803; 5 A. L. R. 262. No partition or sale of lands, etc., devised by last will can be made contrary to the intention of the testator expressed in his last will. C. & M. Dig., § 8090. See, also, opinion on former appeal. 136 Ark. 481. That decision is the law of the case. The court had no jurisdiction, and the decree is void. 15 R. C. L., § 328, p. 885. The decree undertaking to adjudge that all the real estate of J. W. Stuart at the time of his death was the common property of the widow and children is clearly without the issue and is void even on collateral attack.

It was error to cancel the deeds executed by the widow conveying the improved lands. The decision on former appeal is the law of this case. 136 Ark. 481.

2. The final decree is void because it was rendered in vacation. 224 S. W. 488. There is no evidence of an agreement to try the case in vacation and it being disputed that the decree was rendered in vacation it should be set aside.

3. The chancellor erred in refusing to reopen the decree on motion of appellants. It was an abuse of discretion and reversible error. 21 Ark. 329; 77 *Id.* 216. Unless specially authorized, an attorney can not compromise a client's case. 93 Ark. 342; 32 *Id.* 346; 56 *Id.* 355; 12 Heisk. 155.

It was error to refuse to allow the claims of the widow for $1,600, as the evidence shows it was lawful and just; also in refusing to find that the widow was the owner of the certificates of deposit in the joint names of Stuart and his wife at the time of Stuart's death.

W. W. Bandy, also for appellants.

Self & Patton, Block & Kirsch and *Huddleston, Fuhr & Futrell,* for appellees.

Parties can not treat an issue as joined by the pleadings, and, after trying the case on the issue joined, can not raise the issue in this court for the first time on appeal. 227 S. W. 390, 402; 227 *Id.* 407.

The decree of April 7, 1919, was a final decree and fixed the interest of all the parties and is conclusive of this case. 81 Ark. 454; Bliss on Code Pl., § 161.

By appearing and submitting the questions on their merits appellants will be held to have consented to try the issues in vacation and they are bound. 85 N. W. 783; 55 So. Rep. 711; 110 N. W. 984; 9 Neb. 269; 69 Atl. 546; 99 Ill. 609; 61 Vt. 147; 76 Pac. 584.

There was no error in allowing the fees of counsel; they were reasonable and well earned and not excessive.

McCULLOCH, C. J. This case is here now on a second appeal, the attitude of the parties being reversed, the present appellees having been the appellants on the former appeal, and the present appellants having been formerly the appellees. *Barron* v. *Stuart,* 136 Ark. 481. The facts in the case were stated more in detail in the opinion on the former appeal than need be stated again. Reference is made to that opinion, and it is only essential now to give an outline of the facts.

J. W. Stuart, a man sixty-eight years of age, residing in Greene County, Arkansas, died on July 28, 1916, the owner of a large estate consisting of improved farm lands, timber lands and personalty of various kinds. He left surviving him his widow, five sons, two daughters and the children of three deceased daughters, and a few days before he died he executed his last will and testament by which on the face of the instrument he devised and bequeathed all of his property to his wife, M. R. E. Stuart. Appellees, who are the daughters and grandchildren of J. W. Stuart, instituted this action to establish a trust in certain property devised and bequeathed to the widow. The chancellor in the first decree decided that there was no trust under the will and dismissed the complaint for want of equity. On the former appeal this

court sustained the trust and reversed the cause for further proceedings.

In the original complaint it was alleged that the testator, J. W. Stuart, had directed a division of the property, giving to the widow the homestead and $10,000 in money and certain other items of personalty, and that the remainder was to go to his children and grandchildren, and that he devised and bequeathed the whole of his estate to his wife as trustee, with instructions to convey to each of the children and grandchildren, separately, a tract of improved land, which he described by name or location, and to divide the timber land and personal property equally between all the children and grandchildren; that the widow after the death of the testator had carried out said directions by conveying the improved farm lands to the parties in accordance with the directions of the testator, but that she had refused to deed to her daughters and grandchildren any of the timber lands or to divide the personal property equally between the children and grandchildren as directed. The prayer of the complaint was that a trust be declared, and that the widow be compelled to carry out its terms by an equal division of the timber lands and the personal property among all the children and grandchildren, according to the directions of the testator. On the remand of the case, the plaintiffs, the present appellees, filed a supplemental complaint in which they set forth certain defects in the deeds executed to them by the widow conveying the improved farm lands and asked that a correction be made by the cancellation of those deeds, and the execution of new deeds by the commissioner of the court conveying the property to the plaintiffs in fee simple. It was also alleged in the supplemental complaint that the widow and one of the sons of the testator, J. A. Stuart, had cut and moved a large quantity of timber from the wild lands and had sold a large quantity of the stock and matured crops of the testator, and had disposed of other personal property, and asked that a master be appointed with power to state an account between the parties in regard

to their respective interests in the property. There was also a prayer for a partition of the timber lands. There was an answer to this supplemental complaint and also a cross-complaint by the widow in which she claimed the sum of $1,600 as her separate estate, in addition to the sum of $10,000 which was specified was to go to her under the trust.

On April 7, 1919, the court entered a decree on the mandate of this court and the supplemental pleadings, in which the court recited a finding "that the real estate belonging to J. W. Stuart at the time of his death is the common property of his widow, grandchildren and great grandchildren (naming them)," and that it would be necessary to have an appraisement and partition in kind of all the lands belonging to the said testator, and the court appointed commissioners to set aside the homestead to the widow and to appraise each of the forty-acre tracts of land separately and divide the same into ten equal parts. The court also appointed a master to take testimony and to report a statement of the account between the parties. It appears from the account subsequently filed that the widow, prior to that time, had divided the cattle and mules and horses by giving to each of the children and grandchildren a mule or a horse and a cow and calf, and out of the cash on hand she had given to each of them a check for $2,000 except two of her daughters who joined in this suit against her. Testimony was taken before the master, who made a report to the court setting forth in detail his findings concerning the amount of property in the hands of the executor, J. A. Stuart, and the amount of disbursements. The commissioners also made a report of the values of the tracts of wild timber lands and reported a partition of those lands equally among the children and grandchildren, giving to the grandchildren the share of the parent. There were no exceptions to the report of the commissioners, nor is there any controversy here concerning the division of the wild lands. There were twenty-one separate tracts of wild lands, containing forty acres each, and these tracts

were equally divided between the parties. Exceptions were filed to the master's report, and these exceptions came on for hearing by the court on April 5, 1920. There was an order entered by the court reciting the filing of the exceptions and the submission of the cause, which was to be argued at a later time to be fixed by the chancellor. The cause was heard by the chancellor in vacation, all the parties being present by their attorneys, on July 15, 1920, and a final decree was rendered, the entry of which contained a recital of the submission of the cause during the term time on April 5. Certain matters were reserved from the decree entered on July 15, and the hearing was resumed on July 20, 1920. This was a final decree, except that there was a motion made on August 21, 1920, to reopen the decree, which motion the court overruled on September 25, 1920.

On July 13, 1920, the attorneys then representing the parties (not including the present counsel representing appellants here who have succeeded former counsel in the case) joined in a written direction to the master, as follows:

"We hereby request that, in stating the final account for order of distribution in the case of *Barron* v. *Stuart*, that you take into account the difference in value of the so-called improved farms, the disposition of which were directed by J. W. Stuart on his death-bed, and absorb these differences in the final account, the value to be fixed as found by the commissioners, as under the decree of the Supreme Court all parties are to share equally by doing this, no liens will be retained against the respective tracts of lands on account of these differences and owelty awards." It will be observed that this direction was given after the first decree on July 15, 1920, and pursuant to this direction the master reported the values of the improved farms conveyed to the different children and grandchildren, and in stating the account between the parties he equalized these differences so as to give each of the children an equal share in the whole estate. The court entered a decree in accordance with the report of

the master, awarding to each of the children and grandchildren the amounts found to be the balance due to each of them out of the funds in the hands of the executor.

It is contended, in the first place, that the decree is void on account of being entered in vacation without having been previously submitted and taken under advisement by the court in term time. Conceding that the recitals of the record are not sufficient to bring the case within that feature of the statute (Crawford & Moses Digest, § 2190) which provides that the chancellor may "make and sign decrees in vacation in causes taken under advisement by him at a term of the court," the record does show that the cause was heard in vacation by consent of the parties, all being present by attorneys before the chancellor. The statute just referred to expressly authorizes the trial and rendition of decrees in vacation by consent. Some of the plaintiffs were infants, but there is no exception in the statute as to infant parties. The statute provides that the parties themselves, or their solicitors of record, may consent to the hearing in vacation, and we find no reason for reading into the statute exceptions in favor of infants. This is a mere matter of procedure in trials of causes which involve no prejudice to the rights of infants by having the hearing in vacation before the chancellor if the counsel for both sides so agree.

The principal controversy arising on the present appeal relates to the decree of the court equalizing the differences between the values of the improved farm lands and compelling each of the parties to account in the final division of the estate for these differences in value. The contention of appellants is that the improved farm lands were devised to the widow in trust for the several *cestuis que trust,* regardless of value, and that the differences in value, if any, are not to be taken into account in the division of the other property. The contention of appellees is that the whole of the estate was devised in trust to be equally divided between the parties, and that in carrying out this trust the

differences in values of the separate specific tracts of improved farm lands must be equalized and the payment of owelty to be decreed in order to effectuate an equal division of the property. It is claimed on each side of the controversy that this question was adjudicated in the original opinion of this court which became the law of the case. Each side quotes statements from the opinion, which they claim support their respective contentions. The issues involved and the conclusions of this court are clearly stated in the former opinion and show for themselves. There is nothing, we think, in the language of that opinion itself which is decisive of the issue controverted on the present appeal, but we think the effect of the decision of the court upon the issues then involved was an adjudication that the trust had been performed in accordance with the terms, in so far as it related to the improved farm lands and that the remainder of the property was to be divided equally between the children and grandchildren. Appellees, as plaintiffs below, did not ask for an adjudication concerning those lands and it is clear that they treated the trust as being finally accomplished with respect to that portion of the testator's property, and the relief which they asked for was that they be given an equal division in the remainder of the property. This court merely decreed to them what they asked for, and that necessarily resulted in establishing as the law of the case the decision that the remainder of the property was to be equally divided. Moreover, that is, according to the preponderance of the testimony in the case, what the testator intended in the creation of the trust. He was unable to complete the division of the property according to his wishes, but he selected one character of property which stood in a class by itself and divided that in accordance with his own wishes, and apparently upon his own estimate of the respective claims of his children and grandchildren upon his bounty. There is no conflict in the testimony that he called over the children name by name and specified the particular

farms which they were to have. He directed that his crops be sold by his executor and the proceeds equally divided between the children and grandchildren, and that each one be given a mule or a horse, and that the balance of his property be divided among the children and grandchildren, and repeated the saying in the presence of those assembled that they were to be treated alike—that "a child is a child," as he expressed it.

There was nothing to indicate that his intention was that there be an appraisement of the farm lands and that the differences in values, if any, should be equalized. In other words, it is clear that he intended to make the division himself as far as he was physically able to do so at that time, and that the remainder of the property was to be equally divided. We are of the opinion that the original counsel in the case misconceived the effect of the former decision of this court and put the wrong interpretation on it in holding that the parties were liable for the payment of owelty in the equalization of the values of the improved farm lands. The fact that counsel who originally represented the appellants consented, under a misconception of the law, to an instruction to the master to make a finding as to the relative values of the different tracts of improved farm lands does not bar appellants from objecting to the decree on that account. This direction was not given by way of a compromise settlement of the controversy, but, as before stated, was made under a belief entertained by counsel that such was the effect of the former decree. The parties, notwithstanding that concession, during the further progress of the proceedings had a right to object to the findings of the master and the decree of the court awarding the payment of owelty. No prejudice resulted from this concession during the progress of the proceedings, as the court could and should have corrected the misconception entertained at the time and rendered a decree in accordance with what we find now to be the law of the case. But it is contended now that this was settled against the contention of appellants by the decree en-

tered by the chancellor on April 7, 1919, and that the appeal from that decree was taken too late for this court to review the question. That decree, however, was not final. It merely declared the law with respect to the rights of the parties, but it did not award any particular property to any of the parties and left for future adjudication of the property to be awarded to the parties respectively. The case in that respect falls squarely within the rule announced by this court in *Sennett* v. *Walker,* 92 Ark. 607, and also within the rule announced in *Branstetter* v. *Branstetter,* 130 Ark. 301. There was no final decree concluding the rights of the parties without further judicial action until the decree of August 21, 1920, and the appeal was taken within six months after that time.

The widow, M. R. E. Stuart, who is one of the appellants, assigns as error the refusal of the court to allow her in the adjustment of the accounts the additional sum of $1,600 which she claims as her separate property in funds turned over to her in the lifetime of her husband in reimbursmeent for her inherited property which he had used for his own purposes. The chancellor found that these funds were regarded as the property of the testator himself, and as a part of the funds out of which he bequeathed to her the sum of $10,000, in lieu of all other claims, and that conclusion is supported by the evidence.

The contention is also made, on behalf of the widow, that the court erred in failing to decree to her, as her separate property, the funds deposited in bank in the joint names of herself and the testator, and which she now claims by right of survivorship. There was no exception to the report of the master as to this item, and the conclusion is warranted from the proof that these funds were the property of the testator.

An appeal has been prosecuted on behalf of the infant plaintiffs from that part of the decree fixing the amount of the fees of their counsel. The court, in fixing the amount of the fees, seems to have properly taken

into consideration the several amounts recovered by these infants under the decree, and, since the effect of our decision is to reduce the amounts recovered by them, it is proper to reverse this part of the decree so as to allow the chancellor to determine the proper amount of the fees based on the amount recovered.

The decree of the chancery court is therefore reversed and the cause remanded with directions, after ascertaining the amount of fees to be charged, to enter a decree in accordance with this opinion.

HART and SMITH, JJ., dissent.

SELLERS v. HORNEY.

Opinion delivered May 2, 1921.

APPEAL AND ERROR—PROCEEDINS AFTER REMAND.—Where a decree in a mortgage foreclosure was reversed with directions to ascertain from the record the amount due for advances to April 30, 1913, to render a decree for same, to declare a lien on the mortgaged property and to foreclose said lien if the judgment is not paid within a reasonable time to be fixed by the court, the chancery court had no power to change or extend such mandate or to render judgment as to advances made after April 30, 1913.

Appeal from St. Francis Chancery Court; *A. L. Hutchins,* Chancellor; reversed.

W. J. Lanier, for appellant.

The chancery court is bound by the directions in the mandate of this court. It can not add to nor subtract therefrom. 21 Ark. 197; 60 *Id.* 50; 13 *Id.* 654; 5 *Id.* 200; 106 *Id.* 292; 126 *Id.* 197. That part of the decree allowing judgment for items furnished after April 30, 1913, was error.

S. S. Hargraves and *Mann & Mann,* for appellees.

The former decree and mandate of this court settle this case. The chancery court has passed on the merits of this case and the decree is final, and the entire controversy is settled. 198 S. W. 961.

A court of equity having jurisdiction of part of the subject-matter will dispose of the whole case. 30 Ark. 278; 34 *Id.* 410; 14 *Id.* 50. Jurisdiction depends on the state of facts existing at the time the suit is brought and will not be ousted by subsequent events. 34 Ark. 410; 52 *Id.* 541; 92 *Id.* 15; 99 *Id.* 438; 105 *Id.* 558. See, also, 83 *Id.* 554.

McCULLOCH, C. J. Appellees instituted this action in the chancery court of St. Francis County to foreclose a deed of trust executed by appellant's intestate conveying certain real property in Forrest City to secure a debt to appellee Horney. The secured debt was evidenced by a promissory note in the sum of $1,000, due and payable on April 30, 1913, which was recited in the deed of trust, but the evidence in the case showed that the note was executed for an indeterminate amount of advances in money to be made by appellee Horney to the mortgagor. On the final hearing of the cause the chancery court rendered a decree foreclosing the mortgage for the full amount of the debt, including advances made after the maturity of the note, but on appeal to this court it was decided that the chancery court erred in including in the decree the amount of advances made after the maturity of the note. The decree was reversed and the cause remanded with directions "to ascertain from this record the amount due for advances to April 30, 1913, render a decree for the same against the estate of I. W. Leggett, deceased, declare the same a lien on the property described in the trust deed, and to foreclose said lien if the said judgment is not paid within a reasonable time to be fixed by the court."

On the filing of the mandate in the chancery court of St. Francis County, that court, after ascertaining from the record the aggregate amount of advances made up to and including April 30, 1913, with interest to date of decree, also the aggregate amount of advances made after that date, with interest, rendered a judgment in favor of Horney against the said estate for the whole

of said debt, but declared a lien for only the amount of advances made up to April 30, 1913, with interest, in accordance with the directions of the mandate. Appellants objected to that part of the decree which covered the amount of advances after April 30, 1913, and they have prosecuted an appeal to this court.

The contention of appellants is that the directions of this court were specific and excluded the power of the court to render any decree except one for the recovery of the amount of advances up to April 30, 1913, with interest, and declaring a lien for that debt. The contention of appellees is that under the pleadings and proof in the case they were entitled to a decree against the estate for the full amount of the advances with interest, notwithstanding the fact that only that part of the debt which was for advances up to the date mentioned was a lien under the mortgage, and that the directions of this court did not forbid the lower court from including the whole debt in the decree, that part which was merely for the recovery from the estate of Leggett as well as that part of which constituted a lien under the deed of trust. We are of the opinion that the contention of appellants is correct, and that the mandate of this court precluded the chancery court from rendering any decree, except the one directed which was for recovery of the amount of advances up to and including the date mentioned, with interest. The mandate placed a precise limit upon the further proceedings of the chancery court in this cause and precluded that court from rendering any decree except the one expressly authorized by this court in its mandate. The mandate had the same force as if it had been rendered by this court itself, and the chancery court had no power to change or extend it. Like any other decree it was conclusive of all of the issues involved in the case. The question now is, what the judgment of this court was on the former appeal, not what it should have been. The case is controlled by the following decisions: *Gaither* v. *Campbell*, 94 Ark. 329; *McClintock* v. *Robert-*

son, 98 Ark. 595; *Hopson* v. *Frierson,* 106 Ark. 292; *LaCotts* v. *LaCotts,* 118 Ark. 558.

The decree of the chancery court is reversed as to that part which relates to the recovery for advances after April 30, 1913, since the remainder of the decree is correct and is not appealed from, it is not necessary to remand the cause.

MAXWELL *v.* FELKER.

Opinion delivered May 2, 1921.

1. PLEADING—EXHIBITS.—In suits in chancery, the exhibits which are the foundation of the action become a fact of the record, and will control the averments of the complaint and the nature of the cause of action.
2. EVIDENCE—PAROL EVIDENCE TO EXPLAIN WRITTEN AGREEMENT.—In a suit to enforce a written agreement to redeem stock delivered to a bank in consideration of the surrender to the depositor of certain obligations owed by him to the bank, where the agreement is ambiguous on its face, oral testimony is admissible to explain the circumstances of its execution and the intention of the parties to the contract.
3. BANKS AND BANKING — CONSTRUCTION OF CONTRACT.—Evidence that defendant executed an instrument to a bank which recited that "twelve months after date I agree on proper notification to redeem $15,400 Jones Bros. & Co. preferred stock, 8 per cent. on same," and that defendant deposited preferred stock in the above amount with the bank for an indebtedness of $15,400, and subsequently executed an obligation to the bank in that sum, *held* to show that the instrument was intended to evidence an obligation to pay the sum of $15,400 on demand with 8 per cent. interest.
4. EQUITY—CONSTRUCTION OF CONTRACTS.—Equity looks at the substance, and not the form, in construing contracts, and will discard any mere surplusage and unmeaning words, or supply other words to carry out the obvious intention of the parties.

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

E. H. Thomas (of Kansas City, Missouri) and *McGill & McGill,* for appellant.

1. The cause was transeferred to equity, and appellee, saving no exceptions to the order and having subse-

quently filed equitable defenses, can not now object. 74 Ark. 81; 92 *Id.* 46; 101 *Id.* 461; 105 *Id.* 669; 123 *Id.* 255.

2. Appellant did except to the transfer, and it was error to dismiss the cause if plaintiff was entitled to any relief at law or equity. 93 Ark. 376; 139 *Id.* 90; 107 *Id.* 70; 87 *Id.* 206.

3. It is not necessary that a contract in writing, not within the statute of frauds, shall express a consideration, as it may be proved by parol evidence or be inferred from its terms and obvious import. 6 R. C. L., § 64; 3 Enc. of Ev. 372, note 13. A written obligation for the payment of money imports a consideration and upon an issue of want of consideration the burden is on defendant. 33 Ark. 97; 21 *Id.* 69; 8 C. J., § 261. An agreement unilateral in form is not necessarily without mutuality or consideration. 6 R. C. L. 686-7; 119 S. W. 400; 34 Ark. 312; 113 *Id.* 586.

4. An agreement is not within the statute of frauds, if it is sufficient as a memorandum. It need not state the consideration unless the statute requires it. The contract here is simply an obligation to buy stock and contains all the elements necessary to satisfy the statute of frauds. 60 A. S. R. 434; 3 Ark. 97; 8 C. J., §§ 259, 260. The agreement furnishes the key by which every material element may be made definite and certain by proof. 85 Ark. 1.

5. The real nature of the transaction is established by a clear preponderance of the proof. The creditor is not required to return the security before bringing suit. When the debt is satisfied he must release it. The pledgor has the right to redeem and recover the security or pledge by paying the debt. 21 R. C. L. 683-5; 31 Cyc. 858, 862-3; 21 St. Enc. Prac. 460-2; 123 Ark. 528.

No particular formalities are required to constitute a pledge. The title does not pass to the pledgee only so far as it is necessary to carry out the purposes of the pledge. 21 R. C. L. 630-4; 31 Cyc. 785-9; 9 Enc. Ev. 856; 98 Ark. 379.

The renewal of the obligation with an extension of time of payment was a good consideration for the pledge of the stock. 21 R. C. L. 640. The instrument sued on is a direct obligation to pay money which the stock was pledged to secure. It is an *obligation* to pay money, and the stock was pledged to secure its payment. "Proper notification" means "on demand" or "when called for." 8 C. J. 404; 18 A. S. R. 345. See, also, 8 C. J. 530; 83 Ark. 278.

6. There is no limitation or laches here. If defendant suffered any loss on the collateral by and negligence or wrongful act of the bank he should have set up a counterclaim and offered proof to sustain it. 31 Cyc. 869-70.

7. The proof shows there was a consideration for the debt.

8. Defendant was not released from any claim of the creditors by the conveyance to a trustee for creditors, nor by any agreement with the bank commissioners.

Dick Rice, Rice & Rice and *Duty & Duty,* for appellee.

The complaint does not state a cause of action. The instrument sued on, nothing more than an agreement for the purchase of preferred stock, and falls within the terms of the statute of frauds and must be in writing and complete within itself. The agreement is incomplete and void because no consideration is expressed on its face, and it does not specify the price to be paid for the stock, and because it is not alleged nor proved that "proper notification" was given Felker, nor is it alleged or proved that the stock had any market value. The notes were void. The contract is within the statute of frauds and void. 91 Ark. 445; 107 *Id.* 629. See, also, 43 N. E. 575; 66 Pac. 914; 32 N. Y. App. Div. 237; 52 N. Y. Supp. 998.

Redemption implies a subsisting right as against a defeasible claim. 56 Ark. 139; 19 S. W. 497. The con-

tract is clearly within the statute of frauds. 37 Ark. 145; 99 N. Y. Supp. 392; 137 Fed. 143; 14 Atl. 671; 200 Fed. 318; 59 So. 191. The contract does not fix the price; this is essential. Pomeroy on Cont., § 148; 107 Pac. 874. See, also, 45 S. W. 303; 36 Okla. 429; 128 Pac. 1086.

There is no allegation nor proof that Felker's proposition was accepted. 100 Ark. 510; 140 S. W. 590.

Mutuality of contract must be shown or there is no binding obligation. 69 Wis. 43; 33 N. W. 110; 5 Atl. Rep. 103; 30 Ark. 194. A mere offer, unassented to, is not a contract; there must be acceptance. 92 N. E. 178. See, also, 131 Pac. 76; 137 *Id.* 1082; 170 N. C. 510; 87 S. E. Rep. 334.

No cause of action is stated, as there is no allegation of value of stock; nor is there any allegation that the stock is worthless. 36 Cyc. 560-1. If this is an action for damages for breach of contract, the measure of damages is the difference between the market value of the stock at the time it was agreed to be delivered to defendant and the sale price thereof. 100 Ark. 510; 140 S. W. 590; 98 *Id.* 546; 29 N. E. 760; 95 Pac. 803; 101 *Id.* 568.

A contract for sale of stock which can be obtained in the market will not generally be specifically enforced, as the buyer and seller has a sufficient remedy at law. Waterman on Spec. Perf. of Cont., § 19.

There is no allegation of damage in the complaint; no damage is shown. 29 N. E. Rep. 760.

WOOD, J. On Janaury 20, 1920, the appellant, as bank commissioner of the State of Arkansas, filed in the Benton Circuit Court an "amended complaint" in which he alleged "that the affairs of the Citizens Bank of Rogers, Benton County, Arkansas, were, on the 16th day of July, 1914, duly placed in charge of the Bank Commissioner of the State of Arkansas as an insolvent bank, for the purpose of liquidating its affairs, and that all of its assets were taken charge of by the Bank Commissioner, who has since that time been liquidating the same, but its affairs have never been fully liquidated and

wound up. That among the assets of said bank are 154 shares of preferred stock of Jones Brothers & Company, an Arkansas corporation, which were duly issued by said corporation to the defendant, J. E. Felker. Said shares of stock were issued and delivered to the said J. E. Felker as fully paid up stock; that the said J. E. Felker, in consideration of the surrender to him by the said Citizens Bank of Rogers of certain obligations which he owed the said bank, on or about March 24, 1913, delivered to and deposited with said bank the said shares of stock together with a written agreement and obligation by the terms of which he obligated himself, after twelve months from said date on proper notification of said bank, to redeem said stock together with eight per cent. interest on the same; that the said agreement came into the possession and control of the said Bank Commissioner, together with the said shares of stock, as a part of the assets of said insolvent bank; *that the said shares of stock had no market value when deposited in the bank or afterward, and never were worth half the amount of said notes and afterward became worthless;* that, at the end of the first year after receiving the said agreement and shares of stock, the defendant, J. E. Felker, was not ready to redeem the same, but executed and delivered to said bank his note covering the interest on said shares of stock up to the date of the execution of said note, which note is also a part of the assets of said bank and is in the possession and control of the planitiff herein; that, after said bank was placed in charge of the Bank Commissioner as aforesaid, the said commissioner duly notified the defendant as required by said agreement and demanded the redemption of said shares of stock by the payment of the face value thereof and interest, but the said J. E. Felker has failed and refused to redeem the same or to pay the amount required therefor and had not paid anything up to the filing of the original complaint in this action which was on the 19th day of August, 1918, and has made no payment since that time; that the plaintiff has always been ready to receive the amount required to

redeem said stock and thereupon to deliver said stock to said defendant and holds the same subject to the orders of the court for that purpose." The prayer of the complaint was for judgment in the sum of $15,400.

The written agreement and obligation under which the shares of stock were delivered to and deposited with the Citizens Bank of Rogers, and which came into the hands of the Bank Commissioner was made an exhibit to the complaint and is as follows:

"Rogers, Arkansas, January 2, 1913.

Citizens Bank,

"Rogers, Arkansas.

Gentlemen:

"Twelve months after date I agree on proper notification to redeem $15,400 Jones Bros. & Co. preferred stock 8 per cent. on same.

"J. E. Felker."

The cause on motion of the appellee was transferred to the chancery court. The appellee filed an answer in which he set up, among other things, that the agreement sued on is within the statute of frauds and void; that the cause of action is barred by laches and the statute of limitations, and that the contract sued on is void for want of consideration; that plaintiff is estopped, and that all indebtedness to the plaintiff had been paid. Embraced in the answer was also a demurrer to the complaint.

The decree recites as follows: "The cause was heard on the amended complaint of plaintiff, demurrer and answer of defendant, and the evidence adduced, the complaint being by the court treated as amended to conform to the proof. The court sustained the defendant's demurrer to the complaint of the plaintiff on the obligation sued on, being a suit for the collection of $15,400 with accrued interest, on the ground that said complaint does not state facts to constitute a cause of action either in law or equity; and the plaintiff's complaint being treated as amended to correspond to the proof, said cause is dismissed." From that decree is this appeal.

The record shows that the court, on motion of the appellee, struck out the interlineation to the complaint, which alleged that "the said shares had no market value when deposited in the bank or afterward and never were worth the amount of said notes and afterward became worthless." But after this ruling the court heard the cause on the amended complaint, treating the same "as amended to conform to the proof."

There was testimony on behalf of the appellant to the effect that at the time the 154 shares of stock were deposited in the Citizens Bank of Rogers such stock had no market value, and that the appellee and the officials of the bank knew this.

We have set forth the amended complaint as it appeared before the above interlineation was stricken out, for it appears that the lower court treated it as if it contained the above allegation, "that the stock had no market value, etc," and we must so treat it.

There was also testimony to the effect that when the 154 shares of Jones Brothers & Company preferred stock—the $15,400—was delivered to and deposited by the appellee with the Citizens Bank of Rogers, it surrendered to him cancelled obligations to the bank for a like sum. But the testimony of the appellee further shows that, when the exchange was made, he executed the instrument, *supra,* which is exhibited with the complaint and is the foundation of this action. And he subsequently executed a note which was made up in part of, and included in it, the interest for one year on an obligation to the bank in the exact sum of $15,400. "In suits in chancery, the exhibits, which are the foundation of the action, become a part of the record, and will control the averments of the complaint and the nature of the cause of action." *Cox* v. *Smith,* 99 Ark. 218, and cases there cited.

Now, the instrument set out above, to say the least, is ambiguous on its face. Oral testimony was admissible for the purpose of explaining the circumstances of its execution and the intention of the parties to the contract.

Massey v. *Dixon,* 81 Ark. 337; *Jones* v. *Lewis,* 89 Ark. 368; *New York Life Ins. Co.* v. *Allen,* 143 Ark. 143-152.

There was testimony that appellee at the time of the transaction, was solvent. Since the stock of Jones Brothers & Company had no market value—was worthless—it is unbelievable that the officers of the bank, knowing such facts, would have accepted such stock as collateral to, much less in exchange and payment of, the notes of appellee to the bank. Even if they had done so, there was no necessity for, and no sense in, the transaction assuming the form of the obligation in suit. The subsequent execution of the note for accrued interest on $15,400 shows that the instrument under consideration was intended by the parties as an unconditional and binding obligation for the payment of the sum of $15,400. Whatever may have been the purpose of the bank and the appellee in changing the form by which the indebtedness of the appellee to the bank was evidenced, it was certainly not their intention to release the appellee from his primary obligation to pay the bank the sum of $15,400. On the contrary, we are convinced that the only reasonable conclusion is that the instrument sued on was intended to evidence an obligation on the part of the appellee to pay to the Citizens Bank of Rogers, Arkansas, the sum of $15,400 on demand, with interest.

Equity looks at the substance and not at the form, and will discard any mere surplus and unmeaning words, or supply other words to carry out the obvious intention of the parties. Therefore, the words "proper notification" in the instrument were surplusage and could have no other purpose than if the words had been "on demand or notice." In the light of the testimony showing the intention of the parties to the transaction, and to effectuate such intention, we agree with the learned counsel for the appellant, that the instrument should be interpreted the same as if it had the following form:

Twelve months after date I promise to pay to the Citizens Bank of Rogers, Arkansas, the sum of fifteen thousand four hundred and no/100 dollars, with inter-

est at the rate of 8 per cent. per annum, for the redemption of $15,400 Jones Brothers & Company preferred stock.

The instrument so construed explains and controls the allegations of the complaint by which it is sought to enforce the obligation. It follows that the court erred in holding that the complaint did not state a cause of action and in sustaining the demurrer to the complaint. The decree is, therefore, reversed and the cause remanded with directions to overrule the demurrer to the complaint.

PAYNE v. COTNER.

Opinion delivered May 2, 1921.

1. COMMERCE—CATTLE INSPECTION LAWS.—The Federal act requiring the inspection of cattle shipped in interstate commerce for fever ticks, and the isolation of those infected with such ticks in separate pens (U. S. Comp. Stat., §§ 850, 8690-97), is valid.
2. CARRIERS — CATTLE INFECTION — JURY QUESTION.—In an action against a carrier for damages resulting from delay in delivery of a shipment of cattle caused by their detention at destination on account of having fever ticks, testimony of plaintiff tending to prove that the cattle were free from ticks when shipped tends to contradict the testimony of the United States inspector that he found a fever tick on a cow on arrival of shipment, and hence the evidence as to finding the tick is not undisputed so as to take the question from the jury.
3. EVIDENCE—JUDICIAL NOTICE—LAWS OF NATURE.—Appellate courts will take judicial notice of a law of nature, such as that it takes two weeks for an adult cattle tick to develop, and that the development must take place on the animal.
4. CARRIERS—CATTLE INFECTION—EVIDENCE.—In an action against a carrier for damages caused by detention of cattle in quarantine, evidence *held* to establish that, if a cow was infected with cattle ticks as claimed by a United States inspector, the cow was not free from ticks when received for shipment.
5. CARRIERS—LIABILITY FOR MISTAKE OF INSPECTOR.—A railroad company is bound by the rules and regulations of the interstate shipment of cattle promulgated by the Secretary of Agriculture, and can not be held liable in damages resulting from delay in de-

livering the cattle at destination due to mistake of a United States inspector in quarantining cattle on arrival of the shipment, in the absence of fraud or collusion on the company's part.

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

STATEMENT OF FACTS.

On July 7, 1918, appellees delivered at the railroad station at Booneville, Arkansas, forty-one head of cattle consigned to the National Live Stock Commission Company at Kansas City, Mo. Appellees received a through bill of lading, and the shipment was routed over the lines of the Chicago, Rock Island & Pacific Ry. Co. to Howe, Okla., and from there over the line of the Kansas City Southern Ry. Co. to Kansas City, Mo. When they reached their destination the live stock inspector for the Bureau of Animal Industry ordered the car unloaded in quarantine pens because one of the cows had fever ticks on her. This affected the price of the cattle, and appellees had to sell them at a loss. They brought this suit against the appellant to recover damages.

Appellees were witnesses for themselves. According to their testimony, they were engaged in the live stock business near Booneville, Ark., and on July 7, 1918, they delivered to the railroad company, at its station, forty-one head of cattle to be shipped to Kansas City, Mo., and received a through bill of lading therefor. The animals had been thoroughly dipped as required by the regulations of the United States Government and were free from ticks. Appellees in all respects complied with the regulations for dipping cattle and examined them and saw that they were free from ticks at the time they were delivered to the railroad company for shipment.

Logan County, Ark., had been pronounced clean territory and free from ticks, by the government authorities, although a few cattle ticks would be discovered in that territory from time to time. Because the United States inspector claimed to have discovered a cattle tick on one of the cows shipped, he required the shipment of

cattle to be placed in quarantine and on that account appellees received less for the cattle than they would have received had the cattle been unloaded in pens used for receiving clean cattle, or cattle free from ticks.

Joseph Burns, was a witness for appellant. In July, 1918, he was live stock inspector for the Bureau of Animal Industry in the employment of the United States and was stationed at Kansas City, Mo. He was known as a lay inspector and his duties were to inspect cattle, hogs and sheep when they were unloaded at the chutes by the railroad company. He had a civil service appointment under the United States Government and had been engaged in this work for nearly six years. He had received training for the work under a veterinary specialist. He inspected the car of cattle in question before allowing the cattle to be unloaded at the chutes and found live Texas fever ticks on one cow. The cattle had been shipped as clean cattle, but he required them to be unloaded in the quarantine pens on account of discovering the ticks on the cow. If the cattle had been clean cattle or free from ticks, Burns would not have required them to be unloaded in quarantine pens.

E. J. Carey, a veterinary inspector under the United States Bureau of Animal Industry, had supervision over the Kansas City Stock Yards in July, 1918, and had been engaged in work of that character for twenty years. During all of this time he had been an employee of the United States in this kind of work. George Burns was an inspector under him at Kansas City, Mo., in July, 1918. About the 7th or 8th of July, 1918, Burns brought the witness a tick which he reported he had gotten off of a cow in the shipment of cattle involved in this lawsuit. Carey placed the tick in a bottle and had it present at the trial. The tick could not have gotten on the cow between the 6th of July, 1918, and the time it was taken off on the 9th day of July, 1918. The reason is because the Texas fever tick has to go through stages of development on the animal. It does not develop on the ground when it is hatched. After it gets on an animal it takes two weeks to

develop to the size of the tick referred to. A tick goes through two molts. The seed tick gets on the animal and it takes fifteen days to get through its first molt. In other words, it sheds its skin and it takes from five to eight days to go through its second molt. After it has matured on one cow, it can not become detached and attach itself to another animal. The reason is that when the Texas fever tick becomes attached to an animal it can not come off of the animal until it reaches maturity and is gorged with blood so that it lets loose of its own accord. The tick in question had been at least two weeks on the animal upon which it was found.

Other expert witnesses corroborated the testimony of Dr. Carey in respect to the development of the Texas cattle tick.

The jury returned a verdict for appellees and to reverse the judgment rendered, appellant has duly prosecuted this appeal.

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

1. A verdict should have been directed for appellant under the undisputed evidence.

2. The undisputed evidence shows that an adult cattle tick could not have gotten on one of the cows between the date of the shipment and the date of the arrival of the cattle, only three days en route. The court erred in giving instruction No. 1 for appellees and in refusing No. 2 for appellant. 75 Atl. 352; 26 L. R. A. (N. S.) 712; 57 Ark. 402.

3. No evidence of negligence on the part of the carrier was shown, but the evidence shows due care and absence of negligence and no liability whatever. 112 Ark. 298-300. The question of negligence should at least have been submitted to the jury as requested by appellant.

Evans & Evans, for appellees.

1. This court will take judicial knowledge of the rules and regulations of the United States Secretary of Agriculture and Bureau of Animal Industry. Sapps' Federal Rules and Reg., pp. 19-20.

The court properly refused to direct a verdict for appellant. If Carey and Driver are experts, their testimony can not have any more force than the testimony of any other expert opinion witness. 50 Ark. 511. The jury are not bound to accept the conclusion of experts. The testimony of scientific witnesses is not always reliable, and at last the jury are the judges of the facts. There was no basis for the testimony of the experts, Carey or Driver. Under the law and evidence there was no error in refusing to direct a verdict against plaintiff. 105 Ark. 526.

2. The verdict is supported by a clear preponderance of the testimony. 119 Ark. 6. A verdict is final on review or appeal. 89 Ark. 111; 110 *Id.* 632; 1 Crawford's Digest, 297.

3. There is no error in the instructions; they state the law. 110 Ark. 269; 139 *Id.* 143; 100 *Id.* 269; 81 *Id.* 469; 112 *Id.* 298.

HART, J. (after stating the facts). Under the act of Congress regulating the shipment of live stock from one State to another, the Secretary of Agriculture is authorized to establish rules and regulations concerning the exportation and transportation of live stock from one State to another where he may have reason to believe certain contagious diseases exist.

Pursuant to this authority the United States Bureau of Animal Industry appointed an inspector with supervision over the Kansas City Stock Yards at Kansas City, Mo. His duties required him to inspect all cattle from southern points before they were unloaded and to place cattle which were clean and free from ticks in certain pens and those infected with fever ticks in other pens. Such laws are valid. *K. C. S. Ry. Co.* v. *State,* 90 Ark. 343, and *Reid* v. *Colorado,* 187 U. S. 137.

Pursuant to the authority conferred by the act of Congress, the shipment of cattle in question was inspected when it arrived at Kansas City. Burns testified that he found a Texas fever tick on one of the cows and on that

account had the cattle unloaded in quarantine. On this account appellees sold the cattle at a loss. Hence this lawsuit.

Counsel contend that a verdict should have been directed in appellant's favor under the undisputed evidence. Of course, if the undisputed evidence showed that a cattle tick was found on one of the cows and did not get on the cow en route, appellant would not be liable because the cattle were placed in quarantine pursuant to an act of Congress.

In the first place, it is contended by counsel for appellant that the undisputed evidence shows that a cattle tick was found on one of the cows upon the arrival of the consignment at the chutes. They point to the fact that the United States inspector testified to that fact, that he is a disinterested witness, and that there is nothing in his testimony which tends to contradict him. This is true, but that does not make his testimony uncontradicted. The cattle were shipped from clean territory and were billed as clean cattle. Appellees testified that they had dipped the cattle strictly according to regulations before they were shipped; that they examined them carefully at the time of shipment, and that they were free from ticks. This testimony tends to contradict the testimony of Burns, the United States inspector. *Mo. Pac. Rd. Co.* v. *Block,* 142 Ark. 127.

Again it is contended by counsel for appellant that the judgment must be reversed because the undisputed evidence shows that an adult cattle tick could not have gotten on one of the cows between the date of shipment and the date of the arrival of the cattle at Kansas City, Mo. The cattle were only three days en route.

In this contention we think they are correct. In *St. Louis S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, the court held that appellate courts will take notice of the unquestioned laws of nature, of mathematics and the like. In the application of that rule to the facts of the present case, the court will take notice of the unquestioned laws of science. Dr. Carey testified, without objection, that

the inspector delivered to him an adult cattle tick which he had taken from one of the cows of appellees at the stock yards before he allowed the car of cattle to be unloaded. So it may be taken as established that an adult cattle tick was found on the shipment of cattle in question by the United States inspector. The expert witnesses testified that it would take two weeks for the tick to have developed. They point out that the tick only develops while on the animal. Thus it will be seen that it is a scientific fact that it takes two weeks for an adult cattle tick to be developed and that the development must take place on the animal. Therefore, the undisputed evidence shows that if an adult cattle tick was found upon the animal by the inspector, it could not have gotten on the animal en route.

Counsel for appellees insist that the laws of science sometimes change. It is sufficient answer to this to say that in this respect the law has not yet been questioned and is a scientific fact. The expert witnesses all agree that it is impossible as a scientific fact for a seed tick to develop into an adult tick in less than two weeks and that the molting process must take place on the animal. Therefore, the undisputed evidence shows that, if the tick was on the animal, it was there before the cattle were delivered to the railroad company for shipment, and the railroad company was not guilty of any negligence in the premises while the cattle were in its possession for shipment and delivery to the consignee. Liability then could only be predicated on the theory that the cattle were free from ticks when they were received for shipment. As we have already seen, the testimony of the United States inspector to the effect that he found a cattle tick on one of the cows at the unloading of the chute in Kansas City is not undisputed, but it does not follow that the railroad company would be liable on that account. While the testimony in this respect is not undisputed, still there is nothing to show that the railroad company acted in collusion with him in the premises. In the absence of such a showing, the railroad company would not be liable.

The railroad company was bound by the rules and regulations promulgated by the Secretary of Agriculture, and it could not be held liable in damages for a mistake of one of the inspectors of the United States in the absence of fraud and collusion on the part of the railroad company.

There is nothing in the record tending in the remotest degree to establish this charge. Indeed the evidence shows the utmost good faith on the part of the railroad company.

It follows that the judgment must be reversed and the cause remanded for a new trial.

UPTON v. WIMBROW.

Opinion delivered May 2, 1921.

TRESPASS—TREBLE DAMAGES.—Under Crawford & Moses' Digest, § 10320, providing for treble damages for cutting timber on another's land and § 10322, providing that if defendant had probable cause to believe that the land was his own, only single damages should be recovered, *held* that where defendant in good faith accepted a previous survey as marking the true line, not knowing that there was an error in the survey, treble damages were not recoverable for cutting timber up to such line.

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

STATEMENT OF FACTS.

Frank Upton sued John Wimbrow in the circuit court in an action of trespass to recover damages for cutting and removing a quantity of trees from his land.

The action was based upon sections 10320-10322 of Crawford & Moses' Digest. Wimbrow cut from Upton's land a number of hickory trees, amounting in the aggregate to 76,652 feet, of the value of $613.21, and converted the same to his own use.

According to the testimony of Upton, his boundary line was plainly marked by blazes cut on the trees, and it was easy to ascertain where his boundary line was. Other evidence was adduced by him tending to show that

his boundary line was plainly marked, and that it was easy to see the blazes on the trees marking it.

According to the testimony of Wimbrow, he is engaged in the sawmill business and had been cutting timber for the Pinepole and Shaft Company for four years. That company would furnish him stumpage, and he would sell it the lumber cut by his mill. He bought some timber from that company in Sevier County, Ark., and directed his cutters not to cut over the line shown them. Before Wimbrow purchased the timber, the Pinepole and Shaft Company had had the land on which it stood surveyed and the boundary line marked by Tom Cash. Wimbrow told his timber cutters to follow the line established by Tom Cash which was plainly marked on the trees by blazes made by him. Wimbrow did not know that the timber in question was owned by Upton or claimed by him until after he had cut and removed it from the land. He did not go upon the land himself and did not notice the old blazes which marked Upton's boundary line.

Tom Cash was also a witness for Wimbrow. According to his testimony, while he was not a regular surveyor and timber estimator, he did nearly all of that work for the Pinepole and Shaft Company. That company sent him to survey its land situated next to Upton's land. He made the survey and marked the boundary line of the company by hacking, or blazing the trees. After he made the survey and established the line of the company, it sold the timber to Wimbrow. Subsequently it was ascertained that Wimbrow had cut and removed trees from Upton's land. None of the trees cut and removed by Wimbrow, however, were beyond the line established by Cash. After it was ascertained that Wimbrow had cut and removed trees from Upton's land, Cash went back and further examined the land and found that he had made a mistake in establishing the boundary line. There was a jog or a fractional part of a section next to the land surveyed by him, and this caused him to make the mistake. Cash did not notice the old blazes on the trees

which had been formerly put there to establish Upton's boundary line.

Evidence was introduced in rebuttal by Upton tending to show that a good surveyor could have easily discovered the jog next to the company's land and need not have made any mistake in establishing the boundary line.

The jury returned a verdict for Upton in the sum of $613.21, and from the judgment rendered, Upton has appealed.

E. K. Edwards and *B. E. Isbell,* for appellant.

The court erred in not allowing plaintiff treble damages for the trespass. The instructions, 2, 3 and 4, asked by plaintiff and refused are in the language of the statute as construed by this court and embody the law, and it was error to refuse them. C. & M. Digest, §§ 320-2; 96 Ark. 87; 116 *Id.* 207. The lines of the land were clearly blazed, and the fence put Wimbrow on notice of the line, which he could not disregard, and he is liable. 130 Ark. 550; 132 *Id.* 474. A man can not be deprived of his property without his consent or by due operation of law. 65 Ark. 451. See, also, 96 Ark. 87.

Treble damages were recoverable. 116 Ark. 207; 105 *Id.* 157.

The holding of the court that the evidence for treble damages is clearly erroneous.

Lake & Lake, for appellee.

The court properly refused to submit the question of treble damages to the jury. This is fully sustained by the evidence. 73 Ark. 464; 31 *Id.* 286; 101 *Id.* 36.

The measure of damages for the conversion of timber is its value at the time and place of conversion if the cutting is done in good faith, but if in bad faith the enhanced value of the timber may be recovered. 117 Ark. 127. It is not true that if appellee, having admitted the cutting, the burden of proving probable cause for believing he had authority to cut and carry away the timber, was on appellee. 101 Ark. 36; 96 *Id.* 47.

The evidence does not support a verdict for any penalty.

HART, J. (after stating the facts). It is the contention of the plaintiff, Upton, that the court erred in not allowing him treble damages for the trespass. The plaintiff relies on section 10320 of Crawford & Moses' Digest, which provides, in substance, that if any person shall cut down or remove any timber growing on the land of another, every person so trespassing shall pay the party injured treble its value.

Section 10322 of Crawford & Moses' Digest provides that if, on the trial of any action brought under the provisions of the act, it shall appear that the defendant had probable cause to believe that the land on which the trespass is alleged to have been committed is his own, the plaintiff shall recover single damages only.

In construing a statute in all essential respects similar to our own, and in which it was provided that if it should appear that the defendant had probable cause to believe that the land on which the trespass was committed was his own, the plaintiff should recover single damages only, the Supreme Court of Michigan held that the right of the plaintiff to recover treble damages would depend upon the good faith of the defendant. *Wallace* v. *Finch*, 24 Mich. 255. Mr. Justice Graves, who delivered the opinion of the court, in discussing the statute said that no element of wilfulness could avail the defendant from legal liability for single damages under the statute. Continuing the learned justice said:

"The question of treble damages, however, stands on a different principle altogether. When this law gives single damages, it has a single object, and that is to redress the injured party. But when the damages are to be trebled, the object is two-fold, namely: to redress the injury done, and also to punish the wrong-doer. No other explanation of these provisions is possible, and, according to well settled rules, when a law is susceptible of penal applications in special cases, such applications of

it ought to be closely confined to cases within its principle. Now, when we come to interpret this statute, we must either hold that the Legislature meant that any person, however blameless in a moral point of view, who should be within the inculpatory words of the first section, and not within the exact words of the saving provisions of the second section, should be punished; or, on the contrary, that the Legislature meant that the penal application should be made only in cases marked by wantonness, wilfulness or evil design. And it is hardly admissible to impute the former purpose to the Legislature.

"Indeed, the nature of the limitations contained in the second section indicates very clearly that no such purpose was contemplated. Those limitations all point to the exclusion of the penal application where the trespass is not aggravated by bad faith or other positive blame, and they amount to a legislative intimation that the penal provisions were not intended to apply where punishment beyond redress for injury would be inapt, impolitic and unjust."

In *Barnes* v. *Jones,* 51 Cal. 303, it was held that the lower court erred in trebling the damages, and the court held that, while the statute in that State did not so state, in express terms, it was clear that it was not intended to apply to cases in which the trespass was committed through an innocent mistake as to the boundary of a tract of land claimed by the defendant.

In *Batchelder* v. *Kelly,* 10 N. H. 436, 34 Am. Dec. 174, the court said that to subject a party to the penalty prescribed by statute it must appear that the act was done knowingly and wilfully and not through mistake or accident.

In *Perkins* v. *Hackleman,* 26 Miss. 41, 59 Am. Dec. 243, the court held that a party supposing himself to be cutting timber on his own land, but by mistake cutting on another's land, is liable for acutal damages only. In construing such a statute in the case of *Whitecraft* v. *Vandever,* 12 Ill. 235, the court said:

"The object of the statute is to furnish an additional remedy to the owner of the land, and also to punish the wrong-doer.

"To subject a party to such punishment, he must have committed the wrong knowingly and wilfully, or under such circumstances as show him guilty of criminal negligence. It could never have been the intention of the Legislature to impose a penalty upon a person, who, supposing in good faith that he was cutting upon his own land after having taken reasonable pains to ascertain its boundaries, should, inadvertently and by mistake, cut trees upon the land of another."

In *Russell* v. *Irby,* 13 Ala. 131, the court said that the general tenor of the statute was such as wholly to preclude the idea that it was designed to apply to unintentional trespasses. These decisions construing similar statutes in other States are in accord with the decision of this court in *Fogel* v. *Butler,* 96 Ark. 87.

There is nothing in the record in the present case tending to show that the defendant cut the timber knowing that he had no authority to do so, or without having probable cause to believe it to be his own. He cautioned his timber cutters not to go beyond the line established by Tom Cash, which he believed to be his boundary line. Cash had been employed by the Pinepole and Shaft Company to establish the line before that company sold the timber to Wimbrow. There is nothing in the record tending to show that Wimbrow had any reason to believe that Cash was negligent in making the survey. He made the survey before Wimbrow purchased the timber, and for the very purpose of establishing the boundary line. There is nothing tending to show that Wimbrow knew that Cash had been guilty of negligence in making the survey, or that he had anything to do with making it. He simply took the line shown him as the true boundary, and there is nothing in the record tending to impeach his good faith in the matter.

The court properly allowed the plaintiff to recover only single damages under the facts disclosed by the

record. The undisputed facts show that the defendant had probable cause to believe that the land on which the timber in question was cut was his own.

Therefore it is unnecessary to consider or discuss the instructions given or asked on the question of treble damages.

It follows that the judgment must be affirmed.

DeLoach v. Ozark Mutual Life Insurance Company.

Opinion delivered May 2, 1921.

1. INSURANCE — BENEFIT INSURANCE — MISSTATEMENT AS TO AGE.— Where the by-laws of a benfit insurance company prohibited admitting a member above 60 years of age, the company is not bound by a certificate of insurance issued to a member over that age whose application contained a false statement as to his age, whether the false statement be held a representation or a warranty.
2. INSURANCE—MISSTATEMENT AS TO AGE—RECOVERY OF PREMIUMS.— Where a benefit certificate was not binding on the insurer by reason of a false statement that the insured was within the insurable age, the premiums paid may be recovered where the misstatement as to insured's age was not made wilfully or fraudulently.

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

Norwood & Alley, for appellant.

1. The certificates do not contain any forfeiture clause, and the language of the applications and certificates do not amount to a warranty that will render the certificates void because of an honest mistake as to the age of the insured. An insurance policy is construed most strongly against the insurer. 134 Ark. 245; 80 *Id.* 49; 134 *Id.* 245; 113 *Id.* 174; 86 *Id.* 115.

2. Forfeitures are not favored, and if the contract does not specifically and definitely provide for such forfeiture the court will not read a forfeiture into the contract. 89 Ark. 479; 89 Md. 624.

3. The certificates were valid, although the assured was older than the maximum age limit fixed by the laws of the appellee association. 134 Ark. 245; 105 *Id.* 143. The certificate will prevail in the absence of proof that the certificate is in conflict with the charter or articles of association. 105 Ark. 143. Certificates can not be treated as valid for one purpose of collecting assessments and invalid to escape liability. 74 Ark. 190; 70 Ia. 455; 120 Ill. 121. A party can not ratify and repudiate the same transaction. 47 Ark. 301. The certificates were not declared void on account of any fraud but because the insured was over the age limit as declared by the by-laws, and appellee should have returned at least the premiums paid. 3 L. R. A. (N. S.) 114. See, also, 32 *Id.* 298; 88 N. E. Rep. 97. The certificates were not void and appellee is liable.

Minor Pipkin, for appellee.

The certificates were void, and there can be no recovery because of a breach of the warranty. 14 R. C. L., § 207; 63 N. Y. 404; 31 Me. 219; 58 Ark. 526. They are void for false representations of material matters. Elliott's Law of Ins., § 37; 126 Mass. 316. They were void because applicant was not eligible to membership. 39 Minn. 303; 92 Wis. 577; 47 L. R. A. 681. When a policy is void by reason of breach of warranty, the premiums paid can not be recovered back. Dalo 98; Poe 634; 10 Ill. App. 431, 441.

SMITH, J. Appellant DeLoach made application for two certificates of membership in the Ozark Mutual Life Association, hereinafter referred to as the company, on the life of his mother. The certificates were issued, and the insured died April 19, 1919. The proof of death thereafter made disclosed the fact that Mrs. DeLoach was past sixty years of age at the time of the issuance of the certificate, and that information thus acquired was the first knowledge the company had that the insured's true age had not been correctly stated in the applications.

The applications for the certificates contained the following recitals: "To make certificate valid the questions in the application must be answered correctly."

And further: "I hereby make application to the Ozark Mutual Life Association for membership in the same, and in doing so certify that the following statements are made and questions answered correctly as a basis for obtaining same: Name, Telithy Emily DeLoach, age 60."

Another clause in the application is to the effect that "It is hereby understood and agreed that this application, upon its acceptance, is a part of the contract and warranty by the member, and that no agent or other person has any authority to waive or dispense true and correct answers in writing hereon to any of the questions above set forth."

At the time the applications for the certificates were executed there was in force a by-law of the company as follows: "This organization, being founded purely upon a mutual basis and being governed in a representative manner, those eligible for membership shall be of the white or Caucasian race, between the ages of ten and sixty years, inclusive, counting from the nearest birthday."

All the statements herein recited appear in the agreed statement of facts upon which the case was tried before the court without a jury, and it was therein stipulated that DeLoach did not knowingly or wilfully misrepresent his mother's age when the applications were made.

The court rendered judgment in favor of the company on the certificates, but gave judgment against the company for the amount of the premiums paid, and both DeLoach and the company have appealed.

We think the judgment of the court below should be affirmed in its entirety.

The company had the right to rely on the statement that the party proposed for insurance was of an insurable age, and it had no knowledge to the contrary until

the proofs of death were made. In this respect the case differs from that of *Mutual Aid Union* v. *Blacknall,* 129 Ark. 450 (same case, first appeal, 123 Ark. 377), in which case the applicant for the insurance gave his correct age, but the agent of the insurance company, instead of writing into the application the age as given to him, wrote down an age which was within the limit prescribed by the company beyond which it did not accept applications. We there held that, in the absence of collusion between the applicant and the agent, the company would be charged with the knowledge thus acquired by its agent and would be held to have waived the inhibition contained in the policy against insuring a person of the applicant's true age.

Appellant DeLoach cites and relies on the case of *Lincoln Reserve Life Ins. Co.* v. *Smith,* 134 Ark. 245. But that case does not control here. In that case the jury might have found that the insured was fifty-three years of age, as stated in his application, or that he was fifty-nine years of age, as the proof on the part of the company tended to show. The policy in that case contained the following provision in regard to age: "4. Age. If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age, provided, the age at the time insured is not over sixty years." It was not shown or contended in that case that the insured was past sixty. It was shown, however, that the company had an age limit of fifty-five years on a policy of the kind there sued on, and that the company prescribed no rate of premiums on policies of that kind on persons over fifty-five years of age.

The contention of the company in that case was that, if there was a misstatement of age, and the age of the applicant exceeded the maximum limit on such policies, there could be no recovery, for the reason that the premium paid by the insured would not have purchased insurance in any sum according to the insured's correct age. On behalf of the plaintiff, the owner of the policy

by assignment, it was contended that a recovery of the full amount of the policy was allowed, notwithstanding the misstatement of the age, for the reason that the company did not show that a policy for a similar sum was purchasable according to the limited payment plan—the plan on which the policy was issued. We sustained the contention of the plaintiff and assigned as our reason therefor that the effect of the clause in regard to the age, set out above, was to provide for a lessening of the amount provided the age of the insured was not over sixty years, and that it devolved upon the company, in order to obtain any advantage under this clause, to show that there was a purchasable policy according to the plan adopted at the true age of the insured. In other words, that there was a liability for the amount named in the face of the policy unless it could be lessened so as to be reduced to such an amount of insurance as the premium paid "would have purchased at the correct age," and that unless that premium would have purchased a policy for a less sum the liability for the full amount continued.

But we have here no such clause to construe. On the contrary, the applicable clause requires the applicant to be under sixty to be eligible to membership.

The parties litigant debate the question whether the statement in regard to the age of the insured was a representation or a warranty. But we pretermit a decision of that question, as we think the law governing the facts herein recited is correctly stated in Joyce on Insurance, vol. 3 (2 ed.), page 3258. It is there said: "And if the by-laws of a benefit insurance company prohibit it from receiving a member above a certain age, the society is not bound by a certificate of insurance issued to a member over that age, whose application contained a false statement as to his age. So a misstatement as to age, where insured was over the insurable age of admission to a society, will constitute a defense, irrespective of the question whether such false statement be held a representation or warranty."

The case of *Pirrung* v. *Supreme Council of Catholic Mut. Ben. Assn.,* 93 N. Y. Supp. 575, fully supports the text just quoted. There McLennan, P. J., speaking for the Supreme Court of New York, Appellate Division, said: "We think under such circumstances (that is, that the company had, by no act of its own, induced one to become a member who was not eligible) it must be held as a matter of law that if John Pirrung was in fact over fifty years of age at the time he made his application and was initiated into the defendant association he was ineligible, and that the defendant, not being aware of the fact, did not become liable on account of the certificate of membership issued to him; and that this is so entirely independent of whether or not his statement as to his age be regarded as a warranty or as a representation only. *Meehan* v. *Supreme Council,* 95 App. Div. 142, 88 N. Y. Supp. 821.

See, also, 1 Bacon on Life & Accident Ins., section 278; *Sweet* v. *Citizens Mutual Relief Society,* 7 Atl. 394; *Waltz* v. *Workmen's etc., Benefit Fund,* 139 N. Y. Supp. 1016; *Marcoux* v. *Society of St. John,* 39 Atl. 1027.

The return of the premiums was properly ordered. There was no actual fraud here. There was a misstatement of the age of the person proposed for insurance which induced the issuance of the certificates of insurance; but this was not wilfully or fraudulently done.

The case of *Taylor* v. *Grand Lodge A. O. U. W.,* 105 N. W. 408, 3 L. R. A. (N. S.) 114, is a well considered case which reviews the authorities on this subject, and announces the law to be that a recovery can not be had where the certificate was obtained by actual fraud, that is, where there was a wilful purpose to deceive on the part of the insured or the applicant; but that premiums may be recovered in all other cases.

Judgment affirmed.

McCULLOCH, C. J., (dissenting). The majority pretermit a decision of the question as to whether or not the statement with reference to the age of the assured con-

stituted a warranty, and I will content myself with merely saying that under the terms of the policy the statement was not, in my judgment, a warranty. Nor was it a false representation for, according to the undisputed evidence, the mistake as to the age of the assured was an innocent one and free from any intention to misstate the facts. Nor does the policy, in terms, make the correct statement of the age of the assured a condition precedent, so as to avoid the contract.

One of the by-laws of the association prescribes the restriction as to the age, but it does not provide that a policy shall be void if the age of the assured is above the limit. Therefore, the decision of the case comes down, I think, to the question whether or not the contract is *ultra vires.*

Now a rule of law of very general application, sustained by the great weight of authority, is that, if a corporation enters into a contract not immoral in itself and not forbidden by any statute and which has been in good faith performed by the other party, the plea of *ultra vires* by a corporation will not be sustained in order to defeat recovery under a contract. That rule has been adopted by this court. *Minneapolis F. & M. Mut. Ins. Co.* v. *Norman,* 74 Ark. 190.

The rule is applicable to the present case, and results in establishing appellant's right to recover, since there was no breach of warranty, no false representations and no unperformed condition precedent. No statute forbids such a contract, and it is not one of immoral nature. Appellees has enjoyed the benefits of the contract by receiving the premiums paid, and ought not be permitted to escape liability on the ground that the contract is beyond the powers prescribed under its by-laws. It is unimportant that the premiums were received by the company without knowledge that the age of the assured was not within the limit prescribed in the by-laws, for, since there was no breach of warranty and no false representation to defeat the contract, the parties must be

deemed to have contracted with reference to the life of the particular individual mentioned, and the fact that there was a mutual mistake with respect to the age of the assured does not render the contract unenforceable. This does not result from an application of the doctrine of estoppel, but from the principle that when a corporation has received all the benefits of an executed contract which is not forbidden either in law or in good morals, it should be be compelled to perform its part of the contract even though contrary to its own by-laws. Knowledge on the part of the corporation of the fact that there has been a departure from the by-laws is not essential to liability, if the corporation has received all of the benefits of performance by the other party and there has been no breach of warranty nor false representation.

It seems to me that the decision in this case is in conflict with our decision in *Mutual Aid Union* v. *Blacknall,* 129 Ark. 450. In that case there was found to be a waiver of the misstatement of age by reason of the knowledge of it being brought home to the company through its agent. But if, as the court below now decides, the contract was one beyond the power of the company to execute, we ought to have decided in that case that the contract was void on that account.

My conclusion is that, according to the undisputed evidence, appellant is entitled to recover the full amount of the policy.

BLUMENSTIEL v. STATE.

Opinion delivered May 2, 1921.

1. CRIMINAL LAW—MAINTAINING NUISANCE—EVIDENCE.—On a trial for maintaining a common nuisance, namely a resort where betting on horse races was permitted and encouraged, evidence of bets placed more than one year before the finding of the indictment was properly admitted when properly limited to the question of the connection of the parties with the subsequent occurrences in the same building.

2. GAMING—MAINTAINING NUISANCE—STATUTES.—Persons maintaining a common nuisance in a resort where betting on horse races is permitted and encouraged may be prosecuted under Crawford & Moses' Digest, §§ 1432, 1433, relating to common-law crimes and misdemeanors, though they might also be punished under §§ 2632 and 2669, making it a misdemeanor to bet on a horse race or to operate a gambling house.

3. CRIMINAL LAW—PUNISHMENT.—Under Crawford & Mosses' Digest, § 1433, providing that where the punishment for crimes and misdemeanors is not provided for by the statute, the punishment "shall only be fine and imprisoment," both fine and imprisonment are not required, and an instruction authorizing either mode of punishment or both should have been given, instead of an instruction directing that both modes of punishment be used.

4. WITNESS—COMPELLING ACCUSED TO TESTIFY.—Under Constitution, art. 2, § 8, providing that no person shall be compelled in a criminal case to be a witness against himself, a defendant tried jointly with others can not be required to testify, though the jury is admonished that his testimony can not be considered against him; Crawford & Moses' Digest, § 3122, providing that where two or more persons are jointly or otherwise concerned in the commission of any crime either may be sworn as a witness, but that his testimony shall not be used against him, not being applicable to joint trials.

5. CRIMINAL LAW—PROOF OF FORMER TESTIMONY—HEARSAY.—On a trial of a charge of maintaining a common nuisance where betting on horse races was permitted and encouraged, the testimony of a witness as to testimony given on the trial of a third person for betting on horse races was hearsay.

6. GAMING—NUISANCE—KNOWLEDGE OF DEFENDANT.—On a trial for maintaining a common nuisance where betting on horse races was permitted and encouraged, it was competent to show that persons had been convicted for operating a pool room in defendant's cigar store, as tending to charge the owners of the business, who were in the building with more or less frequency, with knowledge of the use which was being made of their place of business.

7. GAMING—COMMON NUISANCE—INDICTMENT.—Under an indictment charging the maintenance of a common nuisance for the purpose of permitting and encouraging divers idle and ill-disposed persons to resort thereto for the purpose of betting on horse races, etc., the allegation that the frequenters of the place were "idle and ill-disposed persons" was surplusage, and no other inquiry into their character was required than whether they assembled there from time to time to bet on horse races.

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

A. J. Murphy and *Geo. P. Whittington,* for appellants.

1. If appellants are guilty, they are either guilty of the statutory misdemeanor of betting on a horse race, forbidden under C. & M. Digest, §§ 2669-70, or they are guilty of the statutory felony of operating a gambling house, under C. & M. Digest, § 2632. The whole subject-matter of the charges is covered by these sections, § 2669 covering every form of betting on horse races and § 2632 covering every form of operating a gambling house, so if appellants are guilty at all they should be prosecuted under these sections and not for maintaining a common-law nuisance, as that offense was merged into the statutes and there is no rule for the infliction of the penalties prescribed by § 1433 of C. & M. Digest and the facts stated in the indictment do not constitute a public offense. 13 Ark. 700. The case, *State* v. *Vaughan,* 81 Ark. 117, is not an authority against us, because when that opinion was rendered it was not a violation of law to bet on horse races, and there was no statutory penalty for operating a place for betting on horse races. The penalties sought to be imposed here are those prescribed in C. & M. Digest, § 1433. Under this section it was error to fine and imprison appellants under the common-law statute, as all phases of such crime are now punishable under statutory provisions.

2. It was error to permit defendants Blumenstiel and Wolf to testify over the objections of defendants. C. & M. Digest, § 3062. See, also, *Ib.,* § 3123.

3. There are other errors in admitting testimony, and the court erred in its instructions. 32 Ark. 124; 71 *Id.* 144.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. Under the undisputed testimony, appellants were guilty, under C. & M. Digest, § 2670, also under § 2632

Id. and § 2669. See 98 Ark. 437; 55 *Id.* 10; 98 *Id.* 440; Bishop on Cr. Law, § 1135; 29 Cyc. 1183. Betting on horse races and operating a place where such bets are made, are common-law nuisances at least and punishable under our common-law statute. 20 R. C. L. 404-5; 81 Ark. 122; 48 *Id.* 60; 2 Wharton, Cr. Law, § 1465.

Under the undisputed testimony, the manner in which appellants carried on this unlawful business was a nuisance within itself. 35 S. W. 553; 98 Ky. 574; 79 Ky. 618; 13 S. W. 236; 88 Tenn. 566; 40 N. E. 432.

It was a nuisance, *per se.* 1 Hawk 733.

2. The testimony offered and objected to was admissible as competent. 131 Ark. 450; 18 A. & E. Ann. Cas. 850-1; 97 S. W. 92; 45 Md. 33; 108 N. W. 6; 135 Ark. 163. The testimony was competent. 131 Ark. 445; 130 *Id.* 48. See, also, C. & M. Digest, § 3124. A nuisance *per se* is clearly charged and proved. 945 S. W. 847; 3 Words & Phr. (N. S.) 661. It was a nuisance at common-law. 10 L. R. A. (N. S.) 995; 218 Am. St. Rep. 269.

SMITH, J. This appeal is docketed and briefed here under the style of *Blumensteil et al.* v. *State,* for the reason that it bore that style in the court below, where Blumensteil, Wolf, Davis and Zoll were jointly tried and all convicted; but only Wolf and Davis have appealed.

The indictment charges the maintenance of a common nuisance "in a certain building on Central Avenue in the city of Hot Springs, Arkansas, known as the Blumensteil & Wolf Cigar Store, for the purpose of permitting and encouraging divers idle and ill-disposed persons to resort thereto for the purpose of betting on various horse races run outside of the State of Arkansas, and at divers times permit and encourage various idle and ill-disposed persons to resort thereto and bet money on horse races run outside of the State of Arkansas, and did thereby promote and encourage immorality, idleness and lawlessness, to the great injury and damage to the public morals and a common nuisance to the county of Garland, against the peace and dignity of the State of Arkansas."

The defendants were jointly tried, and at the trial Blumensteil and Wolf were called by the State as witnesses, and over the objection of the defendants were required to testify. In overruling this objection the court stated that he would instruct the jury that the testimony of Blumensteil could not be considered against him, and the testimony of Wolf could not be considered against him, and the jury was so instructed.

Over the objection of the defendants, witnesses were permitted to testify to bets on races placed with a man in charge of the rear end or back room of the cigar store, where such bets were accepted. But in admitting the testimony the court stated that a conviction could not be had on what occurred more than a year prior to the finding of the indictment, but that such testimony was admissible on the question of the connection of the parties with the subsequent occurrences in the building. We think the testimony as thus limited was competent for the purpose for which it was admitted.

There was testimony that within a year of the indictment bets were received, and that on one occasion the city commissioner, with the police, raided the place and found a large crowd of people there, who ran in every direction out of the front and the rear of the building, and when the crowd had dispersed, tickets were found scattered about the place which were used in betting on the horses, and posted on the wall of the room was a card showing the odds which were being offered on the different horses.

The police judge was permitted to testify about the conviction of a man named Powers, which had been secured in his court by the authorities, for betting on horse races, and in giving this testimony he was allowed to state that "the evidence tended to show that he (Powers) was seen around there on several occasions, and was making a book up there." It is argued, however, that a proper exception was not saved to this testimony.

Appellants requested the court to give an instruction numbered 5, reading as follows:

"If you find the defendants guilty, you will assess their punishment at a fine of not exceeding one hundred dollars or imprisonment not exceeding three months, or by both such fine and imprisonment."

This instruction was refused, and the jury was instructed that "the punishment provided by law for the offense charged is a fine not exceeding one hundred dollars and imprisonment not exceeding three months—that means anything up to one hundred dollars, and imprisonment for any time not exceeding three months."

This instruction numbered 5 was asked by appellants after the court had refused to declare that sections 1432 and 1433, Crawford & Moses' Digest, did not apply to the case made.

No attempt was made to show that any particular frequenter of the place was an idle or an ill-disposed person. On the contrary, appellants offered affirmative testimony that certain persons who were shown to have been in the room when bets were being received were not idle or ill-disposed persons; but this testimony was excluded by the court for the reason that the allegation of the indictment in that respect was an immaterial one; and an exception was saved to that ruling.

The verdict of the jury fixed the punishment of Wolf and Davis at a fine of one hundred dollars and imprisonment in the county jail for sixty days each; and from the judgment in accordance therewith is this appeal.

It is first insisted for the reversal of the judgment of conviction that sections 1432 and 1433, Crawford & Moses' Digest, do not apply. The insistence is that if appellants are guilty at all they should have been punished pursuant to section 2669, Crawford & Moses' Digest, or under section 2632, Crawford & Moses' Digest. Section 2669 makes it a misdemeanor to bet money or anything of value on any horse race, whether run in or out of this State. Section 2632 makes it a felony to operate a gambling house. It may be that appellants might have been convicted under either of these statutes;

but that fact is unimportant here, if they were also guilty under sections 1432 and 1433.

By section 1432 it is enacted that "The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defect of the common law, made prior to the fourth year of James the First (that are applicable to our form of government), of a general nature and not local to that Kingdom, and not inconsistent with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in this State unless altered or repealed by the General Assembly of this State."

Section 1433 is as follows: "In cases of crimes and misdemeanors committed in this State, the punishment of which has not been provided for by statute, the court having jurisdiction thereof shall proceed to punish the offender under the provisions of the common or statute law of England put in force in this State by this act; but the punishment in such cases shall only be fine and imprisonment, and in such cases the fine shall not exceed one hundred dollars and the imprisonment shall not exceed three months."

In the case of *State* v. *Vaughan,* 81 Ark. 117, which was a proceeding to enjoin the operation of a pool room, such as appellants herein are shown to have been connected with, the court said: "The common law is put in force in this State, and the punishment for common-law offenses not covered by statute is fixed as a fine not exceeding $100 and imprisonment not to exceed three months. Kirby's Digest, sections 623 and 624.

"These statutes have been held applicable to a gaming house as a common-law misdemeanor. *Vanderworker* v. *State,* 13 Ark. 700; *Norton* v. *State,* 15 Ark. 71; *Thatcher* v. *State,* 48 Ark. 60; 1 Bishop, Crim. Law, section 1137. Each period in which a nuisance continues is a separate offense. Wharton, Crim. Law, section 1419." Sections 623 and 624 of Kirby's Digest are carried into Crawford & Moses' Digest as sections 1432 and 1433.

The court denied the relief prayed in that case on the ground that the operation of a pool room was a misdemeanor, and persons charged with its commission are entitled to a jury trial, and this right can not be taken away under the guise of an injunction against a nuisance.

The appellants here have had the jury trial which the court in the Vaughan case said persons were entitled to have who were charged with operating a pool room.

We think the court was in error, however, in holding that one convicted under sections 1432 and 1433, Crawford & Moses' Digest, must be punished by both fine and imprisonment, and the court should have given the instruction numbered 5 set out above. The language of the statute is: "But the punishment in such cases shall only be fine and imprisonment, and in such cases the fine shall not exceed one hundred dollars and the imprisonment shall not exceed three months."

In interpreting this statute the purpose of the Legislature must be kept in mind. The Legislature was enacting into our jurisprudence the common law of England so far as the same was applicable and of a general nature, and in fixing the punishment for crimes and misdemeanors where no punishment had been provided by statute, the Legislature sought to exclude certain punishments which prevailed at the common law. The phrase, "but the punishment in such cases shall only be fine and imprisonment," furnishes the key to the interpretation of section 1433.

There were other punishments for misdemeanors at the common law besides fine and imprisonment. There was the pillory in some cases, and whipping in others. 1 Stephen's History of the Criminal Law of England, page 457; 1 Russell on Crimes (7 Eng. ed.), p. 249.

The Legislature intended to prohibit the imposition of such punishments as pillory and whipping, and authorized the imposition of only fines and jail sentences, one or the other or both, and did not intend to require the imposition of both a fine and a jail sentence.

The question has never heretofore been expressly decided by this court, but the interpretation we have now given section 1433, Crawford & Moses' Digest, comports with the interpretation heretofore generally accepted.

In *Vanderworker* v. *State,* 13 Ark. 700, the appellant was convicted of keeping a common gaming house, which constituted a nuisance at common law. He was tried under what is now section 1433, Crawford & Moses' Digest, and only a fine was assessed against him. This judgment was affirmed without comment by this court.

In the case of *Martin* v. *State,* 32 Ark. 124, it was pointed out that the statutes had provided a punishment for voluntary escapes of prisoners, but no punishment had been prescribed for negligent escapes. It was held that escapes of the latter class were punishable as common-law offenses. The punishment in that case was a fine of ten dollars; and while the judgment was reversed on another ground, no question appears to have been made that the punishment did not conform to the law.

So in the case of *West* v. *State,* 71 Ark. 144, the court affirmed without comment a conviction for maintaining a common-law nuisance where a fine of one dollar had been imposed, with the alternative that if the fine was not paid the defendant should be imprisoned until it was paid.

We think the court erred in requiring Blumensteil and Wolf to give testimony in the case. It is true the court did admonish the jury that the testimony of Blumensteil could not be considered against him, and that the testimony of Wolf could not be considered against him, and it is insisted that, this admonition having been given, the testimony of each became admissible against the other. It is argued that such is the effect of section 3122, C. & M. Digest, which reads as follows:

"Section 3122. In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness

shall in no instance be used against him in any criminal prosecution for the same offense."

We do not interpret this statute as the court below did. We think it does not apply where persons are being jointly tried for the commission of the same offense. It applies when one concerned in the commission of a crime or misdemeanor, who is not himself on trial, is sworn as a witness in relation to such crime or misdemeanor upon the trial of another person. In that case he is required to testify and is given immunity against a subsequent use of that testimony against himself. But to require one to testify when he was himself on trial would, in a measure, render nugatory the provision of section 8 of article 2 of the Constitution providing that no person shall be compelled in any criminal case to be a witness against himself, even though the jury were admonished not to consider the testimony against the witness who gave it. Under the Constitution one on trial charged with the commission of a crime or misdemeanor has the right to refuse to be sworn as a witness.

We think it unnecessary to decide whether proper exceptions were saved to the testimony of the judge of the police court. But, inasmuch as the cause is to be remanded for a new trial, we take occasion to say that the police judge had no right to repeat the testimony heard by him at the trial of Powers. Such testimony was hearsay. It was competent, however, to show that persons had been convicted for operating a pool room in this cigar store. Such testimony tends to charge the owners of the business, who were residents of the city and were in and about the building with more or less frequency, with knowledge of the use which was being made of their place of business.

The court below properly treated as surplusage the allegation of the indictment that the frequenters of the place were idle and ill-disposed persons.

The court told the jury that if the defendants kept "a place for people to resort to to place bets on horse races, and persons who desired to place bets on horse

races resorted to such place from day to day or from time to time, and made bets on horse races at such place, and such place was regularly kept for such business, and such business was regularly carried on there, then such a place would constitute a common nuisance within the meaning of the law."

No other inquiry into the character of the persons who patronized the place in question is required than that stated in the instruction, towit: That persons assembled there from day to day and from time to time to bet on horse races.

Other assignments of error are discussed; but we think no other errors were committed, and the other points raised do not, in our opinion, require discussion.

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

PAYNE v. MALLORY.

Opinion delivered May 2, 1921.

1. CARRIERS—DELAY IN SHIPPING LIVE STOCK.—A complaint against a carrier alleging the receipt of cattle and delay in shipment for three or four days states a cause of action for unreasonable delay.
2. CARRIERS—DUTY TO SHIP LIVE STOCK PROMPTLY.—It is the duty of a common carrier accepting live stock for shipment to ship and deliver same without unnecessary delay, and delay in the shipment of stock from Saturday until the following Tuesday is unreasonable unless there was some good and sufficient cause to justify it.
3. CARRIERS—BURDEN OF ESTABLISHING JUSTIFICATION FOR DELAY.—The burden of establishing justification for a delay of from Saturday to Tuesday in forwarding a shipment of livestock rests upon the carrier.

Appeal from Carroll Circuit Court, Western District; *W. A. Dickson,* Judge; affirmed.

Shouse & Rowland, for appellant.

The court erred in overruling appellant's demurrer and refusing to give the peremptory instruction asked by defendant. No negligence was alleged or proved. The

instructions state the law correctly, and there is no evidence to support a verdict for any sum. 1 Hutch. on Carriers, § 510; 83 S. W. 20; Kirby's Digest, § 6804; 77 Ark. 357; 79 *Id.* 59. See, also, 64 Ark. 271; 83 S. W. 20. Under the law *supra* appellee failed to make out a case and a verdict should have been directed.

C. A. Fuller, for appellee.

1. It is the duty of a railroad company to furnish suitable pens for keeping stock and facilities for feeding and watering them, and failing to do so renders it liable. Michie on Carriers, §§ 1757-8, 1784; 82 Ark. 253; 73 *Id.* 112; 101 *Id.* 289.

2. The evidence fully sustains the verdict.

HUMPHREYS, J. Appellees instituted suit against appellant in the circuit court, Western District of Carroll County, to recover damages in the total sum of $696.62, as per itemized statement incorporated in the complaint, on account of the alleged negligence of appellant in failing and refusing to ship two cars of stock on the 22d day of November, 1919, or to deliver same upon the Kansas City market within a reasonable time after said date.

A demurrer was filed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, to which ruling of the court appellant objected and excepted.

Appellant, reserving its exceptions to the ruling of the court on the demurrer, filed an answer, denying the material allegations of the complaint.

The cause then proceeded to a hearing, and at the conclusion of the evidence appellant requested a peremptory instruction directing a verdict in its favor. The court refused to give the instruction, to which ruling appellant objected and excepted. The cause was then submitted to the jury upon the pleadings, evidence and instructions of the court, resulting in a verdict and judgment against appellant for $475, from which an appeal has been duly prosecuted to this court.

Appellant first contends that the court committed reversible error in overruling the demurrer to the complaint. It is asserted that no fact of negligence is alleged in the complaint, the only allegation being that when appellees "arrived at the stockyards it was dark and the stock pens were all full of other stock, and there was no place available in which to drive their stock for shipment." Appellant argues that common carriers can not be held in damages for a failure to furnish shipping facilities unless it be alleged and shown that the facilities furnished were inadequate for the accommodation of all normal business at the shipping station, and that the allegation in the complaint that the stock pens were all full of other stock when appellees' stock arrived was insufficient because it failed to allege that the accommodations were insufficient to accommodate the normal business at the Eureka Springs station. We deem it unnecessary to pass upon this question, as, in our opinion, the complaint sufficiently alleged other facts of negligence upon which to base a recovery. The complaint, in substance, alleged that appellees, on Tuesday before Saturday, November 22, 1919, engaged two cars to ship a car of cattle and a car of mixed stock on the 22d day of said month; that, relying upon the promise of appellant to furnish the cars, they purchased the cattle and drove them a distance of eighteen miles to the shipping pens of appellant at its station in Eureka Springs, arriving with the cattle after dark; that the stock pens and grounds around them were filled with cattle and hogs, and that they were advised by appellant to take their cattle across the track and a public road into an adjoining field until they could be loaded; that appellees were unable to get their stock out of the field across the railroad track and public road into the stock pens after they were vacated of the other stock therein on account of the darkness of the night; that they were required to keep their stock at the station several days before the same were shipped; that, by reason of the failure of appellant to deliver said stock upon the market at a reasonable time

after November 22, 1919, appellees were damaged, on account of extra expense, shrinkage in weight of cattle, downward break in the market and other causes, in the total sum of $696.62. The following is a verbatim copy of one of the allegations in the complaint: "By reason of the defendant company having failed, neglected and refused to provide a way for the shipment of plaintiff's stock on the 22d of November, 1919, and by reason of the failure of their stock to arrive upon the Kansas City market at a reasonable time when it should have arrived, immediately after the 22d of November, 1919, these plaintiffs have sustained a total loss as above itemized of $696.62." These allegations, in connection with the substance of others, amount at least to an allegation that appellant received the stock for shipment on the 22d day of November, 1919, and failed to ship them out for three or four days thereafter, from which act damage resulted to appellees. Unexplained, this was an unreasonable delay and constituted an act of negligence upon which to base an action for damages against a common carrier. The court did not therefore err in overruling the demurrer to the complaint.

Appellant's next and last insistence for reversal is that the evidence is insufficient upon which to establish any liability against appellant. The facts, in substance, are as follows: On the 18th day of November, 1919, appellees applied to appellant's agent at Eureka Springs for two cars to ship one car of cattle and a mixed car of stock on the 22d of November following. The evidence is in dispute as to whether the agent agreed to furnish two cars or whether he simply promised to do the best he could. In reliance upon the promise of the agent to furnish the cars, according to appellees' testimony, they purchased the stock in Benton County and brought it to Eureka Springs for shipment on said date, arriving at the stock pens at about 5:30 or 6 o'clock p. m. J. B. Mallory arrived in advance of the stock and obtained a shipping contract, or bill of lading, for one car and had the shipping contract or bill of lading filled out for the other

car to be delivered when one of his helpers by the name of Evans, who was to accompany the car to Kansas City, arrived. Bills of lading, or shipping contracts, for eight cars of stock were issued during the afternoon, four of which were upon orders for cars made subsequent to appellees' order or request for cars. During the afternoon appellee Mallory discovered that the stock pens and the grounds around same had been entirely occupied with cattle and hogs brought there for shipment. He talked to the agent as to where he should put his stock and was advised to put them in a field across the railroad and a wagon road from the stock pens, around which there was a very poor enclosure. The cattle and hogs on the ground near the stock pen were held by guy ropes and guards. Some of them got away before being loaded. After the darkness came on it was discovered by appellees that it was impossible to drive their cattle from the field in which they had been placed across the wagon road and over the railroad track or under a culvert through a running stream without a part of them escaping. They then notified the agent who had come on duty that it was impractical and impossible to load that night. The train to take the stock arrived at 4 a. m. Sunday morning. According to the evidence of appellees, only one car remained after all stock in the pens and immediately surrounding it had been loaded. Appellant's testimony was to the effect that they furnished appellees with two cars, which were refused by them. No other cars for shipping the cattle were furnished until about 4 o'clock the following Tuesday afternoon, after written notice had been given to the railroad demanding immediate shipment. The cattle did not arrive in Kansas City until Thursday morning, on Thanksgiving day, which was a national holiday, and could not be sold until the following day, and, when sold, were sold on a declining market. The evidence of appellant was to the effect that when appellees declined to attempt to load on Saturday night, or Sunday morning, they were informed that cars could not be furnished before Monday or Tues-

day. There was testimony on the part of appellees as to the amount of damages sustained on account of the delay in shipment, which exceeded the amount recovered.

This evidence sufficiently establishes the fact that the cattle were accepted for shipment on November 22, 1919, and were not shipped until late in the afternoon of the 25th day of said month. Giving the testimony offered by appellees its strongest probative force, it was impossible for them to load the cattle on Saturday night, or Sunday morning, and the cattle remained in the stock pens after the other cattle were shipped until late in the afternoon of the 25th of said month. It is the duty of a common carrier accepting live stock for shipment to ship and deliver same without unnecessary delay. A delay in the shipment of stock from Saturday until the following Tuesday is an unreasonable delay unless there was some good and sufficient cause to justify it. *St. L. & S. F. Rd. Co.* v. *Pierce,* 82 Ark. 353. The burden to establish the justification of a delay for such a length of time necessarily rests upon the common carrier. In the instant case, no cause was assigned by appellant for this unreasonable delay. There was evidence to support the verdict and judgment.

No error appearing, the judgment is affirmed.

WILLISON v. LORETZ.

Opinion delivered May 2, 1921.

1. APPEAL AND ERROR—BILL OF EXCEPTIONS—CONCLUSIVENESS OF JUDGE'S CERTIFICATE.—Where the trial judge certifies that the bill of exceptions contains all the evidence and instructions given and refused, such certificate is conclusive as to the completeness of the bill of exceptions.

2. BROKERS—RIGHT TO COMMISSION.—When an owner lists his property for sale with two or more agents, without the exclusive right in either to sell, the agent effecting the sale is entitled to the commission, if the owner has maintained neutrality between them.

3. BROKERS—GOOD FAITH TOWARD TWO BROKERS.—In an action for a commission on a sale of a farm listed by defendant with plaintiff and with other brokers, the question of good faith on the part of defendant as between such brokers *held* for the jury.

4. BROKERS—GOOD FAITH BETWEEN BROKERS—INSTRUCTION.—In an action for a broker's commission on a sale of a farm listed by defendant with plaintiff and other brokers, an instruction that the agent effecting the sale is entitled to the commission is erroneous in failing to add the proviso that the owner has maintained neutrality between the brokers.

Appeal from Prairie Circuit Court, Northern District; *George W. Clark,* Judge; reversed.

Brundidge & Neelly, for appellant.

1. The court erred in giving to the jury instruction No. 1 requested by plaintiff. It completely ignored the question as to the liability of a landlord to the agent who effects the sale of the land. There was no testimony upon which to base it. 112 Ark. 227.

2. The court erred in refusing instruction No. 1 asked by defendant. 122 Ark. 259.

3. It was error to refuse instruction No. 3 requested by defendant. The law of this instruction is well settled. 121 Ark. 536. Where two agents have the right to negotiate a sale of land for the owner, the agent who actually brings about the sale is entitled to the commission. *Ib.* The facts being undisputed, it was error to refuse to direct a verdict.

F. E. Brown and *Carmichael & Brooks,* for appellee.

1. Appellant relies on 112 Ark. 227. The case is not in point here.

2. The verdict is sustained by the evidence. The question is a new one in this State, but the verdict is in keeping with equity and justice.

HUMPHREYS, J. Appellee instituted suit against appellant in the Prairie Circuit Court to recover $600 as a commission for effecting the sale of a farm owned by appellant, near Des Arc, consisting of 220 acres.

Appellant filed an answer, denying that appellee effected the sale of the land, but that the sale was effected by the Middle-West Land Company, a real estate partnership, composed of Clyde Ridout and G. I. Rogers, to whom he paid a commission of $330, or five per cent. on the purchase price of $6,600.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment in favor of appellee for $270, from which judgment an appeal has been prosecuted to this court.

Appellee suggests the insufficiency of the record, and insists upon an affirmance of the judgment on this ground. It is pointed out that the record does not affirmatively show that it contains all the evidence or all the instructions of the court. While there is no statement at the conclusion of the evidence that the record contains all the evidence, this fact does appear in the certificate to the bill of exceptions by the judge who tried the case. It is also true that the motion for a new trial, filed by appellant, recited that the court erred in its oral charge to the jury, and that the oral charge, if given, does not appear in the bill of exceptions, but the certificate to the bill of exceptions of the judge who tried the case recites that the bill of exceptions contains all the instructions given and refused in the case. The certificate of the judge who tried the case must control, and, according to his certificate, the record is complete.

The facts, in substance, are as follows: Appellant verbally authorized appellee, a real estate agent in Des Arc, to sell his farm for $6,000 net to him, agreeing to allow the agent, as commission, any amount in excess of the net price for which he sold the farm. Appellant also verbally authorized the Middle-West Land Company, a partnership composed of Clyde Ridout and G. I. Rogers, a real estate agency in Des Arc, to sell the farm for $6,600, agreeing to pay them, as commission, five per cent. of the purchase price. The exclusive right to sell the farm was given to neither Loretz nor to Ridout &

Rogers. Loretz did not know that the farm was listed with Ridout & Rogers, and it does not appear whether Ridout & Rogers knew that the farm was listed with Loretz. Appellee had shown the farm to J. H. Tallbut of Madisonville, Tenn., who told his fellow-townsman, W. C. Mason, about it. Based upon the information thus received, Mason, who afterward purchased the farm in connection with W. H. McCrory and a Mr. Hicks, wrote to Loretz on March 5, 1920, that if he would split the commission with him, he would procure a buyer. Loretz showed appellant the letter. Loretz immediately answered the letter, offering the farm to Mason for $7,000, stating that he was to receive eight per cent. as commission on the purchase price, which he would divide equally with him, if he procured a buyer. On March 13 following, W. C. Mason wrote to Loretz that he expected to reach Des Arc the latter part of the week. On the night of the 16th of March, W. C. Mason, in company with a prospective purchaser, arrived at Des Arc, went to Ridout's office, who took them to the farm, introduced them to appellant, and consummated a sale thereof for $6,600. Out of the sum, appellant paid Ridout & Rogers, as a commission, $330.

W. C. Mason testified that he had a personal acquaintance with Clyde Ridout, and had been corresponding with him in reference to real estate; that he did not come to Des Arc through the influence of Loretz, but with the view of looking at appellant's farm; that he had been writing to both and purchased the farm through Ridout & Rogers because they offered it cheaper than Loretz.

H. S. Loretz testified that, on the morning of the 17th of March he started out to appellant's farm to show him the second letter he had received from W. C. Mason; that he met appellant coming to town and showed him the letter; that appellant said nothing to him about having sold the place; that he then returned to town and met W. C. Mason, who informed him of the purchase of appellant's farm through Ridout & Rogers; that he im-

mediately went to appellant concerning the matter, and he said: "If it hadn't been for me, they wouldn't have done anything about the place, and that he didn't want to get into any lawsuit with me;" that he replied to appellant that unless he wanted to pay the commission twice, he had better see Ridout & Rogers; that appellant replied, "We will let a jury do that;" that appellant then closed the deal.

Appellant testified that, when he listed the property with H. S. Loretz for sale, Loretz was to have no commission if he himself, or any other person, sold it; that, when Loretz showed him the first letter he had received from Mason and told him that he was going to price it to him at $7,000, he forbade him to raise the price above $6,600, believing that if he did so he would spoil the sale of the place; that, under the contract, he was to receive $6,000 net in case Loretz sold the property; that Loretz had had the place listed for a year and hadn't sold it because he kept raising the price; that he sold the place to Mason through Ridout & Rogers for $6,600, and paid them $330 as a commission for making the sale; that he received $270 more than he would have received had Loretz sold the place to Mason.

We deem it unnecessary to set the evidence out at greater length in order to determine the questions involved on the appeal. At the conclusion of the testimony, appellant asked a peremptory instruction in his favor, which request was denied by the court, over his objection and exception. The court submitted the cause to the jury upon two instructions, the first of which was requested by appellee and given by the court over the objection and exception of appellant. That instruction is as follows:

"The jury are instructed that if they find from the evidence that Willison had placed his farm with Loretz for sale, agreeing to pay him as a commission for making a sale all above $6,000, that he might sell the farm for, and you further find that Loretz was the procuring cause of bringing Mason, the purchaser, and Willison, the

seller, together, wherefrom a sale was consummated, you should find for Loretz the difference between the excess above $6,000 that the farm was sold for and the commission Ridout & Rogers was to receive on the sale, although you may find that the purchaser was introduced to Willison by Ridout & Rogers."

The second instruction was given at the request of appellant. The court refused to give two other instructions requested by appellant, to which refusal of the court objections were separately made and exceptions separately saved. The two instructions refused are as follows:

"The jury are instructed that if you find from the testimony that the plaintiff Loretz had the lands for sale under a verbal contract which did not give him the exclusive right to sell said lands, and you further find that the defendants, Rogers & Ridout, also had a contract with Willison to sell said lands and did effect the sale thereof, then you will find for the defendant, unless you find that the owner, Willison, did not act in good faith with the plaintiff.

"You are instructed that where land is in the hands of more than one agent for sale, the agent selling the land is the one entitled to the commission, and if you find that the defendant's lands were sold by Rogers & Ridout and they were paid for said sale by the defendant, then you will find for the defendant, unless you find that the owner, Willison, did not act in good faith with the plaintiff."

The first insistence by appellant for reversal is that, under the undisputed facts in the case, appellee did not effect a sale, and, under the law, was not entitled to a commission. It is true that, when an owner lists his property for sale with two or more agents, the agent effecting the sale is entitled to the commission, if the owner has maintained neutrality between them. *Murray* v. *Miller,* 112 Ark. 227; *McCombs* v. *Moss,* 121 Ark. 533. While it is undisputed that the farm was placed in the hands of both Loretz and Ridout & Rogers for sale, with-

out the exclusive right in either to sell, and that Ridout & Rogers effected the sale, there are facts in the case from which an inference might be drawn that appellant, the owner, did not preserve strict neutrality between the agents. The facts referred to are that, with full knowledge on the part of appellant, Loretz was in communication with Mason with reference to a sale of this particular farm; that Mason came to Arkansas with a view of inspecting said farm; that appellant, when shown the second letter by Loretz from Mason, did not inform Loretz that he had sold the farm to Mason through Ridout & Rogers, and that he profited $270 more by the sale through Ridout & Rogers than he would have profited had Loretz consummated the deal. These facts made the question of good faith on the part of appellant a disputed question of fact to be determined by the jury; hence it was proper for the court to refuse the peremptory instruction requested by appellant.

The next insistence of appellant for reversal is that instruction No. 1, requested by appellee, was erroneous because it ignored the question as to the liability of a landowner to the agent that effected the sale of the land. This court announced the doctrine in *Murray* v. *Miller,* 112 Ark. 227, and reaffirmed it in the case of *McCombs* v. *Moss,* 121 Ark. 533, that "where two agents have the right to negotiate the sale of land for the owner, the agent who actually brings about the sale is entitled to the commission, where the owner acted in good faith and preserved strict neutrality between the rival agents." The instruction given at appellee's instance ignored, and the instructions requested by appellant and refused by the court embodied, the doctrine announced in those cases. The court therefore committed reversible error in giving the instruction requested by appellee and refusing those requested by appellant.

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

BROWN v. FALLS RUBBER COMPANY.

Opinion delivered May 9, 1921.

1. RECEIVERS—ORDER DIRECTING INVENTORY.—Where an intervener claimed certain boxes of goods in the hands of a receiver but refused to disclose their contents, no personal right of such intervener was violated by an order that the boxes be opened and inventory made to determine ownership.
2. APPEAL AND ERROR—FINAL ORDER.—An order of the court that certain boxes in the custody of the receiver and claimed by the intervener be opened and their contents inventoried is an interlocutory and not a final order, and an appeal therefrom will not lie.

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

O. H. Sumpter, for appellant.

Chas. C. Sparks, for appellee.

McCULLOCH, C. J. Appellee instituted an action in the chancery court of Garland County against E. D. Brown and T. G. Holland as copartners to recover a debt due on account for merchandise sold and delivered and to wind up the partnership, alleged to be insolvent, to secure the appointment of a receiver and to subject the assets of the partnership to the payment of debts. A receiver was appointed by the court who took charge of the partnership property which consisted of automobile accessories, repairs, equipments and other things at the place of business of said copartners in the city of Hot Springs.

Subsequently it was discovered that immediately before the appointment of the receiver four wooden boxes supposed to contain automobile accessories and repairs, two automobile wheels, a lathe and a counter-shaft had been removed from the place of business of said copartners to the private residence of Brown's father in the city of Hot Springs. The receiver claimed that the contents of the boxes and the other items mentioned were the property of said copartners, and he made demand on

Brown's father for delivery of said property to him, as receiver, under the court's order. Pursuant to the demand, Brown's father delivered the property to the receiver.

Appellant J. M. Brown, who is the brother of E. D. Brown, claimed this property as his own, asserts that he moved it from the place of business of Brown & Holland where he had been at work as an automobile mechanic, and that he left the property with his father for safekeeping. He intervened in the action and filed a plea claiming the property and praying that the court order the receiver to turn the property over to him.

There was a trial of appellant's plea before the chancery court, which was heard on oral testimony in support of appellant's claim and against it. The testimony was conflicting as to the ownership of the property in controversy. At least the testimony warranted the inference that the articles in dispute, or some of them, were part of the stock in trade of Brown & Holland from whose place of business they were removed. Appellant testified as a witness, and his testimony supports his claim. But he could not and did not give a detailed list of the articles in the boxes—he could only remember in general terms the contents of the boxes and the aggregate value thereof. None of the other witnesses knew what the boxes contained, except one of the witnesses introduced by appellee, a negro who had worked in the repair shop and who helped to pack and haul the boxes for appellant. He could only give a general description of the things. Appellant refused to permit the boxes to be opened, though the court suggested that course. The court thereupon entered an order, over appellant's objections, directing the receiver to open the boxes in his possession in the presence of appellant and three other persons on a specified date, and make an inventory of the articles in the boxes. An appeal has been prosecuted from that order, though the court did not render a decree on the merits of the controversy.

No sound reason is perceived why appellant can claim exemption from the right of the other parties to the controversy to have the boxes opened so as to disclose the contents thereof and to enable the court to more readily determine whether those contents were the property of appellant or of Brown & Holland, appellee's debtor. No personal right of appellant was violated in ordering that the boxes in the custody of the receiver be opened. To do so was essential to a correct determination of the rights of the parties.

But the order was interlocutory and not final. It was not an appealable one, for it did not determine the rights of the parties with respect to the subject-matter of the controversy. If an error has been committed, it must be corrected on appeal from a final decree.

The appeal is therefore dismissed.

HARRIS v. TERHUNE.

Opinion delivered May 9, 1921.

1. LOGS AND LOGGING—TIME FOR REMOVAL OF TIMBER.—A contract for the sale of timber which required the buyer to remove it within a specified time and to cut the timber clean, obligated the buyer actually to remove the timber from the land within the time stated, and not merely to sever it from the soil for subsequent removal, and the buyer was liable in damages for removing timber after that time.
2. LOGS AND LOGGING—BREACH OF CONTRACT—DAMAGES.—The measure of damages for breach of a contract to leave the stumps not to exceed a stated height from the ground is the reasonable cost of cutting the stumps down to the required height, and not the difference between the value of the land with the stumps as they were left and its value after they were cut off to the contract height.

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

Lake & Lake and *E. K. Edwards,* for appellant.

1. Under the terms of the contract, appellant had the right to remove, within a reasonable time, the timber sev-

ered from the soil. 89 Ark. 361; 91 *Id.* 291. The word *removal* in a timber contract means a *severance from the soil.* Cases *supra.* Construing the contract in the light of these decisions, it is evident that the intention of the parties that appellant should become the owner of all timber severed from the soil by January 1, 1920, and have a reasonable time thereafter to haul away any logs then remaining on the land, and the court erred in giving for appellee instructions 1 and 2 and in refusing Nos. 1, 2 and 3, asked by appellant.

2. On the issue of the amount of damages sustained because some of the stumps were left higher than fifteen inches, the court overlooked the fact that the stumps, being small pine stumps, would rot and be entirely gone in a few years, and the appellee's damages were on that account only *temporary,* and it was error to give the instructions requested by appellee and refuse appellant's request. Appellee made no attempt to prove the *actual loss* or damages, and only nominal damages should have been allowed for any breach of the contract. 106 Ark. 274.

3. The demurrer to paragraph 7 of the complaint should have been sustained. 91 Ark. 292; 89 *Id.* 361.

Reynolds & Steel, for appellee.

This suit is nothing more than one to construe a contract and hinges upon the legal meaning of the word "removed" as used therein. It is the duty of the court unless it is ambiguous. Here it is plain and not ambiguous, and it was the duty of the court to so construe it as to carry out the intention of the parties. Lawson on Contracts, pp. 387-8-9; Bishop on Contracts, p. 384; 53 Ark. 58; 23 *Id.* 582; 3 *Id.* 258. "*Removal*" signifies an actual or physical change in the position or locality—to move away from the position occupied. See Words and Phrases, citing 120 Fed. 182; 86 Ky. 186; 5 S. W. 567; Funk & Wagnalls' Dict., "Remove." See, also, 87 S. W. 1119. A sale of timber on a tract of land to be removed within a given time is only a sale of so much timber as

is *removed* within that time. 86 S. W. 1122; 26 Mich. 523; 96 *Id.* 83; 25 Cyc. 1551; 46 Am. Rep. 32; 28 A. & Eng. Enc. 541; 107 S. W. 733, and many others. Appellant had a reasonable time within which to remove the timber after the expiration of the specified time. 167 S. W. 1116. A severance from the soil is not a removal from the premises. 114 Tenn. 196; 87 S. W. 415; 59 Ore. 149; 100 Miss. 177; 56 So. Rep. 329; 160 N. C. 281; 75 S. E. 714.

The judgment is not excessive, and there is no error.

McCULLOCH, C. J. Appellee, who was the plaintiff below, owns a small tract of land in Sevier County, and on October 5, 1918, he sold and conveyed to appellant the pine timber on said tract of land and executed to appellant a contract or conveyance, in writing, which, after reciting the consideration and describing the tract of land and timber thereon, contained the following clause:

"The said second parties shall have till January 1, 1920, to remove said timber. And said second parties agree to commence cutting the timber at the north end of said land and to remove all of their said timber clean as they go. And the said second parties further agree to cut the timber as close to the ground as practicable and in no case to exceed fifteen inches above the level of the ground."

A part of the timber on the land was cut down by appellant and removed from the land before the date specified in the contract, January 1, 1920; and a considerable portion of the timber was felled and cut into saw logs immediately before the expiration of the time mentioned, but was not removed from the land until a short time after the expiration date. In cutting the timber the stumps on the land were left higher than fifteen inches above the level of the ground.

This action is to recover damages on account of the removal of the down timber after the expiration of the date mentioned in the contract, and for failure to cut the stumps to a height of not exceeding fifteen inches above the level of the ground. On the trial of the cause

the jury found in favor of appellee, assessing the damages at the sum of $96, the value of 24,000 feet of logs at $4 per thousand, and the sum of $46.35, the cost of cutting 309 stumps at 15 cents each. The verdict is supported by legally sufficient evidence, and the judgment must be affirmed if the issues as to the right of appellant to remove the timber after the expiration of the date mentioned in the contract and the measure of damages for failure to cut the stumps in accordance with the contract were properly submitted to the jury.

The contention of appellant is that under the terms of the contract he had the right to remove, within a reasonable time, timber severed from the soil within the period specified in the contract, and that the measure of damages for failing to cut the stumps in accordance with the terms of the contract was the difference, if any, between the value of the land in the condition in which appellant left it and the condition in which it would have been if the stumps had been properly cut. Appellant relies on the case of *Indiana & Ark. Lbr. & Mfg. Co.* v. *Eldridge,* 89 Ark. 361, in support of his contention that he had a right under the contract to remove severed timber within a reasonable time after the expiration of the date mentioned in the contract. His contention is that the word "remove" meant severance from the soil, and that the time restriction in the contract was only to that extent, and that it did not prevent him from removing the logs within a reasonable time. In the case referred to there was a written contract or deed of conveyance, as in the present case, granting the timber to the purchaser, and there was also a clause which gave a specific period of time within which to "cut and remove" the timber. We decided that the proper interpretation of the contract was to construe the words "cut and remove" together and as meaning a severance from the soil, and we stated the rule of law applicable to the sort of contract, as follows: "But we think that the weight of authority and the best considered cases which are strictly in point harmonize with the

view that all timber cut down and severed from the soil by the grantee before the date specified in the contract of sale becomes his personal property, which he may remove in a reasonable time after said date, unless by the express terms of the contract a contrary intention is manifest."

Now, the language in the contract under consideration in the present case is slightly different from that used in the contract dealt with in the other case, in that the word "cut" is omitted and the language of the contract is that the time mentioned is given "to remove" said timber. There is no reason to construe the word "remove" as relating to the cutting or the severance of the timber from the soil. The plain signification of the word is to take away or to transfer from one place to another, that is, to change the location of the timber from the particular land to some other place. The use of the words "to remove," therefore constitutes, within the rule laid down in the case cited above, an express contract that the right of the purchaser to take away the property is limited to the time specified. The consideration of other language of the contract strengthens this view, for the next sentence provides that the cutting should commence on a certain part of the land, and that appellant should remove all of the timber "clean as they go." This is the construction placed on the contract by the trial court, and the issue was submitted to the jury under this rule to determine the value of the timber wrongfully removed by appellant after the expiration of the contract.

On the other branch of the case we are of the opinion that the trial court was correct in holding that the measure of damages for the breach of the contract was the necessary expense of having the stumps cut so as to conform to the specifications of the contract. It was a part of the contractual obligations of appellant to cut the stumps down to a certain height from the ground, and it was appellee's right to have the contract performed in the specified manner or to recover as his damages the additional cost of completing the performance so as to con-

form to contract. *Inland Construction Co.* v. *Rector,* 133 Ark. 277. It does not answer appellee's claim for damages to say that the difference in value of his land was less than the additional cost of putting it in the condition that the contract called for.

Judgment affirmed.

HOWELL v. DAUGHET.

Opinion delivered May 9, 1921.

1. ANIMALS—IMPOUNDING STATUTES.—Statutes authorizing the impounding and sale of stock found running at large in violation of law are valid as police regulations.
2. ANIMALS—IMPOUNDING STATUTES.—A statute authorizing the impounding and sale of stock running at large and providing for killing the animal taken up if no bidder appears at the sale *held* valid.
3. ANIMALS—RIGHT OF OWNER TO RECLAIM.—A statute authorizing the taking up and sale of stock found running at large in violation of law is not invalid as unduly limiting the time within which the owner may appear and show cause against the condemnation and reclaim the animal where the statute gives the right to reclaim at any time up to the sale.
4. CONSTITUTIONAL LAW—IMPOUNDING STATUTE.—A statute authorizing the impounding and sale of stock found running at large in violation of law is not confiscatory because it directs the officer who sells the animal, after paying the specified fees and expenses, to pay the residue over to the county treasurer to the credit of the road and bridge fund of the county.
5. ANIMALS—IMPOUNDING STATUTE.—An impounding statute *held* to give the owner a reasonable time for reclamation where it provides for a notice of the seizure to be posted in five public places for either ten or twenty days according to the value of the stock, and also providing a notice of sale after condemnation.

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

Will Steel, for appellants.

The act of 1819, act No. 496, is unconstitutional and void, and appellants have the right to enjoin its enforcement. 1 High on Injunctions (4 ed.), p. 87; 118 Fed. Rep. 399; 195 U. S. 223-4; 12 Cyc. 903. The act conflicts with

art. 14, § 1, Const. U. S. and art. 2, § 8, Const. Ark. It unlawfully deprives residents of the district of their property without due process of law. The whole act is void, as the valid and invalid parts of the act can not be separated. 6 R. C. L., §§ 122-3-5-7; 111 Ark. 108, 118; 89 *Id.* 466. The intention fo the Legislature must be gathered from the language of the act. The act can not by judicial construction be so amended as to leave a valid and effective law. 126 Ark. 260; 79 *Id.* 517; 49 *Id.* 492. See, also, 31 Ark. 77-91. The provisions of the act are arbitrary, oppressive and unjust—purely arbitrary—and are not founded upon necessity under the circumstances. 96 U. S. 107. The courts are the judge of the reasonableness of an act. 83 Ark. 180. The act is clearly unconstitutional.

James H. McCollum, for appellees.

The presumption is in favor of the constitutionality of an act, and all doubts are resolved in its favor. 39 Ark. 353; 85 *Id.* 464; 100 *Id.* 175; 102 *Id.* 166; 199 *Id.* 314. Under these decisions the act is valid. But if the last clause of § 1 is in conflict with our "due process" clause of the Constitution, it is separable and should be stricken out or treated as surplusage and leave the act to stand. 37 Ark. 356; 46 *Id.* 312; 70 *Id.* 94; 89 *Id.* 466; 111 *Id.* 108; 125 *Id.* 350; Ann. Cases D 1916, p. 1, and note.

McCULLOCH, C. J. The General Assembly of 1919, at the regular session, enacted a special statute creating a district in Hempstead and Nevada counties where stock is prohibited from running at large, and the statute was put into effect after adoption by a vote of the qualified electors of the district. Appellants are citizens residing within said district and owned stock therein, and they instituted this action in the chancery court of Hempstead County to restrain the officers from enforcing the provisions of the statute. They contend that the statute is unconstitutional and void, and they have appealed from a decree of the chancery court dismissing their complaint.

The statute provides, in substance, that any animal found running at large within the area mentioned shall

be taken up and delivered to a justice of the peace of the township; that said justice of the peace shall cause the animal to be appraised by three disinterested persons and shall then give notice, by posting in public places describing the animal and calling on persons claiming any interest to appear and show cause why the animal should not be condemned and sold, and that if at the expiration of the specified period no person appears to show cause against it the justice of the peace shall enter judgment condemning the animal to be sold to the highest bidder, on notice by posting and by publication in a newspaper; that the sheriff of the county or the constable may make the sale, and that said officer shall dispose of the proceeds by paying a fee of $1 to the taker-up of the animal, a fee of 50 cents each to the appraisers, a fee of $1 to the justice of the peace, a fee of $1 to the officer for making the sale, and also to the person entitled thereto the cost of keeping and caring for the animal up to the time of the sale at the rate of 50 cents per day, and that "the residue, if any, shall be paid into the county treasury to the credit of the road and bridge fund of said county." Another section of the statute permits the owner of the animal or any one having or claiming any interest therein "to retake the same upon payment of the fees allowed to the taker-up thereof, and for the appraisers and to the justice of the peace as in the case of sale together with cost of keeping and caring for such animal." There is also a provision in the statute to the effect that if no person shall bid anything for the animal offered for sale the officer in charge shall proceed to kill the animal.

It is contended, in the first place, that this statute attempts to authorize the taking of property without due process of law, and for this reason it is unconstitutional and void. It is very generally held by the courts, especially in the more recent decisions, that statutes authorizing the impounding and sale of stock found running at large in violation of law are valid as police regulations. The cases on this subject are collated in 12 Corpus Juris.

page 1284, and in the case note in *Fall Creek Sheep Co.* v. *Walton* (24 Idaho 760), 37 Ann. Cas. 1915 C, 1252. The question of the validity of such statutes has been put at rest by several decisions of this court. *Fort Smith* v. *Dodson,* 46 Ark. 296; *Hendricks* v. *Block,* 80 Ark. 333; *Ross* v. *Desha Levee Board,* 83 Ark. 176.

In those cases it was decided that under the police power there can be a summary seizure and sale of trespassing stock without personal service of notice on the owner and without any kind of judicial proceedings. It may be noted, however, that the statute now under consideration provides for a judicial determination of the right under the statute to condemn in a given case, though it does not provide for personal service of notice. It is not doubted that the provisions of the statute are valid so far as they relate to the seizure and sale of the property. Nor is the validity of the statute affected by the provision in regard to killing the animal taken up if no bidder appears at the sale. This is to provide for an emergency where it is demonstrated by failure of bidding that the animal is without value, and in order to dispose of it so as to prevent further depredation, and to obviate the burden of keeping the valueless animal, it is provided that it shall be killed.

One of the contentions in support of the attack on the validity of the statute is that it limits the time within which the owner may appear and show cause against the condemnation and in which he may reclaim the animal to the day specified in the original notice and does not give the right to reclaim up to the time of sale. Counsel is, we think, mistaken in his interpretation of the statute, for, according to a fair and reasonable interpretation, the framers of the statute intended to give the owner the right to reclaim his stock at any time up to the sale, or at least that the time for reclamation was not limited to one date.

The principal ground for attack on the validity of the statute is that the provision which directs the officer who sells the animal, after paying the specified fees and

expenses, to pay the residue over to the county treasurer to the credit of the road and bridge fund of the county. It is contended that this constitutes a confiscation of the property, and that if the provision is invalid it vitiates the whole statute. We do not, however, agree with counsel in his interpretation of the statute and do not think that it should be construed as a confiscatory provision. The purpose is to give the owner the right to reclaim his property at any time up to the sale by paying the fees and expenses, and the other provision with reference to the residue of the funds constitutes merely a final disposition of the funds in the event the owner has failed to claim his property. If the terms of the statute are reasonable and give the owner a fair opportunity to reclaim his property upon the payment of accrued expenses and fees, then the lawmakers have the power to provide for a final disposition of the surplus funds, in the event of a sale of the property on failure of the owner to reclaim it. And it does not, under those circumstances, constitute a confiscation of the property to authorize the residue of the funds to be appropriated to public use. This is the scheme provided in our estray laws for the disposition of proceeds of sale of an estray (Crawford & Moses' Digest, chapter 4, subdivision 2) which are, in substance, that a stray animal may be taken up and after appraisal shall be kept for a period of one year, and if not reclaimed shall become the property of the person who takes it up, and that one-half of the net appraised value of the animal shall be paid to the county treasurer as public funds. This was a part of the Revised Statutes of 1838, with only a few amendments up to this day, and the validity of these provisions has never been challenged. On the contrary, this court has impliedly, if not expressly, sanctioned them and upheld their validity in several cases. *Phelan* v. *Bonham*, 9 Ark. 389; *Davis* v. *Calvert*, 17 Ark. 85; *Smith* v. *Williams*, 95 Ark. 587.

The only difference between the two statutes, so far as concerns the validity of the one now under consideration, is as to the time given for reclaiming the property

by the owner, and that presents the question whether or not the time given for reclamation by the owner is reasonable. Our conclusion is that it is reasonable, or at least that we should not, in the face of the legislative determination, declare it to be unreasonable. This particular statute applies to a limited territory, and there is a provision for two notices, one to be given by the justice of the peace as soon as the impounded animal is appraised and which is posted in five public places in the immediate locality where the animal is taken up. Ten days' notice is required where the property is not over $50 in value and twenty days where it is over that value. After condemnation a notice of sale is then required, which is not only by posting in the locality but by publication in a newspaper. This notice is reasonably calculated to bring home to the owner information as to the fact that his animal has been taken up and is sufficient to satisfy the demands of justice. It is a reasonable interpretation of this statute that the owner may appear and reclaim the property itself at any time before it is sold, but the statute makes it the duty of the officer to deliver the proceeds of the sale of unreclaimed property to the county treasurer. It is intended, not as a confiscation of the property of the owner or of the funds arising from the sale, but as a disposition of the surplus funds arising from the sale of the unreclaimed property. This the Legislature could authorize if the provision for notice is reasonable. Suppose this statute had provided that the funds should be paid over to the county treasurer to be held for the owner for a period of six months and then if unclaimed should be finally credited to a given public fund. Can it be doubted that the statute would be valid? We think not, for the length of time within which the fund might be claimed would undoubtedly be reasonable. We are of the opinion that the provision in the present statute is not unreasonable, for it gives the owner ample opportunity to reclaim his property.

The chancery court was correct in refusing to restrain the enforcement of the statute under consideration, and the decree is therefore affirmed.

PAYNE v. THURSTON.

Opinion delivered May 9, 1921.

1. CARRIERS—TIME FOR PASSENGERS TO ALIGHT.—It is the duty of carriers to allow their passengers a reasonable opportunity to alight, and in determining what is a reasonable time they should take into consideration any special condition peculiar to any passenger and to the surroundings at the station.
2. CARRIERS — FAILURE TO ASSIST PASSENGER — NEGLIGENCE.—Under the evidence, whether the servants of a carrier were negligent in not allowing a passenger sufficient time to debark from a train, and in not rendering her assistance in debarking, *held* for the jury.
3. CARRIERS—DUTY TO ASSIST PASSENGER.—While there is no affirmative duty on the part of the trainmen to ascertain the physical condition of passengers or other conditions and circumstances making it necessary to render them special assistance in debarking from the train, yet where the passenger's physical ailment or other conditions are such that the trainmen in the exercise of ordinary care are bound to observe that the passenger requires assistance in getting off the train, it is their duty to render it.
4. EVIDENCE—STATEMENT AS TO PAST EVENT.—A statement by one that she had fallen from defendant's train and hurt her knee, and that she was unable to walk, was inadmissible, being a narrative of a past event and not in the nature of *res gestae*.
5. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.—The erroneous admission of evidence was harmless where other evidence to the same effect was admitted without objection.
6. EVIDENCE — ABSTRACT HYPOTHETICAL QUESTION.—A hypothetical question addressed to an expert witness which assumes the existence of a fact that the evidence does not tend to prove is too broad.
7. APPEAL AND ERROR—SPECIFIC OBJECTION TO EVIDENCE.—Specific objection must be made at the time that there was no evidence tending to prove one of the facts assumed by a hypothetical question to an expert, and such objection comes too late on appeal for the first time.

8. APPEAL AND ERROR—ABANDONMENT OF GROUND OF MOTION FOR NEW TRIAL.—A ground of appellant's motion for new trial, not urged in his brief, will be treated as abandoned.

Appeal from Logan Circuit Court, Southern District; *James Cochran*, Judge; affirmed.

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

1. It is apparent that appellant was guilty of no negligence, and a verdict should have been directed for defendant. It was the duty of the carrier to allow a reasonable time and opportunity to get on and off its trains and trains must stop at stations long enough for that purpose. A reasonable time is such time as a person of ordinary care and prudence should be allowed to take. It is the duty of the carrier in determining what is a reasonable time to take into consideration any special conditions peculiar to the passenger and the surroundings at the station and give a reasonable time under existing circumstances as they are known, or should be known, by the carrier's servants for a passenger to get on or off its trains. 105 Ark. 269; 101 *Id.* 183. The testimony is undisputed; shows that the carrier performed its whole duty, and there was no negligence nor liability. 117 Ark. 483; 101 *Id.* 532.

No negligence of the carrier was shown. No disability was shown in Mrs. Thurston, and in the absence of any notice of disability appellant owed no duty to her other than that allowed the ordinary passenger. 115 Ark. 505.

2. Under the authority of 115 Ark. 505, it was error to give instructions Nos. 8 and 9 for appellee, without also giving, at the same time, Nos. 3 and 4 requested by appellant. The condition and needs of a passenger must be made known to the carrier or its servants. 115 Ark. 505.

3. It was prejudicial error to admit the testimony of John A. Scott. It was hearsay and inadmissible. 78 Ark. 220; 114 *Id.* 56.

4. Hypothetical questions which were erroneous were permitted to be asked which were clearly prejudicial. 136 Ark. 83; 130 *Id.* 456.

John P. Roberts and *Evans & Evans,* for appellees.

1. Where an injury is caused by the operation of a railway train, a *prima facie* case is made against the company operating the train. 73 Ark. 548-53; 131 *Id.* 571.

2. It is the duty of a carrier to stop its trains long enough for passengers to get off and on its trains. A reasonable time must be allowed under all the circumstances of the case. It is the duty of the carrier to determine what is a reasonable time from the circumstances that are known, or should be known, to it. 128 Ark. 479; 73 *Id.* 548. A railroad must take notice of all things it should have taken notice of in the exercise of the highest degree of care due to passengers on its trains. Railroads are held to the highest degree of care reasonably consistent with their mode of conveyance and the practical operations of trains. 99 Ark. 365; 105 *Id.* 269. A carrier must give a reasonable time for passengers to alight. 2 Hutchinson on Carriers, § 1118.

3. There is no error in the instructions. They state the law correctly; nor was incompetent testimony admitted.

4. The testimony clearly showed that the injury to Mrs. Thurston by her fall hastened her death, and any injury which hastens death causes it within the meaning of the law. 50 Ark. 545; 1 Hale P. C. 428.

Where two concurring causes produce an injury which would not have resulted in the absence of either, the party responsible for either cause is liable for the consequent injury. 129 Ark. 520; 130 *Id.* 435.

WOOD, J. An action was brought by Henry Thurston, appellee, who was the husband of Dora Thurston, to recover judgment against the appellant for damages which he alleged he sustained by reason of the death of his wife. The appellee, among other things, alleged that

Mrs. Thurston was a passenger on appellant's train from Booneville, Logan County, Arkansas, to Waveland, Yell County, Arkansas; that the agents of appellant negligently failed to stop and hold the train at Waveland for a sufficient length of time to allow Mrs. Thurston to alight in safety; that they negligently failed to furnish her with the necessary assistance and means to enable her to safely debark from the train; that by reason of the acts of negligence alleged, Mrs. Thurston fell while endeavoring to alight from the train and received injuries which produced and hastened her death, to his damage in the sum of $3,000, for which he prayed judgment.

The appellee, Charles I. Evans, as administrator of the estate of Mrs. Thurston, instituted an action against the appellant to recover damages for the benefit of the children of Mrs. Thurston. The acts of negligence alleged in his complaint are the same as those set forth in the complaint of the appellee, Henry Thurston. Appellee Evans alleged damages also in the sum of $3,000, for which he asked judgment. The answers denied the allegations of negligence and damages and denied liability. The causes were consolidated for trial and were sent to a jury. The trial resulted in verdicts and judgments in favor of the appellees, from which is this appeal.

1. The appellant contends there was no evidence to sustain the allegations of negligence in the complaint. The facts on the issues are substantially as follows:

About July 1, 1919, Mrs. Thurston, in company with her little girl and carrying such baggage as she needed for a trip, boarded appellant's train at Booneville, Logan County, Arkansas, for appellant's station at Waveland, Yell County, Arkansas, a distance of about eighteen miles. Mrs. Thurston had been ill for some years with tuberculosis, though at that time she was better and was going on a visit to her mother for the benefit of her health. The train on which Mrs. Thurston took passage was about five hours late. It arrived at Waveland about two o'clock p. m.

A witness who lived at Waveland observed Mrs. Thurston attempting to get off the train after it had started. He was standing close to the steps and heard Mrs. Thurston holler and she kept hollering to let her off. Witness took hold of the little girl and set her off, and as she looked around Mrs. Thurston stepped off of the steps and got down and fell over on one leg and knee. She fell in an effort to get off of the train as it was starting. When witness heard Mrs. Thurston hollering after the train started, somebody began to flag the train. It did not stop until after Mrs. Thurston got in the waiting room. No one else got off there, and witness did not see any one get on. Neither the conductor, the porter, nor the brakeman were there. The train moved five or six feet before it stopped. It was barely moving when she stepped off. She got down on one leg and on both hands. Witness did not assist her at all. The train was barely moving when witness helped the little girl off. Witness did not get to Mrs. Thurston before she got up. Witness did not know whether Mrs. Thurston kicked the step box off or not, but it fell off.

Another witness saw Mrs. Thurston while she was waiting to take the train that day, and she looked like she had been sick. Another witness, who was on the train when it reached Waveland, stated that she heard the step box fall and looked around and saw Mrs. Thurston on one knee on both her hands on the ground. The train was then moving slowly. Mrs. Thurston got up and went to the station.

The conductor of the train testified that the first he saw of Mrs. Thurston was when she was right in front of the freight room, probably going into the waiting room. The porter had told him that some lady had fallen. He went back and asked her about getting off and asked her if she was hurt, and she stated that she was frightened more than anything else. This occurred in the waiting room. The witness looked after the unloading of passengers from the white passenger coach.

He did not see Mrs. Thurston attempting to get off. The train was a vestibule train. Witness had been off the train at the front end of the chair car. They had a porter and a brakeman that day. The brakeman was back three or four car lengths protecting the rear end of the train. After the passengers were unloaded and loaded, witness and porter and brakeman went up to the express car. They stayed there three or four minutes. The brakeman's duties required him to be back at the rear end of the train. When the witness took up the ticket from Mrs. Thurston, she did not say anything to witness about being sick, and she was sitting in a seat just like the rest of the passengers. Witness did not pay any attention to her.

Another witness on behalf of the appellant testified that he was the station agent at Waveland and that he remembered the time Mrs. Thurston came down there and got off the train while it was just moving up. He saw her in the waiting room—was there when the conductor asked her if she was hurt and she said she was not. Witness heard her say that she stepped off of the train and fell.

In *Barringer* v. *St. L., I. M. & S. Ry. Co.,* 73 Ark. 548, we said: "But the law is that it is the duty of carriers to allow their passengers a reasonable opportunity of getting on or off their trains, and they must stop at stations long enough for that purpose. A reasonable time is such time as a person of ordinary care and prudence, under the circumstances, should be allowed to take. It is the duty of the carrier, in determining what is a reasonable time, to take into consideration any special condition peculiar to any passenger, and to the surroundings at the station, and to give a reasonable time under the existing circumstances, as they are known, or should be known, by its servants, for a passenger to get on or off its train." *St. L., I. M. & S. Ry. Co.* v. *Trotter,* 101 Ark. 183; *St. L., I. M. & S. Ry. Co.* v. *Wright,* 105 Ark. 269; *St. L., I. M. & S. Ry. Co.* v. *Aydelott,* 128 Ark. 479-485.

Applying the above doctrine to the facts which the evidence above set forth tended to prove, it was clearly an issue for the jury to determine whether or not the servants of appellant were negligent in not allowing Mrs. Thurston sufficient time and rendering her the necessary assistance in debarking from appellant's train. The jury was warranted in finding that Mrs. Thurston and her little daughter were the only passengers who alighted from the train at Waveland station the day of the alleged injury, and that the conductor and his assistants — the porter and brakeman — knew, or should have known, this fact; that, when they were in the act of aligthing, the train was started and was moving slowly as they got off; that no step box was placed on the ground for their use; that, in her sick and feeble condition and with her little girl and their baggage, it was necessary that Mrs. Thurston have assistance to enable them to get off safely, and that appellant's agents were bound to have known such facts and were negligent in not furnishing her such assistance and in not holding the train a reasonable length of time, under the circumstances, for Mrs. Thurston to safely alight.

While there is no affirmative duty upon the part of a conductor, porter or brakeman to ascertain the physical condition of passengers, or other conditions and circumstances making it necessary to render them special assistance in debarking from the train, nevertheless, where the physical ailment of any passenger is such, or other conditions are such, that these train employees in the exercise of ordinary care in the discharge of their respective duties are bound to observe that they require assistance in getting safely on or off the trains, then it becomes the duty of such employees to render such assistance; and a failure to discharge such duty, resulting in injury to a passenger, is negligence, for which the carrier is liable in damages for such injury. In this case the jury might have found that Mrs. Thurston's very appearance indicated that she was seriously ill. Her only companion was her little girl, and she was incumbered with some bag-

gage. Under these circumstances, the porter and brakeman and conductor, knowing that these were the only passengers to be discharged at Waveland, in the exercise of ordinary care in the discharge of their respective duties, could and should have observed that Mrs. Thurston needed assistance to enable her to safely debark from the train, and that it was necessary for the train to be detained a sufficient length of time for that purpose. At least, it was a question for the jury under the circumstances to say whether or not these employees were negligent in failing to discharge their duties to Mrs. Thurston.

The instructions of the court on the issue as to whether appellant was negligent as alleged in the complaint were in conformity with the law as announced in previous decisions of this court in regard to the duty of carriers toward their passengers while getting on and off trains. See *Barringer* v. *St. L., I. M. & S. Ry. Co., supra; St. L., I. M. & S. Ry. Co.* v. *Hartung,* 95 Ark. 220. The doctrine announceed in *Weirling* v. *St. L., I. M. & S. Ry. Co.,* 115 Ark. 505, is not applicable to the facts of this record, because of the difference between the facts of that case and those of the instant case. The court did not err in refusing the instructions in which the appellant sought to have the doctrine of that case applied to the facts of the present case.

2. Witness John Scott testified that he was at the station on the day that Mrs. Thurston got hurt. He met her right this side of the station. She said that she was sick, or had been sick, and that she had fallen from the train and hurt her knee and ankle, and that she was not able to walk to her brother's house. The appellant objected to the above testimony and asked that the same be excluded from the jury. The court overruled the objection and refused the request, to which the appellant duly excepted.

The testimony was not in the nature of *res gestae.* The remarks of Mrs. Thurston were not in the nature of voluntary exclamations of pain resultant from the in-

jury she had received, but they were in the nature of a narrative of the fact that she was sick, that she had fallen and hurt her knee and ankle, and for that reason she was not able to walk to her brother's house. The court, therefore, erred in its ruling. *L. R. & H. S. W. Ry. Co.* v. *Cross,* 78 Ark. 220; *Prescott & North Ark. Ry. Co.* v. *Thomas,* 114 Ark. 56. But we can not agree with learned counsel for appellant that the error was prejudicial to appellant's defense. The undisputed testimony shows that Mrs. Thurston fell on her hands and knee. The appellant's conductor himself testified that the porter told him that some lady had fallen and that she was supposed to have dropped down on her knee in getting off of the train. Another one of appellant's witnesses testified that he heard Mrs. Thurston say that she stepped off of the train and fell.

Mrs. Thurston's brother, who was a witness for appellant, testified that when he drove up she told him that he had just come in time to save her life. "She was complaining of being sick, and while she was at his house she kept complaining of a hurting in her side. She stayed there all night. My sister said she started to get off the train, and the little girl went out ahead of her, and she just kicked the step box out and started to getting off and the train was moving slowly when she started to step off, but when she hit the ground she fell on one hand and on one knee."

Other witnesses on behalf of the appellee, and without objection on the part of the appellant, testified that Mrs. Thurston fell on her knee and both hands, and that she said she had been sick, and she looked like she had been sick.

The physician, who was called to attend Mrs. Thurston at her mother's just after the alleged injury from the fall, testified, without objection from appellant, that he found that she "was suffering from some kind of a shock—had a bruised place on one of her knees—looked very much like she had fallen on her knee."

In view of the testimony thus adduced by appellant itself and the undisputed testimony of the witnesses for the appellee showing that Mrs. Thurston was sick and that she had fallen on her knee and hands, it occurs to us that no possible prejudice could have resulted to appellant from the mere statement of Mrs. Thurston that she was sick and had fallen and hurt her knee and ankle. It will be observed that she did not say that her fall was caused by any negligence on the part of the servants of appellant and appears to have been only narrating the fact of her fall merely to show that she was unable to walk to her brother's house. This statement was but a recital of facts which had been established by the undisputed evidence and to which appellant had before offered no objection.

3. Counsel for appellee asked several physicians—experts—substantially the following question: "If she received an injury to her left side and a shock to her knee and body by falling on the ground, and she was at that time suffering from tuberculosis and afterward was continuously confined to her bed until she died, what is your opinion as to whether or not that injury hastened her death?" Counsel for the appellant objected to the question. The court overruled the objection, and it is now contended that the court erred for the reason that the hypothetical question included an assumption of the fact that Mrs. Thurston in the fall had received an injury to her left side and body when there was no testimony to justify such assumption.

The court excluded from the jury what Mrs. Thurston said with reference to her side hurting her, but the doctor was allowed to testify without objection that she appeared to be suffering from a shock. There is no testimony that her side was injured by the fall, and no testimony that any part of her body was injured except her knee and ankle. The hypothetical question was, therefore, too broad because it assumed the existence of facts that the evidence did not tend to prove. The question was defective. *Taylor* v. *McClintock,* 87 Ark. 243-

294; *Bell* v. *State,* 120 Ark. 535-551-2; *Kelley* v. *State,* 146 Ark. 509. However, there was evidence tending to establish some of the facts assumed in the hypothetical question. It was the duty of the counsel, if he desired to have eliminated the particular fact which he now claims there was no evidence to sustain, to have called the court's attention to it by specific objection to such fact. See *Bell* v. *State, supra; Powell* v. *State,* 74 Ark. 355; *Missouri & North Ark. Ry. Co.* v. *Daniels,* 98 Ark. 352-359-360. The specific objection which the appellant now makes to the hypothetical question for the first time can not avail it.

4. The appellant contends in the last place that there is no evidence that Mrs. Thurston's death was in any way hastened by the injuries alleged to have been sustained. The answers to the hypothetical questions propounded to the several experts show that this contention is not tenable. The experts gave it as their opinion, assuming the existence of facts as stated in the hypothetical questions, that Mrs. Thurston's death was hastened by her fall from the train.

Learned counsel for appellant do not urge by way of argument in their brief that the judgments are excessive, and we therefore treat that ground of its motion for a new trial as abandoned.

The judgments are correct, and they are affirmed.

TROTTER *v.* STATE.

Opinion delivered May 9, 1921.

1. HOMICIDE—MANSLAUGHTER—INSTRUCTION.—In a case where the jury might have found the defendant guilty of involuntary manslaughter, an instruction that if the killing was in the prosecution of a lawful act done without due care and circumspection it was voluntary manslaughter, was erroneous and prejudicial where the jury found him guilty of voluntary manslaughter, since, if the jury had been properly instructed, they might have found him guilty of involuntary manslaughter.

2. CRIMINAL LAW — INSTRUCTION — GENERAL OBJECTION.—A general objection to an instruction that is fundamentally defective is sufficient to direct the court's attention to it.
3. CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.—An instruction to the effect that when the State relies upon circumstantial evidence the chain of circumstances must be so convincing of defendant's guilt as to exclude every other reasonable hypothesis was properly refused in a case where the State did not depend wholly upon circumstantial evidence for conviction.
4. HOMICIDE—EVIDENCE—REPUTATION.—In a prosecution for murder where a witness testified that the reputation of decedent for turbulence and violence was bad, it was not error to refuse to permit the witness to state his opinion as to whether she was a dangerous woman, as the individual opinion of the witness concerning her character does not tend to prove that defendant had knowledge of such character.
5. HOMICIDE—DEGREE OF MANSLAUGHTER—MODIFICATION OF SENTENCE. —Where the court erroneously instructed the jury with reference to the degrees of manslaughter, and the jury found defendant guilty of voluntary manslaughter, and assessed the maximum punishment therefor, and the evidence would have justified a finding of guilt of involuntary manslaughter, the judgment will be modified, unless the Attorney General elects to have the cause remanded for a new trial, and a judgment entered reducing the sentence to imprisonment in the State penitentiary for one year, the maximum punishment for involuntary manslaughter.

Appeal from Drew Circuit Court; *Turner Butler,* Judge; affirmed with modification.

Henry & Harris, for appellant.

1. The evidence is not sufficient to sustain the verdict. It will not support a verdict of any higher degree of homicide than involuntary manslaughter. 34 Ark. 639.

2. There was error in refusing to admit testimony as to reputation of deceased. 2 Wharton, Cr. Law, § 1099; 2 Duval 328; 1 Metc. 370; 31 Miss. 504; 50 Mo. 357; 25 Mich. 405.

3. The court erred in its instructions to voluntary manslaughter. C. & M. Digest, § 2356; 99 Ark. 188; 117 *Id.* 302.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. The evidence is sufficient to sustain the verdict. 75 Ark. 246; 110 *Id.* 402.

2. Testimony as to threats and dangerous character of deceased, was admissible. 29 Ark. 248; 139 *Id.* 446.

3. There is no error in the instructions. C. & M. Digest, § 2345.

WOOD, J. Appellant was indicted for murder in the first degree in the killing of Fannie Read. He was tried and convicted of voluntary manslaughter. From the judgment sentencing him to imprisonment in the State penitentiary for a period of five years, he appeals to this court.

The appellant, a negro eighteen years of age, and Fannie Read, a negress about thirty years old, on the 8th of August, 1920, were living in illicit cohabitation at Tennessee Spur in Drew County, Arkansas. On the night of that day, and near the house in which they were living, a gun was discharged and appellant and Fannie Read were observed running close together for a short distance. They stopped and were scuffling when a gun was fired again and Fannie fell. She was shot in the right groin with bird shot or buck shot and died from the effects of the wound.

It could serve no useful purpose to discuss in detail the testimony. There was evidence to warrant the jury in finding the appellant guilty of voluntary manslaughter. The testimony of appellant was in part as follows: "I had some puppies there, and there was something the matter with the chickens, and I got up (out of bed) to see what the trouble was. Fannie was out there with the gun and said, "You son-of-a-bitch, I told you I was going to get you," and then she shot and ran. I ran after her to take away the gun. While we were tusseling over it, it went off and shot her. We were up close together; both of us had hold of the gun; she grabbed my broken arm; I snatched it and it went off. I didn't know the gun was loaded, but I saw her unbreech it while going down the road. She got the gun out of her room.

It was my gun—a single barrel shotgun. I didn't shoot her. I could not have shot her. My arm was in a sling and in splints from my wrist to my shoulder and I could not get the gun up to my shoulder." The above testimony, if believed, would have warranted the jury in finding appellant guilty of involuntary manslaughter. The court gave the following instructions on manslaughter:

"8. Manslaughter is the unlawful killing of a human being without malice, express or implied, and without deliberation.

"9. Manslaughter must be voluntary upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible. This is voluntary manslaughter.

"10. If the killing be in the commission of an unlawful act, without malice and without the means calculated to produce death, or in the prosecution of a lawful act done without due care and circumspection, it shall be manslaughter. This is voluntary manslaughter.

"11. Under the indictment in this case it is competent, if the proof justifies it, to find the defendant guilty of murder in the first degree, murder in the second degree, voluntary manslaughter or involuntary manslaughter.

"16. If you have a reasonable doubt as to whether it is murder in the second degree or voluntary manslaughter, you should convict only of manslaughter. If you have a reasonable doubt whether it is voluntary or involuntary manslaughter, you should convict only of involuntary manslaughter."

The appellant objected and excepted to the ruling of the court in giving each of the above instructions. While the court told the jury that they might find appellant guilty of involuntary manslaughter, there is no instruction informing the jury as to the punishment prescribed for such offense.

The testimony showed that the gun, from which the fatal shot was fired, was a single barrel shotgun. Ac-

cording to the testimony of the appellant, after Fannie Read fired the gun he ran after her for the purpose of disarming her and was trying to snatch the gun away from her when the same was discharged, causing her death. If the jury believed that such was the intention of appellant, this conduct on his part was not unlawful; but the jury was warranted in concluding that the death of Fannie Read was thus caused without due care and circumspection on the part of the appellant.

The court, in its instruction No. 10, told the jury that, if the killing was in the prosecution of a lawful act done without due care and circumspection, it was voluntary manslaughter. Applying the above instruction to the testimony, if the jury believed and accepted the testimony of the appellant, they had no alternative but to find him guilty of voluntary manslaughter. Instead of telling the jury that such conduct in the prosecution of a lawful act done without due care and circumspection was involuntary manslaughter, the court told the jury just the opposite. This was fatal error and highly prejudicial to the appellant; because, if the jury had been told that if they believed that the killing was done in the prosecution of a lawful act, but without due care and circumspection, they might find the appellant guilty of involuntary manslaughter, the jury under the evidence then would have been authorized to find, and might have found, the appellant guilty of involuntary manslaughter.

The jurors were not lawyers and did not understand the difference between voluntary and involuntary manslaugther. Under their oaths they had to try the case according to the law as declared by the court. The court, in its instructions, made no distinction between voluntary and involuntary manslaughter. The instructions concerning manslaughter were in irreconcilable conflict, and the jury, in attempting to follow them, would be led into inextricable confusion. The mistake of the court in giving conflicting and confusing definitions was not merely one of verbiage or a collateral misprision, which the jurors could themselves observe and correct. The

jurors, being laymen, could not correct the mistake of the court. The fact should be noted here that the framers of the Revised Statutes and the Legislature of 1837 which adopted these "Revised Statutes" defining "manslaughter" as set forth in section one, and "voluntary manslaughter" as set forth in section two, do not designate the offense prescribed in section three as "involuntary manslaughter." Chap. 44, § 3, Revised Statutes. The offense set forth in this section was first designated by our court as "involuntary manslaughter" in *Harris* v. *State,* 34 Ark. 469-79. The first digesters who designated it as such were Crawford & Moses, § 2356, C. &. M. Digest. When the Legislature itself has not undertaken to define "involuntary manslaughter," and only the Supreme Court and digesters have undertaken to do so, how could a jury of laymen know the difference between voluntary and involuntary manslaughter? They could not know, and even if they did know, they are nevertheless bound to take the law from the trial court. The mistake was one which the court alone could correct. The court was not asked by the State to correct it, and did not correct it. The appellant, by his general objection to that particular instruction, called the court's attention to such defects as rendered the instruction fundamentally wrong. The error was one of substance and not of form. It was an inherent defect. Therefore, a general objection to that particular instruction was sufficient to direct the attention of the court to it. *Fones* v. *Phillips,* 39 Ark. 17-40.

2. Appellant complains of the ruling of the court in refusing to give its prayer for instruction concerning the effect of circumstantial evidence, as follows:

"A. You are further instructed that when the State relies upon circumstantial evidence, to justify the conviction of a person charged with crime, then such chain of circumstances, as a matter of law, must not only be inconsistent with defendant's innocence, but must be so convincing of his guilt as to exclude every other reasonable hypothesis, and must establish in the minds of the

jury an abiding conviction, to a moral certainty, of the truth of the charge, and unless this is done in this case then it is your duty to acquit the defendant."

There was no error in the ruling of the court. This was not a case in which the State depended wholly upon circumstantial evidence for the conviction of appellant.

3. J. D. Ratterree testified that he knew the general reputation of Fannie Read while she lived in the town of Monticello for turbulence and violence, or peace and quietude—that such reputation was bad. The witness was asked: "From that reputation did you consider her a dangerous woman?" The court would not permit the witness to answer the question, and the appellant duly excepted to the ruling of the court. This ruling of the court was correct. The individual opinion of a witness concerning the character of the deceased is not competent testimony because that does not tend to prove that the accused had knowledge of the fact that the deceased was a person of turbulent, violent and dangerous disposition. But when such is the general reputation of the deceased, it tends to show that the accused had knowledge of such character; and where it is doubtful as to who was the probable aggressor, such testimony is competent because it tends to throw light upon that issue.

"The reputed character of the deceased on a charge of homicide," says Mr. Greenleaf, "may be evidential as indicating his reasonable apprehension of attack upon an issue of self-defense; for, in a quarrel or other encounter, the opponent's violent or turbulent character, as known to the accused, may give to his conduct a significance of hostility which would be wanting in the case of a man of ordinary disposition. It is the essence of this principle, however, as all courts concede, that the reputed character of the deceased should have been known to the accused." 1 Greenleaf on Evidence, p. 42, § 14; 1 Wharton's Criminal Evidence, p. 246; Underhill on Evidence, §§ 324, 325; *Palmore* v. *State,* 29 Ark. 248, 261, 262, and cases there cited; *Coulter* v. *State,* 100 Ark. 561-564.

4. The jury returned a verdict of guilty against the appellant for voluntary manslaughter and fixed his punishment at a longer term in the State penitentiary than the shortest period prescribed for that offense. Therefore, it is manifest that if the jury had had an opportunity to return a verdict of guilty against the appellant for involuntary manslaughter and had found him guilty of such offense, they would not have fixed his punishment at a shorter period than one year, which is the longest period prescribed as punishment for that offense. The prejudice to appellant in the granting of instruction No. 10 will be cured if the punishment of appellant is fixed at one year in the State penitentiary instead of five.

For the error in granting the State's prayer for instruction No. 10, the judgment convicting the appellant of voluntary manslaughter must be reversed, but, as a conviction for this offense includes the conviction also for involuntary manslaughter, and as it is obvious that the jury would have assessed the maximum punishment for that offense, unless the Attorney General elects within ten days to have the cause remanded for a new trial for voluntary manslaughter, the judgment of the circuit court will be modified and a judgment will be entered here affirming the conviction of involuntary manslaughter, and certified by the clerk of this court to the keeper of the State penitentiary reducing the sentence of the appellant to imprisonment in the State penitentiary for one year for "involuntary manslaughter." *Brown* v. *State,* 34 Ark. 232-239; *Noble* v. *State,* 75 Ark. 246-250; *Routt* v. *State,* 61 Ark. 594; *Harris* v. *State,* 119 Ark. 85-94.

McCULLOCH, C. J. (dissenting). Instructions Nos. 8, 9 and 10 are in the language of the statute defining manslaughter, and the error in No. 10 in declaring that the facts related constitute voluntary manslaughter was obviously clerical. It was a mere "slip of the tongue," and the meaning of the court was obvious to any one who took

notice of the language used. If appellant's counsel took notice of the error, they ought to have called the attention of the court to it by a specific objection. If they did not notice it, then it is not conceiveable that the jury took sufficient notice of it to be misled by the incorrect statement. In other words, this is an instance, I think, where it is peculiarly essential that a specific objection should have been interposed to the incorrect language in an instruction. The trial judge repeated the precise language of the statute and manifestly intended to write the word involuntary, instead of voluntary. Perhaps the error was made by the stenographer who transcribed the instruction. At any rate it is presumable that the trial judge would have corrected the error if his attention had been called to it, for it may be assumed that he did not intend to give two definitions of voluntary manslaughter. The objection to this instruction was formal and general, the same as made to the other twenty-six instructions of the court covering all of the grades of homicide.

The error is therefore harmless and should be disregarded.

Mr. Justice SMITH joins in this dissent.

CALDWELL v. MISSOURI STATE LIFE INSURANCE COMPANY.

Opinion delivered May 9, 1921.

1. CONTRACTS—QUASI AND IMPLIED CONTRACTS DISTINGUISHED.—An implied contract is one that is inferable from the conduct of the parties, as carrying out their intention; while a *quasi* or constructive contract is one where the law imposes an obligation enforceable in a contractual action because of the conduct of the parties, though contrary to their intention.

2. ATTORNEY AND CLIENT—IMPLIED CONTRACT.—Where the attorney of an insurance company resigned his employment upon discovering misappropriation of the company's funds by its president, and reported the facts to the directors, who refused to take action thereon, whereupon he reported the matter to the State Superintendent of Insurance and thereby caused the president's resignation, there was no implied contract by the company to pay for the attorney's services.

3. ATTORNEY AND CLIENT—CONSTRUCTIVE CONTRACT.—Where an insurance company refused to avail itself of the services of an attorney in exposing misappropriations by its president, whereupon the attorney reported the same to the Superintendent of Insurance, and procured the president's resignation, the law does not impose on the company any contractual obligation to pay the attorney for his services in the matter.

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

STATEMENT OF FACTS.

The Missouri State Life Insurance Company brought this suit in equity against Clinton L. Caldwell to foreclose a mortgage on 320 acres of land in the Osceola District of Mississippi County, Arkansas, given to secure an indebtedness of $11,000 borrowed by the defendant from the plaintiff.

Clinton L. Caldwell filed an answer in which he admitted the allegations of the plaintiff's complaint, and by way of cross-complaint asked for judgment against the plaintiff in the sum of $60,000. He based his right to recover against the plaintiff on a state of facts substantially as follows:

The Missouri State Life Insurance Company is a corporation organized under the laws of the State of Missouri and does a life insurance business in that and several other States, including the State of Arkansas. The plaintiff is a stock company with about 11,000 stockholders. In 1918 it had 87,000 policy holders and outstanding insurance to the amount of $157,000,000. Its assests were about $17,000,000 and its capital, surplus and profits, about $3,000,000. John G. Hoyt was president of the company and in active charge of its business. He owned about one-fourth of the stock, and the remainder of the stock was owned by about 11,000 stockholders.

The defendant, Clinton L. Caldwell, was an attorney at law, duly licensed to practice in the States of Missouri and Arkansas. Caldwell specialized in the examination of land titles, and for about fifteen years prior to

January 7, 1918, there was numbered among his clients the plaintiff which employed him to examine and approve titles to real estate offered as security for loans made by it. His compensation for such services was paid exclusively by the borrower. Caldwell usually made $10,000 a year out of this business. A short time prior to January 7, 1918, Caldwell discovered that John G. Hoyt, president of the plaintiff company, was using the funds of his company for his own private gain, in violation of section 7065 of the Revised Statutes of Missouri for 1919. Caldwell resigned from the employment of the company on the 7th day of January 1918, and on January 14, 1918, he presented to the Missouri directors of the plaintiff company a specific statement in writing showing that John G. Hoyt had purchased two sections of cut-over land in Missouri for about $26,000 in the name of E. L. Harris and had loaned Harris $65,000 of the plaintiff's money ostensibly to pay the purchase price of said land, whereas $38,500 of said amount was not needed to pay the purchase price of said land, but was to be used in clearing and improving said land.

The directors caused the charge made by Caldwell to be presented at the annual meeting of the stockholders held in St. Louis on January 15, 1918. The stockholders declined to consider the charge and re-elected Hoyt as a director, and the board of directors re-elected him as president of the company. On January 16, 1918, Caldwell presented his charge to the superintendent of insurance for the State of Missouri, who found this and additional charges made by Caldwell to be true. Whereupon he demanded and received the resignation of Hoyt from the presidency of the board of directors of said company on February 28, 1919. The resignation was duly accepted by the board of directors on that day.

Among the charges brought by Caldwell against Hoyt, similar to the charge detailed above, was one where he frustrated the attempt of Hoyt to purchase 20,000 acres of cut-over land for the sum of $520,000 in the

name of other parties and to borrow from the plaintiff $800,000 with which to pay for and improve said land.

The plaintiff interposed a demurrer to the cross-complaint, which was sustained by the court, and the cross-complaint was dismissed for want of equity. The defendant, Caldwell, has appealed.

Little, Buck & Lasley, for appellant.

This case calls for the application of the law of *quasi*-contracts upon two theories, (1) receipt, acceptance and retention of benefits, and (2) the performance of an obligation by appellant which it was the legal and moral duty of appellee company to perform. Keener on the Law of *Quasi*-Contracts, pp. 19-20; Woodward on *Quasi*-Contracts, pp. 9-10; *Ib.*, pp. 190-4; Keener on *Quasi*-Contracts, pp. 341-2; *Ib.* 34617; Kennedy on Civil Salvage, p. 4 *et seq.* See, also, 83 Ark. 605; 23 Fed. Cases 13, 630; 30 *Id.* 18, 194. The cross-complaint states a cause of action, and this cause should be reversed.

Jourdan, Bassieur & Pierce and *Block & Kirsch,* for appellee.

1. The transactions out of which it is sought to have a contract implied or "constructed" all occurred in Missouri, and the laws of that State govern. All matters must be governed by *lex loci contractus.* 44 Ark. 213; 46 *Id.* 66; 73 *Id.* 518; 137 *Id.* 80.

The parties to a contract are conclusively presumed to have contracted with reference to the law existing at the time when and the place where the contract is made and to be performed. 40 Ark. 423; 25 *Id.* 625. If the person for whom services of a kind usually made the subject of charge are rendered knows of their rendition, he is liable therefor, though he made no express request, in the absence of special circumstances negativing his liability. 2 Page on Contracts, § 774.

If the services are accepted voluntarily, a previous request is not necessary to the creation of a liability. 2 Page on Contracts, § 775. This rule, however, applies

only where the party for whom the services are rendered is free to take their benefit or reject it. If the services are of such a nature that he has no choice but to accept them, he can not be said to accept them voluntarily. Such acceptance creates no liability. 2 Page on Cont., § 776; 61 Mo. App. 64; 75 S. W. 966; 81 Am. Dec. 105; 33 Ohio St. 374; 95 Ark. 156; 42 N. E. 15. See, also, 6 R. C. L. 558; 61 Mo. App. 64; 95 Ark. 156.

The complaint must be looked to to determine what the allegations really are. The allegations of acceptance are directly in the teeth of the allegation that the board of directors and stockholders would have nothing to do with appellant. And they are mere conclusions of law and are not admitted by the demurrer. 163 Mo. 342; 63 S. W. 705; 142 U. S. 510; 110 Ark. 422. In the light of these authorities the cross-complaint does not state facts to constitute a cause of action "on the theory of benefits received or services rendered."

2. No cause of action on *quasi*-contract is made. Woodward on *Quasi*-Contracts, § 207; 34 Ch. Div. 234, 248.

Under the laws of Missouri appellee was under the supervising control of the State Insurance Supernitendent, who was empowered to inquire into all violations of insurance laws. Rev. Stat. of Mo. 1919, § 6095; *Ib.*, § 6129; Woodward, *Quasi*-Contracts, §§ 196, 321, pp. 314-15. The cross-complaint states no cause of action.

HART, J. (after stating the facts). The only issue raised by the appeal is whether on the admitted facts the defendant, Caldwell, was entitled to recover of the defendant on an implied contract the value of the services for which he claims compensation. The defendant does not claim there was any express contract between him and the plaintiff, but he claims that he is entitled to recover from the plaintiff the reasonable value of his services on an implied contract.

In discussing the difference between contracts implied from the facts and contracts implied in law, *quasi*

or constructive contracts, in the case of *Hertzog* v. *Hertzog,* 29 Penn. St. Repts. 465, the court said: "But it appears in another place that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in assumpsit. It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is diregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty."

It is manifest that no contract can be implied from the facts in this case. Caldwell had resigned his position under the plaintiff and did not during the time he performed the services in question act for the plaintiff. He presented his charges against the president of the company to the directors who resided in Missouri, and they in turn presented the same to the stockholders at their annual meeting. The stockholders declined to take notice of the charges, and re-elected Hoyt as a director,

and on the same day the board of directors re-elected him as president. This negatives the idea that the plaintiff accepted the services of Caldwell, or realized that they were deriving any benefit therefrom. Caldwell was not called upon by the corporation to perform the services in question. It not only did not accept his services, but did not even acquiesce in his performance of them. After being turned down by the stockholders, Caldwell presented his charges to the superintendent of insurance and thereby caused the superintendent to demand and receive Hoyt's resignation. The corporation had no voice in the matter and the action of Caldwell was purely voluntary. We can not perceive how the corporation could be said to have made an implied contract with him by accepting the benefits resulting from his services, which it had no power to reject. Hence no contract is raised by implication from the facts to pay Caldwell what his services are reasonably worth.

But counsel for the defendant claim that he is entitled to recover on a contract implied in law. There is nothing in the record from which this relation can be implied. There is no general equitable principle that one who receives the benefit of another's work against his will is liable to pay for it. There is a large class of cases where suits are brought to recover money paid by mistake, or where it has been obtained by fraud. In such cases the law implies a promise to repay the money. In the application of a like principle a recovery has also been allowed where necessaries had been furnished an insane person, or neglected wife, or child. So in the application of the principle this court allowed a recovery to a physician who performed an operation on an unconscious person in an effort to save his life. *Cotnam* v. *Wisdom,* 83 Ark. 601. The court said that the law implied a contract to pay a reasonable fee to the physician because the unconscious person was in the same situation as persons incapable of contracting by reason of being infants, or insane persons. The recovery is allowed in such cases on the ground that the services are

necessary to save or preserve the life of the principal. However, it can have no application in the case at bar.

There is another class of cases where the law prescribes the rights and liabilities of persons who have not entered into any contract with each other, but between whom circumstnces have arisen which make it just and equitable that one should have a right, and that the other should be subject to a liability similar to the rights and liabilities in certain cases of express contracts. Thus if one has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back; for the law implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. *Dusenbury* v. *Speir,* 77 N. Y. 144. In that case the court likened constructive contracts of this nature to constructive trusts in a court of equity.

In 13 C. J. 224, the learned author said: "Among the instances of *quasi* or constructive contracts may be mentioned cases in which one person has received money which another person ought to have received, and which the latter is allowed to recover from the former in an action of assumpsit for money had and received, or money received to the use of plaintiff, cases in which one person has been compelled to pay money which another ought to have paid, and which he is allowed to recover from the latter in an action of assumpsit for money paid to his use; cases of account stated, from which the law implies a promise which will support an action of assumpsit; judgments on which an action of assumpsit or debt may be maintained, according to the circumstances, because of a promise to pay implied by law; cases in which an obligation to pay money is imposed by statute; cases where a person wrongfully appropriating property to his own use becomes liable to pay the owners the reasonable value thereof; cases in which a person fails to deliver specific property and becomes liable for the money value thereof; cases where one party wrongfully

compels another to render him valuable services, and a promise to pay their value is implied; cases where one man has obtained from another by oppression, extortion, or deceit, or by the commission of a trespass; cases where necessaries have been furnished to a wife wrongfully abandoned by her husband, although he has given notice that he will not be responsible; and cases in which the husband is permitted to recover the wife's funeral expenses from her estate."

None of the cases referred to are similar to the case at bar. Neither the law alone, nor natural equity would require the plaintiff to pay the defendant for his services in the present case. Caldwell was under no duty to act in the premises. He was a mere volunteer, and did not act from any sense of duty imposed by law or by his relationship to the plaintiff. He may have been acting as he thought for the public good, but this fact did not make the plaintiff liable for his services. He was under no duty to perform them, and the plaintiff, neither by words, act, nor conduct, recognized, acquiesced in, or accepted his services as beneficial to it. There was no duty performed by Caldwell which would define the contract, nor was there any contract implied by the conduct of the plaintiff. The mere fact that Caldwell voluntarily preferred charges against the president of the plaintiff company, and thereby caused his removal, was not sufficient upon which to predicate a recovery in this case, and it could make no difference that his action resulted in a benefit to the plaintiff company.

It follows that the decree must be affirmed.

FINCH v. HUNTER.

Opinion delivered May 9, 1921.

1. WILLS—CONSTRUCTION.—The cardinal rule in construing a will is to ascertain and declare the intention of the testator, to be gathered from reading the entire will and construing it so as to give effect to every clause and provision therein if this can be done.

2. WILLS—CONSTRUCTION.—Where a testator, having two children, F. and H., devised certain land "to each of my children and H.," and devised the rest of his lands to his wife for life with remainder to H., the first devise is to the two children, the words "and H." being used in the sense of "including H.," to indicate that H. was included in the words, "to each of my children."

3. WILLS—GRANDCHILDREN.—Grandchildren are not included in a gift to the testator's children, in the absence of words in the contract to indicate such intention.

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

STATEMENT OF FACTS.

Mrs. H. C. Finch brought this suit in equity against her sister, Emmer Lee Hunter, for the partition of certain real estate to which she claims an undivided one-half interest under the will of their deceased father.

A. J. Hunter owned the lands in controversy in his lifetime and himself wrote the will which is the basis of this lawsuit. A. J. Hunter died in July, 1919, leaving surviving him his widow, Mrs. A. J. Hunter, two children, the plaintiff, Mrs. H. C. Finch, and the defendant, Emmer Lee Hunter, and two grandchildren, Loyd Gilliam, and Earl Gilliam, the sons of a deceased daughter. A. J. Hunter was married four times, and the plaintiff, the defendant, and the deceased daughter were all children of different mothers. His widow had no children.

The will was duly signed and attested and the body of it is as follows:

"*Know all men by these presents,* that I, A. J. Hunter, of Lavaca, in the county of Sebastian and State of Arkansas, of sound and disposing mind and memory, do make and publish this, my last will and testament, hereby revoking all former wills by me at any time heretofore made.

"1. I hereby constitute and appoint J. B. Branch to be the sole executor of my last will, directing my executor to pay all my just debts and funeral expenses and the legacies hereinafter given, out of my estate.

"2. After the payment of my said debts and funeral expenses, I give to each of my children, and Emmer Lee Hunter, what is known as the Horse Shoe Bend west of Big Creek, towit: (SE) southeast of the (SE) southeast quarter of section (18) eighteen, township (8) eight, north of range (29) twenty-nine west, containing nine acres, more or less.

"And northeast part of southeast (SE) of southeast (SE) section (13) thirteen, township (8) eight, range (30) thirty, eleven acres and eighty-five one-hundredths and the north part of southwest, section (13), township (8), range (29), containing six acres, lying west of Doctor Fork, making Doctor Fork and Big Creek line, containing in all twenty-seven acres, more or less.

"And after payment of all my just debts I give devise to my said wife, during her natural life or long as she remains my widow, all the balance of my real estate, and after her decease or marriage to go to my daughter, Emmer Lee Hunter.

"I give and bequest to my grandson, Loyd Gilliam, five dollars to be paid within twelve months after my decease; I give and bequest to my grandson, Earl Gilliam, five dollars to be paid within twelve months after my decease.

"I give and bequest to my daughter, Willie Finch, five dollars to be paid within twelve months after my decease.

"In testimony whereof, I hereunto set my hand, and publish and declare this to be my last will and testament, in the presence the witnesses named below, this 24th day of April, A. D. 1918."

The contest in this case is over the twenty-seven-acre tract in the second clause of the will.

The chancellor found in favor of the defendant, and the plaintiff has appealed.

Pryor & Miles, for appellant.

The intention of the testator in the construction of a will must be gathered from its language used when

unambiguous and not from oral testimony. There is no ambiguity here; it clearly gave to the two children the 27 acres of land and the balance of the real estate to the daughter, Emmer Lee Hunter. 68 Ark. 369; 116 *Id.* 328.

The appellee, Emmer Lee Hunter, *pro se.*

A clerical mistake in a will may be corrected to effect the manifest intention of the testator as collected from the context of the will. 22 Ark. 567. Where two parts of a will are irreconcilable the latter clause prevails. *Ib.*

A testator is presumed to have used the word "children" in a will in its ordinary and strict meaning, unless the contrary is plainly shown. 105 Ark. 618. The testator's intent should be carried out as ascertained in view of all the provisions of the will. 98 S. W. 1167. Considering the will altogether, there is no prejudicial error, as the evidence sustains the finding.

HART, J. (after stating the facts). It is the contention of the plaintiff that the language of the will gives the Horse Shoe Bend land, consisting of twenty-seven acres, equally to the plaintiff and to the defendant, and such was the contention made by the plaintiff before the chancellor.

The chancellor was of the opinion that, if he had intended to divide this place between the plaintiff and defendant in equal parts, the testator would have used language as follows: "To my children, Willie Finch and Emmer Lee Hunter." The chancellor was of the opinion that it was the intention of the testator to give all of his land to Emmer Lee Hunter, but to charge a certain portion of it with a life estate in favor of his widow.

It is insisted that this contention is borne out by the facts that the testator gave a specific legacy of $5 to Willie Finch, thus evincing an intention to give her this sum and no more.

On the other hand, it is insisted that the use of the words, "I give to each of my children and Emmer Lee Hunter, what is known as the Horse Shoe Bend" place,

shows that the testator intended his two daughters to share in this place equally.

The cardinal rule in construing a will is to ascertain and declare the intention of the testator. That intention is to be gathered from reading the entire will and construing it so as to give effect to every clause and provision therein if this can be done. *Union & Mercantile Trust Co.* v. *Hudson,* 143 Ark. 519, and *Heiseman* v. *Lowenstein,* 113 Ark. 404. The language used is, "I give to each of my children and Emmer Lee Hunter, what is known as the Horse Shoe Bend" place. The word "and," it is true, is generally used in a conjunctive sense, but such is not always the case. The word "and," as used in the clause quoted above, rather expresses the relation of addition and means "including" or "together with." The word "and" has no synonym; but the Century Dectionary says that it is approximately expressed by "with, along with, together with, besides, also, moreover."

We think the word is used in this sense in the clause referred to. The testator used it to indicate a connection of what follows with what has gone before in the way of description. In other words, the testator meant to say that he gave to each of his children, together with Emmer Lee Hunter, or including Emmer Lee Hunter, the Horse Shoe Bend place. In this way only can effect be given to every clause in the will. In the construction placed upon the clause by the chancellor the words, "each of my children and," are merely surplusage. It was not necessary to use the words, "and Emmer Lee Hunter," but these words were probably used by the testator to emphasize the fact that he wanted Emmer Lee Hunter to share with his other daughter in the Horse Shoe Bend place. He knew that he was going to leave the rest of this land to her after charging it with a life estate in favor of his widow, and might have feared that on this account she would be left out of a share in the Horse Shoe Bend place. For this reason he probably added the words, "and Emmer Lee Hunter," to indicate that

she was included in the words, "to each of my children." So that the testator meant to say, I give to each of my children along with Emmer Lee Hunter what is known as the Horse Shoe Bend place.

It is not claimed by the grandsons that the word "children" in the clause just referred to includes them, and it may be said in this connection that a gift to the children of a person means one's immediate offspring and does not extend to grandchildren. Alexander on Wills, vol. 2, § 841; Schouler on Wills, Executors and Administrators (5 ed.), vol. 1, § 533, and 40 Cyc. 1451.

Of course, this rule is merely presumptive and would yield to a contrary intention as gathered from the context. There are no words in the context, however, to indicate that the word "children" is used in other than its ordinary and natural meaning. The testator left a bequest to each of his grandchildren and specifically designated them as his grandsons.

Therefore, we are of the opinion that the chancellor erred in not decreeing a partition of the Horse Shoe Bend place between the plaintiff and the defendant, and for that error the decree will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

RIBELIN v. LOYD.

Opinion delivered May 9, 1921.

1. MORTGAGES—FORM OF RELEASE.—A mortgage is a mere security for a debt, and the property may be released therefrom by either written or parol agreement.
2. MORTGAGES—EFFECT OF RELEASE.—A receipt given to the mortgagor by the mortgagee reading, "Received from L. ** $95, which I hereby release 3 Poland China male pigs on which I have a lien, for his use for meat hogs only," *held* an absolute, and not a conditional, release.
3. MORTGAGE—RELEASE—CONSIDERATION.—A release of a portion of mortgaged chattels, given in consideration of a payment of money was based upon a sufficient consideration.

Appeal from Logan Circuit Court, Southern District; *James Cochran,* Judge; affirmed.

STATEMENT OF FACTS.

This is a suit in replevin brought by the appellees against appellants before a justice of the peace to recover three hogs.

Appellees recovered judgment in the justice court, and appellants duly prosecuted an appeal to the circuit court. There the case was tried *de novo* on evidence substantially as follows:

On the 10th day of February, 1919, D. R. Loyd executed a chattel mortgage on certain personal property to secure an indebtedness of something over $800. Among the property mortgaged was a Poland China gilt and the increase thereof. S. A. Ribelin was a dealer in general merchandise, and D. R. Loyd traded with him. In the fall of the year it was ascertained that the mortgaged property was insufficient to pay Loyd's debt. Loyd had bought a farm on a credit and had mortgaged it to Ribelin to secure the initial payment on it. He sold the farm for $95 more than he had agreed to pay for it. Loyd owed Ribelin a balance of $400 on the mortgage indebtedness and agreed to let him have the $95 if he would release the three hogs which were the increase of the Poland China gilt described in the mortgage. This Ribelin agreed to do and gave to Loyd the following:

"95.00.

"Received from D. R. Loyd, in the land deal with Johnnie Loyd, ninety-five dollars, which I hereby release three (3) Poland China male pigs on which I have a lien, for his use for meat hogs only.

"S. A. Ribelin."

In December, 1919, D. R. Loyd also gave Ribelin a mortgage on the crop he intended to grow the next year, and also on his live stock. In the spring of 1920 D. R. Loyd got into some trouble and had to leave the community. His wife and children were not able to make the crop and so notified Ribelin. They moved away

from the farm and according to the testimony of Mrs. Loyd she turned over the mortgaged property to Mr. Ribelin and the three hogs in question were hauled to town with it upon the agreement that they should then be turned over to her. Subsequently Ribelin refused to let her have the three hogs in question, and, upon her husband's return, this suit was brought to recover them. The three hogs in question were not included in the mortgage given by Loyd to Ribelin in December, 1919.

According to the evidence adduced by appellants, D. R. Loyd left the country in the spring of 1920, and did not make any crop at all that year. After he left, Mrs. Loyd told Ribelin that she could not make the crop and told him to go and get the mortgaged property. The hogs in controversy were also turned over to Ribelin by Mrs. Loyd. Ribelin admitted the execution of the release copied above, but stated that it was executed with the understanding that Loyd was to use the hogs for meat hogs, and was to cultivate the crop which he had mortgaged to Ribelin for the year 1920.

The court instructed the jury to find for the plaintiffs unless they should find by a preponderance of the evidence that the plaintiffs had turned over the hogs to the defendants on their debt.

The jury returned a verdict for appellees, who were the plaintiffs in the court below, and the defendants in the court below are the appellants here.

Evans & Evans, for appellants.

The release was a conditional one, and appellees, not having used the hogs for meat, and not having made the the crop in 1920, as they agreed to, release is of no avail, and that was no consideration ofr the release. The court erred in its instructions given and in refusing those asked by appellants. If the instrument is a release at all, it is only a contingent or conditional one, and the contingency or condition never existed nor occurred. 1 Beach on Modern Law of Contracts, § 481; 8 C. B. 483 and note; 9 Cyc., pp. 670, 761; Anson on Contracts, ch. 1,

§ 11. The intention of the parties *was* plainly expressed, and under it plaintiffs were not entitled to recover. It was error for the court to decide questions of fact that were for the jury, and it was error to direct a verdict. 57 Ark. 461; 79 *Id.* 445; 51 *Id.* 155; 73 *Id.* 431. The burden of proof was on plaintiffs. 29 Ark. 270; 22 *Id.* 396; 25 *Id.* 11, 482; 4 Crawford's New Digest, 4417.

John P. Roberts and *Kincannon & Kincannon,* for appellees.

Plaintiffs were entitled to recover the hogs under the testimony, and defendants were not prejudiced by the court's failure to give the instruction asked nor the instructions given, as they covered the law fully under the testimony. 38 Cyc. 1809; 122 S. W. 309.

HART, J. (after stating the facts). The judgment was correct. The only disputed question of fact was whether or not appellees turned over the three hogs in controversy to appellants in part satisfaction of their mortgage indebtedness. This was a disputed question of fact, which the jury settled in favor of appellees.

It is contended, however, by appellants that the release was a conditional one, and that appellees, not having used the hogs for meat, and not having made the crop in 1920, as they had agreed to do, the release is of no avail to them.

We can not agree with counsel in this contention. A mortgage is a mere security for a debt, and the property may be released from the mortgage by parol agreement, as well as by a written one. *Fincher* v. *Bennett,* 94 Ark. 165, and *Horton* v. *Thompson,* 124 Ark. 545.

The release in question by its terms is an absolute one. It is true that it recites that the three hogs are released from Loyd's mortgage for his use for meat hogs. The lattter part of the release, however, is a mere declaration of the use to which the hogs are to be put, and does not in any sense change the release from an absolute one to a conditional one. To have that effect, lan-

guage must have been used from which the conclusion that the release was a conditional one could have been drawn.

Again, it is contended that there is no consideration for the execution of the release. This contention is based upon the fact that Loyd gave to Ribelin a mortgage on the land from which he derived the profit of $95 for the initial payment. This did not make any difference. The mortgage was a mere security for the payment of the indebtedness, and this was satisfied when the land was sold. The substance of the transaction was that Loyd made $95 profit in the purchase and sale of the land, and Ribelin agreed to release the three hogs from the mortgage indebtedness if Loyd would let him have the $95. This was a sufficient consideration for the execution of the release, and the court did not err in treating it as an absolute release of the hogs.

It follows that the judgment must be affirmed.

ALEXANDER v. STATE (1).

DECKER v. STATE (2).

BLOUNT v. STATE (3).

Opinion delivered May 9, 1921.

INTOXICATING LIQUORS—ENFORCEMENT OF EIGHTEENTH AMENDMENT.—The Eighteenth Amendment prohibiting the manufacture, sale or transportation of intoxicating liquors within the United States, and legislation thereunder by the Congress, did not impair the integrity of any existing State statute to enforce prohibition nor interfere with the enactment of any future legislation by the State for that purpose.

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

(2 & 3) Appeals from Randolph Circuit Court; *John B. Baker,* Judge; affirmed.

Arthur Cobb and *Jerry Mulloy,* for appellants.

The demurrer to the indicment should have been sustained, as the Volstead act supersedes the State law, as the laws are irreconcilable, and the State law must give way as the United States law is supreme. 5 R. C. L., p. 912, § 6; 5 L. R. A. 78. The United States courts have exclusive jurisdiction, and the demurrer should have been sustained. 12 Cyc. 137, 4; 32 Ark. 117; 99 Am. Dec. 360; 34 Conn. 280; 4 Blackf. 146; 116 Mass. 1; 161 *Id.* 204; 12 Metc. 387; 8 *Id.* 313; 41 Am. Dec. 509; 15 N. H. 83; 3 Park., Crim. 358; 2 Am. Dec. 645; 5 How. 410; 2 Wood 428.

A court created by a State Legislature has no jurisdiction, and Congress can not confer upon a State court jurisdiction of offenses against the Federal law. 12 Cyc. 200, 4; 34 Conn. 280; 7 *Id.* 244; 7 *Id.* 239; 17 Johns 4; 3 Park., Crim. 358; 11 Johns 459; 53 Pa. St. 112; Rice 400; 2 Va. Cases 34; 1 *Id.* 321; 1 Wheat. 304.

The United States law is supreme, and the State laws are abrogated. 220 U. S. 151; 233 *Id.* 492; 238 *Id.* 456; 134 *Id.* 55; 80 U. S. (20 Law. Ed.) 597; 209 U. S. (52 Law. Ed.) 670; 140 S. W. 746; 214 U. S. 218; Const. U. S., art. 1, § 6; *Ib.* art. 6; 12 Cyc. 137, 4 and 200, 4; 264 Fed. 376,

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

There is no conflict between the United States and our State laws, and both the United States and State courts have jurisdiction, and an offense may be against *both* laws. 5 Howard 432; 9 *Id.* 560; 134 U. S. 372; 14 How. 13; 205 U. S. 34; 132 *Id.* 131; 22 Pac. 190; 22 Fed. Rep. 285; 9 Am. Dec. 196; 75 Am. Dec. 554. The State law is not excluded unless the act of Congress makes the United States juridiction exclusive and thus supersedes the State law. Bishop on Cr. Law, § 173; 52 Pac. 986; 90 N. E. 337; 28 Fed. Cases 522; 18 Tex. App. 224; 110 Atl. 224; 175 N. W. 683-5. See, also, as sustaining the doctrine, 4 Fed. Cas. 1203; 36 N. E. 328; 6 Ind. 436;

2 Ore. 221; 59 Va. 933; 1 Wash. T. 263; 121 N. W. 1052; 206 U. S. 333; 148 *Id.* 197; 32 Pac. 134; 168 Fed. 991; 22 Fed. 285, 190.

A person living under two governments or jurisdictions may commit two crimes—one against the State and one against the United States. 22 Fed. 285; 9 Am. Dec. 196; 14 How. 13; 75 Am. Dec. 554; Bishop, Cr. Law, § 173. See, also, 28 Fed. Cases 522; 18 Tex. App. 224; 110 Atl. 224; 175 N. W. 683; 175 N. W. 685; 148 U. S. 197; 168 Fed. 991.

SMITH, J. Appellants were each convicted, in separate trials, of selling intoxicating liquors, and a reversal is asked in each case upon the ground that the law of this State on the subject of the sale of intoxicating liquors has been superseded and annulled by the Federal statute commonly known as the Volstead act (c. 85, Acts 66th Congress, 41st U. S. Stat. at Large, 305), enacted to enforce the 18th Amendment to the Federal Constitution.

This amendment reads as follows:

"Section 1. After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The question here presented has already been considered by the courts of last resort in several of the States.

The first of these opinions was that of the Supreme Judicial Court of Massachusetts in the case of *Commonwealth* v. *Nickerson,* 128 N. E. 273. The subject was considered by that court in the most exhaustive manner, and the opinion of the court by Rugg, C. J., is one of great erudition. He leaves but little to be added to the discussion, and other courts which have since been called upon

to decide the same question have followed the lead of that court. Other cases on the subject are: *Allen* v. *Commonwealth* (Supreme Court of Appeals of Virginia), 105 S. E. 585; *State* v. *Fore* (Supreme Court of North Carolina), 105 S. E. 334; *Jones* v. *Hicks* (Supreme Court of Georgia), 104 S. E. 771; *Scroggs* v. *State* (Supreme Court of Georgia), 105 S. E. 363; *Edwards* v. *State* (Supreme Court of Georgia), 105 S. E. 363; *Smith* v. *State* (Supreme Court of Georgia), 105 S. E. 364; *Meriwether* v. *State* (Supreme Court of Mississippi, *en banc*), 87 So. 411; *Kyzar* v. *State* (Supreme Court of Mississippi, Division B), 87 So. 415; *Jones* v. *Cutting* (Supreme Judicial Court of Massachusetts), 130 N. E. 271; *Franklin* v. *State* (Court of Criminal Appeals of Texas), 227 S. W. 486; *Ex parte Gilmore* (Court of Criminal Appeals of Texas), 228 S. W. 199; *State ex rel.* v. *District Court* (Supreme Court of Montana), 194 Pac. 308; *Russell* v. *State* (Court of Criminal Appeals of Texas), 228 S. W. 948.

The Supreme Court of Massachusetts considered all the objections offered to the existing laws of that State on the subject of the illegal sale of liquor which have been made here against our own laws on that subject, and held that none of the objections made were well taken.

It is pointed out in the opinion of Chief Justice Rugg that the Eighteenth Amendment is the only instance to be found in the Constitution of the United States, or any of its amendments, where there is a definite declaration that both Congress and the several States have "concurrent power" to enforce any constitutional mandate by appropriate legislation.

The Supreme Court of Georgia, in the case of *Jones* v. *Hicks, supra,* says the use of the word "several" before the word States is significant in determining the meaning and intent of the amendment. Joint enforcement was not intended. The suppression of the liquor traffic and the establishment of prohibition was the thing aimed at, and the purpose of the amendment was to invoke the aid of the Congress and that of the several States in accomplishing that purpose. To that end each

of these governmental agencies was enjoined to contribute by the enactment of appropriate legislation. As was said in the case of *Commonwealth* v. *Nickerson, supra:* "The force and effect of the words of the Eighteenth Amendment, while possibly enlarging the permissible scope of State legislation respecting importation and exportation of intoxicating liquors, leaves open to State legislation the same field theretofore existing for the exercise of the police power concerning intoxicating liquors subject only to the limitations arising from the conferring of like power upon Congress with its accompanying implications, whatever they may be.

"Having regard only to the words of the Eighteenth Amendment, the Congress and the several States are placed upon an equality as to legislative power. It is only when the amendment is placed in its context with other parts of the Constitution that the supremacy of the act of Congress if in direct conflict with State legislation becomes manifest."

Counsel for the appellants cite the case of *Hickman* v. *Parlin,* 88 Ark. 519, in which this court held that the State Insolvency Act of June 26, 1897, was superseded by the Bankruptcy Act of Congress of July 1, 1898, in so far as they relate to the same subject-matter and affect the same persons, and argue that the effect of that decision is to put our liquor laws in abeyance.

This point was also considered in the Nickerson case, where it was said: "There is a group of cases which hold that, while the general power to deal with some subjects is vested in Congress by the Constitution, yet in the absence of action by Congress, if the power is not denied to the States, legislation by them touching the subject is valid and enforceable. By article 1, section 8, clause 4, of the Constitution, Congress is given power 'to establish * * * uniform laws on the subject of bankruptcy throughout the United States.' There are no words in the Constitution as to the power of States over bankruptcies. Until Congress has acted by passing a general bankrupt law, the several States may enact laws

of that nature, which are suspended when Congress acts upon the subject. See, for example, *Sturges* v. *Crowninshield,* 4 Wheat. 122, 193, 4 L. Ed. 529; *Ogden* v. *Saunders,* 12 Wheat. 213, 6 L. Ed. 606; *Griswold* v. *Pratt,* 9 Metc. 16. Those decisions rest on the principle that a uniform law on bankruptcies throughout the United States can not readily coexist as operative legislation with various State laws covering the same field. That principle in our opinion is not applicable to the subject-matter of the Eighteenth Amendment. There is no inherent or necessary incompatibility between the contemporaneous existence and enforcement of both Federal and State laws designed to enforce prohibition. Therefore it is manifest to us that the explicit words of section 2 vesting 'concurrent power' to enforce prohibition both in Congress and in the States mean something more than the 'concurrent power' to which reference is made in *Sturges* v. *Crowninshield,* 4 Wheat. 122, 193, 4 L. Ed. 529, as existing without express words."

It is here argued, for the reversal of the judgments in each of the appeals before us, that, if the respective States may enact and enforce its own legislation on the subject, authority is found only for legislation enacted subsequent to the adoption by the States of the Eighteenth Amendment, and that, as the appellants here were each convicted under legislation enacted prior to the adoption of that amendment, a reversal must be ordered on that account.

This feature of the question was considered by the Supreme Court of Georgia in the case of *Jones* v. *Hicks, supra,* where that court pointed out that the Eighteenth Amendment was a grant of additional power to the Federal Government, but in this grant of power the States had parted with none of their own power to enforce prohibition within their own sphere of action. That court said: "The amendment and legislation thereunder by the Congress does not impair the integrity of any existing State statute to enforce prohibition, nor can it in-

terfere with the enactment of any future legislation by the States for that purpose."

On this same subject the Supreme Court of Appeals of Virginia, in the case of *Allen* v. *Commonwealth, supra,* said: "We think there can be no conflict between the Federal and State legislation on the subject under consideration so long as neither State nor Federal government attempts to interdict the other from dealing with the conduct in question as Federal or State offenses, respectively, as the case may be, and where the legislation of the State is confined to punishing the conduct as State offenses and the legislation of the Federal Government is confined to punishing the same conduct as Federal offenses, neither undertaking to nullify the laws of the other enacted and operating as the expression of the edicts, respectively, promulgating the provisions as to what shall be offenses against the respective sovereignties and the punishments therefor."

And further: "Under the view which we take of the subject, any statute which the State may have enacted or may enact creating or not creating the State offenses aforesaid would not be in conflict with the Volstead act, or with the Eighteenth Amendment, unless and only to the extent that such State statute should attempt to nullify the Federal law creating the Federal offenses aforesaid. The State law could not authorize the commission of the offenses condemned by the Federal law so as to permit the offender to go free of punishment under the Federal law. It can, however, impose or withhold punishment for such conduct as State offenses, or impose different punishments for State offenses consisting of the same conduct."

On this phase of the case we quote again from the Nickerson case, *supra,* where the Supreme Court of Massachusetts said: "The amendment does not require that the exercise of the power by Congress and by the States shall be coterminous, coextensive and coincident. The power is concurrent, that is, it may be given different manifestations directed to the accomplishment of the

same general purpose, provided they are not in immediate and hostile collision one with the other. In instances of such collision the State legislation must yield."

In the case of *Rhode Island* v. *Palmer,* 253 U. S. 350, 64 L. Ed. 356, the Supreme Court of the United States held that the Eighteenth Amendment had been properly submitted to and ratified by the States. The opinion in that case is unusual in that it consists in an announcement of the conclusions of the court without any exposition of the reasoning by which those conclusions had been reached. In the seventh conclusion announced in that opinion it is said that the second section of the amendment, which declares that "the Congress and the several States shall have concurrent power to enforce this article by appropriate legislation," does not enable Congress or the several States to defeat or thwart prohibition, but only to enforce it by appropriate means. That is, the States may enact laws to aid in the enforcement of the amendment, but may not enact laws to defeat its enforcement. This aid which the States are thus invited to render may be given by enforcing laws antedating the amendment, or by enacting and enforcing laws subsequent thereto and in conformity therewith.

It is pointed out in a number of the opinions which we have cited above that the Volstead act manifests no purpose on the part of the Federal Government to take exclusive possession of the field of operations in the enforcement of this amendment, and, quoting again from the Nickerson case, *supra,* "Even if under the Eighteenth Amendment Congress has the clear power to do so, its enactment would not be given that effect except in instances where its design to accomplish that result is plain and the repugnance between the Federal and the State statute is absolute, positive and irreconcilable, so that both can not stand together. *Missouri, Kansas & Texas Ry.* v. *Harris,* 234 U. S. 412, 419, 34 Sup. Ct. 790, 58 L. Ed. 1377, L. R. A. 1915 E, 942; *Illinois Cent. Rd.* v. *State Public Utilities Com.,* 245 U. S. 493, 510, 38 Sup. Ct. 170, 62 L. Ed. 425."

See, also, *Abbate* v. *United States* (Circuit Court of Appeals, 9th Circuit), 270 Fed. 735; *United States* v. *Holt* (District Court North Dakota), 270 Fed. 639; *Woods* v. *City of Seattle* (District Court, W. D. N. D. Washington), 270 Fed. 315; *Ex parte Crookshank* (Dis-Court S. D. S. D. California), 269 Fed. 980; *Feigenspan, Inc.,* v. *Bodine,* 264 Fed. 186; *United States* v. *Peterson,* 268 Fed. 864.

In the case of *State* v. *Green.* 86 So. 919, the Supreme Court of Louisiana held that the act of that State which denounced as a misdemeanor the retailing of intoxicating liquors without having obtained a license was superseded and in effect repealed by the Eighteenth Amendment and the Volstead act; but the reason given was that such a law, even if enacted subsequent to the adoption of the Eighteenth Amendment, would not be "appropriate legislation," but would be absolutely violative of the amendment. But that court, in the case of *Shreveport* v. *Marx,* 86 So. 602, held that the State statute prohibiting the sale of liquor, although in force when the Eighteenth Amendment and the Volstead act became effective, was not repealed or superseded by such amendment or act of Congress.

The distinction between the two Louisiana cases is of course that one act tended to defeat the purpose of the amendment and the Volstead act in aid thereof by licensing the sale of intoxicating liquors, while the other statute tended to enforce the amendment. The first act was therefore held to be void, and the second held to be valid.

We conclude therefore that act No. 30 (Acts 1915, p. 98; § 6160, C. & M. Digest), under which appellants were convicted, is a valid and subsisting law, and the judgments of conviction are affirmed in each case.

AMERICAN BAUXITE COMPANY v. TUDOR.

Opinion delivered May 9, 1921.

1. MASTER AND SERVANT—SAFE PLACE TO WORK—INSTRUCTION.—In an action for injuries received in a fall in dodging a rolling boulder released by a fellow-servant, where the only danger incident to the employment arose out of the manner in which the employees themselves discharged their duty, it was error to submit to the jury the safety of their place of work.
2. MASTER AND SERVANT—QUESTIONS FOR THE JURY.—In an action for injuries from a fall in dodging a rolling boulder released by a fellow-servant, *held* under the evidence that plaintiff's negligence and his fellow-servant's negligence were questions for the jury.
3. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — INSTRUCTION.—An instruction that plaintiff's negligence would not defeat a recovery if the company's negligence was of a greater degree than his own, in which event the jury would diminish the amount of damages, if any, in proportion to the amount of negligence attributable to the plaintiff, if any, *held* proper.

Appeal from Saline Circuit Court; *W. H. Evans*, Judge; reversed.

Mehaffy, Donham & Mehaffy, for appellant.

No case was made for a jury, and it was error to refuse a peremptory instruction. A servant, even as to dangers created by the acts of the master, assumes the risk of such danger when he is aware of such act of negligence and appreciates the danger. 141 Ark. 438, and many other needless to recite.

The court gave conflicting instructions, which is always error. 138 Ark. 563; 76 *Id.* 224; 83 *Id.* 61; 99 *Id.* 377.

An instruction which ignores a material issue about which the evidence is conflicting is misleading and prejudicial. 93 Ark. 564. See, also, 95 Ark. 108; 94 *Id.* 282; 96 *Id.* 184; 102 *Id.* 627; 134 *Id.* 575.

No case was made for a jury, and a verdict should have been directed for defendant.

N. A. McDaniel, for appellee.

1. The instructions objected to are not set out in appellant's abstract, and this court will not presume error but will presume that correct instructions were given curing any errors complained of. 129 Ark. 95; 132 *Id.* 449; 121 *Id.* 274; 126 *Id.* 562. Any objections thereto are considered waived. 126 Ark. 562; 104 *Id.* 375. See, also, 103 Ark. 430; 101 *Id.* 207.

Appellant has failed to set out in his abstract two instructions given by the court. None of those given were *inherently* defective as defined in the law Century Dictionary *verbo.* 95 Ark. 108.

Rule 9 requires the instructions to be set out—those given as well as those refused—if not, the case will be affirmed. 90 Ark. 230. See, also, Brickwood's Sackett on Instructions, § 175.

2. The court properly refused the peremptory instructions asked by appellant, as there was evidence to establish the issue. 105 Ark. 136; 98 *Id.* 370; 120 *Id.* 206; 119 *Id.* 589.

The question of negligence is a mixed question of law and fact and should be submitted to a jury. 35 Ark. 602, 614; 71 *Id.* 445.

3. The instructions given for appellee are not in conflict with those given for appellant, but, if so, they are not set out in the abstract. The instructions must be taken as a whole, and if on the whole they are correct it is sufficient. 132 Ark. 78. See, also, 89 Ark. 24; 95 *Id.* 209; 118 *Id.* 337.

The instructions state the law, and the objections thereto are not well taken. 88 Ark. 204; 70 *Id.* 441. They were not abstract nor conflicting, nor were they misleading or prejudicial. 96 Ark. 614; 90 *Id.* 278; 88 *Id.* 231; 76 *Id.* 348, 599.

The question of assumed risk *was* submitted to the jury by instruction No. 7 for appellant. It is not practical or possible to state all the law in one instruction, and it is sufficient if the various phases of the law are

submitted to the jury in separate instructions. 93 Ark. 589.

The evidence was conflicting, and the verdict of the jury settles all questions of fact and is final on appeal, as there is no error in the instructions as to the law.

Under our statute appellant is liable, as no warning of danger was given and appellee did not assume the risk. Appellant is liable for the employee's negligent act. C. & M. Digest, § 7137. A servant does not assume the risk of negligence of a fellow-servant (93 Ark. 88), unless he realizes the danger and then exposes himself to it. 105 Ark. 533; 98 *Id.* 227; 108 *Id.* 578; 97 *Id.* 344.

SMITH, J. Appellee recovered judgment to compensate an injury sustained while engaged in digging and mining ore as an employee of the appellant company.

The instructions given at his request permitted a recovery if the jury found that the company had directed him to work in an unsafe place, or if a finding was made that one of his fellow-servants had negligently rolled a boulder in front of him, thereby causing the injury.

On behalf of the company, it is insisted that no case was made for the jury; but the court refused to grant its prayer for a peremptory instruction. The court did, however, give at the company's request an instruction, numbered 2, which told the jury to find in its favor unless they found that appellee was injured "by reason of having dodged a boulder that was thrown or pushed in his way," and it is insisted that error was committed in submitting any other question of negligence.

We think the testimony made a case for the jury; but the case was made upon a showing of negligence on the part of a fellow-servant, and no other question should have been submitted, and it was error to have submitted the question of the master's breach of duty to furnish the servant a reasonably safe place in which to work.

According to appellee, he was injured in the following manner: he was carrying boulders and was piling them on the railroad track, where cars came and hauled

them away, and, while thus employed, an Italian, who was similarly engaged, released a boulder which he was carrying, and, impelled by the force of gravity, the boulder rolled down the side of the mine toward appellee, who, attempting to escape the rolling boulder, became overbalanced and was thrown on his head. Appellee was perfectly familiar with his surroundings. This was a bauxite mine, and it was appellee's duty, as well as that of the Italian, to excavate the boulders and carry them away so that the earth might thereafter be removed. The only danger incident to the employment arose out of the manner in which the employees themselves discharged their duty, and it was error to submit the question of the safety of their place of work to the jury. The mine where the injury occurred was only ten feet deep, and the incline, down which the rock rolled, furnished the means of ingress into and egress from the mine.

Other objections were made to the instructions given, but we think they will pass out of the case upon a trial anew when the case is submitted on the question alone of the fellow-servant's negligence.

The proof on the part of the company tended to show that appellee was not injured in the mine, and that, if he did fall, the fall was not occasioned by any negligence of a fellow-servant, but by his own negligence. However, we have said that question is for the jury.

It is insisted that an erroneous instruction was given on the measure of damages, in that the jury was not required to take into account the contributory negligence of appellee. Such, however, is not the case when instructions numbered 4 and 5 are read together, as we think they should be. In instruction numbered 4 the jury was told that appellee's negligence would not defeat a recovery if the company's negligence was of a greater degree than his own, in which event they would "diminish the amount of damages, if any, in proportion to the amount of negligence attributable to the plaintiff, if any." Instruction numbered 5 dealt with the elements of damage and told the jury the matters they would take

into account in computing the damage, and this sum was, of course, to be reduced as stated in instruction numbered 4.

For the error indicated in submitting the question of negligence in regard to the safety of the place in which appellee was employed the judgment will be reversed and the cause remanded for a new trial.

BANK OF BLYTHEVILLE v. STATE.

Opinion delivered May 9, 1921.

1. BANKS AND BANKING — LIABILITY OF STOCKHOLDERS FOR PUBLIC FUNDS.—Crawford & Moses' Digest, §§ 2832, 2835, making stockholders of banks liable for public funds deposited therein, does not violate Const., art. 12, § 6, providing that the General Assembly may alter or revoke charters in such manner that no injustice may be done the corporators, or Const. U. S., art. 1, § 10, prohibiting acts impairing the obligation of contracts.
2. CONSTITUTIONAL LAW—POWER TO ALTER OR REVOKE CHARTERS.—Under Const., art. 12, § 6, reserving to the General Assembly the power to alter or revoke the charter of a corporation, in such manner that no injustice may be done to the corporators, before an act changing the charter of a corporation can be declared unconstitutional, it must appear that the effect of the act is confiscatory of the stock or property of the corporation.
3. BANKS AND BANKING—CHANGE IN CHARTER—ACCEPTANCE.—Where stockholders of a bank accepted their original charter, subject to the State's reserved power to alter or revoke it, it was not necessary that they should formally accept the act imposing liability on stockholders for public funds on deposit (Crawford & Moses' Dig., §§ 2832, 2835) since they impliedly accepted the act by continuing in business after its passage.
4. BANKS AND BANKING—REPEAL OF STATUTE.—Crawford & Moses' Digest, §§ 2832, 2835, making bank stockholders liable for public funds deposited therein, was not repealed by the banking act of 1913, which does not deal with that particular subject nor expressly repeal such sections.
5. STATUTES—REPEAL BY IMPLICATION.—Repeals by implication do not arise unless there is an irreconcilable repugnancy between the later and older statutes.

6. STATUTES—REPEAL BY IMPLICATION.—A general affirmative statute could only repeal by implication prior statutes of a general affirmative nature dealing with the same subject, and would not have the effect of replacing a prior act dealing with a particular subject.

7. BANKS AND BANKING—LIABILITY FOR PUBLIC FUNDS.—The liability of stockholders of a bank for public funds, imposed by Crawford & Moses' Digest, § 2832, was not defeated by failure of the county collector to deposit each specific fund in a separate account, as the statute imposes no such duty.

8. BANKS AND BANKING—WHAT ARE "PUBLIC FUNDS."—Crawford & Moses' Digest, § 2832, making bank stockholders liable for public funds deposited in their bank, does not apply to funds belonging to a drainage district; § 2835 defining "public funds" as "money, warrants or bonds or other paper having a money value, belonging to the State or to any county, city, incorporated town or school district therein."

9. BANKS AND BANKING — PUBLIC FUNDS.—Voluntary payments of money for school purposes to the county collector, and by him deposited in a bank, were public funds, for which the stockholders of the bank were liable, under Crawford & Moses' Digest, §§ 2832, 2835.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. H. Dudley,* Judge; reversed in part.

Hughes & Hughes, E. P. Rosenberger and *Little, Buck & Lasley,* for appellants.

1. The act of April 9, 1891, as amended by act March 17, 1903, had the effect of increasing the burdens of the stockholders in the Blytheville Bank, which did them an injustice contrary to art. 12, § 6, of our Constitution, and impairs existing obligations in violation of art. 1, § 10, Constitution of the United States. Sections 1990 and 1993 of Kirby's Digest, being C. & M. Digest, §§ 2832 and 2835, were repealed as to banks by act 113, Acts 1913. Where the Legislature takes up the whole subject and covers the entire matter of a former statute, the prior act is repealed. 73 Ark. 536; 70 *Id.* 27.

2. All of the funds going to make up the deposit sued for were not public funds within C. & M. Dig., § 2835. The amount belonging to road districts is not shown. The

burden of doing this was on appellee to prove all material facts alleged by him. 105 Ark. 697. Appellee alleged that the deposit was made up of public funds. This was denied. The allegation was material, and the burden was on appellee to show that the deposit was made up of public funds and within the purview of our statute which must be strictly construed. 59 Ark. 344; 70 *Id.* 481. A recovery could only be had for public funds deposited. C. & M. Digest, § 2835. Drainage district funds are not county funds. 102 Ark. 106; 116 *Id.* 356. nor State funds, nor a city, town or school district fund, and hence not a public fund at all, and the court erred in olding a drainage district fund was a public fund, and appellant was not liable.

3. Appellees were not entitled to recover because the statute is unconstitutional and void, the statute was repealed by the banking act of 1913, and appellees did not separate the funds going to make up the deposit sued for so as to fall within the definition of public funds as set out in C. & M. Digest, § 2835. It was also error to allow a recovery for the drainage district funds, $4,139.23, and the $2,000, the voluntary contribution of the property holders in Blytheville Special School District.

Nelson & Keck, for appellees.

1. The act is constitutional. Acts like this have often been upheld. Elliott on Private Corporations (3 ed.), § 559; Clarke on Corp. (Hornbook Series), § 227; 10 Cyc. §§ 676-7.

The Legislature has the right of alteration and revocation of charters of corportions, limited only by the inhibition that no injustice be done the corporators. 58 Ark. 407; 64 *Id.* 83; 87 *Id.* 587; 94 *Id.* 27; 136 *Id.* 128. The adjudicated cases in Arkansas have no application to the present case. 130 Ark. 135; 219 U. S. 121; 236 *Id.* 579; 165 *Id.* 1.

2. C. & M. Dig., § 2832, was not repealed by the banking act of 1913. If it was, it was by implication, as there is no direct repeal. 50 Ark. 132; 53 *Id.* 337; 53 *Id.*

418; 92 *Id.* 270; 116 Ark. 414-15; 120 *Id.* 589. There is no repugnancy between the acts. 123 Ark. 76; 127 *Id.* 266. Repeals by implication are not favored, and the two statutes must irreconcilable and repugnant. 123 Ark. 187; 142 *Id.* 146.

Drainage and improvement districts are agencies of the government for public purposes, and their funds are public funds. 99 Ark. 336; 107 *Id.* 189; 134 *Id.* 115.

HUMPHREYS, J. Appellees instituted suit against appellants in the circuit court of Mississippi County, Chickasawba District, to recover $41,293.15, alleged to be public moneys collected as taxes by D. H. Blackwood, the duly elected, qualified and acting collector of Mississippi County, and deposited by him in the Bank of Blytheville. A recovery was sought under the act of April 9, 1891, page 230, as amended by the act of March 17, 1903, page 142. The parts of the acts involved in this litigation are digested in Crawford & Moses' Digest as sections 2832 and 2835.

Appellants interposed the following defenses to the alleged cause of action: First, that the acts made the basis of the suit are unconstitutional and void; second, that the acts made the basis of the suit were repealed by act No. 113 of the Acts of the General Assembly of the State of Arkansas for the year 1913, known as the General Banking Law of the State; third, that the collector did not make separate deposits of the alleged public funds in said bank; fourth, that the drainage funds to the amount of $4,139.23 and the voluntary payment of $2,000 for school purposes were not public funds as defined by section 2835 of Crawford & Moses' Digest.

The cause was submitted to the court, sitting as a jury, upon the pleadings and evidence, which resulted in a verdict and judgment against appellants in the sum of $41,293.15.

The facts necessary to a determination of the issues involved on this appeal are, in substance, as follows: The Bank of Blytheville, of which appellants were stock-

holders, was organized and the stock issued in the year 1900. It began business immediately and continued to do business as a banking corporation until the 11th day of March, 1920, at which time, on account of insolvency, it was taken over by the State Banking Department under act No. 113, Acts of the General Assembly, 1913. Prior to the time said bank was declared insolvent and taken over by the deputy State Bank Commissioner, D. H. Blackwood, the sheriff and ex-officio collector of Mississippi County, had deposited in said bank, to his credit as collector, $41,293.15. The funds deposited were collections for the Chickasawba District of Mississippi County. $4,139.23 of said amount was taxes collected for drainage districts 7, 9, 16 and 17; $2,000 of said amount was a voluntary tax paid to the collector for the Blytheville Special School District; the remainder of it was taxes collected for the State, county, schools, towns and cities. Immediately after the bank commissioner assumed control of the bank, D. H. Blackwood, the collector, made a demand for the entire amount deposited, which demand for payment was by the bank refused.

Appellant's first insistence for reversal is that the act of April 9, 1891, as amended by act of March 17, 1903, had the effect of increasing the burdens of the stockholders in the Blytheville bank, who are appellants herein, in relation to public funds, which did an injustice to them, contrary to the inhibition of article 12, section 6 of the Constitution of the State of Arkansas, and which had the effect of impairing existing obligations in violation of article 1, section 10, Constitution of the United States. It is true that, prior to the amendatory act of March 17, 1903, stockholders of a bank were not liable for public funds, and that the amendatory act made them liable for all public funds deposited therein, not paid to the person entitled to receive same on demand. The constitutionality of the act in question has been before the court frequently, and the court is committed to the doctrine that the State has reserved its power in the Constitution to alter the charter of a corporation, limited

only by the inhibition that "no injustice be done the corporators." *Leep* v. *Railway Co.*, 58 Ark. 407; *St. L., I. M. & S. Ry. Co.* v. *Paul,* 64 Ark. 83; *Ozan Lumber Co.* v. *Biddie,* 87 Ark. 587; *Arkansas Stave Co.* v. *State,* 94 Ark. 27; *Davis* v. *Moore,* 130 Ark. 128. The reservation of this power and the only limitation imposed may be found in article 12, section 6, of the Constitution of 1874, which reads as follows: "Corporations may be formed under general laws, which laws may be from time to time altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of any incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this State, in such a manner, however, that no injustice may be done to the corporators." Every objection urged by appellants against the constitutionality of the acts finds an answer in the fact that a corporation accepts its charter powers subject to the reserved right in the State to alter or revoke the charter whenever, in the opinion of the General Assembly, such revocation or alteration is for the protection of the citizens of the State, if done in such a manner that no injustice may be done to the corporators. Before an act revoking or changing the charter of a corporation can be declared unconstitutional, it must appear that the effect of the act is confiscatory of the stock or property of the corporation. In discussing a statute which imposed additional liabilities upon stockholders and directly upon the question as to whether injustice had been done to the corporators by the passage of the statute, this court said, in *Davis* v. *Moore,* 130 Ark. 128: "The statute, as we have already seen, does not impose an absolute liability on the shareholder of stock, nor does it compel the corporation or its stockholders to accept the provisions of the statute. It does not operate in any sense as a confiscation of the shares of stock, for the corporation may be wound up, and in that way the property interest of the stockhold-

ers preserved, or an individual stockholder may sell his stock if he objects to the corporation continuing business under the new terms prescribed. It can not be assumed that the new terms prescribed by the statute operate as an impairment or depreciation of the value of the stock, and that an objecting stockholder would be unable to dispose of his shares of stock at full value." The appellants assail the statute before us on the further ground that no provision is contained in it for an acceptance of the change or alteration in the charter by the corporation or its stockholders. This can make no difference, because, as said before, it accepted its original charter on condition that the State reserved the power to revoke or alter it, if the revocation or alteration did not have the effect of confiscating its property. An acceptance of the altered charter was clearly made by continuation in business after the change was made. The statute in question is not void as infringing upon either the Constitution of the State or of the United States. *Noble State Bank* v. *Haskel,* 219 U. S. 104; *Assaria State Bank* v. *Dolly*, 219 U. S. 121; *Rampo Water Co.* v. *New York,* 236 U. S. 579. In the last case cited, the Supreme Court of the United States said: "Where the charter of a corporation granted by the State Legislature, or the Constitution or the law of a State in force when such charter is granted, reserves to the Legislature the power to alter, amend or withdraw any franchise or privilege granted by such charter, this reservation qualifies the grant, and the subsequent exercise of the reserved power is not within the prohibition of the Federal Constitution as an act impairing the obligation of a contract."

Appellants' second insistence for reversal, that sections 2832 and 2835 of Crawford & Moses' Digest were repealed by the banking act of 1913, is not sound. There is no express repeal of sections 2832 and 2835 of Crawford & Moses' Digest in the general banking act, and repeals by implication will not arise unless there is an irreconcilable repugnancy between the later and older

statutes. Sections 2832 and 2835 of Crawford & Moses' Digest make the stockholders of a bank liable for public funds deposited in the bank, if the bank fails to pay the funds to the person entitled to receive same upon demand. The banking act of 1913 does not deal with that particular subject. While the banking act is a general affirmative statute, it could only repeal prior statutes of a general affirmative nature dealing with the same subject, and would not have the effect of repealing a prior act dealing with the particular subject. *Martels* v. *Wyss,* 123 Ark. 184; *Ward* v. *Wilson,* 127 Ark. 266; *State* v. *Adams,* 142 Ark. 411; *Bartlett* v. *Willis,* 147 Ark. 374.

The third insistence of appellant for reversal, to the effect that appellants are not liable because the collector did not deposit each specific fund in separate accounts in the bank, is not well taken, because the statute in question does not impose any such duty upon the collector.

That part of the fourth or last insistence of appellant for reversal, to the effect that the court erred in permitting a recovery for the amount of the drainage funds of $4,139.23, is sound. The act upon which a recovery is sought specifically defines the public funds for which stockholders become liable when deposited in the bank, when not paid to the party entitled thereto upon demand. It is only money of the United States, State, county, city, town or school warrants or bonds or other paper having a money value which are the property of the State or of the county, city, incorporated town or school district, deposited in banks, which can be recovered from the stockholders of the bank in case not paid by the bank to the party entitled thereto upon demand. The language of section 2835 of Crawford & Moses' Digest is specific in defining public funds, and does not include public funds belonging to drainage districts. If the statute permitted the recovery of all public funds deposited in a bank from the stockholders when not paid by the bank upon demand of the party entitled thereto, then public funds belonging to a drainage district would necessarily be included, but the public funds defined in the act

are confined to those belonging to the State, county, city, incorporated town or school district. The act is as follows:

"For the purpose of this act 'public funds' shall be construed to mean all lawful money of the United States, and all State, county, city, town or school warrants or bonds, or other paper having a money value, belonging to the State, or to any county, city, incorporated town or school district therein."

We can not agree, however, with the insistence of appellant that the voluntary payment of money to the collector in the sum of $2,000 for the Blytheville Special School District is not a public fund, as defined by section 2835 of Crawford & Moses' Digest. It became a part of the school fund as completely by voluntary payment as if the payment had been involuntary. It was property passing through the hands of the collector of a public nature, belonging to said school fund. We think it comes clearly within public funds, defined by said statute.

The judgment is affirmed except as to the item of $4,139.23, and, as to that item, it is reversed and dismissed as against the stockholders.

ARKANSAS ZINC & SMELTING CORPORATION v. SILVER HOLLOW MINING COMPANY.

Opinion delivered May 9, 1921.

1. ACCORD AND SATISFACTION—ACCEPTANCE OF CHECK IN FULL SETTLEMENT.—Where a claim is in dispute, and the debtor sends to the creditor a check or other remittance which he clearly states is a full payment of the claim, and the creditor accepts the remittance or collects the amount of the check, without objection, this constitutes a good accord and satisfaction.
2. ACCORD AND SATISFACTION — EVIDENCE.—Letters exchanged between the parties relative to a change in the computation of the purchase price of the ore, which change was never consummated, do not establish that the acceptance of checks purporting to be in full settlement of claims was merely a tentative settlement pending final agreement.

Appeal from Marion Chancery Court; *B. F. McMahan,* Chancellor; reversed.

Daily & Woods and *J. H. Black,* for appellant.

According to the character of the ore shipped, the schedule of prices provided in sections 9 and 10 of the contract governed, and the payments made on each shipment were calculated on the correct basis, and there was an accord and satisfaction. The checks sent in payment were received and cashed.

Where there is any ambiguity in the contract, then the parties are bound by the construction which they themselves have placed upon it. 134 Ark. 542; 104 *Id.* 474; 98 *Id.* 425; 95 *Id.* 454; 46 *Id.* 131; 55 *Id.* 417; 52 *Id.* 73; 88 *Id.* 363.

Plaintiff received settlement sheets and received and cashed the checks in settlement, and this constituted an accord and settlement, and there was nothing due appellee, and the cause should be reversed and dismissed, as there was accord and satisfaction. 1 C. J., pp. 563-4, § 87; 94 Ark. 158; 98 *Id.* 269; 100 *Id.* 251.

J. C. Floyd and *Williams & Seawell,* for appellee.

If the contract is ambiguous and susceptible of more than one construction, it is the duty of the court to place that construction on it most favorable to appellee, as appellant prepared the contract. 74 Ark. 41; 84 *Id.* 431; 105 *Id.* 518; 112 *Id.* 1; 174 S. W. 136. Under these authorities the court properly construed the contract and held that appellee was entitled to settlement under the schedule in paragraph 14. Appellee is not estopped, and the contention is without merit. From the letters it appears there was no compromise or accord. 99 Ark. 260; 91 *Id.* 141. The evidence sustains the finding of the chancellor on every question involved, and should not be disturbed. 96 Ark. 434; 95 *Id.* 523.

HUMPHREYS, J. Appellee instituted suit against appellant in the Marion Chancery Court to recover $2,999.99 for an alleged balance due it on account of ship-

ments of zinc silicates and zinc sulphides under contract entered into between appellant and appellee on the 21st day of June, 1916. It was alleged that the payments made upon each shipment were erroneously calculated under the basis provided in sections 9 and 10 of the contract, instead of the basis provided in section 14 thereof; that the account between the parties is complicated, and that a correct accounting between them will require the aid of a master.

Appellant interposed two defenses, the first being that, according to the character of the ore shipped, the schedule of prices provided in sections 9 and 10 of the contract governed, and that the payments made on each shipment were calculated on the correct basis; the second being an accord and satisfaction.

The court found that, in ascertaining the correct amount due on each shipment, section 14 of the contract controlled, and that the amounts should have been calculated on a sliding scale, based upon an assay of sixty per cent. metallic contents of zinc sulphides and forty per cent. of zinc silicates, and, in accordance with the finding, entered a decree in favor of appellee for $1,662. From that decree an appeal has been duly prosecuted to this court, and the cause is here for trial *de novo*.

The contract in question was entered into between the parties on the 21st day of June, 1916. It provided for the purchase by appellant from appellee of 300 tons of zinc silicates per month and 700 tons of zinc sulphides per month, covering a period of three years. The contract contained apparently conflicting paragraphs for ascertaining the amounts to be paid for the ore—sections 9 and 10 provided for one basis to deduct smelting charges, and section 14 providing another. Something like fifty-six shipments were made by appellee from its mine at Rush to appellant's smelting plant near Van Buren, covering a period of about ten months. Upon the receipt of each shipment appellant made an assay of the ore and calculated the value of the shipment on the basis provided in section 9, if zinc silicates, and section 10, if zinc sul-

phides, and, in keeping with the assay and the calculations, made out a settlement sheet which it immediately mailed to appellee. Immediately thereafter appellant sent a check for the balance due appellee on the shipment, accompanied by a voucher reciting that the check was in full payment of the shipment. It appeared on each check sent appellee after January, 1917, that it was in full payment. Appellee retained and cashed each check. Each settlement sheet sent appellee by appellant disclosed the gross weight of each car, the per cent. of moisture therein, the net weight, the zinc contents, the total value, the amount which had been advanced on the car, the freight charges, the smelting charges, the net value thereof, the assay and the basis upon which the settlement had been calculated, as well as the character of the ore contained in the shipment. It is disclosed in the record that other mining companies in the Rush district shipped ore to appellant under appellee's contract heretofore referred to. The Edith Mining Company, in charge of a Mr. Hirschler, shipped ore in this way. E. E. Schofield had charge of appellee's affairs. F. W. Bocking was one of the representatives of appellant's affairs. Schofield and Hirschler visited appellant's smelting plant, and, while there, had under discussion the question as to whether the price of ore shipped should be calculated on the basis provided in sections 9 and 10 or 14 of the contract. There is a conflict in the evidence as to the basis determined upon in that interview. On December 6 thereafter Bocking, representing appellant, wired appellee as follows: "We will not accept Edith (referring to ore shipped from the Edith mine) unless settled for under schedule as we have settled with you in the past. Please have definite understanding before shipping." Hirschler, representing the Edith Mining Company, replied to the wire as follows: "Your wire received. Thought my letter December 3 was clear. We fully understand that all shipments arranged for since my visit Van Buren are subject to charges mentioned in first part of contract and not as set out in schedule." Hirschler's

wire was confirmed by a letter in part as follows: "We agree to the charges as set out in the first part of the contract, and not to those claimed by us on the strength of the second schedule, for all shipments made and arranged for after Mr. Hirschler's visit to Van Buren, as to the previous shipments this matter has been referred to New York, and left to them to settle with your New York office." On the next day Schofield, representing appellee, wrote a letter to appellant, which, in part, is as follows: "We received your telegram, and the Edith people were already answering your wire that they would accept the old treatment charge that you had charged them before, and said he thought he had written you to that effect; but at any rate his wire will clear everything. Nothing like bringing a gentleman of his weight and caliber to his milk. You certainly have done the work properly." Concerning the basis upon which the price of the ore should be ascertained, Mr. Schofield testified as follows: "I took it up with them when I was in their office in Van Buren, and also when Mr. Bocking came to Rush, and I wrote him several letters about it." The record contains several letters written by appellant to appellee in relation to the two schedules contained in the contract, which, in part, are as follows:

"December 16, 1916.

"When you were here last, we talked the matter over in relation to the two schedules in our contract, and we both agreed that they were conflicting in many ways, and you suggested that we discard the first schedule and abide by the last schedule as written you by Mr. Hothorn on May 31," etc.

"December 29, 1916.

"I expect in the near future to be in your district, and will then be glad to take up all matters with you pertaining to the change in the treatment charges on your ore as well as other matters," etc.

"March 31, 1917.

"Under date of the 20th, I sent you several copies of an understanding relative to the two schedules in our

contract, two of which I ask you to sign and return and retain one copy, but up to the present time I have not even received a reply, and I believe it is due us to at least have a reply of some kind stating what you wish to do." This last letter was written about the time the last shipment was made under the contract.

We deem it unnecessary to set out the evidence responsive to the issue joined in the pleadings as to whether the paragraphs governing the basis upon which the price of the ore should be calculated are in conflict, and, if so, which paragraph should govern, as the issue of an accord and satisfaction tendered by appellant as a defense is sustained by the undisputed facts in the case. If it be conceded, as contended by appellee, that the basis upon which the price of the shipments should be determined was in dispute between the parties, the case is ruled by the doctrine announced in *Longstreth* v. *Halter,* 122 Ark. 212, which is as follows: "When a claim is in dispute and the debtor sends to the creditor a check or other remittance which he clearly states is a full payment of the claim, and the creditor accepts the remittance or collects the amount of the check, without objection, this constitutes a good accord and satisfaction." Each settlement sheet shows on its face that it was intended by appellant as an account stated concerning the particular shipment, and disclosed the basis upon which the net amount due appellee was calculated. The balance due appellee, as shown by the settlement sheet, was covered by a check and voucher showing the check to be in full settlement of the shipment. The check was received and cashed in each instance by appellee. While there is evidence tending to show that there were conflicting paragraphs in the contract in relation to the method by which to ascertain the price for the ore, and that there was some discussion as to which should govern in fixing the price, it is perfectly clear that the price on each shipment was calculated upon the basis provided in either sections 9 or 10 of the contract with the full knowledge of both parties, and the payment was made and accepted in full settle-

ment on that basis. We can not follow appellee's suggestion that appellant's letters of date December 16 and 29, 1916, and March 31, 1917, show that the settlements were tentative, pending a final compromise as to which schedule should control. Appellee's own letter of December 7, 1916, in answer to a telegram sent to appellee by appellant on December 6, would conflict with the construction appellee places upon appellant's letters. Appellant's letters relate to a contemplated change in the treatment of the ore, if an agreement between the parties could be reached to that effect. The change appellant had in mind was incorporated in writing and enclosed to appellee on the 20th of March, 1917. The proposed written changes did not meet the approval of Schofield, and he destroyed them. We think there is nothing in appellant's letters to the effect that the settlements made from time to time were tentative and subject to a future agreement. Each settlement covered by a check for balance due, which was accepted and cashed by appellee, constituted an accord and satisfaction. The bills should have been dismissed.

The decree is therefore reversed, and the cause dismissed.

PARSLEY v. STATE.

Opinion delivered May 16, 1921.

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—BURDEN OF PROOF.—Crawford & Moses' Dig., § 2342, providing that in homicide cases if the killing is established the burden of proving mitigating circumstances justifying or excusing the homicide shall devolve on accused, has no application in a case of assault with intent to kill, and the burden is on the State to prove every allegation of the indictment beyond a reasonable doubt.
2. HOMICIDE—BURDEN OF PROOF—INSTRUCTION.—It is improper in a murder case to charge that it devolves on defendant to prove circumstances in mitigation or justification without adding the statutory qualification "unless by the proof on the part of the prosecution it is sufficiently manifest that the offense was manslaughter

or that the accused was justified or excused in committing the homicide," or without stating that the burden on the whole case rests on the State.

3. CRIMINAL LAW—INSTRUCTION—GENERAL OBJECTION.—On a trial for assault with intent to kill, a general objection to an instruction placing the burden on plaintiff to prove circumstances in mitigation or justification was sufficient.

4. HOMICIDE—ASSAULT TO KILL—JUSTIFICATION.—Language, however insulting or slanderous, does not justify an assault.

5. HOMICIDE—ABUSIVE LANGUAGE AS JUSTIFICATION.—On a trial of an assault with intent to kill, it would have been correct to tell the jury that, if defendant fired the shot merely because of abusive language and without any assault or overt act, he would be guilty of the offense charged.

6. HOMICIDE—THREATENING ATTITUDE OF PERSON ASSAULTED.—If the prosecuting witness used abusive language toward defendant and was advancing on him in a threatening attitude when the latter fired the shots, so as to lead defendant to believe that his life was in danger, or to arouse a sudden, irresistible passion, this would reduce the grade of the offense, even though shooting was not justified.

7. HOMICIDE—ASSAULT TO KILL.—In order to constitute the crime of assault with intent to kill, the evidence must be such as to warrant a conviction of murder if death had ensued, and there must have been a specific intent to kill.

8. HOMICIDE—ASSAULT TO KILL—INSTRUCTION.—On a trial for assault with intent to kill, defendant was entitled to an instruction that, if the assault was committed upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, so that the offense would have been manslaughter if death had ensued, he would not be guilty of the offense charged.

9. HOMICIDE—ASSAULT TO KILL—INSTRUCTION.—On a trial for assault with intent to kill, an instruction that if the assault was committed by defendant while acting under the influence of passion or excitement caused by provocation apparently sufficient to make the passion irresistible, defendant should be acquitted, was properly refused, since, though the assault was made under those circumstances, this would not justify it, but would only reduce it to a lower grade.

Appeal from Lonoke Circuit Court; *George W. Clark*, Judge; reversed.

Williams & Holloway and *Trimble & Trimble*, for appellant.

1. The court erred in its instructions. They as a whole fail to give the defendant's theory of the case, and do not correctly define the law of self-defense. 179 S. W. 1013; 100 Ark. 209; 161 S. W. 186; 91 Ark. 582; 100 *Id.* 132; 85 *Id.* 179; 121 S. W. 1070; 107 *Id.* 677.

2. It was error to give the oral instruction. Constitution, art. 7, § 23, and cases cited; 139 S. W. 289. The exception to same was properly taken. 95 Ark. 71; 128 S. W. 562; 16 *Id.* 1081. See, also, 58 Ark. 277; 78 *Id.* 132.

J. S. Utley, Attorney General, and *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

There was no error in the instructions given or refused, and no proper exceptions were saved. 101 Ark. 95. The controverting affidavits were not filed in time to make them part of the record. 87 Ark. 463; 95 *Id.* 72.

McCULLOCH, C. J. Appellant was convicted of the crime of assault with intent to kill, committed by shooting and wounding Frank Gassoway. The alleged assault was committed in the town of England, Lonoke County, where both of the parties to the encounter resided. They had been on bad terms for several years, and in July, 1920, about a month before the shooting occurred, Gassoway went to Faulkner County on a visit to his father and remained there about a month. He returned to England a day or two before the assault occurred and heard of a report being circulated about him to the effect that he had been confined in jail in Faulkner County on a charge of stealing an automobile. Gassoway traced this report, as he claimed, back to appellant's wife, and he went to see appellant about it, but the latter claimed that neither he nor his wife were responsible for the report. There was abusive language passed between the two parties in regard to this incident, and appellant went into his house and came out with his shotgun and threatened to shoot Gassoway. They were both arrested and tried before the mayor for disturbing the peace, and during the trial there were manifestations of bad feeling between them. The trial before the mayor occurred early

in the morning, and about 5:30 o'clock on the same afternoon the parties met in front of a livery stable and the controversy between them concerning the rumor about Gassoway having been in jail again arose and rough language was again used by each of the parties.

Gassoway testified that he went over to the livery stable and found appellant and one Sheridan sitting on a bench in front of the stable; that appellant got up and said: "Whoever told you I said that told a damn lie," and started to walk away when he (witness) spoke to appellant, saying, "You could be too fast; you could be a damn liar yourself;" that appellant turned and drew his pistol and said, "You are always making a gun play. That isn't the first time you have, and, God damn you, I am going to kill you if I go to hell in three minutes." He testified that at appellant's first attempt to fire the gun the charge did not explode, and that he (witness) said, "Parsley, don't shoot me," and that appellant replied, "God damn you, I am going to kill you," and continued to shoot as the witness backed away. There were two or three shots fired, and Gassoway was severely wounded, being shot through the arm and through the liver and lungs. His left arm was broken, and his left leg was shot through. Gassoway testified that he was not making any demonstrations toward appellant at the time the latter fired the shots.

Appellant testified concerning the prior trouble with Gassoway and also gave the details of the final encounter between them which resulted in his shooting Gassoway. He testified that he and Sheridan were sitting on a bench in front of the livery stable when Gassoway came up; that he and Sheridan were discussing the alleged report about Gassoway at the time the latter came up, and that Gassoway inquired what they were talking about, and he answered that they were talking about the report, and that he had had nothing to do with it; that he got up from the bench and started away, and as he started uppellant said, "Wait a minute, you God-damn lying son-of-

a-bitch, you told it;" that he (appellant) turned around and saw that Gassoway was advancing toward him with his hand under his arm, and that Gassoway said, "Get your gun, you cowardly son-of-a-bitch, you haven't got nerve enough to use it." He testified that he thought Gassoway was attempting to draw his gun from under his arm, and that he began firing and shot three times. There were numerous other witnesses in the case, some of whom corroborated Gassoway and some corrobrated appellant, and there were several versions of the affair.

Among the numerous instructions given by the court the following was given over appellant's objections:

"You are instructed that the defense relied on in this case is self-defense, that is, that the defendant contends that the reason he shot Gassoway was that it was necessary to shoot the witness Gassoway in order to save his own life, or prevent Gassoway from inflicting a serious bodily injury upon him. This is a legal defense under the law if established, and the burden of proving same is upon the defendant, but, before the law of self-defense can be invoked, the defendant must be without fault or carelessness upon his part in provoking the difficulty, and must have used all means within his power consistent with his safety to avoid the danger, and avert the necessity of taking human life. And you are further instructed that the law of self-defense begins in necessity and ends in necessity; if the defendant could with safety to himself [have] avoided this difficulty, and failed or refused to do so, then the law of self-defense can not avail him."

In an oral instruction subsequently given the court also reiterated the statement that, appellant having admitted the shooting and also that he intended to kill Gassoway, the burden was on him to prove that the shooting was justifiable. We are of the opinion that this instruction was erroneous and calls for a reversal of the judgment. There is a statute which provides that in homicide cases, if the killing be established, "the burden of proving circumstances of mitigation that justify or ex-

cuse the homicide shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide." Crawford & Moses' Digest, § 2342.

This statute, however, has no application to the trial of any offense except homicide. It is improper, therefore, to give this statute, either in form or substance, in any other kind of case, for the burden is on the State to prove beyond a reasonable doubt every allegation in the indictment. Even in cases which fall within the statute, it is improper to instruct the jury that it devolves upon the defendant to prove circumstances in mitigation or justification without stating the further qualifications contained in the statute "unless, by the proof on the part of the prosecution, it is sufficiently manifest," etc., or without stating that the burden of the whole case rests upon the State. *Cogburn* v. *State,* 76 Ark. 110; *Tignor* v. *State,* 76 Ark. 489; *Childs* v. *State,* 98 Ark. 430. The objection made to the instruction was general, but we think that no specific objection was required.

The giving of the following instruction is also assigned as error:

"You are instructed that words, be they ever so insulting or slanderous, can not justify even a simple assault, and you are instructed, if you find from the evidence or circumstances that, because of any insulting or abusive language used by Gassoway, the defendant shot him, and at the time he shot the said Gassoway he intended to take his life, you will find the defendant guilty of an assault with intent to kill and fix his punishment at some period of not less than one or more than twenty-one years at hard labor in the penitentiary."

This instruction is in bad form, but it is unnecessary to determine whether it is prejudicial. The first part of the instruction is correct in saying that language, however insulting or slanderous, does not justify an assault, and it would have been correct to tell the jury that if

appellant fired the shot with intent to kill merely because of abusive language on the part of Gassoway and without any assault or other overt act, appellant would be guilty of the offense charged; but it is doubtful whether the jury understood this instruction to mean that it is only in the absence of such overt act that abusive language will not reduce the grade of an offense below assault with intent to kill.

There was testimony in the case tending to show that Gassoway used abusive language toward appellant, and that he was advancing on appellant in a threatening attitude, when the latter fired the shots; and if the jury believed that to be true, then appellant was not necessarily guilty of assault with intent to kill, even though the shooting was unjustified. In other words, if the jury found that there was such a threatening attitude on the part of Gassoway as to lead appellant to believe that his life was in danger, or to arouse a sudden, irresistible passion, this would reduce the grade of the offense. To say the least of it, this instruction was confusing, and we call attention to it in view of another trial without determining whether or not it constitutes reversible error.

The court's refusal to give the following instructions is separately assigned:

"No. 1. The jury are instructed if you find from the evidence in this case that the assault was committed by the defendant while acting under the influence of passion or excitement, caused by provocation apparently sufficiently to make the passion irresistible, defendant should be acquitted."

"No. 2. The jury are instructed that if you find from the evidence the defendant at the time he assaulted the prosecuting witness, by his acts and conduct, caused the defendant to honestly believe, without fault or carelessness on his part, that he was in danger of great bodily harm, and that in order to protect himself from such bodily harm, then the defendant would have the right to protect himself even in shooting his assailant."

In order to constitute the crime of assault with intent to kill, the evidence must be such as to warrant a conviction of murder, if death had ensued from the assault, and there must have been a specific intent to kill. *Lacefield* v. *State,* 34 Ark. 275; *Davis* v. *State,* 115 Ark. 566. Appellant was therefore entitled to an instruction telling the jury that if the assault was committed "upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible," so that the offense would have been reduced to manslaughter if death had ensued, then he would not have been guilty of assault with intent to kill. However, the instruction requested by appellant was not in correct form, and the court properly refused to give it. In the first place, the instruction does not follow the language of the statute, Crawford & Moses' Digest, § 2355. In the next place, it is erroneous in telling the jury that, if the assault was made under those circumstances, appellant should be acquitted. The indictment embraced the lower degrees of assault, and, even though the assault was made upon a sudden heat of passion, this would not justify it, but would only reduce it to a grade lower than assault with intent to kill.

Instruction No. 2 was correct, but it seems to have been covered by another instruction given by the court on its own motion.

For the error found in instruction No. 1 the judgment is reversed and the cause remanded for a new trial.

BISCOE *v.* DEMING INVESTMENT COMPANY.

Opinion delivered May 16, 1921.

1. BROKERS—UNILATERAL CONTRACT.—A contract authorizing a broker to negotiate a loan on lands on specified terms for designated compensation, without obligating the broker to render any service in procuring the loan, was unilateral and could not be enforced unless the broker performed the service which it was employed to render.

2. BROKERS—RIGHT TO COMMISSION.—Where a real estate broker employed to procure a loan on lands procures a person who is ready, able and willing to make the loan on the specified terms, and the owner refuses to accept the loan, the broker is entitled to his commission.

3. BROKERS—ESCROW AGREEMENT—EVIDENCE.—In a broker's action for compensation for procuring a lender, ready, able and willing to make a loan, on failure to consummate transaction because of owner's refusal to deliver papers to be recorded prior to delivery of the proceeds of the loan to a depositary in compliance with an escrow agreement, evidence *held* insufficient to prove that the broker's agent was without authority to bind the broker by such agreement.

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

Moore, Smith, Moore & Trieber, for appellants.

1. The contract sued on was void for want of mutuality. 96 Ark. 184-5; 21 So. 233; 44 N. W. 669; 102 Ark. 621-624; 100 *Id.* 510-14; 124 *Id.* 354-9; 30 *Id.* 186-194.

2. Appellee did not procure a lender on the terms required by the contract. 4 R. C. L. 303. Before a broker is entitled to his commission, he must produce a purchaser ready, able and willing to purchase and able to purchase on the terms and price designated by the principal. 27 Pac. 882-3; 4 So. 180; 9 N. W. 784; 1101 N. W. 719-21; 83 N. Y. 378-382-3; 92 N. W. 413.

3. The law, as well as the express provisions of contract, required appellee to notify appellant of the acceptance of the loan. The broker must produce the customer, ready, willing and able to take the property on the terms stipulated, and the broker must perform the duties assumed within the time limit of the contract. 99 Pac. 867; 46 N. W. 673; 67 *Id.* 1148; 94 Am. Dec. 541-3; 9 N. W. 784-5; 29 N. E. 154.

The contract is unilateral and void for want of mutuality. The time had been extended, and appellee given every opportunity to procure a customer. 83 N. Y. 378, 382-3; 112 Ark. 227-232.

4. The agency was terminated. Parol evidence was admissible to show that a written contract was executed upon the condition that certain changes were to be made in the writing before it should become the real agreement of the parties. 88 Ark. 383; 98 *Id.* 10-12.

Parol proof is admissible to show that certain sureties signed upon condition that the bond should be signed by certain other sureties 57 Ark. 64, 78; 78 *Id.* 588; 82 *Id.* 225; 76 *Id.* 140-2.

If the copies relieved appellee of the application and the loan contract were not corrected through the neglect of appellee's stenographer, this case falls within the rule in 135 Ark. 609.

The effect of the extensions agreed on was to limit the agency to the period of time named in each of them. No action on the part of appellant was necessary to the termination of the agency. The authority of appellee expired *ipso facto* at the expiration of the period of extension. 112 Ark. 227, 232.

The escrow agreement of May 3, 1915, was entered into to keep alive and extend the agency which expired on that day and giving appellee further time to discharge its duties as agent. The deposition of Mr. Deming is not of persuasive force and is inconsistent with his attitude and the statements in his first deposition, and he by his acts and conversations ratified Long's acts.

When an alleged principal accepts a partial benefit from the act of an agent, he will be held to have ratified the agent's authority throughout. He can not repudiate in part and ratify in part, but must repudiate or ratify the entire transaction. 114 Ark. 12. Any evidence is competent which tends to establish the agency. 93 Ark. 603. It is permissible always to prove a previous course of dealing. 21 R. C. L., p. 820, 855, par. 34.

If the escrow agreement is void for want of authority in Long, the agency of plaintiff was terminated, and it has no right of action.

Trimble & Trimble, Cooper Thweatt and *Coleman, Robinson & House,* for appellee.

Only a question of fact is involved, and the evidence clearly sustains the decree, and no reason is shown for reversal.

WOOD, J. During the year 1915 the Deming Investment Company, hereafter called appellee, was engaged in the business of negotiating loans on farm lands in Arkansas. On the 8th day of March, 1915, John E. Biscoe and Elizabeth Biscoe, hereafter called appellants, executed and acknowledged an instrument addressed to the appellee, the material parts of which are as follows:

"I hereby appoint you my agent to negotiate and procure for me a loan of $70,000 on seven years' time, bearing interest at the rate of six per cent. per annum, payable semi-annually on the first day of November and May in each year to be secured by first mortgage on land hereinafter described. (The description of the land in Lonoke and Prairie counties is then set forth.)

"As compensation for your services in negotiating this loan, I hereby agree to pay you or the assignee of this contract, the sum of $9,800, payable in four notes, as follows: (Here follows a description of the notes and a statement that they were to be secured by second mortgage on the lands herein described, and a statement that the appellants would pay all expenses incident to procuring abstracts of title and recorder's fee.)

"For value received, I do hereby promise and agree to pay such actual expenses as you may have incurred in the negotiation of the loan and examination of the property and title, if I do not obtain said loan by reason of defects in my title, or by reason of my being unable to remove all incumbrances from said land; and if you or any negotiator to whom you apply for me for above loan, notify me of acceptance of said loan, and I am unable to or refuse to complete the said loan, then I agree to pay five per cent. on amount of loan applied for, and all ex-

penses you or the assignee of this contract have incurred for such refusal or inability to complete said loan.

"It is understood that the lender to whom you apply shall have the right to impose all reasonable requirements and conditions in making said loan, and I do hereby authorize you or the assignee of this contract to receive all money due me on said loan and further authorize you or the assignee of this contract to pay off all incumbrances, leases, and liens of every kind on my said land, and pay for insurance, taxes on land, expenses of loan, and any other money necessary to be paid to perfect title to said land or any part thereof. And if the loan hereby applied for should not be sufficient to pay off all liens, I agree to pay the deficiency within ten days after said note and mortgage are executed. And if said land is rented or under lease, either verbal or written, at the time the loan applied for is closed, or if said premises are occupied by any other person or child over legal age, I agree to obtain and deliver to you the written disclaimer of said tenant or person in favor of lender. (Then follows provisions for insuring the buildings on the real estate and a provision for paying the expense of perfecting title to the property, if same should be found defective). And the lender may remit you or the assignee of this contract all money due me on said loan for disbursement or may remit to you part of said money and retain a portion of the same to pay off incumbrances as may be necessary to be paid to perfect my title and this shall be authority to you for the assignee of this contract to receive and disburse all moneys due me on said loan.

"It is also agreed that your authority to negotiate said loan shall be irrevocable for thirty days after I shall have furnished you complete and satisfactory abstract of title, showing perfect title in applicant.

"As security for the payment of any and all sum or sums of money to which you may be entitled under this contract, I hereby pledge and mortgage to you the above described real estate."

This action was instituted by the appellee against the appellants. The appellee alleged the execution of the above instrument and attached a copy as an exhibit and made it a part of its complaint. Appellee alleged that appellants, by the instrument, mortgaged to the appellee the lands described to secure the appellee in any sums of money that appellants might be entitled to under the contract. It alleged that under the terms of the contract it proceeded to negotiate a loan for appellants in the sum of $70,000 and did procure a client ready, willing and able to make said loan; that the appellants refused to accept said loan, and that the failure to complete the loan was due solely to the refusal of the appellants to complete the same under the terms of the contract. The appellee further alleged that they had incurred expense under the contract in the sum of $146.60, and that by reason of the breach of the contract on the part of the appellants it was due the appellee the sum of $3,500 and the amount of the expense above set forth, for which amounts it prayed judgment and that a lien be declared and foreclosed on the lands described.

The appellants answered, admitting the execution of the instrument, but denied that same created a lien on the lands described, and denied that appellee procured the money that was to be advanced on the loan in compliance with the agreement. They averred that, because of the failure of the appellee to furnish the money after repeated demands of appellants, the latter called the transaction off and on May 3, 1915, revoked the appellee's authority. They further alleged that an agreement was then made by which the notes and mortgage executed to secure the loan should be deposited in escrow to be delivered to the appellee by the 15th of May, provided the appellee should place the amount of the loan to appellants' credit on or before that date; that the appellee failed and refused to carry out the agreement, and the escrow agreement ceased to be operative; that the failure to carry out the contract was wholly the fault of the ap-

pellee. The appellants also alleged in their answer, which they made a counterclaim, that the contract sued on had been filed in the offices of the recorders of Lonoke and Prairie counties for the purpose of creating an incumbrance upon appellants' property and beclouding their title, and they prayed that the same be canceled.

The appellee is a Kansas corporation having its home office at Oswego and is engaged in business in this State. Robert C. Deming was the president and general manager of the company. During the year 1915 and at the time the instrument upon which this suit was based was executed, M. B. Long was in charge of the appellee's business in Arkansas. His authority was to take applications and contracts for farm loans in the State, to make inspections of property and report upon the securities for the loans offered, submitting his data to the home office for approval, and, if approved, to proceed with the completion of the loan under directions from the home office.

The appellee, under the authority of the above instrument, made application for a loan to the John Hancock Mutual Life Insurance Company of New York, and on April 23, 1915, the appellee wrote to its local agent, Freed Hutto, at England, Arkansas, to the effect that it had received his letter of April 20 in regard to closing the Biscoe loan; that the appellee was awaiting the decision of the insurance company and stating that action would probably be taken by the finance committee of that company that day, and further stating: "All we can do is to wait on their movements, but certain that it will be hurried forward as rapidly as they can." This letter was sent by Hutto to Biscoe.

On April 23, 1915, the insurance company wrote the appellee the following letter: "The John E. Biscoe loans for $45,000 on 2,036.38 acres in Lonoke County, Arkansas, and $25,000 on 1,818.32 acres in Prairie County, Arkansas, have been recommended for approval by Mr. Hopkins, and they have now been accepted by the committee

of finance, both for seven years and at 6¾ per cent. interest rate. We await receipt of the completed papers."

There is no testimony in the record that this letter written by the insurance company to the appellee was sent to the appellants or that the appellants were advised of its contents. The appellee wired its local agent, Long, to the effect that the Biscoe loan was approved by the insurance company, and that the papers were in Little Rock to be executed. It appears that this telegram was received by the agent while he was at Brinkley. With Long at the time was one Mr. Self, who had been appointed by the company as local agent and general manager of appellee's business in Arkansas in place of Long, and who was to take charge of appellee's business on the first of May, 1915. After receiving the telegram, Long and Self proceeded to Little Rock and finished up there on the last of April. On the next day, which was Saturday, May 1, Self went to England to see Biscoe to have him sign the papers for the loan. Biscoe informed Self that he wanted to take the matter up with Horace Chamberlin, his attorney and agent, and would be in Little Rock Monday to get the papers signed. On Monday morning, May 3, the appellants and Chamberlin, Long, Mitchell and Hutto, met in appellee's office in Little Rock. Long had the notes and mortgages that were to be executed by the appellants in triplicate. One on the Lonoke County land for $45,000, one on the Prairie County land for $25,000, and one on the lands in both counties for $9,800, the latter amount representing the commission that was to be paid the appellee for procuring the loan.

Chamberlin suggested several changes in the terms of the mortgages, which were agreed to by Long, and these changes were made, and the mortgages and notes were executed by the appellants. Biscoe asked for the money and Long told him that he did not have it, but that he could have it there in a very few days—by the 10th. Biscoe protested and stated that unless the money were forthcoming on that day he would call the loan off. At

this juncture Chamberlin suggested that the appellants extend the appellee's time for procuring the money until the 15th and on certain terms, to which appellants and Long and the other agents, Hutto and Mitchell, agreed. This agreement was evidenced by the following instrument signed by the appellants, and the papers described therein were placed in escrow in the Exchange National Bank, as evidenced by its receipt:

"May 3, 1915.

"Exchange National Bank, Little Rock, Arkansas:

"Gentlemen: We hand you herewith one note in the sum of $25,000, payable to the Deming Investment Company on the first day of May, 1922, one note in the sum of $45,000, payable to the Deming Investment Company on May 1, 1922, and also one note in the sum of $1,400, payable November 1, 1915, and three notes in the sum of $2,800 each, payable to the Deming Investment Company on November 1, 1916, 1917 and 1918, respectively. We also inclose herewith a mortgage by John E. and Elizabeth K. Biscoe on Lonoke County land in the sum of $45,000 to secure the aforementioned note; also a mortgage by the same parties in the sum of $25,000 on Prairie County lands to secure the aforementioned note for $25,000. We also hand you herewith a mortgage executed by the same parties on Lonoke and Prairie counties lands in the sum of $9,800, being given to secure the aforesaid notes aggregating $9,800.

"Should the Deming Investment Company place to our credit in your bank on or before May 15, 1915, the sum of $70,000, or should we hand you by said date our acknowledgment in writing of receiving the sum of $70,000 from the Deming Investment Company, you will kindly deliver the aforementioned papers to the Deming Investment Company, or its agent.

"Very truy yours,

.....

"Received the above-mentioned papers to be held as requested. "Exchange National Bank,
"By W. B. Kennedy, Asst. Cashier."

On the next day, May 4, Deming arrived in Little Rock and told Chamberlin that it would be necessary to have the mortgages filed for record and the abstracts redated to cover such filing before he could pay out the loan proceeds. Chamberlin would not consent to this. The appellee, through Deming and Self, insisted on it, stating that it was absolutely necessary to file the mortgages before payment; that it was the usual and customary method of closing loans. They appealed to Biscoe and stated that Biscoe yielded to their request and promised that he would write to the Exchange National Bank and to Chamberlin instructing that the mortgages be delivered to the appellee that they might be recorded and the abstracts redated to cover such filing before the money was paid over. Instead of doing so, however, after consulting with Chamberlin, he wrote to the appellee that he had decided to let the matter remain as per the agreement of May 3, 1915.

Deming contended and testified that during the month of May the appellee was ready, willing and able to furnish the appellants the $70,000 as it had agreed to do, and that it exhibited to Chamberlin and Biscoe drafts showing such facts and informed them that the appellee would furnish the cash if appellants so desired; that on May 13, 1915, Deming and Self had an interview with Chamberlin in which the drafts were exhibited to him, and that later on the same day they had an interview with Biscoe and also exhibited the drafts to him; that Biscoe stated that he would see his attorney the next day and take the matter up further with Self at Little Rock; that, instead of doing this, however, he wrote the appellee a letter dated May 13, in which he stated: "Since your Mr. Deming and Mr. Self were here, I had a conversation over the telephone with Mr. Chamberlin, my agent in this deal, and he says you gentlemen were in his office

and the deal was called off, as you would not comply with our agreement of May 3, and I ratify everything he does in the matter. In view of this, I will not call to see you."

Chamberlin, in his testimony, flatly contradicted the testimony of Deming and Self as to what took place in their interview with him on May 4. He stated in substance that, after he refused to consent to turn over the mortgages to the appellee and having informed them that the appellants would expect the appellee to abide by the agreement as to the escrow of the mortgages and notes executed on May 3, 1915, Deming emphatically stated that he would not do so; that on May 13 Deming and Self again interviewed him, and, after exhibiting to him drafts aggregating $69,900, witness asked what was the purpose of their visit. Deming said: "I want to see if you will change your escrow agreement." Witness replied, "No, sir; we will not." The testimony of the witness as to the conversations he had with Deming and Self at the interviews after the execution of the agreement for escrow is exceedingly voluminous, but the substance of it is that the appellee's agents desired that the appellants modify such agreement, withdraw the mortgages, and turn them over to the appellee so that they might be recorded and shown in the abstracts and the abstracts redated showing that the appellee had a first lien on the property before the money was paid over to appellants; that witness advised appellants not to consent to this, but to stand by the agreement of May 3, and that appellants acted upon his advice and refused to change that agreement. The last interview was concluded by witness asking Deming and Self if they finally refused to carry out that agreement, and Deming replied, "Absolutely. I would not give him a damn dollar unless he does as I want him to do." Witness then said, "All right, sir. We will just consider this transaction closed, and I will withdraw the papers from the Exchange National Bank." Witness did withdraw the papers, marked them canceled, and sent them to Biscoe.

The testimony of Biscoe as to what took place between him and Deming on May 4 and May 13, is also voluminous, but the substance of it is that Deming wanted him to modify the escrow agreement by taking the mortgages from the bank and leaving the notes, which he refused to do. He stated that in the interview on May 13 he did at first tell Deming that he would go to Little Rock and see Self, but after Deming left he had a conversation with Chamberlin over the 'phone in which Chamberlin informed him of what Deming had said to him on that morning, and that after receiving this information he wrote the letter of May 13 in which he told Deming that he ratified everything that Chamberlin did and would not call to see Self.

Both Deming and Self testified that they never had at any time called the loan off, but on the contrary stated in each interview with Chamberlin and Biscoe that they were prepared to close in accordance with the contract, and were desirous of doing so, and demanded the delivery of the mortgages that the transaction might be completed. Deming testified that he did refuse to pay out the proceeds of the loan until the mortgages were filed for record and shown in the abstracts. He also testified that Long's authority to represent the company ended on the last day of April; that Self was employed by the appellee to take Long's place and began his duties on the first of May; that Long had no authority to represent the company on May 3; that the authority of Long and Self was precisely the same. He further testified that neither Mitchell nor Hutto had authority to make contracts like that of May 3, 1915.

Biscoe testified that on May 1 Self told him that he was Long's successor, but that Mr. Long would remain with the company a few days to close up some details with which he was familiar, and that the Biscoe deal was one of them. He and Chamberlin both testified that in the conversation of Deming with them on May 4 Deming did not in any way deny authority of Long to make the escrow agreement.

We have not undertaken to set forth the testimony of the witnesses in detail, as it would unnecessarily extend this opinion to do so. The above statement presents the issues raised by the pleadings and the salient features of the testimony upon which a decree was rendered in favor of the appellee in the sum of $3,646.60, from which is this appeal.

The instrument which is the foundation of this action does not by its terms impose any obligation upon the appellee to render any service to the appellants in procuring the loan mentioned in the instrument. The contract is one purely unilateral, and it therefore can not be enforced unless the appellee performed the service which it was employed to render. See *Grayling Lumber Co.* v. *Hemingway,* 124 Ark. 354; *Eustice* v. *Maytrott,* 100 Ark. 510-514; *El Dorado Ice & Planing Mill Co.* v. *Kinard,* 96 Ark. 184-185.

In the case of *El Dorado Ice & Planing Mill Co.* v. *Kinard, supra,* we said: "Where a party, originally not bound, has executed the contract the doctrine relative to mutuality does not apply." P. 189. The appellee invokes the latter doctrine and contends that it has fully performed the contract by producing a lender who was ready, willing and able to make the loan.

In the case of *Murray* v. *Miller,* 112 Ark. 227-232, this court held: "Where the authority of an agent or broker to sell land is limited to a specified time, he must produce a purchaser ready, willing and able to purchase within the time specified in order to be entitled to a commission on the sale, unless the owner does not act in good faith, or attempts to hinder the broker in making the sale."

We have also held that "where a real estate broker procures a person who is ready, able and willing to purchase the property upon the terms under which the agent is authorized to negotiate the sale and the owner refuses to convey, the agent is entitled to his commission." *Poston* v. *Hall,* 97 Ark. 23. These rules, of course, are ap-

plicable to brokers employed to procure a loan on real estate as well as to brokers who are employed to sell real estate.

Even if the contract contained mutual obligations, by its express terms appellants could revoke the authority of the appellee thirty days after they had furnished appellee abstract showing perfect title. Appellants did not elect to revoke appellee's authority, but, on the contrary, at the request of appellee, continued its authority on the same terms until April 15, again until May 1, and again until May 3. During this time the appellee did not furnish a lender and procure a loan according to the terms of the contract. The contract requires that appellee "notify" appellants "of acceptance of said loan." The insurance company wrote the appellee on April 23, 1915, that the loan had been accepted for seven years at 6¾ per cent. interest, but this communication was not sent to the appellants, and appellants were not notified of its contents. Moreover, even if they had been so notified, the acceptance of the loan was at a rate of 6¾ per cent. per annum, whereas the contract provided that interest should be at the rate of 6 per cent. per annum. Appellee wired its local agent, Long, that the loan had been accepted, but appellants were not notified of this until May 1, and it is not shown that at that time the appellants were advised of the change in the rate of interest.

Therefore, the undisputed evidence shows that on May 3 the appellee had not procured a lender who was ready, willing and able to make the loan according to the terms of the contract. On May 3, 1915, appellants entered into an agreement with the local agent, Long, who assumed to represent the appellee, the terms of which are set forth in the letter of May 3 addressed to the Exchange National Bank. The notes and mortgages executed on that day by the appellants show that appellants had waived the rate of interest provided for in the original contract, and the escrow contract shows that the ap-

pellants again, under the terms of that contract, continued appellee's authority to negotiate the loan until the 15th of May.

The original contract provides "that the lender should have the right to impose all reasonable requirements and conditions in making said loan." If it be conceded that the appellee would have the right under this contract to prescribe as a reasonable requirement that the appellants should turn over to appellee the mortgages for recordation before receiving the proceeds of the loan, nevertheless it is manifest that appellee would have no such right under the terms of the escrow agreement.

It only remains for us to inquire, therefore, whether or not Long was clothed by the appellee with authority to enter into the escrow contract. Deming testified that Long had charge of appellee's business in Arkansas with authority to make applications and contracts for loans. Up to May first he had conducted the negotiations on behalf of appellee for this particular loan. When Self was employed and appeared on the scene to succeed Long, whose service ended April 30, Self, according to his testimony, informed Biscoe that he had taken Long's place on May first and wanted to close up the loan. But according to the testimony of Biscoe, Self informed him that he had succeeded Long, but that Long would remain with the company for a few days to close up certain loans which he had conducted up to that time, one of which was the loan to the appellants.

The burden was with the appellee to prove that Long did not have the authority to bind it by the escrow agreement. Appellee has not discharged that burden. The circumstances on this issue corroborates Biscoe rather than Self. On May first, Self interviewed Biscoe to have him sign the mortgage and notes, and Biscoe told him that he would go to Little Rock on May 3 to see Chamberlin with a view to executing the papers and closing up the loan. Self, instead of meeting him

there on that day, turned over the papers to Long, and Long and other local agents of the appellee appeared on May 3 to conduct the negotiations for the appellee. A clear preponderance of the evidence therefore shows that the appellee had equipped Long with all the indicia of authority necessary to empower him to enter into the escrow contract on behalf of the appellee. The undisputed evidence showed that appellee refused to comply with the terms of this contract, giving as its reason therefor that it had already rendered the service for which it was employed and had earned its commission under the terms of the original contract, which appellants had failed and refused to comply with.

We are convinced that the court erred in sustaining this contention of the appellee. Its decree is therefore reversed, and the cause will be remanded with directions to the trial court to enter a decree dismissing the appellee's complaint for want of equity and granting the prayer of appellants' cross-complaint to cancel and expunge, from the record of mortgages in Lonoke and Prairie counties, the instrument which is the foundation of this action.

STEWART v. STATE.

Opinion delivered May 16, 1921.

1. HOMICIDE—VOLUNTARY MANSLAUGHTER—EVIDENCE.—In a prosecution for murder in which defendant claimed to have acted in self-defense, evidence *held* to sustain a conviction of voluntary manslaughter.
2. CONTINUANCE—CUMULATIVE EVIDENCE.—A continuance asked for the absence of evidence that was merely cumulative in its nature was properly refused by the court.
3. HOMICIDE—DEFENSE OF HABITATION—INSTRUCTION.—In a homicide prosecution, refusal of an instruction submitting the issue whether defendant acted in defense of his habitation or property, under Crawford & Moses' Dig., § 2367, *held* proper where there was no evidence upon which to base it.
4. HOMICIDE—SELF-DEFENSE—INSTRUCTION.—In a prosecution for murder, an instruction on justifiable homicide approved.

5. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Refusal of instructions covered by those given by the court *held* proper.

6. HOMICIDE—DYING DECLARATIONS.—Dying declarations, to be admissible, must be made under a sense of certain and impending death. In determining this question, the court may consider all the facts and surrounding circumstances, such as the character of the wound, the declaration of the deceased that he would not live, and the fact that he died shortly afterward.

7. HOMICIDE—DYING DECLARATIONS—WEIGHT.—It is the province of the jury to weigh dying declarations and the circumstances under which they were made, and to give them only such credit, upon the whole evidence, as they think they deserve.

8. HOMICIDE—ADMISSIBILITY OF THREATS.—Threats of violence toward the defendant, alleged to have been made by the deceased, unaccompanied with overt acts showing an intent to carry them into effect, are competent in a homicide case to show deceased's character for violence and his disposition of mind toward defendant, to be considered in determining who was the aggressor.

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

Schoonover & Jackson, Smith & Gibson and *Ponder & Gibson,* for appellant.

1. The court erred in refusing a continuance. The grounds set up the absence of witnesses whose testimony was material. There was an abuse of discretion by the trial court. 109 Ark. 407; 120 *Id.* 172. Threats has been made, and the testimony of the absent witnesses was material and vital. *Ib.*

2. Instruction No. 1, asked by appellant, stated the law and should have been given.

3. Instructions 2, 3 and 4 were the law and should have been given. They were in regard to threats, and correctly stated the law as ruled by this court. 79 Ark. 594; 82 *Id.* 595; 84 *Id.* 120.

Instruction No. 7 should have been given as to dying declarations. 38 Ark. 498; 81 *Id.* 417; 58 *Id.* 47; 104 *Id.* 162; 113 *Id.* 142.

J. S. Utley, Attorney General, and *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. There was no error in refusing the continuance. Crutchfield was not subpoenaed as a witness. Besides, all the alleged testimony was merely *cumulative*, and the continuance properly refused. 74 Ark. 444. It was not shown that the absent witness was within the jurisdiction of the court, nor what it was expected to be proved by him. 93 Ark. 290; 120 *Id.* 562. The same rules apply to the testimony of Nannie Wilcutt and Jim McCluskey. There was no abuse of discretion by the court. 99 Ark. 394, cited by appellant, is not in point, as the facts are entirely different.

2. There is no error in the instructions. The plea of self-defense was correctly stated, and the evidence sustains the verdict.

HART, J. Bill Stewart was indicted for the crime of murder in the first degree and convicted of voluntary manslaughter, his punishment being fixed by the jury at two years in the State penitentiary. From the judgment of conviction he has duly prosecuted an appeal to this court.

On the 13th day of August, 1920, Bill Stewart, about eighteen years of age, killed Hubert Wilcutt, about twenty years of age, by shooting him twice with a shotgun loaded with large-sized shot. The killing occurred in a field where both parties were at work at about 8 o'clock in the morning in Randolph County, Arkansas. Elmer Wilcutt, a brother of the deceased, saw Harry Stewart standing in the corner of a patch of corn waiting for his brother. He then saw Bill Stewart come up to Harry Stewart with something in his hand. He started home and had gone about a half a quarter when he heard the report of a gun and looking around saw the smoke of it. After he had gone about ten feet he heard the gun shoot again and then saw the defendant and his brother riding across the field on the same horse in a long lope. Elmer Wilcutt went down to where the shooting oc-

curred and found his brother, Hubert, lying down on the ground. He had been shot in the head, neck, shoulder, thigh, and also in his private parts. Hubert Wilcutt told his brother that he was going to die just as soon as he got to him. He did die from the effect of the wounds at about 12 o'clock of that day.

Jim Hibbard also came up soon after the shooting occurred, and Hubert Wilcutt told him that he was going to die. He told his brother, and also Hibbard, that Bill Stewart and Harry Stewart were both present when he was shot; that Bill Stewart said, "I am going to put your light out," and then shot him. After Wilcutt fell Harry Stewart, who was standing by with a corn knife in his hand, said, "Shoot him again," and Bill Stewart shot Wilcutt again while he was lying down on the ground.

Two physicians attended Hubert Wilcutt and testified that both wounds were necessarily fatal. Hubert Wilcutt made a dying declaration to them about the killing in practically the same language detailed above.

According to the testimony of Jim Hibbard, he lived near the place where Bill Stewart killed Hubert Wilcutt. Stewart came to his house on horseback between seven and eight o'clock on the morning of the killing and asked Hibbard for a gun, telling him he wanted it to shoot some rabbits that were eating his cabbage. Hibbard let him have his shotgun and five shells, telling him that the shells were loaded with shot too big for rabbits. In fifteen or twenty minutes thereafter he heard two shots down in the field, and upon going there found Hubert Wilcutt lying on the ground fatally wounded.

Dick Tippett testified that on the morning of the killing he found Hubert Wilcutt lying on the east side of a ditch. Hubert Wilcutt told him that he was going to die, and that Bill Stewart had killed him. He said that Bill Stewart and his brother passed by, and that they had a few words. Stewart and his brother went off and slipped back again, and Bill Stewart said, "I am going to put your light out." He then shot Hubert Wilcutt

and came up closer to him and shot him again. The ditch near where Hubert Wilcutt was found is about nine feet wide and two and a half feet deep. Bill Stewart and his brother were on the opposite side of the ditch from Hubert Wilcutt when he was shot.

Bill Stewart was a witness for himself. According to his testimony, he drove up near Hubert Wilcutt with his horse hitched to a plow. Wilcutt noticed that something was the matter with the horse and examined him. Then Stewart started on to where he was going to work. As he passed Hubert Wilcutt, the latter jerked him down and cursed and abused him. He followed Stewart through the field and told him that he would kill him and also his brother if he did not leave the farm. Stewart was afraid of Wilcutt and took his horse out of the plow and went to Mr. Hibbard's to borrow a gun. Wilcutt followed him a piece and threw a chunk at him, which hit the horse. Stewart borrowed the gun from Hibbard and went back to work. When he got back, Hubert Wilcutt told him he should not go to work, and that if he crossed the ditch he would kill him. Stewart said that he was going to work and started to do so. Hubert Wilcutt then started toward Stewart and threw his hand to his hip. Stewart then shot him. Wilcutt kept going toward Stewart, cursing and abusing him, and Stewart shot him again. Stewart said that he never slipped up on Wilcutt and shot him because Wilcutt threw his hands to his hip pocket and started toward him. George Arnold and Russell Hinton both had told him that Wilcutt said that he was going to kill him. Wilcutt had told Stewart that he had come back there to kill him. They had had a difficulty about a year before, and Wilcutt had beaten up Stewart and broken his leg.

George Arnold and Russell Hinton both testified that Hubert Wilcutt told them that he was going to kill Bill Stewart, and that they had communicated this threat to Stewart before the morning of the killing.

John Thornberry also testified that the deceased had told him that he intended to get a job of work on the farm where the defendant was working, and if he got a chance he was going to kill him.

Alfred Terry, a deputy sheriff, testified that Hubert Willcutt had told him that he was going to have revenge on Bill Stewart and his brother for the way they had treated him. It was also proved by the defendant that the deceased was a quarrelsome, overbearing and dangerous man.

The evidence for the State showed that deceased had no gun in his pocket but had a pocket knife when he was killed.

It is not contended by counsel for the defendant that the evidence is not legally sufficient to support the verdict, and a mere reading of it shows that it was amply sufficient.

Counsel for the defendant, however, earnestly insist that the judgment should be reversed because the court erred in refusing to grant him a continuance. The defendant asked for a continuance on the ground that three witnesses, including the wife of the deceased, would testify, if present, that the deceased bore the reputation of being a dangerous, quarrelsome and overbearing man, and that they had heard him threaten to take the life of the deceased; that his widow would testify that he had gone back there and secured work on the farm where the defendant was working for the very purpose of killing him. The record does not show that these threats were communicated to the defendant.

Other witnesses testified in behalf of the defendant to the effect that deceased had the reputation of being a man of quarrelsome, overbearing, and violent disposition, and that the deceased had told them that he was going to kill the defendant, and that they had communicated these threats to the defendant prior to the killing. One of the witnesses said that the deceased had told him that he had come back there and secured work on the farm where

the defendant was working for the very purpose of getting a chance to kill him. Thus it will be seen that the continuance was asked for the absence of evidence merely cumulative in its nature and was properly refused by the court. *Allison* v. *State,* 74 Ark. 444; *Rider* v. *State,* 140 Ark. 1, and *Snow* v. *State,* 140 Ark. 7.

It is next insisted by counsel for the defendant that the court erred in not giving instruction No. 1 asked by the defendant The instruction is an exact copy of section 2369 of Crawford & Moses' Digest. The killing was not in defense of the habitation or the property of the defendant. Therefore there was no evidence upon which to base it, and the court properly refused to give it. In this connection it may be stated that the court gave full and fair instructions on the question of justifiable homicide.

It is also insisted that the court erred in giving instructions Nos. 2, 3 and 4, asked by the defendant. These instructions were all on the subject of justifiable homicide and were covered by instruction No. 5 given by the court, and we do not deem it necessary to set out the refused instructions.

Instruction No. 5 reads as follows: "You are instructed that the defendant in this case pleads self-defense in justification of his act in shooting and killing the deceased. Self-defense is a legal defense, and one which would entitle the defendant to an acquittal, if the jury finds from the evidence in this case that the defendant acted in self-defense at the time of the killing. And it need not appear, in order that the defendant may plead self-defense, that the defendant was actually in danger of losing his life, or receiving great bodily harm, at the hands of the deceased; but, if you believe from the evidence in the case that the defendant, acting in good faith, and without fault or carelessness on his part, honestly believed, at the time he fired the fatal shot, that he was in danger of losing his life, or of receiving great bodily harm at the hands of the deceased, then the defendant

would be entitled to an acquittal, even though you should further find that the defendant was in no actual danger of losing his life or receiving great bodily harm at the hands of the deceased at the time he fired the fatal shot."

It is apparent from reading this instruction that the court gave all that the defendant was entitled to on this phase of the case.

It is also insisted by counsel for the defendant, that the court erred in refusing to give instructions Nos. 5, 6 and 7, asked by the defendant. We do not deem it necessary to set out these instructions. They were on the subject of threats and the weight to be given to dying declarations. The refused instructions were fully covered by other instructions given by the court.

In *Robinson* v. *State,* 99 Ark. 209, the court said that dying declarations to be admissible must be made under a sense of certain and impending death. In determining this question the court may consider all the facts and surrounding circumstances, such as the character of the wound itself, the declaration of the deceased himself that he could not live, and the fact that he died shortly afterward. See, also, *Rhea* v. *State,* 104 Ark. 162.

The court told the jury that it was its province to weigh the dying declarations and the circumstances under which they were made, and to give them only such credit, upon the whole evidence, as they might think they deserved.

The instructions on this point were full and complete and in accord with the principles of law uniformly laid down by this court.

In *Harper* v. *State,* 79 Ark. 594, the court held that threats of violence toward the defendant, alleged to have been made by the deceased, unaccompanied with overt acts showing an intent to carry them into effect, are competent in a homicide case to show deceased's character for violence and his disposition of mind toward defendant, to be considered in determining who was the aggressor. The testimony of this character was admit-

ted by the court to go to the jury, and the jury was instructed upon this phase of the case in accordance with the rule just announced.

The court also instructed the jury on the question of reasonable doubt and fully and fairly submitted the respective theories of the State and of the defendant to the jury under proper instructions.

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

MALONE v. WADE.

Opinion delivered May 16, 1921.

1. TENANCY IN COMMON—TENURE.—Tenants in common hold by several and distinct titles, but by unity of possession.
2. TENANCY IN COMMON—LANDLORD'S LIEN.—Where two tenants in common leased land to defendant, and one of the cotenants advanced supplies to the lessee to make the crop, he will be entitled to a landlord's lien therefor, under Crawford & Moses' Dig., § 6890.
3. PAYMENT—LANDLORD'S LIEN—APPLICATION OF PROCEEDS OF CROP.—Where a landlord has a lien not only for rent but also for advances of supplies for the crop of his tenant, he may apply the proceeds of such crop first to the account for supplies.
4. LANDLORD AND TENANT—BREACH OF LEASE.—Where a tenant does not pay the rent when due and makes no effort thereafter to pay it on notice that the lessors did not intend to wait on him longer, this constituted a breach of the lease and warranted eviction.
5. LANDLORD AND TENANT—DAMAGES FOR UNLAWFUL EVICTION.—A tenant unlawfully evicted by the landlord may recover the loss directly and naturally resulting therefrom, including the excess of the rental value over the agreed price and the expense of removal to another place.

Appeal from Lonoke Circuit Court; *George W. Clark,* Judge; reversed.

STATEMENT OF FACTS.

A. D. Malone and J. N. Harris brought a suit of unlawful detainer against W. T. Wade to recover possession of a tract of land which the plaintiffs had leased to the defendant.

The defendant denied that the plaintiffs were entitled to the possession of the premises and filed a cross-complaint in which he seeks to recover damages on account of being evicted from the land in question. The material facts are as follows:

On the 9th of October, 1918, A. D. Malone and J. N. Harris leased to W. T. Wade and J. M. Bradford for a period of five years, beginning January 1, 1919, a tract of land in Lonoke County, Arkansas, comprising 546 acres. The contract provided that the lessors should retain a lien on all crops on the place until the rents were fully paid each year, and that the rents should be paid as the cotton was gathered and to be finally paid by November 1 of each year. The lessees agreed to pay $15 per acre each year, or eighty pounds of lint cotton of middling grade, or better. The contract further provided that the lessees should deaden a certain amount of green timber during the summer of 1919, and clear certain lands before the close of the year 1921. It was further provided that the lessees should keep open all the ditches on the place and keep clean all the turn rows.

The lessees were unable to procure any one to furnish them supplies to make the crop for the year 1919, and reported that fact to the lessors. A. D. Malone agreed to, and did, furnish them with supplies to make the crop for the year 1919. In the late summer, or early fall, of 1919, the lessees admitted that they were not able to run so large a place, and it was agreed that the lease contract should be canceled except that each party should retain 160 acres and execute a new lease contract for that amount identical in terms with the original contract.

Malone furnished Wade with merchandise and supplies to the extent of about $7,000 with which to make a crop during the year 1919. Wade failed to pay his rent and supply account, and on the 5th day of February, 1920, A. D. Malone brought suit against him in the chancery court to foreclose his lien for rent and supplies. J. N. Harris was appointed receiver to take charge of the crop

and acted in that capacity without pay. On March 11, 1920, there was a decree by default in favor of Malone against Wade in the sum of $3,460, less the proceeds of the crop in the sum of $2,619.12, leaving a balance due Malone by Wade of $840.88.

According to the testimony of Malone, Wade failed to comply with the contract by cleaning the turn rows and keeping the ditches open. The lessors caused notice to be served on Wade in the manner provided by the statute on the 6th day of February, 1920, to vacate the premises. Wade refused to vacate and was evicted in the manner provided by statute. Malone and Harris denied that they, or either of them, promised to furnish Wade for the year 1920, and stated that they told him he must pay his rent and supply account or get off the place. They waited for him to do so until the 6th day of February, 1920, and, finding that he had made no effort to pay his rent and account for supplies for the year 1919, or to supply himself for the year 1920, they caused notice to be served on him to vacate the premises as above stated.

W. T. Wade was a witness for himself. According to his testimony, Malone first left the impression on him that he was going to take his "stuff," and he thought that, if he did not do something, Malone would "clean him up." Wade then went to see J. J. Scroggin and told him about his condition. He made arrangements with Mr. Scroggin to pay Malone for him. He did not pay Malone because Scroggin went to Florida without letting him have the money." When Wade first told Malone and Harris that Scroggin would "fix him up," Malone left the impression on Wade that he would carry over his account, until after Mr. Scroggin had gone away. Wade testified that he would have worked the land in 1920, if he had not been put off. Other evidence was adduced by him tending to show the damages suffered by him on account of being evicted from the land.

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

The jury returned a verdict for defendant, and from the judgment rendered the plaintiffs have appealed.

Morris, Morris & Williams, for appellants.

The verdict is not only without evidence to sustain it, but is directly against the clear and conclusive evidence in regard to which there was no conflict. 24 Ark. 227; 15 *Id.* 109; 8 *Id.* 155; 7 *Id.* 435. See, also, 10 Ark. 309; 7 *Id.* 462; 5 *Id.* 640. Failure to pay rent and to quit possession after demand in action of unlawful detainer are good grounds of action, independent of their being made grounds of forfeiture in the contract of lease. 57 Ark. 301; C. & M. Digest, §§ 4838, 4842.

The complaint complied with these sections, and the verdict is contrary to the law and the evidence, and a new trial should be granted.

Williams & Holloway, for appellee.

There is substantial evidence to support the verdict, and the damages are not unreasonable or shocking to any court. The great preponderance of the evidence sustains the verdict.

HART, J. (after stating the facts). It is earnestly insisted by counsel for the plaintiffs that the evidence is not legally sufficient to support the verdict, and in this contention we think counsel are correct. Under the terms of the lease contract, the rent was to be finally paid on the first of November of each year. This provision was for the benefit of the lessors and might be waived by them. According to the testimony of the defendant, they waited on him until some time after the first of the year to pay the rent and supply account. Wade had been unable to supply himself, and, some time after the execution of the lease contract, he made an agreement with A. D. Malone to furnish him with merchandise and supplies with which to make a crop in 1919. Malone waited for Wade to pay him his account for supplies and the amount due as rent until the 5th day of February, 1920. Malone and Harris owned the land as tenants in common.

Tenants in common hold by several and distinct titles, but by unity of possession. The reason is, that none knoweth his own severalty, and therefore they all occupy promiscuously. *Firemen's Insurance Co.* v. *Larey,* 125 Ark. 93.

Therefore, under section 6890 of Crawford & Moses' Digest, Malone would be the landlord of Wade, and as such landlord would have a lien upon the crop raised upon the demised premises for the value of advances made by him to Wade to make a crop during the year 1919. Malone brought suit in the chancery court to foreclose his lien for the amount of his supply account and the rent due. A decree was rendered in his favor against Wade for the balance due of $840.88. Wade made no defense to the foreclosure suit and made no effort to finish paying his supply account or the balance of the rent due for the year 1919. Having a lien for the rent and supplies, Malone had a right to apply the proceeds first to the payment of the supply account, and this left a balance of over $800 on the rent. These facts are established by the undisputed evidence and constituted a breach of the lease contract which warranted the lessors in evicting the lessee from the premises.

It is true Wade testified that Malone led him to believe that he would carry him over, and that Scroggin had promised to pay off his indebtedness to the plaintiffs. Wade knew, however, when notice to quit was served on him on the 6th day of February, 1920, that his lessors did not intend to wait on him any longer, and it devolved on him to make arrangements to pay his rent, or to forfeit his right to longer occupy the premises. Yet, after this time, he made no effort to get into communication with Scroggin, or to carry out his contract with the plaintiffs. He did not even make any defense to the foreclosure suit. Therefore, the undisputed facts, as disclosed by the record, warranted the plaintiffs in evicting him from the premises.

Complaint is also made by the plaintiffs as to the instruction given by the court on the measure of dam-

ages. We do not deem it necessary to set out this instruction. Suffice it to say that the instruction complained of follows the rule laid down in *McElvaney* v. *Smith*, 76 Ark. 468. In that case the court said:

"When a landlord unlawfully evicts a tenant from the premises, the tenant is entitled to recover as damages whatever loss results to him as a direct and natural consequence of the wrongful act of the landlord. If the rental value of the place from which he is evicted is greater than the price he agreed to pay, he may recover this excess and, in addition thereto, any other loss directly caused by the eviction, such as the expense of removal to another place."

For the error in not directing a verdict for the plaintiffs, the judgment will be reversed and the cause remanded for a new trial.

FENNER v. REEHER.

Opinion delivered May 16, 1921.

1. ACTIONS—CONSOLIDATION.—Under Crawford & Moses' Digest, § 1081, it was proper to consolidate a suit by the owner of city property to foreclose a mortgage held by him on farm property with a suit by the owner of the farm property for specific performance of a contract to exchange the city property for the farm property.
2. VENDOR AND PURCHASER—MARKETABLE TITLE.—A purchaser should have a title which will enable him not only to hold the land, but to hold it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value; but the doubt must be reasonable, such as would induce a prudent man to hesitate, and not a captious or frivolous objection.
3. VENDOR AND PURCHASER — MARKETABLE TITLE.—A mortgage on land will not justify a purchaser in refusing to carry out a contract of sale where the vendor offered to pay off the mortgage and only refused to pay to the mortgagee's attorney (the mortgagee being the purchaser) because the mortgagee was not there to satisfy the record.

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

STATEMENT OF FACTS.

The principal issue raised by the appeal is the right of F. F. Reeher to the specific performance of an agreement between himself and Gorge F. Fenner for the exchange of a farm in Izard County, Arkansas, owned by the former, for a house and lot in the town of Coffeyville, Kansas, owned by the latter. On the 18th day of October, 1919, F. F. Reeher entered into a written agreement with George F. Fenner for the exchange of a farm, owned by the former, in Izard County, Arkansas, for a house and lot, owned by the latter, in Coffeyville, Kansas. The farm comprised 180 acres, and the contract covenanted that the land was free from all incumbrances. Reeher agreed to take, or cause to be taken, a mortgage for $677, secured by the land. $325 of this amount was a balance due on the purchase price of the land, and $352 was a balance due on the personal property embraced in the exchange of the land between the parties. The contract provided that Reeher should clear the title to the 180 acres of land and give Fenner an abstract showing a good, merchantable title. On his part, Fenner covenanted that his house and lot in Coffeyville, Kansas, was free from incumbrances, except a mortgage of $250. Fenner agreed to increase the mortgage on this property up to $500 and to pay Reeher $250 in cash at the completion of the contract. The contract further provided that, if Reeher failed to clear the title to his land, the rent collected from the Coffeyville property should be applied toward the payment of the personal property sold by Reeher to Fenner, which amounts to $325. Each party covenanted to give the other possession of the property after October 18, 1919, and the latter has been in possesion of it ever since. Its rental value is $100 per annum. Reeher has never been in possession of the Coffeyville property; Fenner has collected the rents on it, and the rental value is $15 per month.

On the 4th day of February, 1919, F. F. Reeher gave to John Michael a mortgage on the 180 acres of land in

question to secure an indebtedness of $625. On the 28th day of June, 1919, Reeher made a payment of $50 on this indebtedness, which was duly credited on the note. On the 6th day of December, 1919, Michael assigned the note and mortgage on the land in question to George F. Fenner and Lillie Fenner, his wife. On the 13th day of December, 1919, they brought suit in equity against F. F. Reeher to foreclose this mortgage. Reeher filed an answer in which he admitted the execution of the mortgage, but stated that he was entitled to a credit of $75 on the note which the mortgage was given to secure. On May 5, 1920, F. F. Reeher brought suit in equity against George F. Fenner to obtain specific performance of the contract described above. On motion of Reeher the two causes, which were pending in the same chancery court, were consolidated. The facts stated above were proved at the trial of the consolidated cases.

Reeher was a witness for himself. According to his testimony, he had tried to make Fenner a deed to the 180 acres of land in Izard County, Arkansas, and had an abstract prepared showing a good and merchantable title to said land. He admitted that the abstract did not show the payment of the Michael debt and the satisfaction of the mortgage, but he stated that he was willing to pay off that indebtedness and offered to do so. He stated that he had never offered the cash to Michael because he failed to meet him at the time they had set for settlement of the matter. Reeher told Fenner that the abstract to the 180 acres of land had been prepared and was in his attorney's office ready for him. He admits that he refused to pay the mortgage indebtedness to Michael's attorney, but says that he told the latter that he was ready and prepared to pay Michael whenever the latter would come and satisfy the record. Reeher denied that he was to take the $400 which Fenner paid him at the time of the execution of the contract and apply it on what he owed Michael.

According to the testimony of George F. Fenner, he never saw the abstract of title to the 180 acres of land

in Izard County. He admits that Reeher told him that the abstract was ready and in the office of John C. Ashley. Fenner went to Ashley's office, and the latter informed him that there were missing links in the title, and that it would have to go through court. Fenner bought the Michael indebtedness to protect himself.

According to the testimony of J. C. Ashley, Fenner called at his office and asked him if the abstract would show a perfect title. Ashley told him that it would be impossible, as there were some imperfections in it, and that the only way to cure them would be to have the title confirmed. Ashley told Fenner that, while the title was not perfect, it was safe; that a title to part of it was perfect, and the title to the balance extended back from twenty to thirty-five years. Fenner replied that he did not want the land if the title was not perfect.

On cross-examination Ashley stated that the abstract shows a merchantable title subject to two liens, one for $400 and the other for $675. He stated it was his understanding and information that the $400 lien had been satisfied, and the other was the one given to Michael and referred to above.

The court found that Reeher was indebted to George F. Fenner and Lillie Fenner in the sum of $681.83 on the note executed by them to John Michael, and indorsed by the latter to George F. Fenner and Lillie Fenner, and it was secured by a mortgage on the 180 acres in question.

The court found in favor of Reeher on the suit for specific performance and found that George F. Fenner was indebted to F. F. Reeher in the sum of $677, the balance due on the personal property and real estate according to the terms of the written contract sued on, and also in the sum of $178.50 rents on the Coffeyville property, making in the aggregate a total indebtedness of $855.50. A decree for the specific performance of the contract was accordingly entered of record, and it was further ordered that the judgment of George F. Fenner and Lillie Fenner against Reeher in the sum of $681.83

be set off against the judgment of Reeher against Fenner in the sum of $855.50 and that Reeher have judgment against Fenner for the balance due in the sum of $172.67.

George F. Fenner alone has prosecuted an appeal to this court.

Elbert Godwin, for appellants.

1. The chancellor erred in consolidating the two causes of action, as the plaintiffs are not the same, and the issues are not the same. 80 Ark. 167; 83 *Id.* 288; 8 Cyc. 594 and 31 *Id.* 45.

2. The court erred in decreeing specific performance against appellant on the contract made October 18, 1919. The land was not *free of all incumbrances* as warranted. The term "incumbrance" in a contract to convey land "*free from all incumbrances*" includes a paramount right to the land which may defeat the grantee's title. Words and Phrases, vol. 4 (1 series), p. 3524; 4 Comstock (N. Y.) 396-400; 4 Mass. (9 Metc.) 462-7.

Incumbrances are of two kind, viz.: (1) Such as affect title, and (2) those which affect only the physical conditions of the property. A mortgage or lien is a fair illustration of the former; a public road or right-of-way, of the latter. Where incumbrances of the title exist, the covenant of warranty is broken the instant it is made, and *it is of no importance* that the grantee had notice when he took title. Words and Phrases, vol. 2 (2 series), p. 1023; 53 So. 381-3; 60 Fla. 284; 30 L. R. A. (N. S.) 833; Ann. Cases 1912 C 647; 4 Atl. 542; 112 Pa. 315.

The undisputed testimony is that appellee never at any time rendered appellant any abstract showing a good, merchantable title. One who seeks specific performance is bound to show a substantial performance or readiness and offer to perform on his part *all that is required by the contract.* Failure in any material respect offers a full defense to the suit. 118 Ark. 283.

A purchaser suing for specific performance of a contract has the burden of showing that he has complied, or offered to comply, with the terms of the contract, and

that he was ready and willing to do so, and that any failure on his part was caused by some neglect or default of the vendor. 219 S. W. 28. A plaintiff seeking to enforce a contract dependnig on a condition precedent must show that the condition has been fully performed. 36 Cyc. 697. The burden of proof is on the vendor to show a good title. 36 Cyc. 694-5. Specific performance of a private contract to purchase land will not be enforced unless the title is marketable. 158 N. Y. 522; 39 Cyc. 1406-7. If the title to any part of the land is defective, appellant may rescind the whole contract. 66 Ark. 433; 39 Cyc. 1407-8 and notes.

This case should be tried *de novo* on appeal, and the case should be decided on its merits, irrespective of the decision of the chancellor. 93 Ark. 394.

John C. Ashley, for appellee.

1. There is no error in consolidating the two causes of action. If Lillie Fenner was a proper party, she did not appeal from the final decree and is not now in court and can not be heard for the first time to object. 26 Ark. 414; 27 *Id.* 156; 100 *Id.* 148.

2. As to Geo. Fenner, he made no objections and saved no exceptions to the consolidation and can not be heard to complain. The causes were properly consolidated. C. & M. Digest, § 1081; 84 Ark. 555; 88 *Id.* 424. But, if error, it was harmless.

3. There was no error in decreeing specific performance, because (1) appellee has failed to clear the land in Izard County of all incumbrances, and (2) appellee has performed his part of the contract so far as possible and shown a readiness to perform his part of the contract. The incumbrance complained of has been paid. But if not paid it is not an incumbrance, as action was barred at the time the trade was made. C. & M. Digest, § 7382. Appellee had no opportunity to clear the title before appellant filed this suit, and this should be given him, and in giving appellee an opportunity to clear the incumbrance there was no error. 40 Ark. 382; 73 *Id.* 491a.

Appellee did not fail to give appellant good, marketable title to the land sold. A marketable title is one that can be held without reasonable apprehension of its being assailed, and one that can readily be transferred in the market, if desired. 121 Ark. 482; 119 *Id.* 418; 66 *Id.* 433; 63 *Id.* 548.

4. This court will not reverse the findings of the chancellor as to matters of fact unless they are clearly against the clear preponderance of the testimony. 73 Ark. 489; 77 *Id.* 305; 97 *Id.* 537.

HART, J. (after stating the facts). It is first insisted that the court erred in consolidating the suit of George F. Fenner and Lillie Fenner, his wife, against F. F. Reeher, to foreclose the mortgage on the 180 acres of land in Izard County, Arkansas, with the suit of F. F. Reeher against George F. Fenner for the specific performance of the contract to exchange the 180 acres of land in question for the Coffeyville property.

The court did not err in consolidating the suits. Section 1081 of Crawford & Moses' Digest provides that when causes of a like nature, relative to the same questions, are pending in the circuit court or chancery court, the court may consolidate said causes when it appears reasonable to do so. In *Little Rock Gas & Fuel Co.* v. *Coppedge,* 116 Ark. 334, the court held that separate actions by the husband and wife to recover damages for injuries sustained by the wife on account of the alleged negligence of the gas company were properly consolidated. The object of the act in question is to save a repetition of evidence, and an unnecessary consumption of time and costs in actions depending upon substantially the same evidence or arising out of the same transaction.

Again it is urged that the court erred in setting off the judgment recovered by George F. Fenner and Lillie Fenner against F. F. Reeher. Lillie Fenner has not appealed and can not be prejudiced by the action of the court in this respect, however erroneous it might be. The decree of the court shows that Fenner is indebted to

Reeher in a greater amount than Reeher was indebted to him. The court gave Fenner credit on the judgment of Reeher against him in the amount of his judgment against Reeher. This action of the court resulted in no prejudice to him, inasmuch as the decree must be affirmed for the reasons hereinafter given.

The principal issue raised by the appeal is whether or not Reeher was entitled to specific performance. The contract provided that Reeher should give Fenner a clear title to the 180 acres of land in question and should give him an abstract showing a good, merchantable title. It is a just principle in the law relating to the specific performance of contracts that Fenner should receive that for which he contracted before he can be compelled to part with the consideration he agreed to pay. The contract provided that he was to receive an abstract showing a good, merchantable title.

In the case of *Dobbs* v. *Norcross,* 24 N. J. Rep., p. 327, cited in *Griffith* v. *Maxfield,* 63 Ark. 548, to sustain the holding of the court, in discussing this question it was said:

"The court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings; or, as it is usually expressed, it will not compel him to buy a lawsuit. That may be a good title at law, which a court of equity, in the exercise of its discretionary power, will not force on an unwilling purchaser. Every purchaser of land has a right to demand a title which shall put him in all reasonable security, and which shall protect him from anxiety, lest annoying, if not successful, suits be brought against him, and probably take from him or his representatives land upon which money was invested. He should have a title which shall enable him, not only to hold his land, but to hold it in peace; and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value."

This court has adopted the rule there laid down. *Griffith* v. *Maxfield*, 63 Ark. 548; *Leroy* v. *Harwood*, 119 Ark. 418; *Mays* v. *Blair*, 120 Ark. 69, and *Shelton* v. *Ratterree*, 121 Ark. 482. The doubt, however, must be reasonable, or such as would induce a prudent man to hesitate. It does not mean a captious or frivolous objection.

We now come to consider the title in the present case tendered by Reeher to Fenner under the contract in question and must determine whether it is so far free from reasonable doubt as to justify the affirmance of the decree ordering the contract to be specifically performed. There was an incumbrance of $400 which John C. Ashley, who abstracted the title for Reeher, testified had been fully satisfied. His testimony was not disputed. Hence this alleged incumbrance passes out of the case.

This brings us to the mortgage made by Reeher to Michael. In the first place, Reeher all the way through claimed that he would pay off this mortgage and only declined to pay to Michael's attorney because Michael was not there to satisfy the record. He again offered to pay off this indebtedness at the trial, and the court credited his judgment against Fenner with the amount of the indebtedness. Under these circumstances, it did not constitute an encumbrance which would warrant Fenner in refusing to carry out the contract on his part. It seems that there was some other objections to the title, but the evidence does not disclose what they were. Ashley testified that the title was a merchantable one, and that Fenner told him he would not take anything less than a perfect title. This, as we have already seen, he was not entitled to under the terms of the contract. The contract gave him a merchantable title, and this Reeher offered to give him at all times. He could not refuse to accept the title thus offered on the ground that there was a possibility of there being a flaw in it. The record does not show any reasonable ground which would warrant Fenner in turning down the title offered him by Reeher. The title which Reeher seeks to compel Fenner to accept

is a merchantable one, within the meaning of our decisions cited above, and the court properly entered a decree for the specific performance of the contract.

It follows that the decree must be affirmed.

SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* KEY.

Opinion delivered May 16, 1921.

INSURANCE—FRATERNAL SOCIETY ESTOPPED BY KNOWLEDGE OF LOCAL AGENT.—The local agent of a fraternal society, through whom only a member may commuicate with the ruling officials of the society, and whose duty it is to report the standing of members, is the agent of the society, and a member's duty under the rules of the society to give notice of engaging in a more hazardous employment was complied with by giving notice to such agent; and where notice was so given, and the member was not notified of any increase of assessment, the order was estopped to deny payment of the proper dues, though the laws of the society provided that no officer or agent could waive the provisions of the laws.

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

T. E. Helm, for appellant.

1. Under the constitution and by-laws of the order employment in an electric current generating plant is classed as hazardous, and appellee failed to give notice and pay the increased assessment rate and his certificate of benefit was null and void.

2. Under the facts of the case plaintiff was not entitled to recover. He made no offer to pay the additional rate.

3. There was no waiver; at least, the clerk of the local camp had no authority to waive the provision in the constitution and by-laws requiring the payment of the monthly installment rate. It was Key's duty to acquaint himself with the provisions of his certificate and the constitution and by-laws of the order, and a failure to pay the additional rate avoided his benefit certificate.

104 Ark. 538; 129 *Id.* 159; 133 *Id.* 411. Act 462, Acts 1917, § 20, is applicable here, and it is not within the power of a clerk of a local camp to waive the payment of the additional assessment for hazardous occupation. 142 Ark. 154.

4. There was no estoppel, as that doctrine does not apply. There was no conduct of defendant or the clerk of the local camp such as to induce action or inaction in reliance thereon, or which could have operated to mislead Horace Key to his injury. There was no fraud or advantage taken. There is nothing to show that any one at any time did anything to discourage, hinder or prevent him from paying the additional dues required. 142 Ark. 154. 188 S. W. 941 is a very similar case and is controlling here. See, also, 2 Bacon on Life & Acc. Ins., p. 1496.

5. It was error to give instruction No. 1 for plaintiff. It does not declare the law properly, and in effect told the jury that the clerk of the local camp could waive the requirements of the constitution and laws of the order, which the clerk could not do. Act 462, Acts 1917, § 20. The peremptory instruction asked by defendant should have been given, as the evidence plainly showed that Horace Key was a member of the order and insured as a machinist, an ordinary or preferred occupation, and that he afterward changed to the hazardous one of an electric current generating plant, and that he never paid or offered to pay the increased rate.

McMillan & McMillan, for appellee.

It is not absolutely clear that defendant was entitled to win this case, even if there had been no estoppel shown. The policy was incontestable after five years except where the policy-holder dies while engaged in a hazardous occupation. The burden was upon the insurer to bring itself within the exception, and it has failed. 140 Ark. 612.

Horace Key was an enlisted man and exempt from the additional premium required by § 43. 140 Ark. 313.

Defendant is clearly estopped to claim a forfeiture. Horace Key was misled by the belief that his policy was still in force. The clerk of the local camp was the agent of the sovereign camp, and his knowledge was that of the principal or sovereign camp. 127 Ark. 133. See, also, 140 Ark. 289.

SMITH, J. On the 15th day of June, 1914, the appellant, Sovereign Camp of the Woodmen of the World, issued its beneficiary certificate for a thousand dollars to H. C. Key, of Arkadelphia, Clark County, Arkansas, naming as beneficiary in said certificate appellee, Mrs. Albey Key, the mother of the insured. In his application Key stated that he was a machinist, which occupation was and is classed as an ordinary or preferred occupation, and required payment of the ordinary or preferred rate. Key paid this rate until the time of his death.

About August 1, 1917, Key removed to Malvern, Arkansas, where he entered the employment of the Arkansas Light & Power Company at its electric current generating plant as engineer, in which capacity he worked about a year. He then entered the United States army, where he served until discharged in June or July, 1919, and on his discharge he returned to the employment of the Arkansas Light & Power Company, where he again worked as engineer for two months and until the time of his death.

On the night of September 16, 1919, Key was found dead at said electric current generating plant. No one saw him die, but the body was found lying in the water at the bottom of the condenser pit, and those who attempted to remove the body received electric shocks in coming in contact with the water. The body was burned and blistered.

The constitution and by-laws of the order in force during all the time Key was a member contained the following sections and parts of sections:

"Section 43. Persons engaged in the following occupations, towit:

"(a) Sailors on seas, electric linemen, employees in electric current generating plants and enlisted men in the army and navy during war, may be admitted to membership if accepted by the sovereign physician, but their certificates shall not execeed two thousand dollars each and their rates of assessment shall be 30 cents for each one thousand dollars of their beneficiary certificate in addition to the regular rate while so engaged in such hazardous occupation.

"(b) If a member engages in any of the occupations or business mentioned in this section, he shall within thirty days notify the clerk of his camp of such change of occupation, and while so engaged in such occupation shall pay on each assessment thirty cents for each one thousand dollars of his beneficiary certificate in addition to the regular rate. Any such member failing to notify the clerk and to make such payments as above provided shall stand suspended, and his beneficiary certificate be null and void."

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

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

The testimony shows that one Waldrop was the local clerk of the appellant order, and that he served in that

capacity for about ten years and during all the time Key was a member. After Key changed his occupation, Waldrop was notified of that fact by Key's father on an occasion when he paid dues for his son. Later the same information was conveyed to Waldrop by the insured's sister when she paid dues for her brother. It was shown to have been the custom of the local clerk, when notified that a member had changed his occupation, to communicate that information to the sovereign clerk of the head camp, so as to learn what amount to increase or decrease the rate to be paid by the member, giving the notice, and, after receiving this direction from the clerk of the head camp, to notify the member of any change in assessment.

Section 112 of the by-laws provided the time and manner in which the local clerk should make remittances of dues collected by him, and that, "accompanying such remittances, the clerk shall also forward such detailed statement of the standing of the members in the camp as shall be required for the information of the sovereign clerk, upon blanks furnished for that purpose."

No notice of change in assessment was given by the local clerk, and the insured continued to remit from Malvern, where he was employed, to his sister in Arkadelphia, where she and Waldrop both lived, and the sister paid the dues with the remittances thus received.

The cause was submitted under an instruction which told the jury to find against the company if the finding of fact was made that the sister of Key, when paying dues, had notified Waldrop that Key was engaged in an electrical current generating plant. There was a finding and judgment against the company, from which is this appeal.

It will be observed that the appellant here was the appellant in the case of *Sovereign Camp of Woodmen of the World* v. *Newsom,* 142 Ark. 132, and that certain excerpts from the constitution and by-laws of the order herein set out appeared also in the statement of facts in the Newsom case.

The principles announced in that case control here. The local clerk is the agent of the order. It is to him, and through him only, that the member may communicate with the ruling officials of the order. The member complied with his duty when he advised the local clerk of his change of occupation.

In the Newsom case the court said: "Since the clerk of the local camp must be regarded as the agent of the sovereign camp in the matter of collecting assessments and reporting the standing of the members to the sovereign clerk, the knowledge of the agent acquired in the discharge of his duties was the knowledge of appellant (the company)."

In the Newsom case the facts were that the insured had arranged with his bank to pay dues upon presentation of proper receipt, and, pursuant to this custom, the bank would have paid the particular dues in question, had receipt therefor been presented. This arrangement was made for the convenience of the local clerk. Presentation of the receipt to the bank was not made, and the dues were not paid, and the member became delinquent. The contention was made that the local clerk was acting as the agent of the insured in collecting the dues through the bank, and that, in so far as the clerk was acting for the order, or could act for it, he had no duty to perform except to receive the money and to receipt for it and forward it. The court, however, held against that contention, and in doing so said: "Having reached the conclusion that the clerk of the local camp was the agent of appellant and acting within the scope of his authority in making collections, remittances and reports to the sovereign clerk, it is manifest that appellant is estopped by the conduct of the local clerk from claiming a forfeiture of Newsom's policy or certificate under the undisputed facts above set forth."

Upon the authority of that case, and of the cases therein cited, we hold that the appellant is estopped, in view of the jury's finding, to assert that the insured did

not pay proper amounts of dues. This is true because it was Waldrop's duty to report the information he had received to the head camp and to revise his collection of assessments to conform to any change made therein as the result of his report, and his knowledge is imputed to the head camp.

As opposing this view, counsel call to our attention section 20 of act 462 of the Acts of 1917 (C. & M. Digest, § 6095), which reads as follows: "The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the law and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members."

This question was also raised in the Newsom case, the statute being first called to the attention of the court on the petition for rehearing. We there said: "Therefore, what we said in the original opinion concerning the authority of a subordinate body and its subordinate officers to waive any of the provisions of the laws and constitution of the society is retracted, and we now hold, in view of this statute, that it was not within the power of the local clerk of appellant to waive the payment of the March dues on or before the first day of April as required by the law and constitution of appellant."

But the decision of the court was not changed. The difference between waiver and estoppel was pointed out, and the court held that, while the subordinate officers would have no power or authority, in view of the statute, to waive any of the provisions of the law and constitution of the society, the insurer, notwithstanding the statute, stood charged with the knowledge of any of its officers acquired in the discharge of their duties. And what the court there said is equally applicable here.

Judgment affirmed.

GIBSON v. JOHNSON.

Opinion delivered May 16, 1921.

REFORMATION OF INSTRUMENTS — NECESSARY PARTIES.—Where the owner of land before his death deeded a 20-acre tract, described as the east half of a certain 40 acres, both to a son and a daughter, and the son sued the daughter to reform the deed, without making other children parties, alleging that the grantor intended to convey to the daughter the west half of the above 40 acres, a decree in such case canceling the daughter's deed, without reforming it, was error; the court should have required the other children to be made parties, so that complete relief could be rendered.

Appeal from Washington Chancery Court; *B. F. McMahan,* Chancellor; reversed.

J. W. Grabiel and *W. N. Ivie,* for appellant.

1. There is a complete failure of proof by any competent evidence that any mistake was made in the deed of February 23, 1895.

2. If there were such competent proof, it fails to show clearly a mistake.

3. Plaintiff failed to show any equity that entitled him to prosecute his action against his sister, Cynthia Gibson.

4. The court was without jurisdiction to grant the relief prayed for or any other.

5. The decree is not supported by the allegations or the proof. 132 Ark. 227; 200 S. W. 139.

There was no competent evidence to show a mistake was made in the deed to Cynthia Gibson. 132 Ark. 227.

The deed of April 14, 1913, is wholly incompetent for any purpose, as the deed was never delivered nor recorded. Both deeds were executed in the absence of appellant, and she knew nothing of either of them until after her father's death. 11 Ark. 249; 96 *Id.* 589; 133 S. W. 173.

6. Possession of part of a tract of land conveyed by a deed constitutes possession of the entire tract within the calls of the deed, where the grantee's possession is

under the deed. 135 Ark. 321; 204 S. W. 755; 134 Ark. 548; 204 S. W. 424.

T. J. Johnson, the grantor, was in possession of part of the twenty acres up to the time of his death for the purpose of receiving the rents, but there is no testimony that his possession was adverse or hostile to that of Cynthia Gibson. The grantor is presumed to hold possession in subordination to the title conveyed. *Ib.;* 96 Ark. 512; 132 S. W. 459; 69 Ark. 562; 85 *Id.* 520; 109 S. W. 541.

The testimony shows that the possession by T. J. Johnson, the grantor, was strictly in harmony with and with full recognition of appellant's legal title to the land and that it was not hostile or adverse to hers. 85 Ark. 520; 69 *Id.* 562.

Courts of equity, in the exercise of their jurisdiction to reform written instruments, proceed with the utmost caution. 97 Ala. 476; 49 Conn. 167.

7. The complaint should have been dismissed for want of equity. The evidence clearly shows that plaintiff claimed under a purely voluntary conveyance. No relief will be awarded to a grantee in an imperfect conveyance which is not supported by a valuable consideration. Plaintiff's claim, in view of the facts, is without merit. 2 Pomeroy, Eq. Jur., §§ 588-590; Pomeroy's Eq. Remedies (2 ed.), § 679.

8. The decree below is not supported by any evidence or theory of the case whatever. Even if a mistake had been made, the title of Cynthia Gibson has matured by adverse possession and plaintiff is estopped by laches. Pom., Eq. Rem. (2 ed.), § 680; *Fletcher* v. *Malone,* 145 Ark. 211.

9. The evidence shows that defendant is entitled to recover on her cross-bill.

John Mayes and *Walker & Walker,* for appellee.

Only a question of fact is involved in this case. The law is well settled. 132 Ark. 227; 79 *Id.* 592. The findings of the chancellor are sustained by the evidence.

SMITH, J. In 1895, Thomas J. Johnson and his wife executed to their daughter, Mrs. Cynthia Gibson, a deed to one hundred acres of land. This deed described the east half southwest quarter northeast quarter, section 19, township 18 north, range 28 west. On March 12, 1918, the same grantors executed to their son, W. W. Johnson, a deed to one hundred and ninety acres of land, and in this deed included the twenty acres above described. Notwithstanding the fact that the twenty acres was described in both deeds, the grantor did not deliver possession to either his son or his daughter, but retained possession and collected rents thereon. Shortly after executing this last deed T. J. Johnson died.

After the death of T. J. Johnson, W. W. Johnson brought this suit against his sister, and alleged the fact to be that their father had not intended to convey the east half southwest quarter northeast quarter to Mrs. Gibson, but had in fact intended to convey her the west half southwest quarter northeast quarter. There was a prayer that the title to the east twenty acres be divested out of Mrs. Gibson and vested in the plaintiff, and that the title to the west twenty acres be vested in Mrs. Gibson. In other words, that the deeds be so reformed as to give W. W. Johnson the east twenty acres and Mrs. Gibson the west twenty acres.

T. J. Johnson owned other lands not conveyed to either his son, W. W., or his daughter, Cynthia, and was survived by other children, who were not made parties to this suit.

Mrs. Gibson answered and denied that any mistake had been made, and much testimony was heard on this issue, and she very earnestly insists that the testimony does not clearly and satisfactorily show that a mistake was made.

The court found, however, that a mistake had been made, and that the grantor intended to convey the east twenty to W. W. Johnson and the west twenty to Mrs. Cynthia Gibson, and entered a decree cancelling the deed

to Mrs. Gibson in so far as it purported to convey the east twenty acres, and this appeal is from that decree.

We have carefully considered the testimony in the case, and, while we do not reverse the decree on the finding of the court below on the facts, we have concluded that the court should not have granted the relief on the case made. We think, however, that W. W. Johnson has the right to prosecute this suit when proper parties have been brought before the court. 20 R. C. L., Title "Reformation," § 31; *Jones* v. *McNealy,* 101 Am. St. Rep. 38, 139 Ala. 379, 35 So. 1022. As the case now stands, Mrs. Gibson is left with the title to only eighty acres of land; while her brother has title to one hundred and ninety; and, while it clearly appears that T. J. Johnson intended to convey his son, W. W. Johnson, that quantity of land, it appears with equal clearness that he intended to convey one hundred acres of land to his daughter, Mrs. Gibson.

The court did not attempt to invest Mrs. Gibson with title to the west twenty. In fact, the parties necessary to the making of that order were not before the court, and therein lies the error for which the decree must be reversed. As the matter now stands, the west twenty acres is a part of the T. J. Johnson estate; and, while W. W. Johnson would be, and is, estopped by this suit from claiming that twenty acres, as against Mrs. Gibson, the rights of the other heirs are not affected by this litigation, as they are not parties to it. So long as the brother and sister litigated over the east twenty acres between themselves, the other heirs could stand by and let the litigation progress, as T. J. Johnson had apparently deeded the land to both W. W. Johnson and to Mrs. Gibson.

No showing is made that the other heirs conceded Mrs. Gibson's title to the west twenty acres, and under the decree appealed from she would have to proceed to acquire in severalty the title to that land. If suit is necessary, it will devolve upon her to show, as against the other heirs, that a mistake was made in the execution of

the deeds; and we can not know what showing those heirs might make against that contention in a proceeding to divest them of their title to the west twenty acres. Their silence in the instant litigation would not prevent them from speaking in that litigation.

By failing to make all the heirs parties W. W. Johnson has not put the court in position to do equity. All the persons whose interests are affected should be brought before the court, to the end that the court might enter a decree which does equity, not only to W. W. Johnson, but to Mrs. Gibson.

Reformation and cancellation are equitable remedies, and relief by way of reformation or cancellation is granted only when it is equitable so to do. 22 Enc. of Procedure, p. 1030; 23 R. C. L., p. 346, and cases cited. Courts have the right, in granting this relief, to impose terms or conditions which work out the equities of the case; and we have concluded that Mrs. Gibson should not be required to bear alone the burden of litigating with the other heirs a question involving the title to the twenty-acre tract which is unaffected by the decree here appealed from so far as the rights of the other heirs are concerned.

The decree will therefore be reversed, and the cause will be remanded with directions to make all the heirs of T. J. Johnson parties to the litigation.

TOWNSEND v. STATE.

Opinion delivered May 16, 1921.

CRIMINAL LAW—CORROBORATION OF ACCOMPLICE.—Testimony of accomplices that defendant in the night time broke and entered into a railway car and stole some smoked meat was sufficiently corroborated by proof that at a time when farmers or others who killed hogs would not have smoked meat, defendant, not being engaged in the meat business, attempted to sell smoked meat.

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

N. B. Scott, for appellant.

Except the testimony of accomplices, there is no evidence whatever of defendant's guilt. The cases in 75 Ark. 540, and 63 *Id.* 310 are conclusive of this case.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. Appellant did not object to the action of the court in giving instructions and can not do so on appeal for the first time. 78 Ark. 490. Exceptions to instructions *must be saved during the trial* and brought into the record by bill of exceptions, and can not be saved merely by assignment in a motion for new trial. 88 Ark. 505.

2. The crime of burglary and grand larceny may be charged in one indictment. There were two counts in the indictment and defendant was plainly found guilty on both counts. C. & M. Digest, § 3016; 71 Ark. 82.

3. The evidence was sufficient to warrant the verdict, and it was sufficiently corroborated. 24 R. C. L. 779. There was sufficient corroborative testimony independent of the two accomplices to warrant the jury in finding defendant guilty.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Chicot Circuit Court for the crimes of burglary and grand larceny committed by breaking and entering a box car in the night time and taking from the possession of the Missouri Pacific Railroad Company meat of the value of $150, and his punishment was assessed for the former at five years in the penitentiary, and for the latter at two years. From the judgments of conviction an appeal has been duly prosecuted to this court.

The convictions were procured on the testimony of St. Claire Crane and Sam Lynch, accomplices in the alleged crimes, Fred Morris and C. W. Tillman, agent and clerk, respectively, of the Missouri Pacific Railroad Company, Tom Baker and Harry Donaldson.

The evidence disclosed that, on the night of December 5, 1920, four cases of wrapped bacon, weighing about 500 pounds, manufactured by the Independence Packing Company of Kansas City, Missouri, of the value of twenty cents per pound, were stolen from a sealed car at Eudora, Arkansas, same being in the possession of the Missouri Pacific Railroad Company. The accomplices testified, in substance, that they, in connection with Clarence Snell and appellant, broke the seal of a box car at Eudora, Chicot County, Arkansas, on the night of December 5, 1920, and stole meat of the value of about $100.

Tom Baker testified that, in the month of December, appellant tried to sell him some meat; and Harry Donaldson that, in the same month, appellant tried to swap him some smoked meat for meal.

The evidence disclosed that appellant was not a dealer in meats.

Appellant contends that the evidence of the accomplices in the crimes is not sufficiently corroborated to warrant the conviction, under Crawford & Moses' Digest, section 3181, which is as follows: "A conviction can not be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. Provided, in misdemeanor cases a conviction may be had upon the testimony of an accomplice."

This court said, in the case of *Vaughan* v. *State,* 58 Ark. 353, in construing the statute in relation to felonies, that the corroborating evidence "must relate to material facts which go to the identity of defendant in connection with the crime." The corroborating evidence in the instant case is to the effect that near about the time the offenses were committed appellant was attempting to sell or trade smoked meat. Appellant was not engaged in the meat business. It was too early in the season for

farmers, or others who had killed hogs in the fall, to have smoked meat for sale. It is a matter of common knowledge that wrapped bacon, put up by manufacturing houses, has been smoked, and, at that season of the year, is the only kind of smoked meat on the market. We think the corroborating evidence was of a substantial character, independent of the statement of the accomplices, tending to connect the defendant with the commission of the crimes. The evidence in the whole case was therefore sufficient to sustain the conviction.

No error appearing, the judgment is affirmed.

BYRD v. BAKER-MATTHEWS LUMBER COMPANY.

Opinion delivered May 16, 1921.

1. EVIDENCE—PAROL TESTIMONY TO EXPLAIN WRITING.—Where some of the provisions of a contract for the sale of lumber indicated that the title was to pass as soon as the lumber was manufactured, while other provisions indicated that the title was not to pass until all the conditions of the contract had been complied with, parol evidence was admissible to show the intention of the parties.
2. SALES—WHEN TITLE PASSED.—In a buyer's action to recover possession of lumber from the sheriff who had seized lumber under execution against the seller, evidence *held* to sustain the trial court's finding that the lumber was to become the property of the buyer when manufactured, as against the contention that the agreement was that the title was to remain in the seller until performance of all the conditions of the contract.

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

Hawthorne & Hawthorne and *A. P. Patton,* for appellants.

Under the written contract, title to the lumber levied on did not pass to appellee until all the conditions in the contract had been performed, and for that reason the execution lien of A. B. Jones Company took precedence over the claim of appellee.

Title to property does not pass until it has been inspected, where there is a provision in the contract providing for inspection. 72 Ark. 141; 83 *Id.* 395; 49 *Id.* 86; 65 *Id.* 33; 50 L. R. A. (N. S.) 111; 36 N. J. L. 449; 106 U. S. 505; 37 Pa. St. 187; 72 Miss. 809.

The undisputed testimony shows that the sheriff attached only such lumber as was manufactured and stacked after the execution came into his hands, as he did not attach any lumber that was inspected and marked "Property of Baker-Mathews Lumber Company."

Lamb & Frierson, for appellee.

This case was tried by the court sitting as a jury, by consent of parties, and its findings have all the force and effect and are as conclusive as the findings of a jury and verdict thereon. 60 Ark. 250. The contract for the sale of the lumber was executed and not executory. The sale was complete. 141 Ark. 393-404. The title passed. 20 N. E. 270; 120 N. W. 572. The question of intention as to delivery governs. In case of bulky articles or ponderous ones, actual delivery is not necessary, but constructive delivery is sufficient, which is governed by the intention of the parties. 24 R. C. L. 56; 104 Ark. 344; 30 L. R. A. (N. S.) 461. 104 Ark. 344, is sustained by many Arkansas cases and cites them. Another strong circumstance indicating delivery is the fact that the lumber was stacked or proper leased to appellee. 24 R. C. L. 57, § 321, and cases cited. 141 Ark. 393, 404; 100 U. S. 124; 103 Ark. 331; 112 *Id.* 63; 81 *Id.* 373; 116 Fed. 261; 100 U. S. 124.

The findings of the court are clear, positive and convincing, and are sustained by uncontradicted evidence and should be sustained.

HUMPHREYS, J. Appellee instituted suit in replevin against appellants in the Craighead Circuit Court, Lake City District, to recover the possession of forty-two stacks and 50,000 feet of loose lumber, situated at Rhoads Bros. & Co.'s sawmill, about two miles from Black Oak, in said county, claiming to be the owner thereof, which

lumber was seized on the first day of April, 1920, by appellant, the sheriff of the county, under an execution issued on a judgment of A. B. Jones Company against Rhoads Bros. & Co. and placed in his hands on the 10th day of March, 1920.

Appellants filed answer, denying that appellee was the owner of the lumber seized, and asserting its right to retain and sell same to satisfy the judgment obtained in said court at the January term in the sum of $2,505.43 in favor of A. B. Jones Company against J. T. and W. M. Rhoads, constituting the firm of Rhoads Bros. & Co.

The cause was submitted to the court sitting as a jury, upon the pleadings and evidence, which resulted in a verdict and judgment in favor of appellee for the possession of the lumber seized by appellants under the execution aforesaid, or $5,000, its value. From that judgment an appeal has been duly prosecuted to this court.

The facts, as disclosed by the record, necessary to a determination of the issue involved on this appeal, are as follows: On or about May 12, 1919, appellee procured a lumber manufacturing contract from L. D. Leach & Co. with Rhoads Bros. & Co. for a cash payment of $10,000 and the future delivery of a certain amount of lumber. At the time the manufacturing contract was procured, it obtained title to 800,000 feet of lumber on the mill yard of Rhoads Bros. & Co. On the same day, to-wit, May 12, 1919, appellee entered into a manufacturing contract with Rhoads Bros. & Co. and advanced the firm six or seven thousand dollars in cash on lumber to be thereafter manufactured. The written manufacturing contract, omitting the prices of the different sizes and kinds of lumber, is as follows:

"This memorandum and agreement, made and entered into this the 12th day of May, 1919, by and between Rhoads Bros. & Co., a copartnership composed of J. T. Rhoads of Jonesboro, Arkansas, and W. W. Rhoads of Cape Girardeau, Missouri, with offices at Black Oak, Arkansas, hereinafter known as party of the first part, and

Baker-Matthews Lumber Company, a corporation under and existing by virtue of the laws of Missouri, hereinafter known as the party of the second part, witnesseth:

"Party of the first part agrees to sell, and does sell, and the party of the second part agrees to buy, and does buy, the lumber hereinafter described and specified, subject to the prices, terms, provisions and conditions hereinafter specified, towit, two million two hundred and fifty thousand feet of red and tupelo gum, oak, elm, maple, cypress, ash, cottonwood, tupelo and sycamore lumber, at the following prices: * * *

"All of No. 3 common which develops with lumber covered by this contract.

"It is understood that the price on the No. 3 common which develops in furnishing the above stock is to be $10 per thousand.

"The above prices are for delivery f. o. b. cars at Black Oak, Arkansas.

"It is understood that the red and sap gum is to be separated in loading, but it is further understood that, in the event said second parties require the sap gum to be sorted and shipped in straight cars of each grade, that they are to allow said first parties an additional $1 per thousand covering the cost of sorting.

"It is understood that there is approximately 800 M' of the various kinds of lumber above described on the mill yard of the parties of the first part at the present time, which is included in this contract and which is subject to all of the terms and provisions herein specified.

"This lumber shall be settled for by crediting the price of the same less 2 per cent., by the second party, against advances made, as herein provided, and any balance shall be accounted for and paid to the first party at the final discharge of this contract.

"It is further understood and agreed that all lumber applying on this contract is to be manufactured in a first-class, workmanship manner, and to be equalized and trimmed and to be of sufficient thickness when dry so

that the thicknesses will be standard, as provided by the regulations and rules of the National Hardwood Lumber Association.

"It is further understood that all lengths are to be piled separate, in piles not more than six feet in width, and at least three feet apart, and of sufficient pitch so as to insure the best results in drying. The twelve-foot piles are to have five sticks to the layer, and the fourteen feet and sixteen feet piles are to have six sticks to the layer, and the sticks are to be placed directly over each other in the pile, so that the lumber will dry out straight. All lumber is to be piled on good solid foundation twelve inches from the ground in the lowest place, the heads of the twelve-foot piles to be twelve inches higher than the tails of same. Heads of fourteen-foot and sixteen-foot piles to be twenty inches higher than the tails of same, the lumber to be piled loose in the piles so as to leave plenty of room for the circulation of air through the pile, all piles to be properly covered by said parties of the first part when completed.

"All lumber applying on this contract to be piled not less than 200 feet from the sawmill or other surrounding buildings, brush, or anything that would invalidate the 200 feet clear space clause provided in the insurance policies, and said parties of the first part further agree to at all times maintain said 200-foot clear space.

"It is understood and agreed that said parties of the first part are to lease, and do hereby lease, to parties of the second part the ground on which the lumber applying on this contract is piled, or to be piled.

"It is further understood and agreed that, when said first parties have complied with all of the terms and conditions of this contract, preliminary thereto and herebefore and hereafter provided, parties of the second part are to advance on the first and fifteenth of each month, for lumber put in pile during the preceding two weeks, $17 per thousand feet, the balance of the contract price

to be credited when the lumber is inspected and loaded out, subject to the terms hereinafter provided.

"It is further understood that no piles are to be estimated until the same are complete and properly covered.

"It is further agreed and understood that all lumber applying on this contract is to be cut from first-class, live merchantable timber.

"Parties of the first part agree to convey and transfer by bill of sale the piles of lumber covered by advances hereinbefore mentioned, together with a complete estimate of lumber, stipulating number of piles, length, thicknesses, and at what point located, each pile to be numbered and marked, 'Property of Baker-Matthews Lumber Company of Memphis, Tenn.'

"Parties of the first part agree to keep all labor bills incidental to the cutting of the timber, hauling of same and the labor pertaining to the manufacture and piling of all lumber and the delivery of the same f. o. b. cars shipping point, applying on this contract paid up in full, as it is specifically understood that the advances made to the parties of the first part are to be used for this purpose, and in no case are the advances to be made to the said first party to exceed the actual cost and expense pertaining to the manufacture of this lumber and in no event is the amount advanced to exceed $17 per thousand as herein provided.

"It is understood that the parties of the first part are not to operate their mill, or cut lumber for any other parties than said second parties to this contract, until all of the indebtedness to said second parties shall have been fully liquidated.

"All lumber applying on this contract shall remain on sticks until same is in good shipping condition before being loaded out and inspected, whch shall be not less than four months, unless sooner ordered shipped or taken up by said second parties.

"It is further understood and agreed that said first parties are to pay said second parties interest at the rate

of 8 per cent. per annum on all moneys advanced to them under this contract, and payment to be made and the lumber credited as delivered f. o. b. cars at Black Oak, Arkansas.

"All of the terms, prices and conditions of this contract to inure to the benefit of the heirs, assigns or successors of either party hereto.

"All lumber applying on this contract is to be measured and inspected in accordance with the rules and regulations of the National Hardwood Lumber Association, now in effect. In the event of a failure of the representatives of the parties hereto to agree to an inspection or measurement of said lumber, then parties of the second part shall make application to the secretary of the National Hardwood Lumber Association for a licensed inspector of said association to inspect the lumber applying on this contract, and such official inspection, if had, to be final and binding on the parties hereto. The expenses of such official association inspection and measurement to be borne equally by the parties hereto.

"It is further understood that parties of the second part are to carry a sufficient amount of insurance against fire loss to cover the market value of the lumber covered by this contract, if same can be procured in reputable and solvent insurance companies and the cost of said insurance to be charged to said first parties and taken out of the settlement of balances on lumber delivered herein.

"In witness wherefore, the said first and second parties have caused these presents to be executed by their respective representatives and hereto set their hands and seals on the date first herein written in duplicate.

"Rhoads Bros. & Co.,
"By W. W. Rhoads.
"By J. R. Rhoads.
"Baker-Matthews Lumber Company,
"By H. W. Baker, Jr."

On November 3, 1919, a similar contract to the one copied was entered into between the parties advancing the prices to be paid for the lumber,

Immediately after the execution of the contract Rhoads Bros. & Co. began to manufacture the lumber thereunder, receiving advances every two weeks, based upon preliminary inspections. Baker and Matthews leased from Rhoads Bros. & Co. the lands upon which the mill was situated and adjoining the mill site. Appellee paid Rhoads Bros. & Co.'s entire pay roll for manufacturing the lumber from time to time, and took an assignment thereof. Appellee also paid the lien of Dr. W. E. Yount for logs out of which the lumber was manufactured and had the lien assigned to itself. A number of letters, receipts and pay rolls were introduced and made a part of the record, showing advances and payments made by appellee to Rhoads Bros. & Co. An account between appellee and Rhoads Bros. & Co. was also filed, showing that at the time the contracts were completed Rhoads Bros. & Co. was indebted to appellee several thousand dollars, on account of said payments and advancements. The effect of the testimony of H. W. Baker, appellee's secretary, and W. L. Brisco, appellee's inspector, was that it was in contemplation of the parties from the inception of the contract that all the lumber of the kind and character specified in the contract should become the property of appellee as soon as manufactured; that the stacking, inspection and marking of the stacks were a method of ascertaining the advances to be made, and had no relation to the method of transferring the title to the lumber. The debt of A. B. Jones Company against Rhoads Bros. & Co. existed at the time appellee and Rhoads Bros. & Co. entered into the manufacturing contract. The evidence tends to show that A. B. Jones Company understood the nature and character of the contract entered into between appellee and Rhoads Bros. & Co., and, during the period the lumber was being manufactured, received payment of about $500 from appellee upon the debt. As we understand the evidence, none of the indebtedness of A. B. Jones Company against Rhoads Bros. & Co. was on account of advances made during the time the lumber was being manufactured. While there

is a conflict in the evidence as to whether an inspection had been made of the stacks levied upon at the time the execution was received by the sheriff, the undisputed evidence does show that all the conditions in the written contract had not been complied with at that time.

Appellant's contention for reversal is that, under the written contract, title to the lumber levied upon did not pass to appellee until all the conditions in the contract had been performed; and, for that reason, the execution lien of A. B. Jones Company took precedence over any claim of appellee to said lumber. There is no provision in the written contract specifying when title to the lumber should pass from Rhoads Bros. & Co. to appellee. Some of the provisions indicate that the intention was for the title to pass as soon as the lumber was manufactured, and other provisions indicate that the title should not pass until all the conditions in the contract had been complied with. There is an ambiguity in the contract as to when title to the lumber should pass. It was therefore admissible to show the intent of the parties to the contract at the time of its execution, with reference to the time of delivery. In the case of *McDermott* v. *Kimball Lumber Co.*, 102 Ark. 344, the court, in discussing this question, announced the doctrine that "title to chattels sold passes where such is the intention of the seller and buyer, though something remains to be done, as, for example, the fixing of the quantity or amount of the property or the payment of the purchase money." The written contract in the instant case might well be construed as intending to pass the title to the lumber in question as it was manufactured and all the conditions in the contract as relating to the mode and method of settlement between the parties, but there are conditions which might also be construed as indicating that the title to the lumber should not pass until all the conditions in the contract were fully performed. All the oral evidence, however, and we think many of the potent circumstances surrounding the case, indicate that it was the intention of the parties that the

title to the kinds of lumber specified in the contract should pass to the appellee when manufactured. Both H. W. Baker and W. L. Brisco testified that such was the intention of the parties to the contract. The fact that appellee advanced the money to pay for the logs and to pay all the labor in manufacturing them into lumber is a strong circumstance tending to establish an intention between the parties that the lumber, when manufactured, should become the property of appellee. There are other circumstances tending to establish that such was the intention of the parties. For example: The lease of the mill site and adjoining lands by Rhoads Bros. & Co. to appellee and the procurement of insurance on the lumber in the name of appellee. Having concluded that there is ambiguity in the written contract as to when the title to the lumber should pass to appellee, we find ample evidence in the record to sustain the specific finding of the court to the effect that it was the intention of the parties that the entire output of the mill of Rhoads Bros. & Co. should become the property of appellee when manufactured.

No error appearing, the judgment is affirmed.

ROBERTSON v. STATE.

Opinion delivered May 23, 1921.

1. INTOXICATING LIQUORS—MANUFACTURE OF WHISKEY—EVIDENCE.—Evidence that defendant, accused of manufacturing whiskey, was engaged in operating a still for the manufacture of whiskey and that whiskey was found on his premises, in the absence of evidence that any one besides defendant frequented the premises, was sufficient to sustain a finding that he manufactured whiskey.
2. INTOXICATING LIQUORS—MANUFACTURE OF WHISKEY—INSTRUCTION.—Where the indictment charged the unlawful manufacture of whiskey, and the evidence tended to prove its manufacture, the sole question being whether or not he succeeded in the effort, an instruction to the effect that defendant could be convicted if he manufactured "alcoholic, ardent, vinous, malt or fermented liquors which could be used and drunk as intoxicating beverage," was harmless.

3. INTOXICATING LIQUORS—MANUFACTURE OF EVIDENCE—EVIDENCE.—Evidence that liquor was found near where defendant lived was admissible to prove that liquor was manufactured by appellant on the premises.

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

Williams & Holloway and *Guy E. Williams,* for appellant.

1. The court erred in allowing prejudicial testimony to be introduced.

2. It was error to refuse to permit defendant to file a demurrer to the indictment which would have shown that defendant's name is Will Robinson and not Bill Robertson, as charged in the indictment. 85 Ark. 12; 101 *Id.* 151.

2. Instruction No. 1 is erroneous and prejudicial because not responsive to the proof and is not law. Defendant was charged with manufacturing "whiskey," and there was no proof that the mixture he had made was intended to be used and drunk as a beverage. 216 S. W. 695; 215 *Id.* 631.

3. It was error to single out defendant and instruct the jury as to his credibility as a witness. 58 Ark. 353. See, also, 61 Ark. 88; 62 *Id.* 543; 77 *Id.* 334; 69 *Id.* 558.

Before a conviction can be had upon circumstantial evidence, such evidence must be so strong as to convince the jury of defendant's guilt to such an extent as to exclude every other reasonable hypothesis than defendant's guilt. 34 Ark. 632.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. No incompetent or prejudicial testimony was introduced. Besides, no objections were made to same, and no motion to exclude same from the jury was made.

2. There was no error in refusing to permit defendant to file a demurrer to the indictment, as no at-

tempt was made to file such demurrer. While appellant alleges said error in his motion for a new trial, this is not sufficient, as no objection was made or exceptions saved. 73 Ark. 407; 90 *Id.* 482. An objection made for the first time on appeal is unavailing. 123 Ark. 66.

3. There was no variance between the indictment and proof. If appellant was identified as the one sought to be punished it is sufficient. 113 Ark. 112; 122 *Id.* 391. Errors not set out in the motion for new trial will not be considered on appeal. 117 Ark. 198; 133 *Id.* 196.

4. The court correctly instructed the jury. Counsel misconstrue and misconceive the decision of the court in 215 S. W. 629. Instruction No. 4, considered with the others given, clearly state the law, and authorities are unnecessary, as it is well settled.

5. The verdict is sustained by the evidence. The evidence is abundantly sufficient to warrant the verdict of guilty.

McCULLOCH, C. J. Appellant was convicted under an indictment charging him with having manufactured "one pint of alcoholic, ardent, vinous and intoxicating spirits, commonly called 'whiskey.'" It is undisputed that appellant erected a crude distillery in an outhouse at the home of one Ezell Trice in Lonoke County, where he lived, and that he attempted to manufacture whiskey. Appellant admitted as much in his testimony, but he denied that he completed the distillation of the whiskey from the raw material which he was using. He used a metal coal oil tank or barrel and a wooden keg, into one of which he put the sour mash and the two containers were connected with a cane pipe used as a "worm." Appellant testified that he put into the keg a half-bushel of chops, two gallons of molasses and five buckets of water. A hole in the ground was used as a furnace, and the metal barrel was set over it. A fire was built in the furnace, and after the contents of the barrel became heated an explosion occurred. Appellant's effort to manufacture whiskey was thus discovered, and his arrest followed in a

few hours, as soon as the services of an officer could be procured.

Appellant freely admitted to the officer, and admitted on the witness stand, that he was attempting to make whiskey for his own use, but he claimed that he did not succeed in the effort, which was frustrated by the explosion.

After appellant was arrested and taken to jail, the officer went back to the house of Ezell Trice, and the latter carried him out a short distance from the house and discovered buried in the ground two jugs and a bottle of white "moonshine" whiskey. Trice testified that he did not put the whiskey there and did not know it was there until it was discovered on the search made by him and the officers. One of the officers who made the arrest testified concerning the condition of the crude distillery that he found, and also stated that some of the material used in making the liquor had been poured out on the ground.

It is earnestly contended that the evidence is insufficient to establish the fact that appellant manufactured any whiskey; that the proof merely shows that he was engaged in an effort to make whiskey, but that he did not complete it. We think, however, that the evidence is sufficient to warrant the jury in finding that the operation of the distillery resulted in the manufacture of whiskey. The fact that used raw material was poured out on the ground and also the fact that whiskey was found on the premises is sufficient to warrant the inference that whiskey was manufactured there by appellant. The two jugs and the bottle of whiskey were found on the premises only a few hundred yards from the house of Trice, who testified that neither he nor his wife put the whiskey there, and there is no evidence that any one else besides appellant frequented the premises.

It is next contended that the court erred in giving an instruction to the effect that the defendant could be convicted if the proof showed that he had manufactured "alcoholic, ardent, vinous, malt or fermented liquors

which could be used and drank as intoxicating beverage," when the indictment specifically charged the manufacture of whiskey. Conceding, under the rule announced by this court in *Carleton* v. *State*, 129 Ark. 361, that the particular language of the indictment was descriptive of the offense and that the proof must be confined to the kind of liquor specifically named, we are of the opinion that the instruction given by the court was not prejudicial, as the sole issue in this case was whether or not appellant succeeded in manufacturing whiskey which he was undertaking to do at the distillery when the explosion occurred. Appellant admitted that he was attempting to manufacture liquor, and, as before stated, the sole question was whether or not he succeeded in the effort. It is not conceivable that the jury were misled by this instruction and reached the conclusion that appellant manufactured anything else but whiskey. We think the instruction was harmless.

Again, it is insisted that the court erred in permitting one of the officers to testify concerning the finding of whiskey near Trice's home. We think that this had some tendency to prove that liquor was manufactured by appellant on the premises, and that the ruling of the court in admitting the testimony was correct.

Judgment affirmed.

FARMERS' BANK & TRUST COMPANY *v.* BOSHEARS.

Opinion delivered May 23, 1921.

1. BANKS AND BANKING—RECEIVING DEPOSIT AFTER BANKING HOURS. —Where there was testimony tending to prove that it was the custom of the employees of a bank to receive deposits after the usual banking hours for the purpose of accommodating belated customers, it was not error to submit to the jury the question whether the bank was liable for a deposit so made.
2. BANKS AND BANKING—DUTY OF DEPOSITOR TO CHECK UP ACCOUNT. —While no rule can be laid down that will cover every transaction between a bank and its depositors, the latter's duty to make objection to the statement of his account is discharged when he

exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties and the established or known usages of the banking business.

3. BANKS AND BANKING—REASONABLE TIME FOR OBJECTING TO STATEMENT.—In an action against a bank to recover a deposit, which the bank denied having received, whether the plaintiff made objection within reasonable time to the statement furnished by the bank, not showing the deposit, *held* for the jury.

4. BANKS AND BANKING—FINDING OF DEPOSIT MADE.—In an action against a bank by a depositor to recover a deposit claimed to have been made, evidence *held* to sustain finding that such deposit was made.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. H. Dudley,* Judge; affirmed.

Davis, Costen & Harrison, for appellant.

The court should have given defendant's requested instruction No. 1, and also have given requested instruction No. 5 without modification. The proof establishes a conclusive case of estoppel. The undisputed evidence shows that the money was received by the bank's employees, if at all, after banking hours, when there was no officer to receive such deposit.

Appellee received and receipted for two statements of the bank with full knowledge that if no error was reported within ten days the account would be considered correct. He made no complaint and is estopped. 126 Ark. 266. The deposit was made, if at all, after banking hours. The bank is not responsible unless the deposit is made during banking hours. 7 C. J., p. 637, §§ 318-19; 1 Morse on Banks, etc. (5 ed.), pp. 9-381. The evidence of Mr. Gay was not sufficient to establish a custom of the bank to receive deposits after banking hours. 17 C. J. 522, § 91; *Ib.* 524, § 92.

A. G. Little and *Arthur L. Adams,* for appellee.

Appellant's contentions for a directed verdict are not sustained by the law or the evidence. No estoppel is shown by the evidence. On appeal the evidence should be given its strongest probative force in favor of appellee. 141 Ark. 617-24; 135 *Id.* 466-70.

The doctrine of estoppel and account stated is an artificial one, growing out of the law merchant. It is highly penal and should be liberally construed with reference to those against whom it is invoked. 57 Miss. 51; 34 Am. Rep. 435; 42 N. H. 158; 27 L. R. A. 820 (note). Ten days can not be arbitrarily fixed as sufficient time under all circumstances for a bank depositor to examine his pass book after it has been balanced and returned to him with canceled vouchers. 103 Mo. App. 613; 77 S. W. 1002.

Failure to examine the pass book within a reasonable time after it is balanced will not estop a depositor from subsequently showing the incorrectness of the statement, though by his delay he may be compelled to assume the burden of overcoming the presumption arising of its correctness. 147 Ill. App. 193; 60 App. Div. 241; 70 N. Y. S. 246; 187 Mo. App. 483; Michie on Banks, etc., § 133.

A reasonable time is to be determined by the situation of the parties and nature of the business. It would be unreasonable to apply the rule applicable to merchants to the mechanic or farmer. 12 Barbour 487; Michie on Banks, etc., § 138; Bald. C. C. 539. The cases cited for appellant, 126 Ark. 266 and 117 U. S. 96, are not in point. See 141 Ark. 414. There was ample testimony here to take the case to a jury. A usage, being a matter of fact, may be proved as any other fact. 17 C. J. 524, § 92.

The finding of the jury has established the usage or custom of the appellant to receive deposits after the usual banking hours, and appellant's case falls. Established usage is binding on a bank. 57 N. Y. 131; 1 Head 162; 17 C. J. 479-80, § 42. See, also, 7 Wis. 1; 73 Am. Dec. 381; 7 C. J. 637; 21 L. R. A. 440 and note.

Taken altogether, the instructions state the law and there is no error. 97 Ark. 358-363; 98 *Id.* 211, 219; 100 *Id.* 437-441.

McCULLOCH, C. J. Appellant is a banking corporation engaged in business in the city of Blytheville, in this

State, and during the autumn of the year 1919 appellee, a farmer living eight or ten miles out in the country from Blytheville, was one of its depositors. He claimed that he made a deposit of $250 on October 17, 1919, which does not appear to his credit, and on the refusal of the bank to place it to his credit he instituted this action to recover that sum.

The issues in the case are whether the amount was deposited by appellee, as claimed by him; whether the deposit was received by an employee of the bank, if at all, at such time as he was authorized to receive dedospits; and whether appellee is precluded from recovery of the sum by his failure, within apt time, to make objection to the account rendered him by the bank.

Appellee was a tenant on the farm of a Mr. Gay, who was formerly the president of appellant bank, and at the time of the transaction in controversy was one of its directors. According to appellee's testimony, he brought cotton to Blytheville on October 17, 1919, and after selling it he and Mr. Gay had a settlement of their accounts, and he paid Mr. Gray a small balance due him, and, having the sum of $250 left out of the proceeds of the cotton, he deposited it in appellant bank. He described the method of deposit as follows: That he counted out the money to Mr. Gay, who made out a deposit slip and handed it to Mr. Cheatham, the assistant cashier, who accepted the money and placed the letters O. K. on the deposit slip with his initials attached. This was after the usual closing time of the bank, but the assistant cashier was in the bank at the time and received this deposit. Appellee testified further that he was accustomed to making deposits in this way after the usual banking hours for the reason that he came a long distance with his cotton, and did not usually sell it until after the bank closed. There was other testimony tending to show that it was the custom of the bank to receive deposits after the usual banking hours.

The testimony adduced by appellant tended to show that the money was never received by the bank or any of

its employees. Cheatham testified that he had no recollection of the deposit, and it is shown by his testimony and that of other employees that the deposit had never been entered on the books of the bank, and that the amount of funds in the bank did not indicate that they exceeded the amount entered on the books. Mr. Cheatham also testified that the initials on the deposit slip held by appellee were not in his handwriting.

On October 21 appellant sent to appellee, by mail, a statement of his account which did not show this deposit. The statement concluded with the following notice:

"This statement is furnished you instead of balancing your pass book. It saves you the trouble of bringing your pass book to the bank and waiting for it to be balanced. These statements will be found very convenient to check up and file. All items are credited subject to final payment. Use your pass book only as a receipt book when making deposits."

Another statement was furnished in like manner on December 15, 1919. There is a conflict in the testimony as to when appellee made objection to the bank that his account was not correctly set forth in the statement furnished to him. He testified that he made the discovery in three or four days after he received the statement by checking up the account with his deposit slips at home; that because of the fact that Mr. Gay was one of the directors of the bank he had made the deposit through the latter, and waited to see him before making his protest to the bank, and that it was several weeks before he could find Mr. Gay in town. He testified that at the first opportunity he presented the matter to Mr. Gay, and that they went to see the cashier of the bank, and presented the deposit slip showing the deposit of this amount on the date mentioned.

The issues were properly submitted to the jury, and the court, among other instructions, gave the following: "Even though you may believe from the evidence that

the deposit in question was received by the officers of the bank, if you further find and believe from the evidence that thereafter the plaintiff Boshears received a statement or statements from the bank showing the amount of the deposits made by him and the charges against his account, as shown by the vouchers, and upon receiving such statement or statements he did not in a reasonable time thereafter notify the bank of the errors here complained of and that such failure upon his part to so notify the bank occasioned injury to the bank, you will find for the defendant."

The contention of appellant's counsel is that the court should have given a peremptory instruction, for the reason that the undisputed evidence shows that the money was received by the bank's employees, if at all, after banking hours when there was no officer to receive such deposit and also because the undisputed evidence shows that appellant waited an unreasonable length of time before he made objection to the statement sent to him omitting this deposit. We think the contention of counsel in both respects is unfounded. There is testimony tending to show that it was the custom of the employees of the bank to receive deposits in the bank after the usual banking hours for the purpose of accommodating belated customers. The testimony also warranted a submission of the issue as to whether or not the objection made by appellee to the statement of his account was within a reasonable time. The rule approved by this court in several cases was stated by the Supreme Court of the United States in *Leather Manufacturers' National Bank* v. *Morgan,* 117 U. S. 96, as follows: "While no rule can be laid down that will cover every transaction between a bank and its depositors, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business."

Citizens Bank & Trust Co. v. *Hinkle,* 126 Ark. 266; *Bank of Black Rock* v. *B. Johnson & Son Tie Co.,* 148 Ark. 11.

Considering the circumstances under which the alleged deposit was made and the circumstances under which appellee was placed when he received the notice omitting this deposit, we think that the trial jury was warranted in drawing the inference that appellant proceeded with proper diligence in presenting his protest to the bank, and that it was made within a reasonable time, considering all those circumstances.

The testimony was conflicting as to whether or not the deposit was actually made, but there was sufficient evidence to warrant the jury in finding that appellee deposited the sum mentioned in the manner which he described in his testimony.

Judgment is therefore affirmed.

BRICKEY v. STATE.

Opinion delivered May 23, 1921.

1. CONTINUANCE—ABSENCE OF WITNESS.—It was not error to refuse a continuance for the absence of a material witness where the motion for continuance was not verified by defendant or his attorney, nor where another witness testified, on defendant's behalf, to substantially the same facts set up in the motion.
2. CONTINUANCE—ABSENCE OF COUNSEL.—It is not an abuse of discretion to refuse a continuance on account of the absence of employed counsel, unless such counsel is absent by reason of sickness or some other unavoidable casualty; the absence of counsel by reason of his attendance upon another court in causes therein pending in which he is also employed as counsel not being an unavoidable casualty.
3. CRIMINAL LAW—TIME OF SENTENCE WAIVED.—Under Crawford & Moses' Digest, § 3229, providing that, "upon the verdict of conviction in cases of felony, the court shall not pronounce judgment until two days after the verdict is rendered unless the court is about to adjourn for the term, and then in not less than six hours after the verdict, except by the defendant's consent, *held* that a judgment pronounced twenty-four hours after verdict in a felony case will not be reversed as being prematurely rendered

where it does not appear when the court adjourned, and where defendant was given an opportunity to object to the pronouncement of the sentence and did not do so.

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

J. Allen Eades, for appellant.

It was error in overruling the motion for continuance. It stated good grounds for continuance. A material witness duly summoned was sick and unable to get to court. Act 52, Acts 1905, p. 143; 50 Ark. 161; 10 *Id.* 528; 21 *Id.* 560; 89 *Id.* 130; 64 S. W. 412. Absence of defendant's counsel without fault was good ground for continuance. 26 S. W. 60; 21 Ark. 460. The court abused its discretion in refusing a continuance.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. There was no error in refusing the continuance on the grounds stated therein. It does not state the materiality of the testimony of the absent witnesses or what they would testify to if present. C. & M. Digest, § 1270; 187 S. W. 308; 2 Ark. 33; 101 *Id.* 513. The testimony of the absent witness was *cumulative* merely. 215 S. W. 1. No abuse of discretion by the court was shown. 103 Ark. 352; 138 *Id.* 500. Due diligence was not shown. 90 Ark. 1.

2. The verdict is supported by the law and the evidence.

WOOD, J. On the 9th of March, 1921, the same being an adjourned day of the regular February term of the Van Buren Circuit Court, the appellant was convicted of the crime of selling intoxicating liquors, and by judgment of the court sentenced to imprisonment in the State penitentiary for one year. From that judgment he prosecutes this appeal.

1. Appellant urges as a ground for reversal of the judgment that the court erred in overruling his motion for a continuance. He assigns two reasons why the

court erred. First, because of the absence of H. G. Wolverton, a material witness, who was summoned before the court convened, and who was sick and unable to attend. The motion for continuance was in due form, but was not verified either by the appellant or his attorney for him, and, furthermore, another witness testified on behalf of appellant to substantially the same facts set up in the motion tending to impeach the testimony of the State's witness. The court did not abuse its discretion under these circumstances in overruling the motion. Sections 1270 and 3130 of Crawford & Moses' Digest. *Morris* v. *State,* 103 Ark. 352; *James* v. *State,* 125 Ark. 269; *Burris* v. *Wise & Hind,* 2 Ark. 33, 40; *State Life Ins. Co.* v. *Ford,* 101 Ark. 513.

2. The appellant set up that the cause should be continued on account of the absence of J. A. Eades, who was unable to attend court because the adjourned term was at a day when the circuit court was in regular session at Morrilton, requiring the attorney's presence at the latter court. The affidavit of Eades in support of this ground of the motion shows that he had been employed by the appellant to defend him, and his fee had been paid; that he appeared in attendance at the regular term of the Van Buren Circuit Court, but that court was adjourned until the 7th of March on account of the absence of the regular judge; that he could not appear at the adjourned day because on that day the regular term of the circuit court was in session at Morrilton, and he could not be present at both courts and was compelled, on account of his business in the latter court and the duty he owed his clients there, to attend that court. Of these facts he duly notified the presiding judge of the latter court and also the prosecuting attorney, and requested a continuance of the cause to the regular fall term of the Van Buren Circuit Court. The regularly employed attorney being absent, the court appointed Garner Fraser, an attorney in attendance at the adjourned term of the Van Buren Circuit Court, to repre-

sent the appellant, who prepared and filed his motion for continuance, and conducted his defense.

The court did not err in refusing appellant's motion to continue because of the absence of employed counsel. The right to be heard by counsel, guaranteed to persons accused of crime by the Bill of Rights, article 2, section 10, Constitution of 1874, was not denied the appellant in this case. On the contrary, when his regularly employed counsel did not appear, the court appointed counsel to represent him. Counsel who are employed to represent clients having cases pending in courts must so arrange their business as to be able to appear to represent their clients when those cases are called for trial. The business of the courts can not be controlled, interrupted, or made to conform to the business interests of attorneys. The fact that an attorney may have cases for clients pending in different courts whose terms convene at the same time, and which condition may render it impossible for the attorney to be in attendance at one of the courts, is no imperative reason for the continuance of the causes in which he is employed in the court which he does not attend. These are matters addressed to the sound discretion of the presiding judge of the court, who must conduct the public business entrusted to him in a manner most conducive to the interests of the public whom he serves. It is never an abuse of discretion for the court to refuse to grant a continuance in a cause on account of the absence of employed counsel, unless such counsel is absent by reason of sickness or some other unavoidable casualty. The absence of an attorney from a court where causes are pending in which he is employed as counsel because of causes pending in other courts in which he is also employed as counsel is not an unavoidable casualty.

3. The appellant contends that the court erred in sentencing the appellant on the day after the verdict of guilty was returned against him. The appellant relies upon section 3229 of Crawford & Moses' Digest, which

provides in part as follows: "Upon the verdict of conviction in cases of felony, the court shall not pronounce judgment until two days after the verdict is rendered unless the court is about to adjourn for the term, and then in not less than six hours after the verdict, except by the defendant's consent." The record shows that the jury returned a verdict on the 9th of March, and the record entry of March 10 is as follows: "The defendant was this day brought into open court and, being informed of the nature of the indictment, plea and verdict, was asked if he had any legal cause to show why sentence should not be pronounced against him, and, none being shown, it is adjudged, etc." The record does not show when the Van Buren Circuit Court adjourned. In the absence of any showing to the contrary, it will be presumed that the sentence was pronounced according to law. Moreover, the appellant did not make any objection at the time to the pronouncement of the sentence, and he was given an opportunity to do so. He therefore must be held to have waived the time specified in the statute.

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

FARMERS' BANK & TRUST COMPANY v. FARMERS' STATE BANK OF BROOKPORT.

Opinion delivered May 23, 1921.

BANKS AND BANKING—FORGED CHECKS—LIABILITY.—Where plaintiff bank issued its cashier's check to a customer and mailed it to him, and it was presented to defendant bank by a third person of the same name who represented himself to be the payee, and forged the payee's name, and received a part of the funds called for, leaving the rest on deposit, and defendant bank indorsed the check with a guaranty of prior indorsements, and transmitted it to plaintiff bank for payment, which was made, plaintiff bank, after discovery of the forgery, could recover from defendant bank the amount so paid.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. H. Dudley*, Judge; affirmed.

Davis, Costen & Harrison, for appellant.

The only question we desire to present is, Can a bank which pays a check drawn upon itself, the indorsement upon which is forged, recover the amount paid from the bank which originally cashed the check? The trial court rested its judgment upon the theory that defendant bank was negligent in not requiring the indorser to be identified. Under the agreed facts an attempt at identification would have been futile. Neely was a stranger in Blytheville, and there was no one to whom appellant could apply for identification.

Appellant was not guilty of any negligence. The correct rule is laid down in 168 N. C. 605. A bank which pays a check upon itself, the signature of the drawer and indorser upon which are forged, can not recover the amount paid the bank which originally cashed the check, although it indorsed thereon, "All prior indorsements guaranteed." L. R. A. 1915, p. 1138; 85 S. E. 5; 10 Vt. 141; 33 Am. Dec. 188. The rule of North Carolina court is recognized in 73 Ark. 561-566. The court erred in refusing defendant's declarations of law, Nos. 1, 2 and 3, and in finding for plaintiff, as defendant was not liable.

W. D. Gravette, for appellee.

Had appellee known and recognized the forgery, appellant would be in the same position it is now on account of the fact that the money had been paid to this forger at the time the check was presented and before appellee had time or opportunity to see or examine the forgery. All the harm had been done before the check came into possession of the appellee bank. Appellee bank was not required, on account of the payee having once been a customer of said bank, to know whether the payee's name was forged or genuine, in the face of the indorsement of appellant bank's guaranty that all prior indorsements were guaranteed. 152

Ill. 296; 43 Am. St. Rep. 454. Plaintiff had a right to rely on the bank's guaranty that all prior indorsements were genuine. 88 Tenn. 299; 17 Am. St. Rep. 884. See, also, 159 Ky. 141; 166 S. W. 986; 137 Ark. 251. The findings and declarations of law were amply justified by the court below. Magee on Banks, etc., 352; Michie on Banks, 1090-3 and 1190; 151 Mass. 280; 5 Cal. 124; 98 Ark. 1.

WOOD, J. This cause was submitted to the trial court sitting as a jury upon an agreed statement of facts, as follows:

On or about December 1, 1919, J. W. Neely, a former citizen and resident of Brookport, Illinois, and a patron of the Farmers' State Bank, the plaintiff herein, emigrated to Arkansas, and located near Blytheville, his correct postoffice address being Blytheville, Arkansas, R. F. D. No. 1. Before leaving Illinois, he had disposed of some property there, and on the 4th day of December, 1919, the plaintiff bank issued its cashier's check payable to J. W. Neely for the sum of $540.85, which was put in the mail properly addressed to him at Blytheville, Arkansas, R. F. D. No. 1. The check never reached the person for whom it was intended, but was presented to defendant bank between the 4th and 13th of December, 1919, by a person, a negro, who represented himself to be J. W. Neely, and who indorsed the name "J. W. Neely" upon said check, without the consent or authority of the person for whom said check was intended.

The person presenting said check received from the defendant bank the sum of $140.85 in cash and left the balance of $400 on deposit in said bank to the credit of J. W. Neely. After receiving said check as above, the defendant bank indorsed said check on the back as follows: "Pay to the order of any bank, banker or trust company, all prior indorsements guaranteed.

"Farmers' Bank & Trust Company,
"Blytheville, Arkansas.
"H. E. Barnett, Cashier."

Defendant bank then transmitted same to plaintiff bank for payment, which was made on December 13, 1919. Upon learning that said check had not reached the hands for which it was intended, the defendant bank paid over the $400 left on deposit to plaintiff bank, but refused to pay over the sum of $140.85, the amount paid upon presentation of said check. and this suit is by plaintiff bank to recover that sum.

It is further agreed that, upon receipt of information that the party for whom the said check was intended had never received same, plaintiff bank immediately wrote defendant bank, advising it that said indorsement was a forgery, but that said letter was not received by defendant bank, and that plaintiff bank had paid to the person who purchased said cashier's check the amount represented thereby.

The finding and judgment of the court was in favor of the appellee, from which is this appeal.

Learned counsel for appellant rely upon the case of *State Bank* v. *Cumberland Savings & Trust Company,* 85 S. E. (N. C.) 5, L. R. A. 1915 D, p. 1138; *Bank of St. Albans* v. *Farmers' & Mechanics' Bank,* 10 Vt. 141; 33 Am. Dec. 188.

The first of the above cases is comparatively recent, the opinion having been rendered by the Supreme Court of North Carolina in 1915. The facts and the law announced as applicable thereto reported in the syllabus to that case in 85 S. E. 5, are as follows: "Plaintiff bank, which, in the course of business, received through another bank a check purporting to be drawn on it and indorsed by a third person, whose signatures were both forged, and which had been cashed by defendant bank, in reliance upon the indorsement "all prior indorsements guaranteed" and the custom to take such checks relying upon the exercise of due diligence on the part of the bank first cashing it, could not recover the amount paid on the forged check, as it should know the signature of the drawer, its own depositor."

This doctrine has no application to the facts of this record. Here its cashier's check made the appellee both the drawer and the drawee. In this case the drawee was not required to know the signatures of the indorsers. To apply the doctrine of *State Bank* v. *Cumberland Savings & Trust Co., supra,* to the facts of this record would be to ignore a wholesome principle of natural justice and equity which has also been thoroughly established as a rule of law, towit: That, as between two innocent parties to a transaction which must result in financial loss, the loss must fall upon that one whose acts contributed most to produce it. The principle is well expressed in the case of *Danvers Bank* v. *Salem Bank,* 151 Mass. 280, as follows: "Where a loss which must be borne by one of two parties alike innocent of the forgery can be traced to the neglect or fault of either, it is reasonable that it should be borne by him, even if innocent of any intentional fraud, through whose means it has succeeded. To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened, and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which from his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken. * * * When this check was forwarded by the defendant for redemption, the plaintiff was without the means it would have had if it had been presented at its own counter of ascertaining the character of the person offering it. It had a right to believe that the defendant, in cashing a check purporting to be drawn by one not its own customer or entitled to draw upon it, had by the usual and proper investigation satisfied itself of its authenticity. The indorsement, which was not necessary to the transfer of the check, was a guaranty of the signature of the drawer, and the plaintiff had a right to

believe that the indorser was known to the defendant by proper inquiry." See, also, *People's Bank* v. *Franklin Bank,* 88 Tenn. 299; 17 Am. St. Rep. 84; *Farmers' National Bank of Augusta* v. *Farmers' & Traders' Bank of Maysville,* 159 Ky. 141; *Cureton* v. *Farmers' State Bank.* 147 Ark. 312.

The rule invoked by appellant is an exception to the rule that money which has been paid through a mistake can generally be recovered. This exception is mentioned by Judge RIDDICK, speaking for the court, in *LaFayette* v. *Merchants' Bank,* 73 Ark. 561-66. This exceptional rule, however, as held in the case of *Farmers' National Bank of Augusta* v. *Farmers' & Traders' Bank of Maysville, supra,* does not "require the drawee bank to know the signature of an indorser. That burden is upon the holder, who is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the check, or were duly authorized by them." In *First National Bank* v. *Northwestern National Bank,* 152 Ill. 296, it is held (quoting syllabus): "A bank indorsing and collecting a check warrants the genuineness of all pre-existing indorsements thereon, including the indorsements of the respective payees named in such check, and is answerable for moneys received by it if any such indorsements are forgeries."

In the case of *Schaap* v. *State National Bank of Texarkana,* 137 Ark. 251, we said: "In other words, the true owner of a check, with a forged or unauthorized indorsement, may ratify the act of a bank in receiving it in that condition, and collecting the proceeds or paying them out without authority, and yet not ratify the forged or unauthorized indorsement. In such cases the bank can not avoid liability by showing that its conduct was governed by good faith, and the payee is entitled to recover unless he has been guilty of fraud or negligence in the matter."

The facts of this record show that the appellee was not guilty of any fraud; and if it could be said to be in the least negligent, its negligence in a measure was superinduced by the indorsement of the appellant, which was calculated to lull the appellee into a sense of security in reliance upon such indorsement and thereby lessen the diligence which it doubtless otherwise would have exercised. It follows that the rulings of the circuit court are in all things correct, and its judgment is therefore affirmed.

BERGER v. JONESBORO MOTOR COMPANY.

Opinion delivered May 23, 1921.

1. CONTRACTS — CONSTRUCTION — QUESTION FOR COURT.—Where the terms of a written contract are unambiguous in the light of the undisputed evidence, it is the duty of the court to construe it.
2. SALES—CONSTRUCTION.—Where a contract for the purchase of an automobile provided that the car was sold f. o. b. at the city of purchase, the written contract stipulating that in case the car costs the seller $100 more the buyer will pay same, and there was an understanding between the buyer and seller that if there was an advance of $100 in the price the buyer was to pay it, the parties did not have in mind that there might be an increase in cost of the car on account of transportation charges.

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

Sloan & Sloan, for appellant.

1. The court should have instructed a verdict for appellant, and erred in submitting the case to a jury, as the facts are undisputed. It is clear beyond doubt that it was the intention of the parties to charge Berger the additional $100 only in the event that the manufacturer charged the Jonesboro Motor Company that amount by reason of an advance in price.

2. There was error in the admission of evidence which was highly prejudicial to appellant.

3. The court erred in refusing to give instruction No. 1 asked by appellant and in giving No. 2 of its own motion. The verdict is totally unsupported by any testimony showing the value of the car. 21 Ark. 488. While

this case was replevin, yet the suit was in effect treated as a suit upon a contract to decide the contract price agreed to be paid for the car, instead of determining what was the actual value of the car, the only issue.

Lamb & Frierson, for appellee.

This case was tried by both parties upon the sole question of whether Berger was to pay $1,750 or $1,650 for the car. An appellate court will not permit parties to repudiate the theory upon which a trial court proceeded and insist upon a different theory upon appeal. The theory can not be changed on appeal. 101 Ark. 95; 108 *Id.* 490; 77 *Id.* 177; 64 *Id.* 253; *Ib.* 305; 121 *Id.* 124; 83 *Id.* 10; 95 *Id.* 593; 71 *Id.* 242; 74 *Id.* 88, 557; 78 Ark. 1; 106 *Id.* 525. Appellant chose his own ground in the trial below, and it is too late now for him to contend that the trial was not carried out strictly and technically as a replevin suit. All the pleadings, evidence and argument were directed to the one controversy, the price of the car, was it $1,750 or $1,650? A shift of position like the one claimed can not be allowed on appeal. Verdicts which are responsive to the issue will be sustained, although not strictly in statutory form. 103 Ark. 422; 123 *Id.* 261. See, also, 96 Ark. 190; 32 *Id.* 612; 68 *Id.* 580; 50 *Id.* 506, 94 *Id.* 548; 2 Bibb 178; 4 Dana 271; 1 Tex. 93; 22 Enc. Pl. & Pr. 877.

The verdict is sufficiently certain. 3 W. Va. 37; 9 W. Va. 184; 47 Pa. St. 376; 105 Mo. 411; 112 N. Y. 364; 15 Cyc. 166. Where the only issue is the amount due, an assessment of the value of the property is not necessary. Cobbey on Replevin (2 ed.), § 1065, p. 601. Appellant on appeal can not raise the issue as to the value of the car, nor as to the form of the verdict. The contract is unambiguous. 143 Ark. 143. Written contracts by letter are sustained if not ambiguous. 81 Ark. 337. The construction of such contracts is for the courts. 81 Ark. 337; 89 *Id.* 368. When a verdict is instructed by the court, this court will give to the evidence its strongest probative force to the opposing side. 103 Ark. 231; 76 *Id.* 520. Berger admittedly never complied with his contract. Con-

sidering this then as strictly a replevin suit, appellee is entitled to recover the car. Berger never made a sufficient tender of compliance with his contract. He is in default if the price were $1,650. Appellant willingly submitted the construction of the contract to the jury, and can not complain here for the first time. Cobbey on Replevin (2 ed.), § 1083.

WOOD, J. This suit was instituted by the appellee against the appellant to recover the possession of a certain automobile which is described in the complaint and affidavit for replevin. The appellee alleged that it was the owner and entitled to the immediate possession of the automobile. The complaint and the affidavit contained the usual allegations in replevin. The appellant answered, denying all the material allegations of the complaint, and set up that he purchased the car of the appellee for the sum of $1,650; that he made tender of payment as contemplated by the contract, and that the appellee demanded of appellant $100 in excess of the contract price; that it was the understanding that, if the Buick Automobile Company raised the factory price of the car in controversy $100 before the same could be delivered to the appellant, then the appellant was to pay this additional sum, but the appellant alleged that the appellee procured the car from the factory at the market price existing on the day of appellant's purchase.

J. R. Lane testified that he was the manager of the appellee on March 29, 1920. He exhibited the contract between appellant and the appellee under which the car was purchased, which contained, among others, the following provision: "In case this car costs the Jonesboro Motor Company $100 more, J. M. Berger will pay same." Witness testified: "We signed up this contract, and I told him that it would cost more money; that the factory would raise the price the first of April, and he said that would be all right, and he signed up the contract like I wrote it. He saw me write this (the above provision) in the contract." Witness further testified substantially that the above provision meant in case the car cost ap-

pellee $100 more to get the car to Joneboro, which witness said it did, as follows: He and three others went to Flint, Michigan, and drove the cars from there to Lima, Ohio, a distance of two hundred miles, and witness paid the expenses, which made it cost appellee more than $100 to get the car to Jonesboro. Witness had in mind in entering into the contract two prices—the delivered price and the cost to witness. The delivered price was the price to the man who bought. The cost provision in the contract meant that the delivered price would have been less than $1,700. The testimony of witness showed that the appellant had complied with the contract except that appellant was only willing to pay $1,650 for the car at Jonesboro, whereas the appellee was unwilling to accept less than $1,750.

Another witness testified that he heard the discussion between Lane and the appellant at the time of the execution of the contract regarding the $100, and that the agreement between them was that, if the car cost the appellee $100 more than the factory price, appellant was to pay that additional amount.

The appellant testified in substance that the provision in the contract above quoted meant the advanced price of the car, and the price was supposed to advance about April 1. Lane told appellant that there would be an advance at that time. He said he had several cars bought at the old price, and, if this car cost him more money, appellant would have to pay it. There was nothing said at the time the deal was made about some fellows being sent up to Flint to drive the car back. Witness told Lane that he did not want his car driven at all. Witness wanted the car shipped from the factory to Jonesboro. When the car arrived, Lane did not say a word with reference to the increase in the factory price. When witness went to settle with Lane, Lane said witness would have to pay him $100 more. Witness asked Lane if it cost him more, and he said, "No;" that he got it at the old price, but it cost him $100 more on the car to get it to Jonesboro, and he was charging appellant that much more. Witness told Lane that such was not

the contract. Witness bought the car f. o. b. Jonesboro.

The above are substantially the facts upon which the appellant asked the court to instruct the jury to return a verdict in his favor, which the court refused. The court, instead, instructed the jury in effect that, if the provision in the contract was intended by the parties to cover either an advance in the cost of the car or expense incurred by the appellee in procuring and delivering the car, they should return a verdict in favor of the appellee and fix the value of the car at $1,750. On the other hand, if the parties intended the above provision to cover only the advance, if any, in the price of the car, then the jury would fix the value of the car at $1,650. The jury returned a verdict in favor of the appellee, fixing the value of the car at $1,750, and judgment was rendered in favor of appellee, from which is this appeal.

The court erred in refusing to instruct the jury to return a verdict in favor of the appellant. The undisputed evidence showed that the price of the automobile was f. o. b. Jonesboro; that it was the custom of automobile factories to quote the price of their automobiles f. o. b. city of purchase. The testimony of Lane, the manager of the appellee at Jonesboro, as well as the testimony of the appellant, shows that when this contract was entered into the parties had in mind that there would be an advance in the factory price of cars about the first of April. This was clearly the meaning of Lane's language when he said, "I told him that it would cost more money—that the factory would raise the price the first of April." Berger also said, "Russell told me there would be an advance in the price of the car the first of April. He said he had several cars bought at the old price, and, if this car cost him more money, I would have to pay it."

When the provision of the contract quoted is construed in the light of this undisputed evidence of the intention of the parties, it is absolutely unambiguous, and the court erred in submitting it to the jury for construction, but should have construed it to mean that the

appellant was to pay an additional $100 to the contract price of $1,650, in case the factory advanced the price to the appellee; that is, in the event appellee had to pay the factory $100 more, then the appellant should pay the advanced price to the extent of $100. The price of the car was fixed f. o. b. Jonesboro, and showed that the parties did not have in mind at the time the contract was entered into that there might be any increase in the cost of the car to appellee on account of transportation charges. The provision under review was clearly intended to cover the advance price of $100, which the parties contemplated at the time the appellee might have to pay the factory. It was not intended to cover any additional cost or expense that appellee might have to incur in order to deliver the car f. o. b. Jonesboro.

"Where the terms of a written contract are unambiguous in the light of the undisputed evidence, it is the duty of the court to construe it." *Capitol Food Co.* v. *Mode & Clayton,* 112 Ark. 165; *Starnes* v. *Boyle,* 101 Ark. 469, and other cases cited in 2 Crawford's Digest, Contracts, § 81.

Now, the undisputed evidence shows that the factory price of the car in controversy at the time of its purchase was $1,595 with war tax added. The factory did not advance the price, and the undisputed evidence shows that the appellee did not have to pay $100 more on account of the advance in factory price to it. On the contrary, Lane testified that the car cost him $1,650, counting in his profit. He added the $100 because it cost him more than that to get it to Jonesboro. For the error in refusing to give the appellant's instruction No. 1, the judgment is reversed and the cause is dismissed.

G. H. HAMMOND COMPANY v. JOSEPH MERCANTILE COMPANY.

Opinion delivered May 23, 1921.

PRINCIPAL AND AGENT—APPARENT AUTHORITY OF AGENT.—To the general rule that no man can get a title to personal property from a person who himself has no title to it, there is an exception where the owner has conferred upon the seller the apparent right of property as owner or for disposal as his agent.

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

D. G. Beauchamp, for appellant.

1. The giving of instruction 6 was prejudicial error. It was abstract and not based upon any evidence. There is no evidence that Perkins sold the meat to defendant company in accordance with any custom of the trade and usual course of business conducted by Perkins or others engaged in that line of business at Paragould and shown to plaintiff company.

The instruction is erroneous in that it ignores the powers and limitations placed upon Perkins by the plaintiff company under the contract.

2. Appellee was estopped. Under the contract Perkins could not pass a good title to defendant. 97 Ark. 43-9; 33 *Id.* 465; 48 *Id.* 426; 82 *Id.* 367. Any statements made by Perkins to defendant company, or any acts of Perkins with defendant company concerning his dealing could not bind appellant. All such statements and acts were *res inter alios actae* as to appellant. 97 Ark. 43-49.

3. Instruction No. 6 is indefinite and uncertain. Taking the entire record and all the evidence in the case, there is no theory upon which can be based an instruction that would authorize the jury to find for the defendant and a verdict should have been instructed for plaintiff. 222 S. W. 27-8. The former appeal settles the law of this case, and it was error to give instruction No. 6.

4. On the question of estoppel, see 36 Ark. 96; 80 *Id.* 404; 82 *Id.* 367; 97 *Id.* 43; 89 *Id.* 394; Ann. Cas. 1914 B 984.

5. On question of innocent purchaser, see 42 Ark. 373; 47 *Id.* 363; 48 *Id.* 160; 49 *Id.* 63; 54 *Id.* 305; 44 *Id.* 210; 7 Pa. Co. Ct. 637; 32 Ill. 411; 167 Ala. 109; 3 Am. Dec. 740; 80 N. C. 275; 56 Minn. 244; 53 W. Va. 415.

Huddleston, Fuhr & Futrell, for appellee.

The question is not, "What was the authority actually given to Perkins?" but is, "'What was the party dealing with Perkins justified in believing?" The authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, *upon the character bestowed rather than the instructions given.* The principal is bound to third persons, acting in ignorance of any limitations, by the apparent authority given and not by the express authority. 5 Atl. 504; 75 Ill. 426; 56 *Id.* 23; 79 Mich. 516; 44 N. W. 942. Whatever attributes properly belong to the *character bestowed* will be presumed to exist, and they can not be cut off by private instructions of which those who deal with the agent are ignorant. Among those attributes is the power to do all that is usual and necessary to accomplish the object for which the agency was created. 54 N. W. 50.

Parties dealing with an agent have a right to presume that his agency is general and not limited. 33 Me. 169; 78 *Id.* 160; 3 Atl. Rep. 185. The presumption is that one known to be an agent is acting within the limits or scope of his authority. 79 Mich. 516; 44 N. W. 942.

The customs and usages of business are silently adopted in to the contract. Story on Bailments, § 384. One who is engaged in a trade or business is bound to know its usages at the place where he acts and is presumed to have contracted with reference to them. 13 Wall. 363; 49 N. Y. 464; 21 N. E. 160; 46 N. Y. 325.

The plea of the contract means the place of its making unless its terms indicate another place of performance. 78 N. W. 562.

No negligence can be charged to appellee, and where, as between two innocent parties, the title of the one or the other must be lost the misfortune must rest upon the

one who designedly or by negligence has placed some third person in such apparent control of the title as to enable him to perpetrate a fraud upon the other, if that other be deprived of the title. 42 Ark. 473. See, also, 20 Wend. 278; 128 Ark. 600; 137 *Id.* 475; 48 *Id.* 147; 46 *Id.* 210; Story on Agency (8 ed.), § 127; 96 U. S. 84. There was no error in sending the case to the jury, and the verdict is amply supported by the evidence.

WOOD, J. The appellant, a corporation of the State of Michigan and doing business in Arkansas, entered into a contract with one Ray Perkins of Paragould, Arkansas, the material parts of which are as follows:

The appellant appointed Perkins its broker for the sale of certain of its products in Paragould, Arkansas. The appellant was to pay Perkins a commission for his services. Perkins was to keep an account of goods consigned to him by the appellant in books furnished by the latter, which were subject to recall and inspection by the appellant at all times. Perkins was to make weekly reports of the stock on hand and delivery of goods on blanks furnished by appellant. Perkins was to sell the goods on behalf of appellant and on terms prescribed by the appellant. Perkins was to bill no goods from consigned stock to himself under any circumstances. Perkins was to bill all goods on blanks furnished by the appellant and to forward a duplicate thereof to appellant on the day the goods were delivered. He was to keep the receipts for goods delivered on file subject to the order of the appellant. He was not to handle on consignment any packing house products except appellant's with appellant's consent. Perkins was to account to appellant for all weights shipped. He was to keep all goods in a suitable building and not mingle them with other merchandise and to sell and handle the same without expense to the appellant except his commission.

This action was brought by the appellant against the appellee to recover the sum of $308.10. The appellant alleged that the appellee had taken possession of 1,165

pounds of bacon extras which belonged to the appellant, and that appellee had converted the same to its own use without authority of appellant. This is the second appeal in this case. The complaint remained the same on both trials. On the first trial, the answer to the complaint set up that Perkins was in the employ of the appellant as a factor and in possession of its products with full power and authority to sell, deliver, and collect for appellant's products, either in his own name or in the name of appellant; that appellee purchased the meat in controversy from Perkins as his individual property; that he represented to the appellee that it was his property, being the accumulation of what was known as "overs," and was billed out to the appellee as the individual property of Perkins and paid for by the appellee as such; that the appellee in purchasing the meat from Perkins followed the custom and course of trade which had prevailed at Paragould for many years and was well known to the appellant; that the appellee believed that the meat was the individual property of Perkins and had no knowledge to the contrary.

The issue as thus raised on the first trial was sent to the jury, and in one of its instructions the court declared as follows: "If the plaintiff authorized and knowingly permitted its factor, Perkins, to sell overs or any other of its goods, or his own goods, on his individual account as individual owner to customers, * * * and the defendant at the time believed Perkins to be the true owner, or authorized to sell in his own name, then you will find for the defendant." In passing on this instruction, this court explained the difference between factor and broker as follows: "A factor may buy and sell in his own name, and he has the goods in his possession, while a broker as such can not ordinarily buy or sell in his own name and has no possession of the goods sold."

In passing on the facts as developed at the former trial, we said: "Perkins was not a factor or commission merchant and had no right to sell the products of the

plaintiff in his own name. Therefore, the court erred in assuming to the jury that Perkins was a factor and in telling the jury to find for the defendant if it should further find that the plaintiff authorized or knowingly permitted its factor, Perkins, to sell overs or any of its goods, or his own goods, on his individual account." For the error in giving the above instruction the court reversed the judgment and remanded the cause for a new trial.

On the second trial the appellee filed an amended answer in which it alleged that Perkins was an independant dealer in meat products in Paragould, Arkansas, and was conducting his individual business in connection with that of the plaintiff; that he combined his own and the plaintiff's business in this way to such an extent that his customers could not tell whether they were dealing with him individually or as the agent of the plaintiff; that the plaintiff knew, or should by the exercise of reasonable prudence and care have known, that Perkins was conducting his own individual business in conjunction with the plaintiff's business; that the defendant, acting in good faith and ignorant of plaintiff's alleged interest in said meat, purchased the same according to the custom of trade and paid Perkins for the same, honestly and in good faith believing Perkins to be the true owner thereof, and that plaintiff company is, therefore, estopped from now claiming payment from the defendant.

On the issue thus joined at the last trial, the president of the appellee testified substantially as follows: He had been in business at Paragould, Arkansas, for about fifteen years. The day appellee purchased the meat, Perkins came in and said he had some meat that he would sell to the appellee a quarter of a cent under the market price. Witness purchased it of him and paid for it. He had traded with Perkins and his father for fifteen years and had bought meat from them quite a number of times as their individual property. No question ever came up before, and nothing had happened to arouse his suspi-

cion that the meat was not Perkins'. Witness knew that Perkins was the broker of the appellant to sell its meat products, and that he had no right to sell appellant's goods as his own individual goods, but he did not sell the meat in controversy as the goods of appellant. Witness did not know anything about the contract between Perkins and the appellant. Witness knew that nobody had a right to sell goods belonging to some one else without authority. Witness didn't know that this meat was the property of appellant. Perkins might have bought it from some one else so far as he knew. He supposed that the goods were shipped by the appellant to Perkins. Appellant had done nothing at any time or said anything that would lead witness to believe that the goods were purchased. He trusted Perkins' word that the goods were his. The products that the appellee bought from Perkins were paid for for sometimes in cash and sometimes by check. The checks were made payable sometimes to Perkins and sometimes to the appellant. Witness never heard any kick on this. Witness bought the goods from Perkins and not from the Hammond Company. When he bought goods from Perkins that were billed by the Hammond Company, he paid the Hammond Company for them. The only time he gave Perkins checks in his own name was when he owned the stuff himself. Witness didn't know whether the appellant had any knowledge or information of the individual transactions he had with Perkins or not.

The secretary of the appellee testified that he had been in charge of the office and book affairs of the appellee for about twenty years. During this time appellee had been doing business with Ray Perkins and his father. Witness knew nothing about the contract between appellant and Perkins—made no inquiry about it. Witness knew that the appellee bought the meat in question from Ray Perkins individually and paid for it. Witness had nothing to put him on inquiry that the meat did not belong to Perkins. He would not have bought it if he had known it was Hammond's. Witness knew that Per-

kins had no right to sell Hammond Company meat as his own and in his own name. The accounts that the appellee paid Perkins in his own name were for goods that Perkins claimed were his own and sold as his own. Witness didn't remember how many companies Perkins might have represented. No question ever came up about the purchase of meat. He did not know whether under the contract Perkins had the right to sell the meat in his own name—never saw the contract. Perkins said he was selling his own meat.

Other witnesses testified substantially to the effect that they had bought packing house products from Perkins for several years. One witness stated that he had bought meat from Perkins in the name of the Hammond Company. Sometimes Perkins would bill it out to witness in his individual name in average amounts from $75 to $700. Witness had transactions directly with the Hammond Company. They would often send him a statement for comparison. Perkins always protected witness against all advances. Witness would make remittances to Perkins. All checks for individual purchases would be made direct to him.

Another witness stated that he had bought quite a large quantity from Perkins—had had transactions for the Bertig Brothers with Perkins in which Perkins sold Bertig Brothers meat as his individual property. It did not occur often, and no question was raised about it.

Another witness testified that for thirteen years he had bought stuff from Perkins. He would mail checks to both Perkins and the appellant. No question was ever raised. Toward the latter part of his business witness thought Perkins was selling meat on a commission, but never gave it any thought. Witness had bought meat from Perkins as his own product and would usually pay Perkins individually when he purchased it from him that way, and there was never any complaint on the part of the appellant. Witness did not know whether they ever knew about it or not.

Another witness stated that for fifteen years he had bought meat from Perkins. He did not know whether he traded with them as individuals or as the agents of the Hammond Company. He would buy stuff from them, and they would send around and collect for it, and he would make the checks payable to Perkins. Witness "thought Ray Perkins was the whole cheese—didn't know any difference."

Ray Perkins testified for the appellee to the effect that he dealt in meats and lards on his own account; that he sold in his own name to a large extent to appellee and other merchants who handled the goods sold by him. These merchants were his customers in buying his individual goods and also the Hammond goods. He would sell them Hammond goods as Hammond's agent and sometimes as his individual goods and collect for them individually. Customers paid sometimes in checks to the Hammond Company and sometimes to witness individually. Witness would get the money and account to the Hammond Company for their part of it and keep his part. There was never any objection by the appellant to this method of conducting the business. Question never arose. Goods billed out to purchasers along the railroad would be billed in the Hammond Company name when that company sold the goods. If Perkins sold the goods, it would be billed out in Perkins' name. Perkins transacted considerable business with the defendant company; sold them goods as his individual property. Witness never had any understanding with the Hammond Company about overs—no written contract. He was in Chicago talking to the head of the concern, and the subject of shrinkage came up, and the manager told witness that he would be satisfied to receive the weights they shipped Perkins, and in any case where it would happen to be one-half of one per cent. less than they shipped Perkins it would be all right, and he said, "If anything else occurs, you know how to take care of it, I guess." Witness assumed that he meant if the meat ran over

witness was supposed to take it, and he did. Witness would accumulate stock of his own in this way with "overs." When witness considered the market right, he would instruct his employee to weigh up one or two thousand pounds of meat and put it over on witness' side of the warehouse and go to his book and charge it to Bertig Brothers at the best market price on that day and pay the money on that invoice and remit it to Chicago, and report the sale as having been made to Bertig Brothers. Witness transacted the business in that way because appellant company would not allow witness to bill anything to himself. The bills that were billed in that way were never presented to Bertig Brothers—were not intended to be. Witness paid the company the market price for the stuff he got.

On cross-examination witness stated, among other things, that the contract under which he was employed by the appellant reflected his authority, and the same had not been changed. Only the manager of plaintiff said "occasionally there are 'overs,' and if there are 'overs' you know what to do with them," and witness took it for granted that witness might appropriate the "overs" to his own use. The meat that was sold to the defendant belonged to the Hammond Company. The defendant wanted bacon extras. Witness didn't have it, but did have dry salt extras, and he told his employee to take the dry salt extras out of his pile and take and put them in place of the bacon extras and take the bacon extras and deliver them to the defendant company; that was the only claim witness had to the meat sold the defendant. The Hammond Company was never advised about the transaction and was never paid for it. The meat was delivered to the defendant in the original packages as received from the Hammond Company. Witness was a merchandise broker and a manufacturer's agent. He handled meat and lard for the appellant and also bought from the Hammond Company and sold it on his own hook. Witness also handled oil and gasoline and sold

it as the agent of the company who owned it. Witness had no authority to buy from the Hammond Company in his own name. Appellant had no information, so far as witness knew, that witness was handling appellant's goods in his own name, or that he was handling the goods of any one else in his own name. When appellant's auditors would come to check up witness, whatever witness owned himself he would put out to one side of the house out of the way and take some lard and pack it around in various places, and hauled some to the oil house so that appellant's auditor couldn't discover it.

Another witness, an agent in the employ of Perkins since July 6, 1906, testified that any time the auditor came to audit the books and discovered any extra stock he would be told that that was sold and didn't belong to the stock. After the contract between Perkins and the appellant was executed on July 10, 1917, up to May 7, 1918, if Perkins was engaged in any other business of any kind except representing the plaintiff and an oil company, it was so slight that witness could not remember it. Witness sometimes made collections for Perkins including oil and other things. If the company had any knowledge of any of the transactions, witness didn't know it. These transactions detailed by the witness did not appear on the record. The witness further testified, "Mr. Taylor told us to sell one kind of meat and bill it out as another kind. It would be sold as the company's meat."

Witness Taylor testified that he had been working for the appellant company for about fifteen years. He visited Paragould at irregular intervals of about six weeks; had appellant's business at Paragould under his immediate control as inspector. He did not discover that Perkins was buying goods on his own account or selling them. During all the time he never found any meat or products in Perkins' house that Perkins claimed as his own. He had no information that Perkins was selling appellant's goods in appellant's name and collecting for

them in his own name. He had no information that Perkins was billing out goods and not delivering them. The company had no information of any of these things, so far as witness knew. Witness was familiar with Perkins' books, and in examining the books and the business nothing ever occurred, nor did witness ever discover anything, irregular. Witness never made a complete audit of Perkins' books. If there were any discrepancies, he checked them up.

The court gave instructions correctly defining the issues and interpreting the contract between the appellant and Perkins, and told the jury, among other things, that the undisputed evidence showed that the title to the meat in question was in the appellant and that the possession and sale of it by Perkins as his own would not give the appellee good title to it. The court also told the jury that if the appellee knew that Perkins was the agent or broker of the appellant when it bought the meat from him he was acting as such in the sale of the meat, they should find for the appellant. The court further instructed the jury as follows:

"But, if you find from the evidence in the case that the plaintiff by its manner and course of conduct and dealings with its agent, Perkins, and through him with the public; and plaintiff by its own voluntary acts or consent gave to, or knowingly permitted, said Perkins to sell its goods as his own; and, if you further find from the evidence that the said Perkins sold the meat in question to the defendant company in accordance with the custom of the trade and usual course of business as conducted by Perkins, or others engaged in that line of business at Paragould, and known to plaintiff company; and if you further find from the evidence that the defendant company, acting in good faith, and in ignorance of the fact that plaintiff owned the meat, and in the exercise of such care as an ordinarily prudent person would use under like circumstances, bought the meat in question, believing it to be the property of said Perkins, then you

will find for the defendant; but, unless you do so find, then you will find for the plaintiff."

The appellant duly excepted to the ruling of the court in giving instruction No. 6. The verdict and judgment were in favor of the appellee. The appellant seeks to reverse the judgment, and concedes that the only question is as to whether or not the court erred in giving instruction No. 6.

On the first trial the issue was submitted on the theory that the undisputed evidence showed that Perkins was the factor of the appellant. This court held on the former trial that the trial court erred in instructing the jury that Perkins was the factor of the appellant. On the last trial, as shown by the present record, the court avoided that error, and the cause was submitted upon the theory that, although Perkins was the broker or agent of the appellant for the purpose of selling its meat products at Paragould, yet, if the appellant by its conduct knowingly permitted Perkins to sell its goods claiming them as his own in pursuance of a custom or course of dealing which he had established at Paragould of which appellant had knowledge, and the appellee, in good faith and in the exercise of ordinary care, purchased the meat from Perkins believeing it to be his property, the verdict should be in favor of the appellee.

The testimony speaks for itself, and we are convinced that it is sufficient to have warranted the court in presenting the cause to the jury upon the theory which the court did in its instruction No. 6. The testimony is voluminous, and it could serve no useful purpose to discuss it in detail. After a careful consideration of it, we have reached the conclusion that it can not be said as a matter of law that there was no testimony to warrant the instruction and to justify the verdict. The case on the facts as developed at the last trial is ruled by the principle announced by this court in *Rogers* v. *Scott,* 128 Ark. 600-603, as follows: "The general rule is that no man

can get a title to personal property from a person who himself has no title to it. There are, however, certain exceptions to the general rule. One of these exceptions is that a *bona fide* purchaser will be protected where the owner has conferred upon the seller the apparent right of property as owner, or for disposal as his agent." See, also, *Andrews* v. *Cox,* 42 Ark. 473-78; *Meyer, Bannerman & Co.* v. *Stone & Co.,* 46 Ark. 210-214; *Jetton* v. *Tobey,* 62 Ark. 84; *Jarvis* v. *Pague,* 137 Ark. 475-484.

The instruction of the court was in conformity with the doctrine announced in the above cases, and there was testimony to warrant the court in giving it.

The judgment is therefore affirmed.

MEYER v. BOARD OF IMPROVEMENT OF PAVING DISTRICT No. 3.

Opinion delivered May 23, 1921.

1. MUNICIPAL CORPORATIONS—ATTACK ON IMPROVEMENT ORDINANCES—LIMITATION.—After expiration of the 30-day period for attacking improvement ordinances, provided by Crawford & Moses' Dig., § 5668, third persons who are not parties to actions previously instituted for the purpose of attacking an assessment can not become party plaintiffs by adopting the pleadings of the original plaintiffs.
2. MUNICIPAL CORPORATIONS—ESTOPPEL TO ATTACK VALIDITY OF IMPROVEMENT ORDINANCES.—Persons who signed a petition for creation of a municipal improvement district are not, by signing such petition, estopped to question the validity of the ordinances creating the district or fixing an assessment on the ground that the law was not followed, since the petitions conferred no authority beyond the statute.
3. MUNICIPAL CORPORATIONS—ESTOPPEL OF PROPERTY OWNERS.—Where property owners know that the commissioners of an improvement district are exceeding their authority, they may by some affirmative act estop themselves thereafter from questioning the legality of the commissioners' action.
4. MUNICIPAL CORPORATION—BOUNDARIES OF IMPROVEMENT DISTRICT.—The boundaries of an improvement district are not indefinite because described as running along a certain street to the place of beginning, though another street intervenes between such street

and the place of beginning, where the line between the end of the designated street and the place of beginning is a straight one, as course and distance yield to fixed monuments in land surveying.

5. MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—EXCESSIVE ASSESSMENT.—Where an assessment in an improvement district exceeded the 20 per cent. limit fixed by the statute (Crawford & Moses' Digest, § 5666), the assessment is void, though the assessment is based on an estimate of costs which includes an item for unforeseen expenses, which might not be needed.

6. MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ASSESSMENT.—In determining the benefits from street improvements, the assessors should take into consideration the peculiar situation of each lot, including the fact that some of the lots had access to pavements already constructed.

7. MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ALLOWANCE FOR IMPROVEMENTS.—Under Crawford & Moses' Dig., § 5672, where property owners had curbed and guttered their property, and such improvement was of value to an improvement district formed to improve the street, the commissioners of the district should allow the value of such improvement as a set-off against their assessments.

8. MUNICIPAL CORPORATIONS—ASSESSMENT OF BENEFITS.—Property owners in an improvement district can not object that the assessed benefits equal the cost of the improvement.

9. MUNICIPAL CORPORATIONS—SEPARATE IMPROVEMENT DISTRICTS.—Where separate improvement districts for paving and guttering streets were attacked on the ground that the work was in reality a single improvement, and that the estimated cost of the combined improvements exceeded the statutory 20 per cent. limit, the *prima facie* presumption that the improvements are separate, arising out of the petition of the property owners and the ordinances of the city council, is not overcome by proof that such improvements are ordinarily constructed as a single improvement; it being necessary to show that it would be impracticable to construct one without constructing the other.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; reversed.

Joseph R. Brown, for appellants.

1. The petitioners were not estopped to attack the assessment. 2 Page & Jones on Taxation, p. 1696; 35 S. W. 726; 115 Ark. 88; 70 *Id.* 451; 117 *Id.* 98. The court erred in ruling that estoppel precluded signers of either petition in the creation of the district from attacking the

validity of either petition. A petitioner must he held to intend that the improvement will be constructed and assessments levied in a manner provided by law.

The court's attitude in suggesting a motion to make more definite and certain was well taken. If defendants were at a loss to know the names of parties plaintiff, the motion referred to would have disclosed the information. Authorities need not be cited as it is well settled.

2. It was error to exclude the testimony of plaintiff's expert witness, Foos, as a question of fact was raised as to whether or not the two districts were created for the purpose of making one improvement and therefore illegal because the cost exceeded 20 per cent. of the value of the property. This was settled in 75 N. Y. 354, which see. Also 138 N. W. 853. 135 Ark. 315 has no application.

3. The court erred in denying plaintiff's request for a perpetual injunction on the ground that it was admitted by defendants and proved that the cost of the paving alone within the district was estimated at $84,000 which was more than 20 per cent. of the value of the property in the district as disclosed by the last county assessment. Kirby's Digest, § 5683.

4. The court erred in precluding plaintiffs from introducing testimony on the inequality, unjustness, unequitableness and discriminatory nature of the assessment, and that they were improperly levied. The imputation of fraud on part of the assessors was not requisite; the issue was raised whether a constitutional right had been infringed, and plaintiffs were entitled to be heard on the question.

Starbird & Starbird, for appellants.

1. The assessments are illegal and void. The place of commencement is indefinite and uncertain, and the cost is excessive. Kirby's Digest, § 5683. The cost exceeds 20 per cent. of the value of property in the district. 115 Ark. 94; 86 *Id.* 21; 106 *Id.* 46.

An assessment which does not take into consideration the fact that the paving needs of property is furnished or partly furnished by former pavements built at the expense of the property by former improvement districts is not valid. The benefits accruing to the property in the old district from the improvement should be considered in determining the benefits to accrue from the new improvement. 109 Ark. 90-7; 97 *Id.* 342-3. The assessors refused to consider the former pavement, and the assessment is invalid and should be set aside.

2. The testimony of the assessor was competent, and it was error to exclude it. 86 Ark. 21.

3. The doctrine of estoppel does not bar appellants. They are not estopped. It was the duty of those who were authorized to exercise powers which might find the property of appellants to see that the provisions of the statutes under which they were acting were complied with. 59 Ark. 344-361. The boundaries of the districts are uncertain, and the commissioners have assessed more than 20 per cent. of the value of the property in the district, and the assessment of benefits is invalid.

E. L. Matlock, for appellees.

1. There was no error in refusing to admit the evidence offered or tendered. C. & M. Digest, § 5672. The assessor's evidence as tendered was not sufficient, if admissible at all. The assessments were not excessive, and the evidence fails to show that they were not fair, equal and just. 80 Ark. 462; 81 *Id.* 80; 84 *Id.* 527; 93 *Id.* 563; 98 *Id.* 543; 99 *Id.* 508.

4. The tender of evidence was objectionable for two reasons. (1) It was not shown by the witness Foos that he had ever seen the plans of two improvement districts or the estimates of cost of same, and he was not qualified as an expert. 132 Ark. 511. (2) Appellants proposed to prove merely a conclusion of law.

5. There was another failure of proof on part of appellants to sustain their allegations in the complaints. It was not error to admit the new parties as plaintiffs.

C. & M. Digest, § 5668. This statute has been sustained by a long line of our own decisions, too numerous to cite. A legal proceeding is not begun when a party empowers an attorney to appear and act for him, but when the attorney in pursuance of authority does appear and act. 45 Atl. Rep. 735. It was error to permit new parties plaintiff to be made.

6. The proof utterly fails to overcome the presumption that the improvement board will do its duty and obey the statute and hold the cost within the statutory limit. Appellants have utterly failed to prove their case.

7. Appellants are estopped by signing the petitions. 115 Ark. 88.

SMITH, J. On September 9, 1919, an ordinance was passed by the council of the city of Van Buren creating Paving District No. 3 for the purpose of paving certain streets therein designated. On the same day the council passed an ordinance creating Curb and Gutter District No. 1, for the purpose of curbing, guttering, and draining the streets which were to be paved by Paving District No. 3.

Within the time limited by law J. L. Rea, J. H. Butler and H. F. Meyer, filed suits attacking the two districts on numerous grounds. About the same time M. L. Garrett and W. J. Martin filed suits for the same purpose. All these plaintiffs had signed the petitions for both improvements. The causes were consolidated and tried together, and from a decree dismissing these suits for want of equity is this appeal.

The districts are attacked on the following grounds:

(1) That the boundaries of the districts have not been designated with the certainty required by statute.

(2) That the commissioners of the district and the city council have assessed and levied more than twenty per centum of the value of the real estate according to the last county assessment.

(3) That the assessors specifically refused to consider the present condition of appellants' lands in the

districts by reason of their paving needs being wholly or partly supplied by public and private pavements and improvements already built.

(4) The fact that the assessments are an expense spread upon the districts, and are not special benefits enjoyed by appellants' lands fairly assessed against them.

(5) That the improvements proposed as separate improvements constitute in fact a single improvement, the cost of which very largely exceeds twenty per cent. of the value of the real estate lying in the district.

In answer to these objections, it is first contended on behalf of the districts that the plaintiffs are estopped to raise these questions, for the reason that they had signed the petitions for the creation of the districts. The court below appeared to have had this view, and permitted other property owners who had not signed the petitions to become parties plaintiff to the suits, and the trial proceeded in the name of these new parties to a final decree.

We think the court should not have permitted the new parties to be made plaintiffs. Several months had then expired since the publication of the notices of the ordinances creating the districts; and the effect of the court's action was to permit these persons, by adopting the pleadings of the persons whose names are set out above, to prosecute litigation which the statute required them to begin within thirty days.

Section 5668, C. & M. Digest, prescribes the period of limitation for the institution of suits to test the validity of these ordinances, and is as follows:

"Section 5668. Within thirty days after the passage of the ordinance mentioned above, the recorder or city clerk shall publish a copy of it in some newspaper published in such town or city for one time. And all persons who shall fail to begin legal proceedings within thirty days after such publication for the purpose of correcting or invalidating such assessment shall be forever barred and precluded."

We think, however, the court was in error in dismissing the plaintiffs' complaint because they had signed the petitions for the districts. The petitioners, in signing the petitions, consented only that the law be followed, and the petitions themselves conferred no authority beyond the statute. *Rayder* v. *Warrick,* 133 Ark. 491; *Nunes* v. *Coyle,* 148 Ark. 365.

Of course, where property owners know that the commissioners have exceeded their authority, they may do some affirmative act which will estop them from thereafter questioning the legality of the commissioners' action, as was done in the case of *Harnwell* v. *White,* 115 Ark. 88. But these plaintiffs took no such action. They merely petitioned in conformity with the statute for the creation of the districts.

We think the boundaries of the districts were sufficiently described. The objection to the boundary is that, after reaching Bois D'Arc Street, the boundary is described as thence northwesterly along Bois D'Arc Street to the place of beginning. Bois D'Arc Street does not extend to the place of beginning. Second Street intervenes between the end of Bois D'Arc Street and Main Street, the place of beginning, and the distance is three blocks. But Second Street is an extension of Bois D'Arc Street. A line to the point of beginning from Bois D'Arc Street is a straight one, and this part of the boundary line—a line between two fixed points—is, therefore, definite and certain, as both course and distance yield to fixed monuments in land surveying. *Johnson* v. *Hamlen, post* p. 634; *Doe* v. *Porter,* 3 Ark. 18; *Harrell* v. *Hill,* 19 Ark. 102; *Brown* v. *Hardin,* 21 Ark. 324; *Chapman & Dewey Lbr. Co.* v. *Levee Dist.,* 100 Ark. 94; *Scott* v. *Dunkel Box & Lbr. Co.,* 106 Ark. 83; *Paschal* v. *Swepston,* 120 Ark. 230.

We think the second objection is well taken, in so far as it applies to Paving District No. 3. The valuation of the real estate in the district as shown by the last county assessment was $418,420. The twenty per cent. limita-

tion fixed by statute would limit the cost of any improvement in that district to $83,684. The estimated cost of the paving is, we think, $84,000, which is, of course, in excess of the twenty per cent.

On behalf of the district it is insisted that the estimated cost of the improvement is only $78,000. The controversy about the estimated cost arises over an item of $6,764 which is designated as "unforeseen" in the report of the board of commissioners of Paving District No. 3 which was filed in open council meeting March 1, 1920. The court below excluded this item of $6,764 in determining the estimated cost; and that action is defended on the ground that no showing is made that its expenditure will be necessary to complete the improvement, and that the cost of the known and necessary expenditures is only $77,236. Such, however, is not the case. The expenditure of this item of $6,764 is sufficiently probable to cause its insertion in the estimate of cost contained in the commissioners' report to the council, and the ordinance creating the paving district, which was passed April 12, 1920, contains a recital that "the estimated cost of said improvement is $125,000." While this last named sum appears to include interest—a thing permitted by the statute—it appears also to include the estimated construction cost of $84.000.

We think the third objection is also well taken. It was shown that, before the organization of Paving District No. 3, lots in this district 3 belonging to certain of the plaintiffs herein, fronting on Main Street, had been paved and curbed upon that front at great expense, and that such paving and curbing was in good repair, and was in daily use, and was sufficient for the needs of all the property so fronting on Main Street. But the assessors, in making the assessment, refused to take into consideration the condition of said property by reason of said former pavement which had been built by Paving District No. 1 and that certain other plaintiffs had, privately and at their own expense, paved portions of their

own property and had built curbs and gutters; and the assessors had also refused to take that paving and curbing and guttering into account in assessing the betterments.

These improvements should have been taken into account. In assessing benefits to accrue to property by reason of an improvement, it is the duty of the assessors to take into consideration the peculiar situation of each and every piece of property to be assessed.

It is true District No. 3 did not propose to repave streets which an older district had paved; but this older district had paved streets on which lots in District No. 3 fronted, and it would have been proper, therefore, to consider that the lots which would be in two districts had access to pavements already constructed in determining what additional enhancement in value would result from the construction of other pavements. This, of course, is a question of fact, and we do not undertake to say what finding the commissioners should have made. We only hold that those conditions should have been taken into account in determining what betterment would result from the construction of the proposed improvements.

Section 5672, C. & M. Digest, applicable to this phase of the case, reads as follows: "Section 5672. If in the construction of sidewalks or making other improvements any owner of taxable property in the district shall be found to have improved his own property in such manner that his improvement may be profitably made a part of the general improvement of the kind in the district, being also as good as that required by the system determined upon by said board, the board of improvement shall appraise the value of the improvement made by the owner, and shall allow its value as a set-off against the assessments against his property. And, in case the owner who has made such improvements shall be found to have failed to come up to the required standard, the board may allow him the value of the materials thereof, so far as the same may be profitably used in

perfecting the system aforesaid, as a set-off against his property thus improved. In such cases the board shall issue to the owner a certificate showing the amount of set-off allowed, which certificate shall be received by the collector in lieu of money for the amount named therein charged against said property."

The commissioners should have taken into account the contention of the property owners in regard to their curbing and guttering. Their curbs and gutters might, or might not, have possessed value as defined in section 5672, C. & M. Digest, *supra*. But the property owners' contention in this respect should have received sufficient attention at the hands of the commissioners for them to have determined that fact. The assessment of betterments by the assessors is not influenced by the value to the district of the curbing and guttering; but, when the curbs and gutters have value to the district, that value should be ascertained by the commissioners as provided in section 5672, C. & M. Digest, and certificates issued by the commissioners showing what that value is, to the end that the certificate may be paid to "the collector in lieu of money for the amount named therein charged against said property."

We do not think the fourth objection is well taken. It does appear that the betterments assessed exactly equal the total estimated cost. No attempt was made to show that the assessment was otherwise improper than the failure of the assessors to take into account certain existing improvements, which failure we have already discussed. It is not shown that excessive betterments have been assessed. The showing is that total estimated betterments equal total estimated cost. This, of itself, is not a fatal defect. The cost of the improvement can, of course, never exceed the betterments. But where the betterments are fairly and uniformly determined, and that finding is not the result of a purpose to raise sufficient revenue to construct the improvement, whether the betterments equal the cost of the improvement or

not, there is no legal or constitutional requirement that the full betterment be assessed. No betterment can be assessed unless an honest and impartial finding is made that an enhancement of value results from the proposed improvement, and the amount of this betterment can never exceed the estimated enhancement in value resulting from the improvement. But, if, acting honestly and impartially, the assessing officers conclude the betterment will exceed cost, and they decide to proportionately reduce their estimate of betterments, so that the total betterments assessed shall not exceed the known estimate of cost, we think they have not transcended their authority, nor have they acted in contravention of the Constitution or the statutes of the State.

We think the court did not err in the ruling made excluding the testimony of a witness named Foos in regard to the identity of the improvements. In the case of *Bottrell* v. *Hollipeter,* 135 Ark. 315, we said: "The petition of the property owners for, and the ordinance pursuant thereto creating, the two districts are at least *prima facie* evidence that the petitioners and the town council considered that the improvements provided for did not constitute a 'single' improvement, as designated in the statute. The facts stated in the answer and admitted by the demurrer of appellant to be true show that they were not essentially one improvement." The witness was a contractor, and had never seen the plans for the proposed improvement. He would have testified—had he been permitted to do so—that such improvements were considered by the engineering profession as constituting a single improvement. He did not offer to testify, however, that the improvement could not be separately and successfully constructed. He would have testified that they were usually constructed together, and, therefore, regarded by the engineering profession as a single improvement. But that testimony would not have shown that they were essentially one improvement.

To overcome the *prima facie* presumption arising out of the petition of the property owners and the ordi-

nance of the council, something more is required than a mere showing that paving and curbing and guttering are ordinarily constructed as a single improvement.

The presumption would not be overcome unless there was an affirmative showing that it was not practicable to construct one without constructing the other, or the showing made that one might not be first constructed as a complete improvement and the other subsequently constructed as another separate and complete improvement.

There are cases cited in appellants' brief which hold that the question of the identity of these improvements is judicial, and not one of fact. But this court held otherwise in the case of *Bottrell* v. *Hollipeter, supra;* and we now hold that the testimony excluded by the court was not sufficient to overcome the *prima facie* presumption arising out of the enactment of the ordinances creating the districts.

Other objections to the districts are urged in the briefs; but they are questions which we think do not require discussion here. These were certain questions of fact in regard to the assessed values of property within the districts; and it does not appear that the finding of the court thereon was clearly against the preponderance of the evidence.

Decree reversed and cause remanded.

JOHNSON v. HAMLEN.

Opinion delivered May 23, 1921.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICTS—SEPARATE IMPROVEMENTS.—Where plaintiff alleged that two separate improvement districts had been created to pave certain streets, and to grade, drain, curb and gutter the same streets, the two districts having the same boundaries, it was not error to overrule a demurrer to the answer of the commissioners of the two districts alleging that the two improvements were distinct, that either improvement could be done without the other, and that the cost of neither district would exceed 20 per cent. of the assessed value of the lands in the district.

2. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICTS—BOUNDARIES. A mistake in the last call in the description of the boundaries of an improvement district, in publication of the ordinances creating the district, reading "firty-one degrees west," where it should have read "forty-one degrees west," was immaterial where the call was from one known point to another known point, and a line drawn between these points completed the boundary.

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

S. L. White, for appellants.

The two districts constitute only a single district, and the double assessment is in direct violation of the law and void. The boundaries of the two districts are coterminous and identical. 105 Ark. 65. The improvement district undertaken exceeds the 20 per cent. cost and is invalid. C. & M. Digest, § 5666; 135 Ark. 315; 115 *Id.* 95. The grading, curbing, guttering and paving are for one improvement district, and there is no authority under our law for splitting the district into two districts, and district 275 is void because there was not a real copy of the ordinance published as required by law.

Wallace Townsend, for appellees.

1. The case presented here is identical and settled by 135 Ark. 315.

2. District No. 275 is not void because of a misprint in the publication of the ordinance. 104 Ark. 298. Any mistake was cured by a perfect description in another part of the ordinance. Read as a whole, there is no reasonable doubt as to the property included in the district. The errors are merely typographical and do not confuse or mislead any one and can not be regarded as material. The publication fully complies with the object of such publication and enables property owners to ascertain what property is included in the district and is void.

SMITH, J. The complaint in this cause contained the following allegations: That appellees constituted the board of improvement for Street Improvement Districts Nos. 274 and 275 of Little Rock; and that appellants,

who were the plaintiffs below, are owners of real property within the boundaries of each of said districts. That said district No. 274 was created for the purpose of grading, draining, curbing and guttering certain streets, more particularly described in the ordinance creating same. That district No. 275 was established on the same day for the purpose of paving the same streets. That the petitions for the two districts were circulated at the same time, were signed by the same petitioners, and were a part of the same movement for the improvement. That the boundaries of the districts were identical and coterminous, and that the streets to be graded, drained, curbed and guttered in district 274 were the identical streets to be paved in district 275, and that both districts were created for but one improvement, the grading, etc., being a portion of the street and an essential part of the paving; that the paving could not be done except without the grading, draining, curbing and guttering; that the organization of the two districts for the one improvement was in violation of the law; that the cost of the improvement would be in excess of twenty per cent. of the value of the real estate within the boundaries of the district.

It was further alleged that the ordinance creating district 275, as passed by the city council, correctly described a portion of the district as "thence north forty-one degrees west fifty feet to point of beginning," but in the publication of the ordinance in the newspaper said portion of the district is erroneously described in the preamble to section 1 as "thence north north firty-one degrees west fifty feet to point of beginning," and was erroneously described in section 1 of the ordinance as "thence north forty-one degrees west fifty feet to point of beginning."

The complaint further alleged that the law required the city clerk to publish the ordinance in some newspaper within twenty days; but the notice published was no notice, as one could not ascertain the boundaries of the district on account of the error in description set out above.

The commissioners answered, and denied that the improvements contemplated were in their nature essentially a single improvement. They alleged that the streets could be graded, drained, curbed and guttered, and it would be one complete improvement. That the second district provided for the paving, which was in itself a complete improvement; and that either improvement could be done without the other, and that the cost of neither district would exceed twenty per cent. of the value of the land in the district.

A demurrer to this answer was overruled, and the plaintiffs have appealed.

On the question of the identity of the improvement, the case is controlled by the case of *Bottrell* v. *Hollipeter,* 135 Ark. 315. The question here raised was there decided, and the question arose in that case, as in this, on demurrer.

It was contended in the case of *Bottrell* v. *Hollipeter, supra,* that the opinion of this court in the case of *Board of Improvement* v. *Brun,* 105 Ark. 65, was controlling, and that therefore the separate districts petitioned for could not be organized. But the court distinguished the cases on the facts and said: "Appellant cites and relies upon the case of *Improvement District* v. *Brun, supra,* as authority for his contention, that the districts herein challenged were created to complete what was in fact but a single improvement. The case does not support appellant's contention. There was no allegation that the underground drainage was unnecessary and not incident to the work of paving. But here the allegations of fact in the answer are that 'the storm-sewers are not an essential part of the pavement but are entirely separate.' That 'the pavement could be made without the storm-sewer.' * * * That 'the curbing is no part of the paving, * * * nor is the gutter an essential part of the pavement.' These allegations were properly pleaded, and the demurrer to the answer admitted the truth of them. * * *

"The petition of the property owners for, and the ordinance pursuant thereto creating, the two districts are

at least *prima facie* evidence that the petitioners and the town council considered that the improvements provided for did not constitute a 'single' improvement, as designated in the statute. The facts stated in the answer and admitted by the demurrer of appellant to be true show that they were not essentially one improvement."

The objection to the description is not well taken. The description complained of began at a fixed known point, and was given to another known point, which was fifty feet from the point of beginning. This last call in the description—the one complained of—should have read, "Thence north forty-one degrees west fifty feet to point of beginning." Instead it read, "Thence north north firty-one degrees west fifty feet to point of beginning." This discrepancy is unimportant. As we have said, the last call was from one known point to another known point, and a line drawn between those two points completed the boundary. This last boundary line was only fifty feet in length, and any discrepancy in the notice as published as to the number of degrees west of north which this line would run in connecting the two fixed points is immaterial, as both course and distance yield to fixed monuments in land surveying. *Doe* v. *Porter,* 3 Ark. 18; *Harrell* v. *Hill,* 19 Ark. 102; *Brown* v. *Hardin,* 21 Ark. 324; *Chapman & Dewey Lbr. Co.* v. *Levee Dist.,* 100 Ark. 94; *Scott* v. *Dunkel Box & Lbr. Co.,* 106 Ark. 83; *Paschal* v. *Swepston,* 120 Ark. 230.

Decree affirmed.

GEORGE v. STATE.

Opinion delivered May 23, 1921.

1. CRIMINAL LAW—EVIDENCE—INFERENCE OF WITNESS.—Where, on a prosecution for murder alleged to have been committed on a stairway, a witness who did not see the parties at the time and had no personal knowledge of their relative positions, was asked as to what the appearance of a freshly scraped place on the third step indicated, and the court properly sustained an objection, and confined his statement to what he saw; the inferences therefrom being for the jury.

2. HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE.—Where in a murder trial the testimony warranted a finding that defendant was the aggressor, an instruction that if he was the aggressor he could not plead self-defense was not objectionable as being abstract, nor for failing to contain the qualification "unless he in good faith withdrew from the conflict as far as he could, and did all in his power consistent with his safety to avoid the danger and avert the necessity of killing the deceased;" no objection being taken to such failure, and the qualification being contained in other instructions.

3. CRIMINAL LAW—INSTRUCTIONS.—Since no instruction can declare the whole law in a murder case, defendant was not prejudiced by the action of the court in dealing with separate phases of the case in separate instructions.

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

J. N. Rachels and *G. G. McKay,* for appellant.

The court erred in refusing to give the instructions asked by defendant. They correctly state the law of this case, the law is well settled and no citations are necessary.

J. S. Utley, Attorney General, and *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. No proper objections were made nor exceptions saved to the instructions.

2. The error of excluding a statement of a witness will not be considered on appeal if appellant did not offer to show what the statement was. 88 Ark. 562; 87 *Id.* 123; 133 *Id.* 599; 93 *Id.* 410; 215 S. W. 723.

3. It is inadmissible for a defendant to prove a conversation between himself and one of his witnesses. 72 Ark. 409; 105 *Id.* 697; 125 *Id.* 189. Appellant made no offer to show what the statement or answer was.

SMITH, J. Appellant was convicted of murder in the second degree for killing Bliss Chatman. He admits the testimony is legally sufficient to support the verdict, but insists that error was committed in excluding testimony, and in giving and in refusing instructions.

According to appellant, he and deceased were good friends prior to the time of the killing, and spent much of their time together. Appellant testified that some money and a razor and some other personal effects were stolen from a dresser in his room, and he had reason to suspect the deceased had taken them. He further testified that Chatman had made an insulting proposition to his wife; but that fact had not been communicated to him by her at the time of the killing. He went to see Chatman about the lost articles, and upon meeting him inquired, "Bliss, what do you mean—" but the question was not completed, as deceased immediately assaulted him. It is the theory of the defense that Chatman supposed appellant was inquiring about the insult to his wife, and, believing he was about to be assaulted—if not killed—he made such a vigorous assault on appellant as that appellant was compelled to shoot in his necessary self-defense, when, in fact, appellant had no purpose of provoking a difficulty, and intended by his question only to inquire about the lost articles.

The testimony on the part of the State is to the effect that appellant armed himself and went in search of Chatman, and assaulted him as soon as he found him, and killed him by shooting him.

The men met on a stairway, and a witness, Foster, was asked about a freshly-scraped place on the third step from the bottom. Foster was asked what the appearance of the place indicated, and the court sustained an objection to that question, and in doing so said: "Let the witness state what he saw." The court was correct in this ruling. The witness did not see the parties at the time of the difficulty, and had no personal knowledge of their relative positions on the stairway, and his testimony was properly confined to a statement of what he saw. The inferences deducible from the appearance of the scraped place on the step were for the jury—and not for the witness—to make.

Over appellant's objection the court gave the following instruction: "You are further instructed that,

if you find from the evidence in this case that the defendant, Lee George, was the aggressor in the difficulty, or that he mutually engaged in the difficulty, he can not plead self-defense in justification of his act in shooting and killing the deceased, Bliss Chatman." This was an oral instruction. In addition, there were written instructions numbered 1 and 2, which dealt with the same phase of the case. These instructions told the jury also that, if appellant was the aggressor, he would have had no right to kill the deceased; but the written instructions contained this qualification: "Unless he in good faith withdrew from the conflict as far as he could, and did all in his power consistent with his safety to avoid the danger and avert the necessity of killing the deceased." The court would, no doubt, have qualified the oral instruction to conform to the written instructions, had that point been made.

But the absence of this qualification from the oral instruction does not appear to have been the ground of the objection to it. The objection is that the instructions on that phase of the case were abstract, in that there was no testimony that appellant was the aggressor. Counsel is mistaken in this contention. According to appellant's own testimony, he was hemmed in by deceased on the stairway and viciously assaulted; but the jury did not accept that version of the difficulty as the truth. As has been said, the testimony fully warranted a finding that appellant was the aggressor throughout.

Over appellant's objection the court gave an instruction numbered 3, which reads as follows: "No. 3. You are instructed that the law has such regard for the sanctity of human life that one person may not kill another, even in his necessary self-defense, except as a last resort, and when he has done all in his power consistent with his safety to avoid the danger and avert the necessity of the killing; so, in this case, if you find from the evidence and circumstances, beyond a reasonable doubt, that the defendant could have reasonably avoided the danger to

himself and averted the necessity of killing the deceased, it was his duty to have done so."

The objection to this instruction is that it leaves out of account the appearance of danger as appellant saw it. The instruction is a correct declaration of the phase of the case with which it dealt, and another instruction dealt with the appearance of danger as the appellant saw it and correctly declared the law in that respect.

No instruction could declare the whole law in the case, and appellant was not prejudiced by the action of the court in dealing with different phases of the case in separate instructions, inasmuch as each instruction correctly declared the law applicable to the phase of the case with which it dealt.

Appellant asked a number of instructions which were refused. But these instructions, in so far as they correctly declared the law applicable to the issues raised, were covered by other instructions which were given.

No error appearing, the judgment is affirmed.

PORTER v. VAIL.

Opinion delivered May 23, 1921.

LANDLORD AND TENANT—CONSTRUCTION OF LEASE.—A lease of land "to be farmed in corn, peanuts and all grain and crops," which obligated the tenant "to furnish two-thirds of all seed planted, also plant, cultivate, harvest and deliver in barn or wareroom one-third all crops grown on said land," *held* not to include a volunteer hay crop, but only cultivated peanut, corn and other grain crops.

Appeal from Woodruff Circuit Court, Southern District; *J. M. Jackson,* Judge; reversed.

Jonas F. Dyson, for appellant.

The court erred in directing a verdict for appellee. Under the undisputed testimony, appellant was entitled to an instructed verdict. Appellee was not entitled to the possession of the premises because he had not in any

way complied with his contract. 36 Ark. 518; 104 *Id.* 322; 41 *Id.* 535.

Appellee in his contract agreed to move out of the house on ten days' notice, which was given, and appellant was entitled to possession. 100 Ark. 629; 102 *Id.* 388. Under the law and evidence, appellant was entitled to possession and the relationship of landlord and tenant existed. 130 Ark. 431; Kirby's Digest, § 5028.

Ross Mathis, for appellee.

1. Both parties asked a peremptory instruction and this was an agreement that the issue should be decided by the court. 100 Ark. 71; 105 *Id.* 25; 118 *Id.* 134.

The court's instructions as to the measure of damages was correct, and appellant raises no issue as to that part of the instruction. Under the evidence the jury would have been warranted in returning a verdict for a much larger amount.

2. The contract contained no forfeiture clause; no rent was shown to be due and unpaid and there was no abandonment.

The absence of a forfeiture clause in a lease will prevent a landlord from terminating a lease, and even if there is a forfeiture clause for breach of covenant, it is strongly construed against the lessor. Forfeitures are not favored by the courts. 24 Cyc. 1347, 1360-1.

3. The title to the hay was in appellee, and the jury would have been warranted in awarding him a larger sum. The title to grass is in the tenant at will. 72 Ark. 302.

HUMPHREYS, J. The appeals are briefed separately, but the issue involved on each appeal is between the same parties and dependent upon a construction of the same contract, so one opinion will suffice in the two cases.

No. 6721 is an action of unlawful detainer for the possession of a farm, and No. 6722 a suit in replevin for 266 bales of hay cut and removed from the farm.

The issue joined in the first action is whether appellee was unlawfully evicted from the premises, and, if so,

the extent of the damages sustained by him on account of the loss of the volunteer hay crop upon the farm, resulting from the eviction.

The issue joined in the second action involved the title to 266 bales of hay which appellee cut and removed from the premises to a barn in the nearby town of Hunter before the eviction.

The causes were submitted upon the pleadings and evidence, at the conclusion of which both appellant and appellee asked for a peremptory instruction in the first case, which resulted in a directed verdict and judgment in that case for appellee for damages to the amount of $500; and, in the second case, a directed verdict on the court's own motion in favor of appellee for the hay, or its value, $266.

From the judgment in each case, an appeal has been duly prosecuted to this court.

The evidence in the two cases is, in substance, as follows: In January, 1919, appellant verbally leased appellee the farm in question for the year, to raise rice, cotton, corn and peanuts, for a stipulated rental of one-third of the crops. Appellee failed to comply with the verbal contract, and, on the first day of June, 1920, the following written contract was entered into between the parties, towit:

"Contract by M. A. Porter, first party, and F. M. Vail, second party.

"I, M. A. Porter, party of the first part, agree to lease all farming land in section 20, township 5 north, range 1 west, not in cultivation in rice in this year, 1919, A. D., to be farmed in corn, peanuts and all grain and crops, and party of the first part further agrees to furnish one-third of all seed planted on said land.

"Party of the second part, F. M. Vail, hereby agrees to furnish two-thirds of all seed planted, also plant, cultivate, harvest and deliver in barn or wareroom one-third all crops grown on said land.

"Party of the second part, F. M. Vail, also agrees to vacate residence on said land at any time with ten days' notice from party of the first part, M. A. Porter.

"M. A. Porter.
"Frank M. Vail.

"Hunter, Arkansas, June 1, 1919."

Appellee did not plant or cultivate the land leased. He remained in possession, however, and in August harvested about twenty-five acres of wild grass which grew on the land that should have been cultivated. He baled and removed 266 bales of the hay to a barn in Hunter, and, according to the evidence of appellee, hauled one load of the third left in shocks upon the ground to the baler, when he was told by appellant not to touch any more of the hay. Appellee left the rest of the hay upon the ground, and, in obedience to the written notice from appellant and the writ issued in the unlawful detainer action, moved off of the premises. There was an estimate of 1,500 bales of hay, cut and standing, left upon the ground. It would have cost $500 to harvest it, and its value in the bale would have been about $1,500.

The sole question presented by this appeal is whether the court erred in construing the contract to include the volunteer hay crop. Appellee's contention is that the contract had relation to all crops grown on the leased land, whether volunteer or cultivated crops. We think the contract entirely unambiguous, and that such crops as were to be harvested and divided in the proportion of two-thirds to one-third were crops to be planted and cultivated by appellee. It was specified in the contract that the landlord should furnish one-third and the tenant two-thirds of the seed to be planted, and the only kinds of crops mentioned were peanut, corn and other grain crops. Reading the contract as an entirety, it is quite apparent that the parties had in contemplation crops to be planted and cultivated, not volunteer crops. The contract did not embrace uncultivated grass grown on lands which should have been cultivated. Under the undisputed facts,

the court should have directed a verdict in each case for appellant.

For the error indicated, the judgment in each case is reversed and remanded with directions to enter a judgment in each case for appellant.

APPENDIX

I.

IN MEMORIAM

GEORGE W. MURPHY

RESOLUTIONS OF THE LITTLE ROCK BAR ASSOCIATION ON THE DEATH OF COLONEL GEORGE W. MURPHY.

Colonel George W. Murphy was born near Huntington, Carroll County, Tennessee, on January 8th, 1841, and lived there until May 3rd, 1861, when he enlisted in the Confederate Army, in the 22nd Tennessee Regiment. He was wounded at the battle of Shiloh, and again more severely at the battle of Murfreesboro. When sufficiently recovered from his wounds, he enlisted in Forrest's Cavalry, where he served until the battle of Harrisburg, when he received three wounds so severe as to incapacitate him for future active service. He nevertheless continued with the army until the surrender.

While convalescing from his wounds, he began the study of law, and at the close of the war he came to Hamburg, in this State, where he continued his studies with W. D. Moore, and where he began the practice.

In 1877, he removed to Hot Springs, and formed a partnership with the late Judge James B. Wood, and afterwards with Colonel E. W. Rector.

In 1890, he came to Little Rock, where he continued to reside up to the time of his death on October 11th, 1920. He at first formed a partnership with the late Judge T. B. Martin, which continued until Judge Martin was appointed Chancellor. He was afterward associated in partnership with Mr. T. M. MeHaffy, and also with Mr. Charles T. Coleman and Mr. W. M. Lewis. At the time of his death he was in partnership with Mr. E. L. McHaney and Mr. M. E. Dunaway. He was Attorney-General of the State from 1901 to 1905.

On December 24, 1866, he married Miss Sallie Harris Halton, who died June 27, 1901.

Colonel Murphy is survived by five daughters.

The talents of Colonel Murphy as an advocate were so extraordinary that few realized the depth and extent of his legal attainments. He was really equally equipped in all usual branches of the

law, and, if he had devoted himself principally to constitutional questions or chancery practice, he would have attained a distinction as great as that which he won in trials before juries. His truly amazing eloquence, however, and his tact in handling witnesses were so conspicuous that, almost against his will, he was dragged chiefly into the defense of persons charged with crime and into the prosecution of damage suits. No lawyer of such moving eloquence has ever practiced at our bar. Others have had a more stately diction; but in his power to wring the hearts of his listeners, to make them weep with sympathy or burn with indignation, he has had no rival. He began his addresses in a quiet conversational tone; but as he advanced he became inspired, carried away by a passion of pity or indignation that swept his hearers off their feet.

His appeal to the feelings of the jury was virtually irresistible, and scarcely a person defended by him was ever convicted. He practiced criminal law on a plane of the highest ethics, and his success was due only to his extraordinary skill in examining witnesses, to the masterly manner in which he summed up the evidence, and to his impassioned appeals to the sympathies of the jury.

Colonel Murphy never wrote his speeches. Great as was their eloquence, it was purely extemporaneous, and is preserved only in the memory of men. We can find only one such utterance of his that can be reproduced at this time; and it is so precious a specimen of his exalted diction when deeply moved, that we take this occasion of recording it permanently:

"Internal discord, discrepancy and doubt belong to error and falsehood alone. Truth, whose domain is co-extensive with immensity, whose existence is measured only by eternity, hath neither time nor place for discord or discrepancy. Wherever she speaks, with Truth all is harmony, whether it is found in the movement of earth's most insignificant insect, or in the widest revolution of heaven's grandest planet. Whether it comes from the lowest murmur of the rippling rill or echoes from the highest note on creation's universal harp; whether it comes from the low-speaking, candid witness upon the stand, or echoes from the voices of the white-robed angels as they move upon the sea of glass,—with Truth, all is harmony. Clothe not Truth in the foul garniture of falsehood, ascribe to her no such base attribute. That would be attributing the works of the Holy Spirit to the arch fiend of evil. It can never, never, never justify the taking of life or liberty under the guise of administering the law. It brings no balm to the troubled heart in this world or the world to come. The arrow of Truth, whether set in motion by the string of the boy's bow, the lisp of the helpless child, or the unaided will of Him who needs no aid, will go on and travel on through time, through space, through all immensity, prostrating all wrong and strik-

ing down all opposition until at last that Voice which spake all movements, all things, all worlds, into existence, shall bid it to be still!"

Colonel Murphy possessed not only great talents, but a heart of gold. It is impossible to imagine a more devoted husband and father, or a more faithful friend. He was extremely kind and sympathetic, and the cases in which he made his most wonderful speeches were often those in which he received no reward. If he felt that a party was being wronged, he would throw himself into the defense of the case with all the ardor of his soul, and he was so disinterested that he rarely thought of the remuneration to which he was entitled.

He was one of the bravest of men. There seemed to be no limit to his moral or physical courage. Whatever he deemed it his duty to do, he did, absolutely without fear of the consequences. His integrity was perfect. He was extremely public-spirited, always ready to devote his commanding talents to any cause tending to the uplifting of our community, or to the relief of those in distress.

He was generous to excess, and always courteous and kind to his brethren of the profession, and peculiarly helpful to the younger members. He was beloved by all his associates, and a few years before his death, they united in giving him an ovation such as few men receive. Our bar assembled at Forrest Park, adjacent to this city, at a great barbecue in his honor, and we all devoted the entire day to addresses, in which were expressed the admiration and affection which we all felt, and which he so richly merited. It was an occurrence unique in the history of our city, and a fitting tribute to extraordinary worth.

The death of Colonel Murphy comes as a blow to all of us, and we resolve that in his death the bar of our State has lost one of its most brilliant ornaments, our community one of its most public-spirited and noblest citizens, and his children the kindest of fathers, while all of us have lost a friend dear to our hearts.

RESOLVED, FURTHER, That a copy of these resolutions be sent to the family of the deceased, and that they be presented to the Supreme Court by Mr. J. F. Loughborough, and to the United States District Court by Mr. Wm. H. Martin.

G. B. ROSE, CHAIRMAN,
T. M. MEHAFFEY,
E. B. KINSWORTHY,
G. W. HENDRICKS,
X. O. PINDALL.

In presenting the above resolutions, Mr. J. F. Loughborough spoke as follows:

When I first came to the bar, twenty-seven years ago, Colonel Murphy was in his prime, and it was my privilege to hear several

of the important trials in which he took part. During these trials I was impressed with his grand but well-balanced imagination and his dramatic ability of the finest order. His resemblance to Joseph Jefferson was somewhat striking, and I have often thought that, had the circumstances in his life been such that he had gone upon the stage, he would have been in the front rank in that profession. In no sense was he a poser, but his dramatic power arose from his ability to live the scenes and feel the emotions that he undertook to describe. The flights of his eloquence, the striking poses in which the periods in his speeches frequently left him, were all the outgrowth of his burning intensity to be the person or fit in the scene that he was endeavoring to portray or describe.

In his professional work as a lawyer, he exhibited that rare quality of being able to grasp the utmost outlines of his case as a whole and to understand and value the pertinence and weight of its smallest details. He had a fine conception of the fundamentals of right and wrong in a given situation and profound appreciation of the reasons for the rules of the common law. If, in a mass of testimony that he undertook to unravel, there was the slightest inconsistency, all the power of his being was concentrated upon ascertaining the details of each of the bits of evidence that he was dealing with, so there would be no jar in their aggregation. This trait made him master, not only of the testimony which he expected would be produced in a case by both sides, but also the correct value of the testimony as evidence.

He was devoted to his chosen profession, cherished its traditions and was warmly attached to his associates of the bench and bar, towards whom he always exhibited the utmost generosity and chivalry.

My acquaintance with him began when I was quite a young man and he was past middle age, but his kindliness of heart was such that few young men came under his observation who did not arouse his keen interest, and my acquaintance with him soon ripened into an intimacy that lasted without interruption during the remainder of his life.

His fondness for his fellow human beings was very great, and his trait of forgiving error, overlooking mistakes and making allowances for weaknesses ever drew closer to him those with whom he came in contact. He had a rare philosophy that was most refreshing. I recall an occasion when we were discussing the rush of work that men of the present day seem bent upon and in commenting upon the mistakes they were making, he told this anecdote: "A rich man died, and a day or two later a man met an acquaintance and inquired, 'What did he leave?' 'Why,' replied the other, 'he left it all.'" Colonel Murphy had a keen sense of humor and a rare wit, and many are the original sayings to be cherished in his memory.

During one of the trials in which he was engaged, he and the judge, with whom he was most friendly, disputed over a point of law, and it seemed impossible that the judge could see counsel's point of view, or that counsel could appreciate the view of the judge. There ensued one of those debates that so frequently occur, and as often happens, both the judge and Colonel Murphy became somewhat irritated. When court adjourned, a bystander remarked to Colonel Murphy, as he left the court room, "The judge seems to be somewhat against you today." "Yes," replied the Colonel, "He sits up there like an old owl, and the more light you throw on him, the blinder he gets."

In memory's pictures of our departed friends, we are prone to distinguish each of them with some outstanding characteristic. The one in Colonel Murphy that always impressed me was his desire, amounting to a painful anxiety, to eliminate error and find the truth of the matter he was considerng. If I had the talent to impress on canvas the images that I call to mind, I would paint one in allegory—the figure of a man past middle age, a fine head, chin sunk upon breast, a mass of gray hair, dishevelled as if its arrangement were the least of his concerns, blazing eyes, fine brow and clear-cut features, the hands clasped in high nervous tension, and the whole figure indicating profound thought, with intense mental activity. The picture would be a portrait of Colonel Murphy in characteristic attitude. And I would inscribe under it the question which seemed ever present in Colonel Murphy's mind, whether he was contemplating some peculiar action of the smallest living thing or the mystery of the universe, "Why is it?."

After the presentation of the foregoing resolutions, and tributes from other members of the bar were heard, to which suitable responses were made by the Chief Justice, and Associate Justice Wood for the court, the said resolutions were ordered entered at length on the record, and as a further tribute to the memory of the deceased, it was ordered that the court adjourn.

OPINIONS NOT REPORTED

II

Hill v. Hill; Howard Chancery Court; James D. Shaver, Chancellor; reversed October 4, 1920; per Humphreys, J.

Moseley v. Georgia State Sav. Assoc.; Clay Chancery Court, Eastern District; Archer Wheatley, Chancellor; affirmed October 11, 1921; per McCulloch, C. J.

Butler v. Oldham; Lonoke Circuit Court; George W. Clark, Judge; affirmed October 18, 1920; per McCulloch, C. J.

Hays v. State; Sebastian Circuit Court; Ft. Smith District; John Brizzolara, Judge; affirmed November 8, 1920; per McCulloch, C. J.

Horsnell v. Gilliland; Franklin Chancery Court; Ozark District; J. V. Bourland, Chancellor; modified and affirmed October 18, 1920, per Smith, J.

Morrell-Soule Co. v. Terry Dairy Co.; Pulaski Circuit Court; Third Division; W. G. Hendricks, Judge; affirmed October 25, 1920; per Wood, J.

Darling v. State; Howard Circuit Court; James S. Steel, Judge; reversed November 29, 1920; per Smith, J.

Harris v. Wyss; Sebastian Chancery Court, Ft. Smith District; J. V. Bourland, Chancellor; affirmed December 13, 1920; per McCulloch, C. J.

Camden National Bank v. Donaghey; Jefferson Chancery Court; John M. Elliott, Chancellor; affirmed December 13, 1920.

Parker v. McNew; Jefferson Circuit Court; W. B. Sorrells, Judge; affirmed December 20, 1920; per Smith, J.

Cooper v. Chambless; Hempstead Chancery Court; James D. Shaver, Chancellor; affirmed December 20, 1920; per Humphreys, J.

Kyle v. Little Rock & F. S. R. Co.; Pulaski Circuit Court, Second Division; Guy Fulk, Judge; appeal dismissed December 20, 1920; per Humphreys, J.

Old Kentucky Overall Co. v. Kemp; Van Buren Circuit Court; J. M. Shinn, Judge; affirmed December 20, 1920; per Humphreys, J.

Cox v. Hart; Washington Chancery Court; Ben F. McMahan, Judge; affirmed January 10, 1921; per Hart, J.

Kientz v. Hines; Jefferson Circuit Court; W. B. Sorrells, Judge; affirmed January 10, 1921; per Humphreys, J.

Collier v. Craig; Prairie Chancery Court, Northern District; John M. Elliott, Chancellor; affirmed Janunary 17, 1921; per Smith, J.

Henley v. Redus; Boone Circuit Court; J. M. Shinn, Judge; affirmed January 17, 1921; per Wood, J.

Pekin Cooperage Co. v. Wilson; Ouachita Circuit Court; Charles W. Smith, Judge; affirmed February 7, 1921; Per Wood, J.

Williams v. Benton; Ouachita Chancery Court; James M. Barker, Judge; affirmed February 7, 1921; per McCulloch, C. J.

Phillips v. Pike & Fisher; Carroll Circuit Court, Eastern District; W. A. Dickson, Judge; affirmed February 14, 1921; per Smith, J.

Russell v. State; Pope Circuit Court; A. B. Priddy, Judge; affirmed February 21, 1921; per Smith, J.

Gregory v. Gregory; Crawford Chancery Court; J. V. Bourland, Chancellor; affirmed February 21, 1921; per Humphreys, J.

Sercer v. Hughey; Bradley Chancery Court; E. G. Hammock, Chancellor; affirmed February 21, 1921; per Smith, J.

Miller v. Green; Poinsett Circuit Court; R. H. Dudley, Judge; affirmed February 28, 1921; per Wood, J.

Cox v. Roark; Carroll Circuit Court, Eastern District; W. A. Dickson, Judge; affirmed February 28, 1921; per Wood, J.

Green v. Freeman; Miller Circuit Court; G. R. Haynie, Judge; affirmed Febuary 28, 1921; per Hart, J.

Free v. Adams; Lincoln Circuit Court; W. B. Sorrells, Judge; affirmed February 28, 1921; per Hart, J.

Turner v. Coats; Howard Circuit Court; J. S. Steel, Judge; affirmed February 28, 1921; per Smith, J.

Hill v. Evans; Drew Chancery Court; E. G. Hammock, Chancellor; reversed March 7, 1921; per Humphreys, J.

Currie v. Nation; Desha Circuit Court; W. B. Sorrells, Judge; affirmed March 14, 1921; per Wood, J.

Hall v. Hammett; Van Buren Circuit Court; J. M. Shinn, Judge; affirmed March 14, 1921; per Hart, J.

Chittim v. Gossett; Pulaski Chancery Court; J. E. Martineau, Chancellor; reversed March 14, 1921; per Wood, J.

Shipp v. Johnson; Van Buren Circuit Court; J. M. Shinn, Judge; affirmed March 14, 1921; per Humphreys, J.

Norsworthy v. State; Cross Circuit Court; R. E. L. Johnson, Judge; affirmed arch 14, 1921; per Humphreys, J.

Hogg v. J. R. Watkins Med. Co.; Columbia Circuit Court; Charles W. Smith, Judge; affirmed March 21, 1921; per Wood, J.

Buckeye Cotton Oil Co. v. Winn; Pulaski Circuit Court, Second Division; reversed April 4, 1921; per Humphreys, J.

Teel v. Burel; Lawrence Chancery Court; L. F. Reeder, Chancellor; reversed April 11, 1921; per Wood, J.

Dustin Grain Co. v. Gravette; Benton Circuit Court; W. A. Dickson, Judge; affirmed April 11, 1921; per Hart, J.

McCracken v. Bangs; Marion Chancery Court; Ben F. McMahan, Chancellor; affirmed April 18, 1921; per Smith, J.

Alling v. Lee & Sons; Jackson Circuit Court; D. H. Coleman, Judge; affirmed April 18, 1921; per Humphreys, J.

Bishop v. Johnson; Little River Chancery Court; James D. Shaver, Chancellor; affirmed May 2, 1921; per Wood, J.

Rees & Co. v. Overton; Clark Circuit Court; George R. Haynie, Judge; affirmed May 9, 1921; per McCulloch, C. J.

Horton v. Durham; Faulkner Chancery Court; Jordan Sellers, Chancellor; affirmed May 30, 1921; per McCulloch, C. J.

Federal Truck & Motors Co. v. Tompkins; Franklin Circuit Court, Ozark District; James Cochran, Judge; reversed June 6, 1921; per Smith, J.

Parker v. Mitchell; Conway Chancery Court; Jordan Sellers, Judge; affirmed June 6, 1921, per Humphreys, J.

Kuros v. Banner Cove Co.; Jefferson Circuit Court; W. B. Sorrells, Judge; affirmed June 27, 1921; per Wood, J.

Robertson v. Dell; Clay Chancery Court, Western District; Archer Wheatley, Chancellor; affirmed June 27, 1911; per McCulloch, J.

Turner Furnishing Goods Co. v. Price Bros.; Randolph Circuit Court; J. B. Baker, Judge; affirmed June 27, 1911; per Smith, J.

Pope County Real Estate Company v. Clifton; Pope Circuit Court; A. B. Priddy, Judge; affirmed July 4, 1921; per Wood, J.

Reynolds v. Cowan Bros. & Hardin; St Francis Chancery Court; A. L. Hutchins, Chancellor; affirmed July 11, 1921; per Hart, J.

Ozark Coal & Mining Co. v. Mansfield; Franklin Chancery Court, Ozark District; J. V. Bourland, Chancellor; affirmed July 11, 1921; per Humphreys, J.

CASES DISPOSED OF ON MOTION

III.

Louis Rich Construction Company v. F. C. Culver; Yell circuit court, Danville district; A. B. Priddy, Judge; settle and appeal dismissed on appellant's motion, September 20, 1920; *per curiam.*

The Climber Motor Corporation v. W. G. Schutte; Pulaski circuit court, Third division;. W. G. Hendricks, Judge; settled and appeal dismissed October 4, 1920, by consent; *per curiam.*

Mrs. Marah Roberts v. E. N. Wiegel, et al; Pulaski circuit court, Second division; Guy Fulk, Judge; appeal dismissed December 20, 1920, on appellant's motion; *per curiam.*

Maude Patterson, by her Guardian, Thad Walker, v. John Lea; Pulaski circuit court, Second division; Guy Fulk, Judge; appeal dismissed on appellant's motion, October 11, 1920; *per curiam.*

Pierce Watkins v. The State of Arkansas; Boone circuit court; J. M. Shinn, Judge; appellant pardoned by Governor, and appeal dismissed October 11, 1920; *per curiam.*

City of Dermott, et al. v. L. M. Belser, et al.; Chicot chancery court; E. G. Hammock, Chancellor; appeal dismissed October 11, 1920, for non-compliance with rule nine; *per curiam.*

A. J. Marsh v. W. L. Wesson; Prairrie circuit court, Northern district; George W. Clark, Judge; settled and appeal dismissed October 25, 1920, on appellant's motion; *per curiam.*

Western Union Telegraph Co. v. DeWitt Rice Mill Company, et *al.*; Pulaski circuit court, Second division; A. F. House, Judge; appeal dismissed on appellant's motion, November 15, 1920; *per curiam.*

New York Life Insurance Company v. D. W. Hughes, administrator of the estate of Samuel A. Hughes, deceased; Ouachita circuit court; C. W. Smith, Judge; appeal dismissed on appelant's motion November 15, 1920; *per curiam.*

Alfred Hawn v. S. N. Bradshaw and George J. Crump; Searcy chancery court; Ben F. McMahan, Chancellor; appeal dismissed November 22, 1920, for non-compliance with rule nine; *per curiam.*

Mrs. Susie Morton v. Clarence W. Hussey and Jas. A. Gorman; St. Francis chancery court; A. L. Hutchins, chancellor; appeal dismissed November 29, 1920, in accordance with stipulations filed; *per curiam.*

A. A. Price, et al., commissioners of Road District No. 1, of Howard county, v. J. C. Cornish, et al.; Howard chancery court;

James D. Shaver, chancellor; appeal dismissed January 1, 1921, for non-compliance with rule nine; *per curiam.*

Ed Daniels v. The State of Arkansas; Jefferson circuit court; W. B. Sorrells, judge; appeal dismissed January 10, 1921, for failure to perfect appeal within the time prescribed by law; *per curim.*

City of DeWitt, et al. v St. Louis Southwestern Railway Company; Pulaski circuit court, second division; Guy Fulk, judge; appeal dismissed January 17, 1921, on appellant's motion; *per curiam.*

Vess Summers v. The State of Arkansas; Hempstead circuit court; G. R. Haynie, judge; appellant pardoned by Governor; appeal dismissed January 17, 1921; *per curiam.*

Hicks Riley v. The State of Arkansas; certiorari to Jefferson circuit court; W. B. Sorrells, judge; judgment refusing bail affirmed, February 7, 1921; *per curiam.*

James Reidenger v. The State of Arkansas; certiorari to Jefferson circuit court; W. B. Sorrells, judge; judgment refusing bail affirmed, February 7, 1921; *per curiam.*

Alfred Jack v. B. F. Yount; Washington circuit court; W. A. Dickson, judge; appeal dismissed February 7, 1921, for non-compliance with rule nine; *per curiam.*

Whitcomb Safford, doing business as Safford Motor Company, v. Billie Boone; Miller circuit court; George R. Haynie, judge; affirmed on appellee's motion, March 21, 1921, pursuant to rule seven; *per curiam.*

St. Joe and Witts Springs Road Improvement District, et al. v. W. F. Cash, et al.; Searcy chancery court; B. F. McMahan, chancellor; appeal dismissed March 21, 1921, for non-compliance with rule nine; *per curiam.*

Ed. Daniels v. The State of Arkansas; Jefferson circuit court; W. B. Sorrells, Judge; appeal dismissed March 28, 1921, for failure to lodge transcript within the time required by law; *per curiam.*

T. H. Tucker and B. H. Friar v. Marianna Cotton Oil Company; St. Francis circuit court; J. M. Jackson, judge; appeal dismissed March 28, 1921, on appellant's motion; *per curiam.*

Tempie Golightly, et al. v. M. D. Thompson; Woodruff chancery court, Northern district; A. L. Hutchins, chancellor; settled, and appeal dismissed April 4, 1921, on appellant's motion; *per curiam.*

Nick Peay v. City of North Little Rock; Pulaski chancery court; John E. Martineau, chancellor; affirmed May 2, 1921, on appellee's motion, for non-compliance with rule nine; *per curiam.*

St. Francis River Plantation Company and George B. Morledge v. E. L. Horton; St. Francis chancery court; A. L. Hutchins, chancellor; settled, and appeal dismissed by consent, May 2, 1921; *per curiam.*

H. L. Richardson, Lee Downey and Standard Life Insurance Com-

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Ed Bass v. Granville Clarkson; Clay circuit court, Western district; R. H. Dudley, judge; appeal dismissed June 13, 1921, on appellee's motion; *per curiam.*

Turner Williams v. R. S. Cherry; Jefferson circuit court; W. B. Sorrells, judge; appeal dismissed June 13, 1921, on appellee's motion, pursuant to rule seven; *per curiam.*

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