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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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ERRATA

In 127 Ark. 353, 15th line from bottom, for "not" read *nor*

In 148 Ark. 393, 1st headnote, second line, for "fact" read *part*

In 141 Ark. 64, 5th headnote, 5th line, for "when" read *where*

In 143 Ark. 377, 6th headnote, erase next to last line.

In 142 Ark. 472, second line from top, for "affirmed" read *reversed*

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

ROBINSON *v.* STATE.

Opinion delivered May 23, 1921.

1. CRIMINAL LAW—EVIDENCE—ADMISSION BY SILENCE.—In a prosecution for rape, resulting in a conviction of assault with intent to commit rape, where the prosecutrix, immediately after the offense was committed, informed her mother she was going to leave home, and her mother replied, "You are no better than your other sister," such statement, though made in defendant's hearing, was not competent as an admission by defendant that he had been guilty of improper conduct with the other sister, as it did not call for denial by him, and was hearsay and incompetent, and its admission constituted error prejudicial to defendant.
2. CRIMINAL LAW—INSTRUCTION AS TO REASONABLE DOUBT.—In a prosecution for rape, an instruction defining reasonable doubt as one on which a person would be willing to act in a matter confronting him in the every-day walks of life, was erroneous, as the definition was broad enough to include the trivial affairs of life, when it should have been limited to the important or grave affairs of life.
3. CRIMINAL LAW—INSTRUCTION—GENERAL OBJECTION.—A general objection to an instruction will reach an inherent defect.

Appeal from Clay Circuit Court, Western District; *R. E. L. Johnson,* Judge; reversed.

Oliver & Oliver, for appellant.

1. The great weight of the evidence is contrary to the verdict.

2. The court erred in permitting but two members of the grand jury to testify as to the testimony the prosecutrix gave before that body. 120 Ark. 160-5; 64 *Id.* 121. It was error to limit the number of witnesses, and the error was prejudicial. *Ib.*

3. It was error to permit Laura Harbison to testify as to her statement to her mother and her mother's reply, because (1) it is not shown that the statement was made in appellant's hearing, and (2) the girl had told her mother she ought to make her man leave her alone, and that she was going to leave home. The statement of the mother in reply that she was no better than her other sister impliedly charged that appellant had been guilty of conduct toward the other sister similar to that which the prosecutrix alleges. It was improper to admit this evidence for a witness may not be impeached by evidence of particular wrongful conduct, except that it may be shown by examination of a witness, or a record judgment that he had been convicted of a felony. C. & M. Dig., § 4187; 100 Ark. 324. 91 Ark. 555 is directly in point. A defendant on trial for crime is entitled to offer in defense evidence of his good character. *Ib.;* 76 N. C. 216. If the facts are disputed or proof controverted, that view most favorable to defendant must be taken; and if in such view the incompetent testimony would have a tendency to disparage this controverting evidence, then its admission is prejudicial. 91 Ark. 555-61; 74 *Id.* 489. It was prejudicial error to admit this testimony.

4. It follows that the court erred in giving instruction No. 14.

5. The court erred in refusing to permit defendant to excuse from the jury James Button, one of the jurymen, after he had been accepted by both parties. It was prejudicial. 104 Ark. 606.

6. It was error to give instruction No. 12 on reasonable doubt. 69 Ark. 537.

7. The court erred in refusing to give instruction No. 1, as asked by defendant. It states the law correctly, and no other instruction was given covering the proposition. The defendant is presumed to be innocent, and that presumption follows throughout the entire trial.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. There was no error in refusing to permit appellant to call but two members of the grand jury to testify as to what Laura Harkison testified to before that body. 64 Ark. 121-4. It was a matter within the sound discretion of the court, and no abuse is shown. 64 Ark. 121; 116 *Id.* 30; 42 S. W. 827; note 8, Ann. Cas. 828.

2. Where no objection is made or exception saved to the admission of evidence in the trial court, the question can not be raised on appeal. 130 Ark. 111. No objections were made nor exceptions saved to the testimony of Laura Harbison. 129 Ark. 316.

3. Instruction 14 was a correct statement of the law. Where the accused takes the witness stand in his own behalf, he may be impeached as any other witness. 108 Ark. 316; 114 *Id.* 239.

4. There was no error in refusing to permit appellant to excuse the juryman, James Button. It was a matter of cound discretion for the trial court, and no abuse of discretion is shown. 13 Ark. 205. See, also, 19 Ark. 156; 20 *Id.* 36; 40 *Id.* 515; 134 *Id.* 197.

Objections to a juror must be made before he is sworn and impaneled. 29 Ark. 99.

5. There is no error in instruction 13 on reasonable doubt. But, if error, defendant did not request a proper one, and there was no error. 74 Ark. 444; 80 *Id.* 349; 86 *Id.* 456.

6. There was no error in refusing instruction No. 1. 109 Ark. 516. Presumption of innocence becomes effective only where there is absence of proof. 8 R. C. L. 170-1.

7. The verdict is not contrary to the evidence. The substantial evidence supports it. 135 Ark. 117; 136 *Id.* 385.

HUMPHREYS, J. Appellant was indicted and tried for rape at the January, 1921, term of the Clay Circuit Court, Western District, Second Division, and convicted

for an assault with intent to commit rape, his punishment being fixed at imprisonment in the State penitentiary for five years. From that judgment is this appeal.

The prosecuting witness is a stepdaughter of appellant, and resided in his home, near Corning, at the time it is alleged the offense was committed. She testified that, on the morning of July 11, 1920, while her mother was milking at the water gap, about 100 yards from the house, appellant forcibly obtained carnal knowledge of her; that, when her mother returned to the house, she was in the kitchen, and appellant in the adjoining room fumbling with a trunk; that there was no door between the two rooms; that her mother asked why the house had not been cleaned, and she answered by saying, "You ought to make your man leave me alone;" that she then informed her mother she was going to leave home, and her mother replied, "You are no better than your other sister." The statement made by Mrs. Robinson to her daughter, near enough for the jury to have found that appellant heard it, was admitted in evidence, over the proper objection and exception of appellant, and appellant now insists that the court committed reversible error in allowing the statement to go to the jury. The statement, standing alone and disconnected from evidence subsequently adduced, did not imply a charge against appellant that he had been guilty of similar conduct toward the other sister. Appellant was not called upon, therefore, to make a denial, even if he heard the statement. The statement was not therefore competent evidence as an admission of appellant that he had been guilty of conduct with the other sister, similar to that now charged against him. The statement, however, was purely hearsay evidence and clearly incompetent on that ground. The admission of it constituted reversible error, if prejudicial to the cause of appellant. We think it clearly prejudicial, when considered in connection with the evidence introduced later, tending to show a sexual intimacy between appellant and the other sister.

Appellant also contends that the court erred in giving instruction No. 12 upon reasonable doubt, which is as follows: "The burden is upon the State to establish its case to your satisfaction beyond a reasonable doubt. This is a wise and sane provision of our law, which is designed in no case to enable any guilty person to escape just punishment, but, on the contrary, to shield and protect the innocent from unjust conviction. It means simply that if, after a consideration of all the facts and circumstances adduced in proof in the case, there naturally arises in your minds a substantial doubt as to the guilt of the defendant, then it will be your duty to acquit him. It is not a far-fetched or chimerical doubt to be conjured up for the purpose of enabling a guilty man to escape just punishment, but a reasonable doubt means a doubt that is reasonable, and one upon which you yourselves would be willing to act in any matter with which you might be confronted in the every-day walks of life." A reasonable doubt is defined in this instruction as one upon which a person would be willing to act in a matter confronting him in the every-day walks of life. This definition is broad enough to include the trivial affairs of life, and, for that reason, is inherently wrong. It should have been limited to the important or grave affairs of life. In trivial affairs of life, one would act upon a high degree of probability, whereas in important or grave affairs he would want to know to a moral certainty before acting. In the case of *Byrd* v. *State,* 69 Ark. 537, this court condemned an instruction which told the jury that "a moral certainty signifies only a high degree of probability;" and further said that "a high degree of probability is not sufficient; for the jury might think there was a high degree of probability that the defendant is guilty, and yet think there is a reasonable doubt as to his guilt from the evidence in the case."

The objection to the instruction was general, but a general objection will reach an inherent defect, such as we find here. The court committed reversible error in thus defining reasonable doubt.

Other assignments of error are insisted upon for reversal, but we deem it unnecessary to discuss them, as some are not well taken, and others will not likely recur upon a new trial.

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

STATE v. EAGLE LUMBER COMPANY.

Opinion delivered May 30, 1921.

TAXATION—STOCK OF CORPORATION.—Under the rule that the taxable value of the stock of a corporation is ascertained by deducting the value of its tangible property otherwise assessed from the market value of such stock, the capital stock of a corporation is not taxable where its value did not exceed the aggregate value of its other property assessed in the State.

Appeal from Ouachita Chancery Court; *James M. Barker,* Chancellor; reversed.

J. S. Utley, Attorney General, *Elbert Godwin,* Assistand, and *George Vaughan,* special counsel, for appellant.

1. Foreign and domestic corporations are treated alike in all constitutional and statutory provisions. Const. Ark., art. 12; act No. 19, Acts 1899, p. 18; act 168, Acts 1899, p. 305; act 216, Acts 1901, p. 386; act No. 313, Acts 1907, p. 744; Kirby's Digest, §§ 824-833; C. & M. Dig., §§ 1825-8.

Affirmative legislation was necessary to render operative the above constitutional provision, *supra,* which has been held "not self-executing." 65 Ark. 312, 315; 45 S. W. 988; 60 Ark. 325, 332-3; 30 S. W. 350. The legal status of foreign corporations has been clearly defined in the above several acts. Such corporations are entitled to all the rights and privileges and subject to the same penalties as domestic corporations. C. & M. Digest, § 1828. The status of foreign corporations is also well settled by our decisions. 69 Ark. 521; 65 S. W. 465; 69 Ark. 528-9; 71 Ark. 451; 75 S. W. 725; 81 Ark. 304; 98 S. W. 729; 82

Ark. 309. The validity of the acts has been sustained. 82 Ark. 309, 315; 95 Ark. 588; 130 S. W. 583; 114 Ark. 155; 169 S. W. 942.

Under these decisions foreign corporations are subject to the same control as domestic corporations when they have complied with our laws as to doing business. 140 Ark. 135; 204 U. S. 103; 115 Ark. 524; 81 *Id.* 519; 100 S. W. 407; 212 U. S. 322; 69 Ark. 521; 54 *Id.* 101; 156 U. S. 649; 119 Ark. 314; 173 S. W. 1099; 76 Ark. 303; 89 S. W. 42.

The taxation of foreign corporations in Arkansas is well settled under our Constitution and laws. Const., art. 16, § 5; *Ib.*, §§ 6, 7.

The mode of taxation of intangible property is pointed out in our revenue laws. Kirby's Digest, §§ 9961-2-3; act March 31, 1883, §§ 42-3; act March 28, 1887, §§ 17, 18; Mansf. Dig., §§ 5045-6; Sand. & H. Dig., §§ 6462-3; Kirby's Dig., §§ 6936-7; C. & M. Dig., §§ 9961-2-3. See, also, 78 Ark. 187; 85 S. W. 772; 94 Ark. 235; 126 S. W. 727. See especially 128 Ark. 505; 131 Ark. 40; 97 Ark. 254; 138 *Id.;* 128 Ark. 505; 131 *Id.* 40; 97 *Id.* 254; 138 *Id.* 541. See, also, 251 U. S. 532; 139 Ark. 397; 227 S. W. 770.

Intangible property of foreign corporations had already been held taxable. 82 Ark. 309; 101 S. W. 748; 63 Ark. 576; 40 S. W. 710; 37 L. R. A. 371. Both the tangible and intangible property of foreign corporations is taxable wherever found and where the work is done. 165 U. S. 194; 166 *Id.* 185; 141 U. S. 18; 130 Pac. 565.

Our special act of 1893 has been duly approved of. 63 Ark. 576.

The unit rule is well established in Arkansas for 40 years. 65 S. W. 775; 190 U. S. 413; 94 Ark. 235-7. The unit rule is also well settled and followed in other States. 116 N. C. 441; 21 S. E. 423; 39 S. E. 18; 165 U. S. 194; 13 Peters 586; 143 U. S. 305; 77 N. E. 1195; 31 *Id.* 238; 61 So. 417; 109 N. Y. S. 868; 180 N. W. 108; 110 Atl. 867.

2. The Arkansas Tax Commission has power to fix and promulgate a uniform basis for a valuation of property for taxation. Under the agreed statement of facts,

the property of foreign corporations is clearly taxable. 92 Ark. 492. The Legislature has provided the agency for the assessment and taxation of such property, and the action of the tax officers is conclusive *in the absence of a statute to the contrary,* and the courts have no power to supervise and correct assessments. 92 Ark. 492; 123 S. W. 753; 103 Ark. 127; 145 S. W. 892; 132 Ark. 395; 130 *Id.* 259.

3. All inferior political subdivisions must be subordinate to the State in taxation matters. 33 Ark. 497, 690; 42 *Id.* 54; 34 *Id.* 224-30; 35 *Id.* 56-61; 37 *Id.* 339-345-6; 94 *Id.* 27; 125 S. W. 1001; 140 Am. St. 103; 27 L. R. A. (N. S.) 255; 30 Ark. 435; 59 *Id.* 513, 530-1; 27 S. W. 59.

The Tax Commission's dominant function is to promote uniformity, and it is its first duty. 127 Ark. 349; 129 *Id.* 41; 138 *Id.* 483. See, also, 92 N. E. 7, 10; 64 *Id.* 661; 58 L. R. A. 949; 95 Am. St. Rep. 280; 31 Ind. App. 224; 150 Ind. 216; 49 N. E. 14; 52 Pac. 954; 54 *Id.* 974; 6 Okla. 757; 141 N. W. 839, 822; 115 N. W. 647; 155 Pac. 416-19; 134 *Id.* 688; 135 *Id.* 609-10.

The General Assembly has the power, in the absence of constitutional inhibition, to require that all property be assessed at its full cash value and to provide the plan necessary to effectuate that result. 138 Pac. 1010; 56 Col. 512; 186 Pac. 812.

It is the duty of this court to sustain the act creating the Tax Commission and the powers necessary to properly carry it into effect.

Gaughan & Sifford, for appellee.

Under the agreed statement of facts, the Eagle Lumber Company paid taxes on its property upon an assessment equal to that of other similar property throughout the State, and the court below properly held that it was not liable for the $1,000. The decree for $1,000 should be reversed, and in other respects affirmed.

MCCULLOCH, C. J. The Attorney General instituted this action on behalf of the State of Arkansas against the defendant, Eagle Lumber Company, a foreign corpora-

tion, to recover unpaid taxes alleged to be due on its capital stock since the time it began doing business in this State in the year 1899 up to the time of the commencement of the suit in 1919. The facts are undisputed, and are set forth in a written stipulation signed by counsel on both sides.

The defendant is a private corporation, organized under the laws of the State of Iowa, and it began doing business in the State of Arkansas on March 3, 1899, and complied with the laws of the State with respect to foreign corporations doing business in the State. Its authorized and paid-up capital stock was originally $250,000, and subsequently raised to $500,000, "all of which," according to the recitals of the agreed statement of facts, "has always been employed in Arkansas." The written stipulation as to facts reads as follows:

"(2) The tangible assets of the company consist wholly of a sawmill, lumber, logs and merchandise at Eagle Mills, and of the timber lands situated in Ouachita, Dallas and Calhoun counties, all in the State of Arkansas. It owns no property located elsewhere, and for all the years covered by this suit its sole business was the manufacture and sale of timber products at Eagle Mills, Arkansas."

"(3) * * *"

"(4) The company has paid the State and local taxes on all of its tangible property, real and personal, including certain 'moneys and credits' to the proper authorities in Arkansas in accordance with the revenue laws of this State."

"(5) It is agreed as a stipulation of fact that, during the period of years covered by the complaint herein, the shares of stock representing the capital stock of the company had the same value and no greater than the aggregate property owned by the corporation, all of whose physical assets had an actual situs within the State of Arkansas. It is further stipulated that during said period the property of the company assessed in Arkansas was valued for taxation in the several counties in which

it was located at an amount equal to the actual average assessment of other similar property in the State of Arkansas."

"Provided, it is further agreed that if the court holds that the company as a foreign corporation is in any event taxable in Arkansas upon its intangible property or its capital stock, the extent of its liability for such taxes is stipulated to be one thousand ($1,000) dollars and no more, unless the proper basis for assessment be held to be fifty (50%) per cent of true value as per the Tax Commission order recited in paragraph 6 herein."

"(6) * * *"

"(7) It is further agreed that if all issues of law are finally determined adversely to the defendant, judgment will be entered against the company for two thousand dollars (or in lieu thereof one thousand dollars in the event the court upholds as the true taxable criterion the actual average assessed basis rather than the Tax Commission's 50% basis. * * *"

The court rendered judgment in favor of the State for the recovery of the sum of $1,000, and both parties have appealed.

The Attorney General and his associate counsel argue with much earnestness the question whether the intangible property or capital stock of a foreign corporation doing business in this State is subject to assessment against the corporation for the purposes of taxation. That question is very thoroughly covered by the learned counsel on each side. But it seems to us that under the stipulation of facts in this case it is not proper for us to decide that question for the reason that the capital stock has no value in excess of the value of the property otherwise taxed in this State and that the corporation owns no property elsewhere, either tangible or intangible. The substance of the agreement is that all of the capital of the corporation is and has always been employed in the State of Arkansas, that all of its tangible assets are situated in the State of Arkansas, and that it

owns no property located elsewhere, that the shares of stock have the same value as the aggregate property owned by the corporation, and that it has paid taxes on all of its tangible property, including moneys and credits.

The rule announced in the decisions of this court is that the taxable value of shares of stock of a corporation is ascertained by deducting the value of its tangible property otherwise assessed from the market value of the shares of stock. *State* v. *Bodcaw Lumber Co.,* 128 Ark. 505; *State* v. *Fort Smith Lumber Company,* 131 Ark. 40; *Crossett Lumber Co.* v. *State,* 139 Ark. 397; *State* v. *Gloster Lumber Company,* 147 Ark. 461. Under the agreement of facts there is no taxable value of the capital stock, as it does not exceed the aggregate value of the other property assessed in this State. Nor is it shown in the agreed statement of facts that the corporation owns any other property elsewhere. We do not, therefore, feel at liberty to follow counsel far enough in the argument to decide the question not applicable to the facts set forth in the record.

The court erred in rendering a decree against the defendant for any sum, and the decree is therefore, on the appeal of the defendant, reversed, and the cause is dismissed.

COSBY *v.* HURST.

Opinion delivered May 30, 1921.

1. ATTORNEY AND CLIENT—LIEN ON EVIDENCE OF DEBT.—At common law an attorney has a lien upon his client's evidence of indebtedness in his hands, but not upon the debt itself, and hence a complaint in equity seeking to fix a lien on the proceeds of the client's insurance policy did not state facts which would confer a lien where it did not allege that the policy or other evidence, if any, was in the possession of the attorney.
2. EQUITY—INADEQUACY OF LEGAL REMEDY.—As the basis of a suit in equity for the sole purpose of recovery of money is the inadequacy of legal remedies, equity has no jurisdiction of a suit by an attorney against his client and an insurance company to recover compensation for his efforts in effecting a settlement of a

claim under an insurance policy on the ground of the client's insolvency; it not appearing that garnishment at law would not afford an adequate remedy.

3. EQUITY—PLEADING.—Nothing is added to a complaint in equity seeking to enforce an equitable garnishment by the formal statement that plaintiff has no adequate remedy at law; such statement being a mere conclusion.

Appeal from Washington Chancery Court; *B. F. McMahan,* Chancellor; reversed.

John Mayes, for appellant.

1. It was error to refuse to transfer the cause to the law court.

2. It was error in overruling appellant's demurrer. Appellee had no lien as an attorney under our statute. C. & M. Digest, § 6304; 47 Ark. 86; 140 Ark. 558; 109 *Id.* 171; 8 U. S. (Law. Ed.), *Forde* v. *Lawson.*

W. N. Ivie and *H. L. Pearson,* for appellee.

Appellee was entitled to a common-law lien and the allegations of insolvency were sufficient to give the chancery court jurisdiction. 6 C. J., p. 784, § 395; 2 A. L. R. 474.

2. Equitable garnishment has always been recognized in courts of equity and the statutes of this State. C. & M. Dig., §§ 4366-7, 4906; 56 Ark. 476. The chancery court had jurisdiction of the subject-matter, and was clearly right in overruling the demurrer and motion to transfer.

McCULLOCH, C. J. Appellee is an attorney at law and a member of the Washington County bar, and he instituted this action against appellant in the chancery court of that county to recover the amount of fees alleged to be due for professional services rendered in connection with a claim of appellant against an insurance company. It is alleged in the complaint that appellant made claim in the sum of $1,000 against the Fayetteville Mutual Benefit Association under a policy issued to appellant's wife, now deceased, that appellant employed appellee to collect the claim from said insur-

ance company, and that appellee "prepared the necessary papers and presented the matter to the Fayetteville Mutual Benefit Association in the usual manner;" that, after such presentation and after investigation made by the said company, the latter notified appellee that the claim would be allowed and would be paid as soon as reached in the regular order of business; that subsequently appellee was notified by the insurance company that payment would be made on June 15, 1919, and that a check was made out by the company payable to appellee as attorney for appellant, but that, after the performance of said services by appellee and before the delivery of the check, appellant employed another attorney to handle the claim for him and notified the said insurance company not to turn over the check or make any payment to appellee. The complaint contains the further allegation that appellant is insolvent, and the prayer of the complaint is that a lien be declared in appellee's favor for the amount of his fee in the sum of $150 on said claim against the insurance company, which said company was made a defendant in the action. Appellant appeared by attorney and demurred to the complaint on the ground that it did not state a cause of action within the jurisdiction of the chancery court and also filed a motion to transfer the cause to the circuit court. The court overruled the demurrer and the motion to transfer, and, the defendant declining to plead further, decree was rendered against him and against the Fayetteville Mutual Benefit Association for the recovery of the sum of $150, which was declared to be a lien on appellant's claim against said insurance company.

It is conceded by counsel for appellee that there is no statutory lien in appellee's favor for the reason that there was no judgment rendered and no action instituted on appellant's claim against the insurance company. Crawford & Moses' Digest, sections 628 and 6304. But it is contended that appellant had a common-law lien, independent of the statute, on the papers in his hands evidencing appellant's claim against the insurance company.

The validity of this sort of claim was recognized by this court in the case of *Gist* v. *Hanley,* 33 Ark. 233. But the difficulty with appellee's contention is that he has not set forth in his complaint a state of facts which would confer a lien, in that he does not allege that the policy or other evidence, if any, of appellant's claim against the insurance company was turned over to him and still remains in his possession. Such a lien at common law was, as we understand, on the evidence of indebtedness in the hands of the attorney, and not on the debt itself. This being true, appellee has not shown in the complaint that he had in his possession any papers on which he was entitled to a lien.

It is next contended by counsel for appellee in support of the decree that the allegations of insolvency were sufficient to confer jurisdiction on the chancery court, and that the insurance company, as appellant's debtor, having been made a party to the suit, appellee is entitled to an equitable garnishment. The mere allegation of insolvency was not, however, sufficient to show that the remedy at law was inadequate, and it does not show a cause of action cognizable in equity. The basis of a suit in equity for the sole purpose of recovery of money is the inadequacy of legal remedies. *Davis* v. *Arkansas Fire Ins. Co.,* 63 Ark. 412; *Euclid Avenue National Bank* v. *Judkins,* 66 Ark. 486; *Horstmann* v. *LaFargue,* 140 Ark. 558; *Henslee* v. *Mobley,* 148 Ark. 181. There are no allegations which set forth grounds for equitable relief. *Newman* v. *Neal,* 147 Ark. 439. Nothing is added to the force of the complaint by the formal statement that appellee had no adequate remedy at law. That was a mere conclusion, and according to the facts alleged there was no reason why a garnishment in an action at law would not have afforded an adequate remedy.

The court erred in refusing to transfer the cause to the circuit court, and for that reason the decree is reversed and the cause is remanded with directions to transfer the cause, unless further grounds are stated for equitable relief.

GREGG v. SANDERS.

Opinion delivered May 30, 1921.

EMINENT DOMAIN—JUST COMPENSATION—ENHANCEMENT IN VALUE.—The general rule that where the public use for which a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation in benefits, has no application to a taking by an improvement district, as the benefits by the improvement can not be deducted from the compensation to be allowed to a property owner for that portion of his property which is taken and used in the construction of the improvement.

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

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

1. The court erred in sustaining the demurrer to the answer.

The Constitution contains no limitations upon the consideration of benefits as just compensation for land taken under the power of eminent domain except when exercised through the instrumentality of a corporation. 64 Ark. 559. The Newport Levee District is not a private corporation, but a body politic and corporate, a public corporation, and the act creating it is constitutional. 59 Ark. 533. Art. 12, section 9, of our Constitution does not apply to anything except condemnation proceedings by private corporations. 64 Ark. 555; 78 *Id.* 580; 120 *Id.* 239. There is nothing in article 12, section 9, Constitution, to support the lower court in sustaining the demurrer. The rights of the parties here are controlled by section 22, article 2 of our Constitution, which declares that private property shall not be taken for public use without just compensation. C. & M. Digest, title Eminent Domain. Where the public use for which a portion of a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner *has* received "*just compensation*" in benefits. 64 Ark. 559; 114 *Id.* 334. The court should have overruled the demurrer.

Geo. A. Hillhouse and *Brundidge & Neelly,* for appellees.

No question was raised as to the right of the corporation to take private property without paying therefor, and the only question is the constitutionality of the act. The act is constitutional. The questions raised in the Cribbs and Benedict case are not now before this court, and the rule does not apply. 114 Ark. 334. Under the proof the judgment is right, and should be affirmed.

McCULLOCH, C. J. The Newport Levee District was created as an improvement district by the Legislature (Acts 1917, page 1285), for the purpose of constructing a levee along the bank of White River, through the city of Newport and contiguous territory. The right of eminent domain was conferred for the purpose of acquiring lands to be used in the construction of the levee. The cost of the improvement included, of course, all costs of acquiring rights-of-way and other expenses to be paid for by assessments on benefits accruing to the real property affected by the improvement. Appellees are the owners of a tract of land containing approximately seventeen acres situated just outside of the city of Newport and fronting on White River, and in the construction of the levee the district took and used about five acres of said land of appellees, all of which land so taken fronted on White River. The remainder of the land of appellees is within the bounds of the district, and the benefits thereto from the construction of the levee have, of course, been assessed and will be taxed proportionately for the construction of the improvement. It is not shown in the present record how the district acquired the right-of-way over the land of appellees, and, as no point is made in this case on that proposition, we assume that the lands were taken without the exercise of the right of eminent domain in the manner prescribed by the statute.

Appllees instituted this action against the district to recover damages laid in the aggregate sum of $3,500

and specified as being the sum of $3,000, the value of five acres taken and used by the district, and the further sum of $500 for damages to the remainder of the land. Appellants (said district and its commissioners), in addition to denials of the allegations of the complaint with respect to the extent of the injury and amount of damages recoverable, pleaded that "the benefits received by said land, local and peculiar to the same over and above the benefit which said tract receives in common with the other lands in Newport Levee District greatly exceeds the value of the land taken by said district for the right-of-way of its levee over the lands of the plaintiffs."

The cause was tried before a jury on conflicting testimony in regard to the value of the land taken and the injury or benefit to the remaining land not taken, and the jury returned a verdict in favor of appellees, fixing the damages at the aggregate sum of $1,500, without apportioning the same between the items of damages charged in the complaint.

The court in one of its instructions told the jury, over the objections of appellants, that, in ascertaining the amount of damages for taking the land, the jury "should not take into consideration any benefits which may accrue by the building of the levee to the remainder of the original tract." An exception was saved to this ruling of the court, and the only question presented on this appeal is whether or not the court erred in holding that appellees' right of recovery for the value of the lands taken and used by the district in the construction of the levee could not be reduced by the benefits accruing to the remainder of the tract.

The only provision in the Constitution of this State in which it is attempted to regulate or restrict the right of eminent domain for public purposes is in section 22, article 2 of the Constitution of 1874, which declares that "private property shall not be taken, appropriated or damaged for public use without just compensation therefor." The inquiry which, therefore, must always arise in the interpretation of a statute authorizing the taking of

property or in any proceeding to recover compensation therefor is: What is "just compensation" under the given state of facts? Counsel for appellants contend that decisions of this court in *Cribbs* v. *Benedict,* 64 Ark. 555, and *Paragould* v. *Milner,* 114 Ark. 334, have established the rule of "just compensation" in cases similar to this to be that "where the public use for which a portion of a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation in benefits." Such is undoubtedly the rule established by the great weight of authority in cases where property taken for general public use and compensation is to be awarded at the expense of the public. Many cases on that subject are referred to in *Cribbs* v. *Benedict, supra,* and there are many other cases to the same effect decided before that time and since.

The rule has been generally applied in instances of the taking of land for use as a public highway or park or such other public use where the compensation is to be awarded out of public funds. The case of *Paragould* v. *Milner, supra,* is an instance of that character, and we have no doubt as to the correctness of that rule as applied to the facts of such a case. *Cribbs* v. *Benedict, supra,* was, however, a case where there was involved an improvement district formed under general statutes for the purpose of constructing a drainage ditch, and we announced the same rule in that case. The question of damages was not, however, involved in that case further than to determine whether or not the statute which failed to provide for the payment of damages was valid, and this rule was merely stated as one of the reasons for holding the statute to be valid without providing for the payment of compensation other than impliedly by the benefits which would accrue from the construction of the improvement. This was stated only as one of the reasons why the statute was valid, and the decision was

undoubtedly correct, even though we conclude that this particular reason for so holding was unsound.

We have reached the conclusion that that rule should not be applied in measuring the compensation to be paid to a property owner whose land is taken for the construction of a local improvement so as to reduce the amount to be recovered to the extent of the benefits accruing to the other lands in the district which are specially taxed for the purpose of paying for the improvement.

It is found, on examination, that all of the cases cited in *Cribbs* v. *Benedict, supra,* are those which relate to payment of compensation for property taken for public use where the question of special benefits arising from a purely local improvement to be paid for by special assessments did not arise. In a few cases like the present one, the authorities are to the contrary. It is readily seen that the application of this rule to the payment of compensation for property taken by an improvement district constitutes a double charge for the benefits accruing to the remainder of an owner's land where a part has been taken for the construction of the improvement. The benefit to the remaining portion of the land is paid for by the owner in special assessments levied to defray the cost of the improvement, and, if the owner is compelled to credit the amount of these benefits on the compensation to which he is entitled for that portion of his land which is taken, the effect is to charge him twice for the same benefits. In other words, he will be paying for the benefits by the assessments which are levied against his property and also the second time when he credits them on the compensation which is due him for his property which is taken.

Page & Jones, in their work on Taxation by Assessment (vol. 1, section 67), states the rule as follows:

"Whatever method of exacting compensation from the property owner for benefits inuring to him is adopted, the property owner can not be charged twice for the same benefit. * * * So if, under the local statute, cer-

tain benefits may be made the basis of a local assessment against the property, such benefits can not be set off against damages, as the property owner can subsequently be compelled to pay therefor in such assessment proceedings."

This rule was announced by the Supreme Judicial Court of Massachusetts in the case of *Garvey v. Inhabitants of Revere,* 187 Mass. 545, though that court has steadily adhered to the general rule hereinbefore stated that compensation may be made for property taken for public use in the benefits to accrue to the remainder of the property of the same owner. This doctrine was also announced by Judge Mitchell with much force in the case of *State* v. *District Court,* 66 Minn. 161. In that case the court dealt with a statute, one section of which authorized the appraisal of damages for property taken for use in providing a local improvement and another section which provided for the assessment of such special benefits which was to form the basis of taxes levied to defray the cost of the improvement. The Minnesota court had, in other decisions, announced the general rule as hereinbefore recited with reference to the reduction of damages by compensation in benefits, and reiterated that rule in the case just cited, but held that the rule had no application to an instance where the cost of the improvement for which the land was taken was to be defrayed by the imposition of taxes based upon special benefits. The court said: "But counsel's contention is that where, as under this statute, the cost of the acquisition of the land is to be defrayed by special assessments upon the property specially benefited thereby, a deduction of special benefits to the remainder of the tract from the value of the part taken is unconstitutional, for the reason that this remainder is subject to assessment, to the extent of these same special benefits, to defray this same cost, which would result either in the owner being taxed twice for the same improvement, or else in depriving him of his property without just compensation. It is very clear that, if the statute will accomplish this

result, it, or some part of it, is unconstitutional and void. We need not stop to inquire what are benefits 'resulting from such taking,' which are to be deducted in the condemnation proceedings, whether they are only those resulting from the mere taking of the land by the city, disassociated from the appropriation and improvement for the purpose for which it is taken, or whether they also include those that will result from such appropriation and improvement, although it is very difficult to conceive what benefits can result to the residue of a tract from the mere act of taking a part of it. But it is very evident from the language of section 8 that the benefits for which assessments are there required include the same benefits which are required to be deducted by section 7. Moreover, the language of section 8 is mandatory, and not merely permissive. It not only requires such assessments to be made, but also that they shall be made on all property benefited. Hence, if all the provisions of both sections are carried into effect, the result will be either that the landowner will be deprived of his property without just compensation, or else he will be taxed unequally, by being compelled to pay twice for the same thing."

It is true that in that case the court held that the two sections were in conflict, and that the last one, which provided for taxation upon the whole of the benefits without taking into consideration the damages, was void. We have no such question as that in the present case, but the decision of the Minnesota court is persuasive to the extent that it lays down the principle that it would constitute a double charge against the property owner to make him contribute out of benefits received to the cost of improvement by paying assessments, and also by compelling him to credit the benefits which accrue from the improvement on the compensation to which he is entitled for damages on account of other portions of his land being taken.

The theory upon which rests the proceedings for the construction of local improvements by the imposition of

special assessments on contiguous property is that the improvement is public in its nature to the extent that the right of eminent domain may be authorized, but it is local to the extent that special benefits accrue to the adjoining property. The improvement is paid for out of special assessments based on such benefits, and when property is taken for use in the construction of the improvement full compensation must be awarded in order to satisfy the requirements of the Constitution without deduction of the benefits which are to accrue to the owner on the remainder of his property. Damages to the property not taken may, however, be balanced off against the benefits which accrue, for damages must necessarily be taken into account in the estimate of benefits. There are authorities to the effect that, if the benefits to the remaining property exceed the damages to the property taken, such benefits may be used in the reduction of the damages, and the excessive benefits over damages may be the basis of a local assessment. And it has been held that it is proper "to deduct the amount of the special tax levied for a given improvement from the amount of the benefits received from such improvement, and to treat the amount thus obtained as the net amount of benefits to be deducted from the amount of damages." 1 Hamilton on Taxation by Assessment, section 67; *Carroll* v. *City of Marshall,* 99 Mo. App. 464; *Village of Grant Park* v. *Trah,* 218 Ill. 516. There is no question, however, in the facts of the present case as to whether the benefits will exceed the amount of taxes assessed against them. It does not appear even that the jury awarded any damages for injury to the remainder of the property not taken, though they may have done so under the testimony and instructions of the court. No point is raised that the benefits exceeded the taxes levied and should be, to that extent, credited on the compensation to be allowed for the damages to the property taken. At any rate we are convinced that the true rule is that, whether the taxes levied amount to the appraised benefits or not, there can be no deduction of any part of the bene-

fits from the compensation to be allowed to a property owner for that portion of his property which is taken and used in the construction of the improvement, for the reason that he pays for his benefits in taxes, the same as other property owners, and it would destroy the rule of equality to require him to contribute to the common use any part of his property without compensation.

There was no error committed, and the judgment should be affirmed. It is so ordered.

WILSON v. MATTIX.

Opinion delivered May 30, 1921.

1. DRAINS—AUTHORITY OF COUNTY COURT TO DISSOLVE DISTRICT.—As the statutes do not authorize the county court to dissolve a drainage district after it has been organized, it can not exercise that authority.
2. COURTS—JURISDICTION OF COUNTY COURT TO RESTRAIN UNLAWFUL ACTS.—The county court has no jurisdiction to relieve property owners by injunction against unlawful acts of the commissioners of a drainage district in attempting to proceed under a void organization.

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

H. M. Mayes, for appellants.

The motion to dismiss filed in the county court and circuit court was nothing but a demurrer, and admits that the reported cost of improvement as shown by the preliminary survey is less than $60,000; that the cost as returned by the commissioners approximated $85,000; that the petition alleges and the demurrer admits that the commissioners now undertake to sell bonds in the district in the sum of $130,000, which is excessive and prohibitory.

To obtain an outlet for a drainage system, commissioners may construct ditches, do other work on land beyond the jurisdiction of the county court, or which for other reasons can not be included in the district. In that event they shall have the right to condemn a right-of-way

for such drain or other construction, and the proceedings shall be the same that are now provided by law for the condemnation of the right-of-way for railroads, telegraphs and telephones. Such a ditch or drain beyond the limits of the district shall be the property of the district, and no person, corporation or other drainage district, not assessed, shall have the right to dig any lateral drain connecting therewith without paying compensation, to be fixed by the circuit court. C. & M. Digest, § 3629.

The complaint alleges and the demurrer admits that all of the proceedings of the commissioners should be presented and filed in the county court. A demurrer admits the truth of all the allegations of the complaint. 218 S. W. 381; 141 Ark. 8. The circuit court should have sustained the findings of the county court upon the demurrer filed by appellees, and erred in not so doing.

Basil Baker and *Horace Sloan*, for appellees.

1. The order of the county court is void, as it had no jurisdiction. It can not act except as empowered by statute. 115 Ark. 130-9. The grant of jurisdiction to the county court by our Constitution is not self-executing. There must be legislative action. 4 Ark. 473; 28 *Id.* 359. The county court has no jurisdiction to act unless authorized by statute. C. & M. Digest, §§ 3607, 3655, 3637, 3630.

2. Corporations can not be dissolved by courts, except insofar as the Legislature by statute permits. 81 Ark. 391, 402; Fletcher's Cyc. of Corporations, chap. 64. For a parallel case, see 71 Ark. 4.

3. The county court has no jurisdiction to issue injunctions. 84 Ark. 341. Nor can it cancel contracts. 96 Ark. 251, 263. County courts can not exercise jurisdiction *in personam* in plenary proceedings of this nature involving third parties except as to the allowance of claims against the county. The jurisdiction of the county court is wholly *in rem*. 2 Crawford's Digest, "Courts," p. 1275, § 40. The present suit is clearly one *in personam*.

The county court can not appoint committees of tax payers to take over the affairs of drainage districts.

Nonjoinder of necessary or proper parties defendant may be waived by failure to object at the proper time, but the nonjoinder of an indispensable party defendant leaves the court powerless until he is brought in. C. & M. Dig., § 1101.

4. No cause of action was stated. 83 Ark. 344-6. The validity of the assessment of benefits was settled by order of the county court. As to any errors in assessment, the remedy was by appeal. A collateral attack will not now be permitted. C. & M. Dig., § 3165; 138 Ark. 131.

The validity of the assessment of benefits can not be challenged without setting forth the facts rendering the assessment invalid or improper. 139 Ark. 280.

In this case the complaint does not state what the value of the land will be after the construction and completion of the improvement. The validity of the assessment of benefits can only be challenged in the statutory manner as prescribed by C. & M. Dig., § 3165; 125 Ark. 163-7; 139 *Id.* 282.

An error in the estimate cost does not vitiate an assessment of benefits. 213 Pa. St. 123; 62 Atl. 516; 176 N. W. 373. See, also, 137 Ark. 354, 365; 86 *Id.* 46.

McCULLOCH, C. J. This is a proceeding instituted in the county court of Craighead County to dissolve a drainage district which had been previously organized pursuant to the general statute providing for the organization of such districts by an order of the county court. Crawford & Moses' Digest, sections 3607 *et seq.*

Appellants are the owners of real property in the district, and, after the district had been organized and put into operation by the assessment of benefits, issuance of bonds, the letting of a contract for the construction of the improvement and after the work of constructing the improvement had been begun, they filed their petition in the county court praying for an order of the court dissolving the district. They alleged, in substance, that the lands in the district were generally uncultivated and of little value, that the cost of the construction of the

improvement when considered in comparison with the value of the lands was prohibitive, and that the imposition of the tax on the land would be so burdensome as to constitute confiscation of the property, and that the commissioners had increased the cost from the sum of $60,000, as first estimated, to the sum of $130,000, as finally estimated as the actual cost of the construction. It was further alleged in the petition that the commissioners were proceeding with the construction of the drainage ditch without first obtaining an outlet for the discharge of the water. There was also a general allegation that the improvement, as contracted for, is improvident, and will not result in the benefit of the property in the district. There are other allegations not of sufficient importance to mention.

The commissioners of the district appeared by their attorneys as parties for the purpose of resisting the order of dissolution, and on the hearing the county court made an order declaring the district dissolved, and appointed a committee of property owners "to ascertain all claims and charges of any and all persons or firms against said district and to ascertain the financial condition of said district." The order of the court further enjoined the commissioners from proceeding with the construction of the ditch and ordered that the funds on hand to the credit of the district be applied to the payment of current accounts against the district and the remainder tendered to the purchaser of the bonds, and further that, if the committee should find that bonds had been issued and sold and the money received by the commissioners, the sum found to be due "shall be by the clerk of this court extended against said lands on the ditch tax book * * * in proportion as assessments have been made and filed by the commissioners of said district, and the same shall be collected by the collector of Craighead County for the year 1921 and paid out in full liquidation of the proper claims against said district." In other words, the court dissolved the district and made a general order winding up its affairs and provided for payment of its

indebtedness. The commissioners filed an affidavit and bond for appeal, and prosecuted their appeal to the circuit court, and in that court they filed a written motion to dismiss the cause on the ground that the county court had no jurisdiction to adjudicate the dissolution of the district. The circuit court sustained the motion and dismissed the proceedings. The record of that court recites that the cause was heard on the motion of appellees, and the record brought up from the county court. An appeal has been duly prosecuted to this court.

The statute confers no authority upon the county court to dissolve drainage districts. Crawford & Moses' Digest, sections 3607 *et seq.* On the contrary, the statute (section 3609) provides that the order of the county court establishing such a district "shall have all of the force of a judgment," and that if no appeal from said order be taken within twenty days "such judgment shall be deemed conclusive and binding upon all the real property within the bounds of the district, and upon the owners thereof." Another section of the statute (3630) provides that the district shall not cease to exist upon the completion of the system, but shall continue for the purpose of maintaining the ditches and keeping them clear from obstructions, etc. A search of the statute from end to end fails to disclose any provision which, either in express terms or by implication, can be construed to confer authority on the county court to dissolve the district after it has been organized. The county court, in the absence of a statute, can not exercise that authority. *Morrilton Waterworks Imp. Dist.* v. *Earl,* 71 Ark. 4; *Hall* v. *Callaway,* 94 Ark. 49; *Taylor* v. *Wallace,* 143 Ark. 67.

The case last cited is conclusive of the question now under discussion. In that case we held that, inasmuch as the general statue in regard to the organization of road improvement districts (act 338 of the General Assembly of 1915) did not confer authority upon the county court to remove commissioners, the power could not be exercised by that court. In disposing of the question,

we said: "The power conferred upon the county court to appoint three road commissioners at the time of making the order establishing the road district, pursuant to the terms of the act, is a special, and not a general power. No such power exists in the county court except by enactment of the General Assembly.. The general power of supervision by the county court over roads, conferred by the Constitution, invests said court with no such power or authority. The delegation of power being special, the extent thereof is limited to the express grant." Nor does the county court possess jurisdiction to exercise the relief to the property owners by injunction against unlawful acts of the commissioners in attempting to proceed under a void organization. If it be conceded that the petition contains allegations which would justify relief in the proper court, it is certain that the county court has no jurisdiction to grant the relief sought in the prayer of the petition.

Judgment affirmed.

ARKANSAS ANTHRACITE COAL COMPANY v. STATE.

Opinion delivered May 30, 1921.

TAXATION—DOMESTIC CORPORATIONS—FRANCHISE TAX.—Under Crawford & Moses' Dig., §§ 9799-9801, providing that every corporation organized and doing business under the laws of the State shall make a report to the Tax Commission, which shall report the same to the Auditor, who shall charge and certify to the Treasurer for collection from such corporation a tax of one-tenth of one per cent. on that part of its subscribed and issued capital stock employed in this State, *held* that domestic corporations owning coal lands which they have leased to others are liable to the tax, though they transact no other active business in the State.

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

Rose, Hemingway, Cantrell & Loughborough, for appellants.

The purpose of the act is only to levy a franchise tax upon those corporations which are doing business within the State, and as the appellant corporations are not doing any business, but are merely holding mineral rights for sale or lease, they are not within the purview of act No. 112, Acts of 1911, p. 67, or the amendatory act No. 122, Acts 1917. A foreign corporation who leases mines for a term of years is not doing business within the meaning of the statute. 237 U. S. 28; 228 *Id.* 295, 303-5; 220 *Id.* 145; 163 Pac. 148; 99 Kan. 671.

J. S. Utley, Attorney General; *A. L. Rotenberry* and *J. C. Marshall,* special counsel, for appellee.

The case cited by appellant, 227 S. W. 411, does not settle the question, nor are 237 U. S. 28 and others cited in point. See 91 N. E. 266; 194 S. W. 820; 163 Pac. 148; 96 N. Y. S. 745, affirmed in 97 N. E. 1194; 87 N. E. Rep. 434. The corporations were clearly liable for the tax, as they were doing business in the State.

McCULLOCH, C. J. Two consolidated actions are involved in this appeal, each instituted by the State of Arkansas against domestic corporations to recover unpaid franchise taxes under the statute which provides that every corporation "organized and doing business under the laws of this State for profit shall make a report in writing to the Arkansas Tax Commission," the form and substance of such report being specified, and that upon the filing of such report the Tax Commission shall report the same to the Auditor of State, "who shall charge and certify to the Treasurer of State for collection from such corporation * * * a tax of one-tenth of one per cent. upon that part of its subscribed or issued capital employed in Arkansas." Crawford & Moses' Digest §§ 9799-9801.

The articles of incorporation of the Arkansas Anthracite Coal Company define its purposes to be "to buy, own and sell lands, mineral rights, oil, gas and timber rights; conduct mining operations; to run a general

mercantile business; to manufacture lumber; to build, own and operate switches and tramroads; to buy, own and sell stocks of railroads and other corporations; to operate stone quarries; to manufacture stone and brick; to lay out cities." This corporation has a paid-up capital of $597,000, which is invested in mining rights and coal lands siutated in this State.

The articles of incorporation of the Arkansas Anthracite Mining Company define its purposes to be, "the mining of coal and other minerals; the operation of railroads, steamboats, barges and tramroads; the buying, owning and selling of lands, merchandise, stocks in other companies; the selling of coal and other minerals, and the establishment of agencies for that purpose." This corporation has a paid up capital of $100,000, and invested the same as the other corporations.

The property owned by the two corporations constitutes a single coal field of about 15,000 acres. The coal company has made a lease of a tract of 328 acres of its mineral rights to a certain person, which said lease lapsed without any development work being done. The mining company leased 160 acres to an individual who assigned the lease to another corporation which has mined the coal and paid royalties to the mining company annually from the year 1918 up to the commencement of these actions. The coal company owns all of the capital stock of the mining company, which it received in consideration of a conveyance of 5,000 acres of its mineral right holdings to the mining company. This conveyance to the mining company was executed to enable the latter to mortgage the property for a loan of $50,000 to use in paying a bonus to a certain railroad company for building a railroad to the coal field. The reason for this was that it did not suit the purposes of the coal company to incur this obligation and the mining company was organized for the purpose of assuming the obligation under the arrangement just described. Neither of the corporations has transacted any other active business, if it

be held that the above-recited transactions constitute "active business." The trial court rendered a decree for the recovery from each of the corporations of the several amounts claimed by the State as franchise taxes.

It is the contention of learned counsel for the corporations that neither have been "doing business" within the meaning of the statute, and that neither is liable for the payment of the franchise tax under the statute. The contention is that the corporations have been and are holding the property in which the capital stock is invested merely for the purpose of doing business in the future, and that this does not fall within the terms of the statute. Counsel argue that the words "doing business," as used in the statute, should be interpreted to mean activity in the prosecution of the business specified in the charter. We do not so interpret the statute. The purpose is to exact the payment of a tax on the exercise of the franchise (*St. Louis S. W. Ry. Co.* v. *State*, 106 Ark. 321), and a corporation neceessarily exercises its franchise in the investment of its capital in other property, for it derives its authority to make the investment from the franchise granted by the State. It can not function at all except under the powers granted to it in the franchise. The statute applies to all active corporations—those which are functioning and not those which are dormant. A corporation must be both organized and active in order to be liable for the franchise tax. A corporation may have been duly organized and may remain or become inactive and dormant, but, if it functions at all, it is, as before stated, alive and active. This view of the meaning of the statute is strengthened by the fact that the tax is laid according to the amount of capital stock "employed" in this State, which shows that the employment of capital stock was construed as constituting the doing of business in the exercise of the franchise.

This view is also very much strengthened by the provision in section 9820, Crawford & Moses' Digest, to the effect that all corporations, both domestic and foreign,

"qualifying * * * to do business in the State or organized under the laws of this State," shall pay an annual franchise tax of $10, where such corporation has no capital stock employed in this State or has less than $13,333 of its capital stock employed. This shows that the lawmakers intended to impose a franchise tax on all live corporations in this State, whether actively engaged in business or not"

In the recent case of *State* v. *Gloster Lumber Company,* 147 Ark. 461, we decided that a domestic corporation was, under a statute applicable "to all corporations doing business in this State," liable to general taxes on its stock, all of which was invested in property and business wholly situated and operated in another State, and in disposing of the question we said: "The theory of counsel for appellee is that a corporation organized under the laws of this State and domiciled here does not come under the requirement of the statute if it has no tangible property here and is not visibly operating some kind of business here in this State. That is not, we think, the correct interpretation of the statute. The words used in the statute are very broad. 'All corporations doing business in this State' is the language used. A corporation organized and domiciled here is necessarily doing business here if it is doing business at all. Its life and existence are here, and all of its business activities necessarily emanate here primarily if it functions at all. Its domicile is the fountain head of all its activities."

The same principle controls in the present case for the reasons already stated. Our decision in the recent case of *Linton* v. *Erie Ozark Mining Co.,* 147 Ark. 331, has no application, for it only reached to the question that a foreign corporation which had not filed its articles of incorporation and obtained permission to do business in the State was not, by merely owning property in the State and leasing it, doing business here within the meaning of the statute, which prohibits corporations from doing business in the State without complying with the laws

thereof. The decisions of the Supreme Court of the United States cited by counsel are not applicable, for they relate to a Federal statute imposing an excise tax on the net income of corporations doing business in any of the States or Territories of the United States. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *McCoach* v. *Minehill, etc., Rd. Co.*, 228 U. S. 295; *United States* v. *Emery*, 237 U. S. 28. In *Flint* v. *Stone Tracy Co., supra*, which was followed in the later cases, the court said: "It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporations irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof * * *."

We conclude, therefore, that the decree of the chancery court is correct, and the same is affirmed.

WOODALL v. STATE.

Opinion delivered May 30, 1921.

1. CRIMINAL LAW—OPINION AS TO ACCUSED'S SANITY.—It was not error, in a murder case, to refuse to permit a non-expert witness to give her opinion as to accused's sanity until the witness should state the facts upon which her opinion was based.
2. HOMICIDE—INSANITY AS DEFENSE.—Where one is on trial for murder in the first degree, and the State proves the killing under circumstances that would constitute murder in the first degree if the homicide was committed by a sane person, then if the killing is admitted and insanity is interposed as a defense, such defense can not avail unless it appears from a preponderance of the evidence, *first*, that at the time of the killing the defendant was under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or *second*, if he did know it, that he did not know that he was doing what was wrong; or, *third*, if he knew the nature and quality of the act and knew it was wrong, that he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist the doing of the wrong act, which was the result solely of his mental disease.

3. HOMICIDE—EMOTIONAL OR MORAL INSANITY.—One accused of murder who is otherwise sane will not be excused because the killing was committed while his reason is temporarily dethroned, not by disease but by anger, jealousy or other passion; nor will he be excused because he has become so morally depraved that his conscience ceases to control or influence his actions.

4. CRIMINAL LAW—DELUSIONAL INSANITY.—The rule that where one labors under partial insanity only, and is in other respects sane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real, is limited in its application solely to those cases in which the testimony proves, or tends to prove, that the disease is in its first or earliest stage of development; but where the disease has progressed or evoluted to its second or persecutory stage, or to subsequent stages, and its form and hallucinations are such as to indicate that its victim, because of the disease, is no longer able to control his will and actions, then the defense of insanity is available, though he knows the nature and quality of his act and that it is wrong.

5. CRIMINAL LAW—QUESTIONS OF LAW AND FACT.—Where the defense of insanity is interposed, it is an issue of fact for the jury to determine whether the accused at the time of the alleged act was afflicted with a mental disease, and an issue of law whether the mental disease is such as to render him irresponsible.

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

J. N. Rachels and *G. G. McKay,* for appellant.

The court erred in permitting the witness, Mrs. Woodall, to answer the question propounded to her, and in its instructions to the jury both in giving and refusing. No. 3 given for the State was abstract, misleading, prejudicial and erroneous. It was also error to refuse instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 19, which are the law of this case.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. There was no error in refusing a continuance, as refusing a motion for continuance is a matter addressed to the sound discretion of the court. 97 Ark. 643; 102 *Id.* 513; 105 *Id.* 698; 109 *Id.* 407. The motion was not made a ground for motion for new trial. 40 Ark. 114.

2. There was no error in refusing to permit Mrs. Woodall to answer the questions asked her. She did not qualify by showing her relation, acquaintance, knowledge, information, etc. Besides appellant got the full benefit of her testimony and can not complain. The error of excluding statements 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.

3. No exceptions were saved to the instructions nor carried into the motion for new trial, and on appeal all such objections will be treated as waived or abandoned. 73 Ark. 455; 105 *Id.* 253; 132 Ark. 596.

4. Written instruction No. 4 is a correct statement of the law of necessity as a defense as was also Nos. 5 and 6, 8, 10, etc. 54 Ark. 588; 55 *Id.* 259; 54 *Id.* 588.

Appellant had a fair and impartial trial, the evidence fully sustains the verdict and there were no errors of law.

WOOD, J. The appellant was indicted for the crime of murder in the first degree in the killing of L. S. Rudisill. He entered a plea of not guilty, and the only defense offered was insanity. He was convicted of murder in the second degree, and, from a judgment sentencing him to a period of twenty years in the State penitentiary, he appeals.

First. Mrs. R. S. Woodall testified that she was the mother of the appellant. The record shows that during the progress of her examination the following took place:

"Q. Was he (Lee Woodall) at the time of the killing, and had he been for some time prior thereto, on the subject of his trouble with L. S. Rudisill sane or insane?

Mr. Miller (prosecuting attorney): I object on the ground that the witness has not detailed any of the facts and circumstances sufficient to express an opinion.

Court: The objection will be sustained to it; I don't think she has detailed sufficient facts and circumstances to testify as to that.

Mr. Rachels (attorney for defendant): We might as well settle this.

Court: I am familiar with the decision, and it is not necessary to argue the matter; I have ruled on it and you can save your exceptions.

Mr. Rachels: Note my exceptions. He objects to my qualifying the witness.

Mr. Miller: No, I do not.

Court: She has not detailed facts sufficient to justify her in expressing an opinion as to his sanity, yet she may be able to do so after while."

The record shows that, after the above ruling, Mrs. Woodall was examined at length and testified in detail as to the appellant's conversation with her concerning his trouble with Rudisill and his manner during such conversation, showing what appellant said and did and how his mind was affected. At the conclusion, she was asked:

"Q. I believe you said awhile ago that upon the question of his trouble with Rudisill he was insane?

A. He was."

Counsel for appellant contends here that the court erred in not permitting the witness during the early part of her examination to answer the question propounded to her as above set forth. The ruling of the court at that juncture was correct. For at this time the witness had not detailed sufficiently the facts upon which she based her opinion. The record shows that the witness later during her examination fully stated facts upon which her opinion was based and was permitted to express the opinion that on the subject of his trouble with Rudisill, appellant was insane. The ruling of the court was in conformity with the rule announced by this court in *Bolling* v. *State,* 54 Ark. 588-598-599; *Smith* v. *State,* 55 Ark. 259-62; *Schumann* v. *State,* 106 Ark. 362; *Dewein* v. *State,* 120 Ark. 302-311; *Hankins* v. *State,* 133 Ark. 38-63.

Second. The appellant next contends that the court erred in its ruling in giving certain instructions on its own motion and in refusing prayers of appellant for instructions on the issue of insanity. The court, on its own motion, gave fourteen instructions on this issue, and it appears that counsel for appellant presented nineteen prayers for instructions on the same issue, which the court refused.

In *Bell* v. *State,* 120 Ark., at page 553, this court, having under consideration rulings of the trial court in giving and refusing prayers for instructions on the issue of insanity where the crime charged was murder in the first degree, announced the law as follows: "Where one is on trial for murder in the first degree, and the State proves the killing under circumstances that would constitute murder in the first degree if the homicide was committed by a sane person, then, if the killing is admitted and insanity is interposed as a defense, such defense can not avail unless it appears from a preponderance of the evidence, first, that at the time of the killing the defendant was under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or, second, if he did know it, that he did not know that he was doing what was wrong; or, third, if he knew the nature and quality of the act, and knew that it was wrong, that he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist the doing of the wrong act which was the result solely of his mental disease." * * *

"But it must be remembered that one who is otherwise sane will not be excused from a crime he has committed while his reason is temporarily dethroned not by disease, but by anger, jealousy or other passion; nor will he be excused because he has become so morally depraved 'that his conscience ceases to control or influence his actions.' In other words, neither so-called 'emotional' nor 'moral' insanity will justify or excuse a crime."

In commenting upon the numerous prayers for instructions, at page 556, we said: "It is not surprising that, in the multiplicity of prayers for instructions on this issue, many of them conflicting, long, and involved, that the trial court, being under the necessity of ruling promptly and not having the time to investigate, should have failed to give a consistent and harmonious charge in conformity with the law as above announced, which we find to be the case. We can not comment upon each assignment of error and upon the separate prayers in which error appears without unnecessarily extending this opinion, * * *. Instead of the numerous instructions that were given, it would have been far better if the court, after announcing the law as to the burden of proof and declaring the above tests, had instructed the jury that if they believed from the preponderance of the evidence that the appellant was insane they should acquit him, otherwise they should convict him of the crime charged. If counsel had succinctly presented their respective contentions in a few plain prayers embodying the above tests, doubtless the errors that crept into the court's charge would have been avoided."

What we have said in *Bell* v. *State* is opposite to this case. In the case at bar the court did not heed the admonition and follow the suggestion of this court in *Bell* v. *State, supra*, and as a result we find that the court's charge on the issue of insanity is inconsistent and well calculated to mislead the jury. While some of the instructions given by the court on its own motion correctly declare the law in conformity with the law as announced by this court in *Bell* v. *State, supra,* other instructions were entirely out of harmony with the law as there declared and were contradictory and inconsistent in themselves. The same may be said with reference to the prayers of appellant for instructions. While some of them declared the law in conformity with previous decisions of this court, others did not.

The court told the jury in several of the written instructions given on its own motion that, if the appel-

lant at the time of the killing was laboring under a mental delusion, and the killing was the result of such delusion, and the appellant was unable to control his act, the jury should acquit him, provided they found the imaginary facts, if real, would justify or excuse the crime. For instance, the court gave instruction No. 10, as follows: "You are further instructed that, upon a consideration of all the testimony in the whole case, including the testimony tending to show defendant's insanity or mental incapacity for the commission of crime, if you find he was, at the time of the act of killing, laboring under a mental delusion and was unable to control his act, then you should acquit the defendant, provided you find that the imaginary facts, if real, would justify or excuse the crime."

In *Bolling* v. *State, supra,* we approved the rules announced in McNaughten's case, and one of them is to the effect that "if the defendant labors under a partial delusion only and is in other respects sane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." We also recognized this as announcing a correct legal principle in *Smith* v. *State,* 55 Ark. 259-263. It will be observed that the court in its instructions applied this principle broadly, and without qualification or limitation, which makes all the instructions containing this provision in direct conflict with the rule or doctrine as announced in the third test in *Bell* v. *State, supra,* and which had been firmly established in previous decisions of this court. *Williams* v. *State,* 50 Ark. 511-518; *Green* v. *State,* 64 Ark. 523-34; *Metropolitan Life Ins. Co. v. Shane,* 98 Ark. 132.

Commenting upon the legal tests laid down in *Bell* v. *State, supra,* we there said: "The second and third of these tests are applicable in every case where the evidence tends to prove, as it does here, that the accused, at the time of the alleged criminal act, was afflicted with that disease of the mind termed by medical experts, alienists and authors on medical jurisprudence as 'para-

noia,' which has progressed to the 'stage of persecution.' This disease manifests itself and is characterized by systematized delusions; that is, a delusion based on false premises, pursued by a logical process of reasoning to an insane conclusion. *Taylor* v. *McClintock, supra.* The victim of this disease, in its first stage, has apparently a sound mind upon all subjects except those coming within the particular sphere of his delusion, and he may then be able to control his actions with reference to his delusion. Hence the reason for the rule announced in *McNaughten's Case,* 10 Clark & Finley's Rep. 199-211, and recognized by us in *Bolling* v. *State, supra,* that where one labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. But where the disease has progressed to its second stage, according to Wharton & Stille, in their excellent work on Medical Jurisprudence, pp. 828-1031b, 'the patient passes on to the formation or delusion of suspicion and persecution. He believes he is the object of evil designs of others; he is talked about and maligned; he is shunned; his plans are thwarted; he is unjustly dealt with; he is defrauded of his rights. * * * He may fasten his suspicion upon some particular person or persons. He meditates plans of protection, and then of resentment. He has now become the persecuted paranoiac, the most dangerous of all the insane.'

"In this the second stage of the disease the mind of the victim of paranoia may have become so completely dominated by the disease as to render him incapable of controlling his actions with reference to the subject-matter of his delusions. The disease may have progressed to the extent that, in the language of Dean on Med. Jur. 497, 'the reason has lost its empire over the passions and the actions by which they are manifested to such a degree that the individual can neither repress the former nor abstain from the latter.' But he adds, 'it does not follow that he may not be in possession of his

senses. The maniac may judge correctly of his actions without being in a condition to repress his passions and to abstain from the acts of violence to which they impel him.' Hence, the reason for the third test mentioned above, approved by the best of modern authorities."

In the more recent case of *Hankins* v. *State,* 133 Ark. 38, at pages 47-48, we said: "In approving these rules of McNaughten's case, the court did not hold that the doctrine of irresistible impulse caused by disease of the mind would not be a good defense in cases where the evidence adduced warranted it. In *Bolling* v. *State, supra,* the court was of the opinion that the evidence did not warrant an instruction on irresistible impulse, * * *. Now, it seems to us, *en passant,* that this court, in *Bolling* v. *State, supra,* did not have the correct view of the evidence on the issue of irresistible impulse, for the testimony tended to prove that Bolling was afflicted with paranoia or delusional insanity which had progressed to the stage of suspicion and persecution, in which stage the homicidal tendency or mania is most pronounced."

In the record now before us, there is testimony tending to prove that the appellant was afflicted with a disease of the brain, known as "partial insanity," "monomania" or, in modern psychiatry, as "paranoia," and that this disease had progressed to its second, or persecutory stage. There is also testimony from which the jury might have found that it had not progressed to that stage, and also testimony from which the jury might have found that the appellant was not insane at all. Such being the testimony, it was peculiarly a question of fact for the jury to determine whether or not the appellant was sane or insane according to the tests laid down in *Bell* v. *State, supra.* The rule that "where one labors under a partial delusion only, and is in other respects sane, he must be considered as if the facts with respect to which the delusion exists were real," according to the doctrine of *Bell* v. *State, supra,* and *Hankins* v. *State, supra,* is limited in its application solely to those cases where the testimony proves or tends to prove that the

disease—paranoia—is in its first or earliest stage of development.

Paranoia is a progressive disease of the brain. Webster defines it as follows: "a chronic form of insanity characterized by very gradual impairment of the intellect, systematized delusion, and usually by delusions of persecution or mandatory delusions producing homicidial tendency. In its mild form paranoia may consist in the well-marked crotchetiness exhibited by persons commonly called cranks." See, also, New Int. Enc. "Paranoia;" 1 Wharton & Stille, Med. Jur., p. 827, 1031 (a), (b), (c); 2 Clevenger's Med. Jur. of Insanity, p. 860 *et seq.* 865; Americana; Ency. Brit. In its first and earliest stage the manifestations of delusion indicating a disease of the mind are yet so mild and unpronounced that its victim, notwithstanding his mental delusion, may still be able to exercise his will and control his actions with reference to these delusions. Where such is the case, there is no room for the doctrine of irresistible impulse caused by a disease of the brain. But, where the disease has progressed or evoluted to its second or persecutory stage, or subsequent stages, and its form and hallucinations are such as to indicate that its victim, because of the disease, is no longer able to control his will and actions, then the doctrine of irresistible impulse as laid down in the third test, *supra,* is applicable. See Legal Medicine (Stewart), p. 405, section 158.

Where the defense is insanity, as was said in *Hankins* v. *State, supra,* "it is an issue of fact for the jury to determine whether the accused at the time of the alleged act was afflicted with a mental disease, and an issue of law as to whether the mental disease is such as to render him irresponsible. Therefore, the issue of responsibility or irresponsibility in such cases should be submitted to the jury under proper instructions." And in that case, after approving the legal tests or rules as announced in *Bell* v. *State, supra,* we further said: "These legal rules for determining the issue of guilt or innocence where the defense is insanity give the jury a

simple and definite guide announced by those learned in the law, and they cover every possible phase of testimony that may arise in any case."

In cases where the defense is insanity, if counsel in the preparation of their prayers for instructions and trial courts in framing their charges to the jury will but follow the legal tests or rules as approved and announced by this court in the recent case of *Bell* v. *State, supra,* and *Hankins* v. *State, supra,* they can not go astray. As was said in *Kelley* v. *State,* 146 Ark. 509, "In those cases the whole subject was gone into as thoroughly as could be done by the writer who voiced the opinion of the court. We deem it unnecessary here to do more than call the attention of the court and counsel to those cases which must have been overlooked in the framing of the charge to the jury."

For the error in the rulings of the court in its instructions to the jury, the judgment is reversed, and the cause will be remanded for a new trial.

LEWIS v. HARPER.

Opinion delivered May 30, 1921.

1. LANDLORD AND TENANT—ESTOPPEL TO DENY LANDLORD'S TITLE.—The possession of a tenant is that of his landlord, and, so long as the relation of landlord and tenant exists, the tenant can not acquire an adverse title as against his landlord, nor can he prove that the title is in the State, and not in the landlord.
2. LANDLORD AND TENANT—ESTOPPEL TO DENY ASSIGNEE'S TITLE.—A tenant can not dispute the title of an assignee or purchaser of the land of the landlord, any more than he can dispute the title of the landlord himself.
3. LANDLORD AND TENANT—DENIAL OF TITLE—TERMINATION OF LEASE.—Upon the disavowal of the landlord's title, the relation of landlord and tenant ceases, and, as between them, the tenant becomes a trespasser, and the landlord may sue at once to recover possession, though the leasehold term has not expired.

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

J. E. London, for appellant; *J. B. McDonough,* of counsel.

The action of unlawful detainer does not lie to determine the rights in the property sued for but only who is entitled to the present possession. 84 Ark. 220; 98 *Id.* 235; 100 *Id.* 629; 102 *Id.* 380. The lands were wild when defendants took possession under a contract with Robert Dunning to clear the land, and they did clear it under the agreement and put it in cultivation. Under the testimony plaintiff can not take possession until the expiration of the time they were let to defendants. Plaintiff has invoked the law in unlawful detainer and is bound by it. It was error to instruct a verdict. To create the relation of landlord and tenant, there must be a valid contract between the parties. 93 Ark. 222; 57 *Id.* 215.

At the time plaintiff bought out Dunning defendants claimed the land; it was an island and belonged to the State. A question for a jury was made, as there was a question of fact to be decided and it was error to direct a verdict. 19 Cyc. 1171; 69 S. W. 839, 908; 151 Mass. 543; 24 N. E. 907; 53 Mo. 313; 30 Mo. App. 44, 450; 44 N. W. 29.

Pryor & Miles, for appellee.

1. The undisputed facts show that appellants were placed in possession as tenants of appellee's grantors; that they disclaimed their landlord's title and denied that they were their lessor's tenants, and put themeselves in hostility to the rights of the lessor. 16 R. C. L., § 631. The relation of landlord and tenant ceased upon the disclaimer by the tenant of the landlord's title. 9 Wall. 592; 14 Peters 156. A tenant can not dispute his landlord's title, or interpose an after-acquired title in defense of a suit by the landlord for possession or rent. 125 Ark. 141; 112 *Id.* 105; 9 *Id.* 328; 39 *Id.* 135; 20 *Id.* 547; 13 *Id.* 385; 31 *Id.* 222; 7 *Id.* 310; 27 *Id.* 50; 114 *Id.* 376. A tenant in possession can not disclaim the landlord's title without surrendering possession nor attorn to another. 43 Ark. 28; 27 *Id.* 50; 28 *Id.* 153. Nor can he

extinguish his landlord's title to the demised premises by purchasing an adverse title. 45 Ark. 177; 77 *Id.* 570; 28 *Id.* 153; 42 *Id.* 289.

2. There was no error in the rulings of the court as to the admission or exclusion of testimony and a verdict was properly directed.

WOOD, J. The appellee brought this action against the appellants. He alleged that he was the owner of certain lands in Sebastian County, Arkansas, and that he was entitled to the possession of same; that the appellants entered into possession of the lands under an agreement with the appellee and Robert Dunning, who at that time owned an undivided one-half interest. By the terms of the contract the appellants were to clear the lands of standing timber, and as compensation for their services in so doing they were to have the possession of the lands free of rent for two years; that in the year 1919 the appellants disclaimed the title of appellee and Dunning; that they made false and misleading statements to William B. Owen, State Land Commissioner, to the effect that the land was an island, and that the title was in the State. They applied to the commissioner for a deed; that the appellee and Dunning were compelled to go to considerable expense to resist the claims of the appellants; that the commissioner decided that the lands did not belong to the State. Notwithstanding this decision, the appellants still contend that the lands belong to the State. Appellee further alleged that appellants had committed waste and had refused to allow other tenants of the appellee to cross the lands. Appellee prayed for judgment for possession and damages in the sum of $250 and for rents.

Appellants answered, denying all material allegations of the complaint, and they averred that the lands in controversy held by them is an island; that it is subject to sale under the act of the General Assembly of 1917; that they applied to purchase the same on May 20, 1919, and that the State Land Commissioner arbitrarily

refused their application and that a mandamus is now pending against him to compel him to make appellants a deed. They alleged that appellee had no title or color of title to the lands.

The testimony on behalf of the appellee tended to sustain the allegations of his complaint. Lewis (one of the appellants) was called as a witness for the appellee, and he testified substantially as follows: That he and his brother went into possession of the lands in February, 1919; that Bob Dunning showed them the land and said he had some land to lease and that he would give them two crops to clear the land or one crop and give him the timber; that they did not agree as to which they would take, but they told him they would cut the timber off for $2 and give him the timber or either they would sell the timber and not cultivate it the next year. They took charge of the lands under that agreement and cleared up some of it. After they went into possession they learned that the land was State land. They then made application to the Commissioner of State Lands to purchase the same, and as soon as they made this application they did not consider themselves any longer tenants of Dunning, under whom the appellee claimed by warranty deed; that, after the commissioner denied their application to purchase the land, they brought a mandamus to compel him to do so. The appellants cultivated about twenty acres of the land in controversy in the year 1919—lands which they had cleared, and this year 1920 they had in cultivation between twenty and twenty-five acres. There were 131 acres on the island which was in their possession. They were to pay no rent for the years 1919 and 1920; that they only sold about ten cords of wood from the land, and the balance was still there cut up in such lengths as were required for making excelsior. There was no fence around the land when Dunning showed same to appellants. The river was on one side, and a fence on the other between the island and the rest of the farm.

There was further testimony to the effect that at the first of the year 1920 the appellee notified appellants to get out, and they refused to obey the notice, giving as a reason that they considered themselves no longer his tenants but were holding possession. The appellants offered to prove that the land in controversy was an island, which the court would not permit them to do, and also offered to introduce deeds to show that the title was not in the appellee, which testimony the court refused to allow. At the conclusion of the testimony the court instructed the jury to return a verdict in favor of the appellee, which was done. A judgment was then rendered in favor of the appellee, from which is this appeal.

It appears from the undisputed facts in the record that the appellants went into possession of the lands in controversy under the appellee's grantors. The appellants do not deny, but on the contrary admit, that they took possession of the lands in controversy under appellee's grantors, but they set up in defense of the action that appellee's grantors had no title, and hence they say that the appellee acquired none. The appellants have thus placed themselves in the attitude of denying the title of their landlord while holding on and claiming the right to the possession, which they only could have obtained through him. This they can not do, according to the authorities generally and as held by numerous decisions of this court.

"A tenant can not dispute the title of his landlord while he remains in possession under him nor acquire possession from the landlord by lease and then dispute his title without surrendering possession." *Burton* v. *Gorman,* 125 Ark. 141.

"The possession of a tenant is that of his landlord, and, so long as the relation of landlord and tenant exists, the tenant can not acquire an adverse title as against his landlord." *Gee* v. *Hatley,* 114 Ark. 376. See, also, *Bryan* v. *Winburn,* 43 Ark. 28; *Simmons* v. *Robertson,* 27 Ark. 50; *Hughes* v. *Watt,* 28 Ark. 153; *Pickett* v. *Fer-*

guson, 45 Ark. 177; *Dickinson* v. *Arkansas City Imp. Co.,* 77 Ark. 570, and other cases cited in appellee's brief.

No question of the right to homestead government lands is involved in this controversy.

The appellants contend that the relation of landlord and tenant did not exist between the appellants and the appellee because the appellee was the purchaser from appellants' landlord, and they did not take and hold possession under the appellee. "A tenant can not dispute the title of an assignee or purchaser of the landlord any more than he could dispute the title of the landlord or lessor himself." *Adams* v. *Primmer,* 102 Ark. 380.

The appellants also contend that they had cleared up the land under the contract which entitled them to the land free of rent for two years, but the law is that upon the disavowal of the landlord's title the relation of landlord and tenant ceases, and as between them the tenant becomes a trespasser, and the landlord may sue at once to recover possession though the leasehold term has not expired. 16 R. C. L., § 631; *Meryman* v. *Bourne,* 9 Wallace 592; 19 L. Ed. 683; *Walden* v. *Bodley,* 14 Peters 156; 10 L. Ed. 398. There was no error in the ruling of the court in refusing to allow appellants to offer testimony to show that the lands in controversy belonged to the State. The judgment of the court was in all things correct, and it is affirmed.

FISHER v. STATE.

Opinion delivered May 30, 1921.

1. HOMICIDE—JUSTIFICATION—ILLICIT RELATIONS OF DECEASED WITH DEFENDANT'S WIFE.—In a prosecution for murder, it was proper to refuse a requested instruction that defendant was entitled to prove that illicit relations existed between deceased and defendant's wife as exculpating the defendant or in mitigation of the punishment, as that fact did not justify or excuse the homicide.
2. WITNESSES—COMMUNICATIONS TO PROSECUTING ATTORNEY—PRIVILEGE.—In a murder trial, testimony of the prosecuting attorney that, prior to the killing, defendant consulted him as to a crimi-

nal prosecution against deceased for illicit relations with defendant's wife, and that witness informed defendant that he did not have sufficient evidence, was not privileged, as the witness was consulted as the public prosecutor, and no confidential relationship existed between them.

3. HOMICIDE—EVIDENCE—GOOD CHARACTER OF DECEASED.—In a prosecution for murder, evidence on behalf of the State that deceased was a peaceable and law-abiding citizen is not admissible unless defendant undertakes to attack the character of deceased.

4. HOMICIDE—EVIDENCE—CHARACTER OF DECEASED.—In a prosecution for murder, evidence on behalf of defendant that on several occasions, when visiting defendant's wife in the night time, deceased borrowed a pistol to take along with him, is not an attack on deceased's character for peace and quietude, and does not render admissible evidence on behalf of the prosecution as to deceased's character in that respect.

Appeal from Cross Circuit Court; *R. E. L. Johnson*, Judge; reversed.

Killough, Lines & Killough, for appellant.

1. The court erred in refusing instruction No. 1 offered by defendant.

2. It was reversible error to permit the testimony of Judge H. T. Mitchell and W. A. Weaver as to the reputation of deceased as a peaceable, law-abiding citizen to go to the jury, as the character of deceased had not been put in issue. 75 Ark. 297; 171 S. W. 149; 190 S. W. 290; 21 Cyc. 907-8.

3. Ernest Fountain was not a competent juror and the court erred in not setting aside the verdict and granting a new trial. 104 Ark. 606; *Ib.* 616; 178 S. W. 328; 72 Ark. 158.

4. The burden was on the State to show the purity of the trial, and no proof was offered to show that defendant was not prejudiced by the conduct of the juror. 44 Ark. 115; 109 *Id.* 193.

5. It was error to admit the testimony of Giles Dearing. It was a privileged communication. C. & M. Dig., § 4146.

The facts of this case are substantially the same as in 190 S. W. 290.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. There was no error in refusing instruction No. 1 for defendant. The use of the word "*exculpating*" was not prejudicial. Webster Dict., *verbum.*

2. There was no error in permitting H. T. Mitchell and W. A. Weaver to testify that the reputation of deceased as a peaceable, law-abiding citizen, was good.

3. There was no error in permitting the testimony of Mitchell and Weaver to go to the jury.

4. The record fails to show that Ernest Fountain, a juror, was not a competent juror. The objections came too late—after the verdict. 40 Ark. 511; 19 *Id.* 156; 20 *Id.* 50; 29 *Id.* 99.

5. There was no error in admitting the testimony of Giles Dearing. No proper exceptions were saved and the objections were waived. 2 R. C. L. 96-7.

HART, J. George Fisher was indicted for the crime of murder in the first degree, and was convicted of the crime of murder in the second degree, his punishment being fixed by the jury at twenty-one years in the State penitentiary. From the judgment of conviction the defendant has duly prosecuted an appeal to this court.

It appears from the record that the defendant shot and killed Jess Moore with a pistol in the town of Wynne, in Cross County, Arkansas, on the 16th day of July, 1920.

According to the witnesses for the State, Jess Moore, with two other men beside him, was sitting down near the depot in the town of Wynne when the defendant, George Fisher, approached them and sat down beside them, being the farthest away from Jess Moore. He spoke to them as he came up, and, after sitting there a few minutes, he arose and said, "Jess, you have done me dirty," and then shot Jess Moore twice with a pistol. Jess Moore rose up and exclaimed, "Oh, George, don't do that." At the time he was staggering around on the sidewalk. The defendant replied, "You have done

enough to me," and shot him twice more. The deceased was unarmed at the time and made no attempt to shoot or otherwise injure the defendant.

According to the testimony of the witnesses for the defendant, the defendant lived at the town of Tilton, just north of the town of Fair Oaks, where Jess Moore lived. Both of these towns are situated in Cross County and not far from Wynne, the county seat. The wife of the defendant ran a boarding house at Tilton, and the deceased was accustomed to go there every other night ostensibly for the purpose of eating supper, but in reality to visit the defendant's wife. It finally came to the knowledge of the defendant that the deceased was visiting his wife. Finally the defendant's wife went to St. Louis, Mo., on a visit to her relatives, and on her return stopped at Wynne and did not come home. The defendant went over there to induce her to come home, but was unable to do so. He was on his way to the depot to take a local freight train for his home when the shooting occurred. According to the defendant's testimony, the deceased made an effort to shoot him, and he shot him in his necessary self-defense.

A daughter of the defendant testified at the trial that she found a letter from the deceased to her mother in which he urged her to act in such a way that her husband would leave her so that he, the deceased, might then get to live with her. The deceased said in his letter that he could not live without her. Some testimony was introduced by the defendant tending to show that he was insane at the time of the killing.

No complaint is made by the defendant that the evidence is not legally sufficient to support the verdict, and it is only necessary to say that a reading of the evidence for the State shows that it was amply sufficient for that purpose.

It is insisted by counsel for the defendant that the court erred in refusing instruction No. 1, asked by the defendant, which is as follows:

"The jury are instructed that defendant had a right to show all the circumstances connected with the killing of the deceased and to prove the illicit relations, if any, between deceased and wife of defendant, and that they may take all such facts and circumstances into consideration as exculpating the defendant or in mitigation of the punishment."

The court was right in refusing this instruction. The fact that the deceased may have had illicit relations with the wife of the defendant did not excuse or justify the homicide under our statutes. Crawford & Moses' Digest, §§ 2338-2383.

It is also insisted that the court erred in admitting the testimony of Giles Dearing. The latter was deputy prosecuting attorney of the county, and the court permitted him to testify before the jury that the defendant came to his house on the evening before the killing and asked him a number of questions relative to whether the deceased and the defendant's wife had violated the criminal laws. From the information elicited by the questions, the deputy prosecuting attorney told the defendant that there was not sufficient evidence to warrant him in prosecuting the deceased and advised him that he might get a divorce from his wife. The defendant did not consult Dearing for the purpose of employing him as his attorney. He only consulted him as a public prosecutor. His testimony did not concern any communication made to him as attorney by the defendant as his client, or his advice thereon. Therefore no confidential relation existed between them which would prevent the witness from testifying concerning the matters talked about without the consent of the defendant.

Again it is contended by counsel for the defendant that the court erred in permitting witnesses to testify for the State that the reputation of the deceased for being a peaceable and law-abiding citizen was good.

In *Bloomer* v. *State,* 75 Ark. 297, the court held that it is well settled in this State that evidence on the part of

the prosecution that the deceased was a man of good character for peace and quietude should not be admitted unless the defendant had undertaken to attack the character of the deceased. See, also, *Kelley* v. *State,* 146 Ark. 509.

The Attorney General conceded that the reputation of the deceased for peaceableness is not admissible as original evidence against one charged with murder where self-defense is relied upon. He contends, however, that the evidence of the defendant himself conflicted with the evidence in behalf of the State and made an issue on the question of who was the aggressor. The defendant, in order to corroborate his own testimony that the deceased was the aggressor, introduced several witnesses who testified that the deceased asked to borrow a pistol from them and gave as a reason that he was going to walk from Fair Oaks to Tilton in the night time and did not want to do so without having a pistol. They refused to let him have a pistol.

Another witness testified that the deceased approached him in the same way, and that he let him have a pistol on one occasion to carry with him from Fair Oaks to Tilton in the night time.

Another witness testified that he frequently let the deceased have his pistol to carry with him on his night trips from Fair Oaks to Tilton, and that on each occasion the deceased would return the pistol to his store on the day following. After the witness heard that the deceased was visiting the defendant's wife at Tilton he refused to let him have his pistol any more.

It is insisted by the Attorney General that this testimony introduced by the defendant was sufficient to bring the case within the rule announced in *Carr* v. *State,* 147 Ark. 524. We can not agree with the Attorney General in his contention. We do not think what the defendant proved concerning the deceased was equivalent to proving his general character as a violent, quarrelsome and fighting man. It is clear that the proof made in the

Carr case by the defendant as to the character of the deceased was of an entirely different nature from the proof made in the case at bar. In that case the defendant offered to prove that the deceased had had numerous fights, paid a fine for each one of them; that he had had several quarrels with other persons; that he had beat up others; that he had killed a negro; and these matters all came along in such consecutive order that the court was of the opinion that they showed the general reputation of the deceased to be that of a violent, turbulent and fighting man. Here the deceased did not own any pistol, did not habitually carry one, and only wanted to carry it on the occasions when he went from Fair Oaks to Tilton in the night time. On each occasion that he borrowed the pistol he returned it on the next day. The evidence does not show that he went armed on other occasions. He was unarmed at the time he was killed. It was not shown that he had had any previous difficulties with the defendant or any other person. The mere fact that testimony was introduced tending to show that he visited the defendant's wife and returned home in the night time and borrowed a pistol frequently on such occasions, does not establish his general reputation as being that of a violent, quarrelsome and fighting man.

The character of the deceased as being peaceful and quiet is presumed to be good until the contrary appears, and, the testimony of the defendant not being sufficient to show that the general reputation of the deceased in that respect was that of a quarrelsome and fighting man, the State was not entitled to introduce original evidence upon that subject.

It necessarily follows that, if the proof was incompetent, it was prejudicial to the defendant.

For the error in admitting it, the judgment must be reversed and the cause will be remanded for a new trial.

BATTLE v. DRAPER.

Opinion delivered May 30, 1921.

1. CONTRACTS—CONSTRUCTION.—It is the duty of the court to construe a written contract and to declare its terms and meaning where the contract contains no words of latent ambiguity.
2. CONTRACTS—MUTUALITY.—Where plaintiff had sold a tract of mortgaged land to defendant, there was no lack of mutuality in a subsequent contract whereby it was agreed that defendant should for a reduced consideration buy in the above tract of land at the foreclosure sale and should also buy in another tract belonging to plaintiff, for which plaintiff agreed to pay the purchase money.
3. FRAUDS, STATUTE OF—MEMORANDUM SIGNED BY AGENT.—Where an agent was authorized to sign a memorandum of a written contract for the sale of land, it is immaterial that the authority of such agent was not witnessed by writing.
4. PRINCIPAL AND AGENT—AUTHORITY OF GENERAL AGENT.—Where a father was general agent to act for his daughter, she was bound by his act in signing a written contract for the sale of her land, regardless of whether he had shown it to her or stated its terms to her before he signed it for her as her agent.
5. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Objection that a verdict is excessive can not be raised on appeal where it was not made one of the grounds of the motion for new trial.

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

STATEMENT OF FACTS.

Mattie B. Draper brought suit against O. M. Battle to recover damages for the alleged breach of a contract. The defendant denied liability under the contract.

Mattie B. Draper purchased from J. J. Battle two tracts of land in Hempstead County, Arkansas, known respectively as the Custer place and the Smith place. On the 10th day of October, 1912, she executed a mortgage on said tracts of land in the sum of $19,000 to J. J. Battle to secure a balance of the purchase money. On the 9th day of December, 1912, she sold and conveyed to the defendant, O. M. Battle, a brother of J. J. Battle, the Smith place for $16,000 and retained a lien upon the land for the unpaid purchase money. Most of the purchase money

was unpaid, and the sale was made subject to the mortgage she had given to J. J. Battle. Having failed to pay J. J. Battle according to the terms and conditions of the mortgage, he brought suit against her and O. M. Battle in the chancery court to foreclose her mortgage and to cancel her deed to O. M. Battle in so far as it affected his rights under the mortgage. On the 5th day of March, 1915, a decree of foreclosure in favor of J. J. Battle was entered of record in the chancery court. The court rendered judgment in favor of J. J. Battle for the sum of $21,621.45 for his mortgage debt, interest and taxes paid by him. This sum was adjudged to bear interest from date at the rate of 8 per cent. per annum until paid. It was decreed that the deed of Mrs. Draper to O. M. Battle for the Smith place should be canceled, in so far as the rights of J. J. Battle under his mortgage are affected. A decree of foreclosure upon default of the payment of the mortgage indebtedness was entered of record in the usual form. The sale was advertised to take place on the 30th day of June, 1915. In order to protect their rights in the premises on that day and before the sale was had, Mrs. Mattie B. Draper and O. M. Battle entered into a contract in writing as follows:

"Whereas, J. J. Battle has a judgment for $21,876.06, principal and interest, against the Custer land belonging to Mattie B. Draper and against the Smith place belonging to O. M. Battle; now we agree that O. M. Battle is to bid in all this land at the sale today, or have it done, and that, in payment of the judgment, there shall be charged against the Smith land the sum of $15,000 and against the Custer land the sum of balance of the judgment and costs of the case, now estimated at $100. O. M. Battle is to take care of the $15,000 and Mattie B. Draper is to take care of the balance of the judgment, that is, she is to proceed to make a loan on the Custer land and take up her part of the judgment, and O. M. Battle will deed or have deeded to her or her assigns the Custer land. If she fails to do this within twelve months, then this agree-

ment is void, and said O. M. Battle shall own the Custer land absolutely, this agreement being an option by O. M. Battle, given in consideration of a large concession of the indebtedness due her, Mattie Draper, on the Smith place by O. M. Battle. All received for these lands at the sale advertised for today, over the amount of the judgment coming to these parties, they or either of them may bid said land up, and if a reasonable bid is offered by an outside party, the owner may let his or her land sell, but such sale shall not change the basis of this settlement, and the owner of the land so sold shall have the overplus so bid."

J. J. Battle was the only bidder at the foreclosure sale, and he bid in both the Smith and Custer tracts for his debt, interest and costs. O. M. Battle did not attempt to bid at the sale. Before twelve months expired Mrs. Draper, through her father, who was her agent in the premises, made demand of O. M. Battle for a deed to the Custer place in accordance with the terms of the contract of June 30, 1915, and offered to pay him the sum of $7,000 therefor. O. M. Battle waived the actual tender of the money and refused to make the deed. He claimed that the title to the land was then in J. J. Battle, and that there was no liability on his part under the terms of the contract between him and Mrs. Draper of the date of June 30, 1915.

The witnesses in the case variously estimated the value of the Custer tract at from $15 to $35 an acre. J. J. Battle said that there were between five and six hundred acres in the tract, and that the land was not worth more than $15 per acre. The father of Mrs. Draper said that there were between six and seven hundred acres in the tract, and that the whole tract was worth $20,000. Other witnesses estimated the land to be worth from $20 to $35 per acre.

J. J. Thomas, the father of Mrs. Draper, acted as her agent throughout the entire transaction, and signed the contract with O. M. Battle of the date of June 30, 1915,

as follows: "Mattie B. Draper, by John J. Thomas, her agent."

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

The jury returned a verdict in favor of the plaintiff, Mattie B. Draper, against the defendant, O. M. Battle, in the sum of $7,500.

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

John B. Gulley, for appellant.

1. The court erred in its instructions. 53 S. E. 795; 6 L. R. A. (N. S.) 403; 89 Ark. 368; 104 *Id.* 459; 1 Elliott on Contracts 232; 13 C. J. 329; 49 L. R. A. (N. S.) 380; 13 C. J. 330; 84 N. E. Rep. 614. The contract and the evidence was undisputed, and a verdict should have been directed for appellant. Mutuality was lacking in the contract. 47 S. E. 66. See, also, 13 C. J. 330.

2. It was error to refuse to allow testimony as to whether or not an offer or tender of money was made to J. J. Battle as shown by the record. Fraud must be proved; it is never presumed. 99 Ark. 45, and many others. A promise to do something in future can not be made the basis of an action of fraud. 225 S. W. 340; 91 Ark. 324; 121 *Id.* 23; 124 *Id.* 308. Mrs. Draper waived the alleged fraud by failure to act promptly and long delay in making complaint. 26 Ark. 28; 77 *Id.* 261; 20 Cyc. 92.

3. The verdict is excessive.

L. F. Monroe and *John N. Cook,* for appellee.

1. No proper exceptions were saved, nor objections made to the instructions, nor to the introduction of testimony. 135 Ark. 499; 139 *Id.* 416; 113 *Id.* 120. The authority of Thomas to sign appellee's name to the contract was not required to be in writing. 72 Ark. 359; 101 *Id.* 73; 92 *Id.* 215.

2. The issues made were properly submitted to a jury and proper instructions given, and the verdict is not excessive.

HART, J. (after stating the facts). It is first insisted by counsel for the defendant that the court erred in giving instruction No. 1, as follows:

"1. If you find from a preponderance of the evidence that the plaintiff, Mattie B. Draper, through herself or her agent, and within one year from June 30, 1915, offered to pay the plaintiff (defendant) the sum of $7,000 as the balance due on the 'Custer place,' and that the defendant refused said offer, or waived a tender of said sum, and failed to execute a deed to plaintiff to said land, your verdict will be for the plaintiff."

The correctness of this instruction depends upon whether or not the contract between O. M. Battle and Mrs. Mattie B. Draper of the date of June 30, 1915, is ambiguous.

It will be observed that the court construed the contract and declared it valid in giving this instruction. It is well settled in this State that it is the duty of the court to construe a written contract and declare its terms and meaning to the jury where the contract contains no words of latent ambiguity. *Paepcke-Leicht Lbr. Co.* v. *Talley,* 106 Ark. 400, and *Wilkes* v. *Stacy,* 113 Ark. 556.

It is first insisted by counsel for the defendant that the construction is erroneous because the contract lacked mutuality. We can not agree with counsel in this contention.

In *Johnson* v. *Wilkerson,* 96 Ark. 320, the court held that the entire contract must be looked to as a whole in determining the consideration for its various obligations and the question of mutuality of the obligations. The court held further that one condition is sufficient to support several undertakings and promises.

In *Kilgore Lumber Co.* v. *Thomas,* 98 Ark. 219, the court held that mutual obligations imposed by a contract form a sufficient consideration for entering into it. See, also, *Fisher* v. *Skinner,* 112 Ark. 190.

Tested by the principles announced in those cases, it can not be said that the contract was void for want of

mutuality. By the terms of the contract O. M. Battle bound himself to bid in all the land at the foreclosure sale and that he would take care of $15,000 of the mortgage indebtedness and that Mrs. Draper should take care of the balance of it, which amounted to about $7,000.

It will be remembered that Mrs. Draper had conveyed the Smith place to O. M. Battle in December, 1912, for the consideration of $16,800, most of which was on deferred payments. The sale was subject to the mortgage of J. J. Battle. The contract further provided that, unless Mrs. Draper paid her part within twelve months, the agreement should be void, and that O. M. Battle should own the Custer land absolutely. The contract then recites that this option is given in consideration of a large concession of the indebtedness due Mrs. Draper on the Smith place by O. M. Battle. Thus it will be seen that, if O. M. Battle had carried out the contract on his part and had bid in the land for the amount of the mortgage indebtedness, interest and costs, he would have had an absolute title to the Custer place, provided Mrs. Draper did not exercise her option to repurchase under the contract and Battle would have been released from the payment of the purchase money which he agreed to pay Mrs. Draper on the Smith place in excess of $15,000. He had agreed to pay $16,800. Thus it will be seen that the difference was a substantial sum and was a good consideration for the contract. The agreement on the part of Mrs. Draper to release a part of his indebtedness to her for the purchase price of the place was a sufficient consideration for his agreement to bid in the lands at the foreclosure sale. There was a benefit derived on each side from the contract, and that fills the demand of the law as to consideration. Any benefit conferred on O. M. Battle to which he was not lawfully entitled or any detriment suffered or agreed to be suffered by Mrs. Draper is a good consideration and will support the contract.

It is also urged that the last part of the contract which deals with the question of what the parties should

do in case of a reasonable bid being offered and accepted by an outside party is ambiguous. We need not consider this, however, for there was no bid by any outside party exceeding the mortgage indebtedness, as contemplated by the parties. The whole tenor of the agreement shows that O. M. Battle was to bid the amount of the judgment and costs, and the clause of the contract relative to outside parties bidding refers to them bidding more than the mortgage indebtedness and costs. This is shown by the language used, because it provides that such a sale should not change the basis of the settlement, and that the owner of the land so sold should have the overplus so bid. We think the court was right in construing the contract to mean that O. M. Battle must bid at least the amount due J. J. Battle under the foreclosure decree.

The undisputed evidence shows that O. M. Battle did not bid in the land as he had agreed to do, and there was no error in giving the instruction.

It is true the contract was signed by the agent of the plaintiff, and that there was no writing authorizing him to do so, but that does not make any difference. The evidence shows that the agent had authority to sign the contract for his principal, and such authority was not required to be in writing. *Davis* v. *Spann*, 92 Ark. 213.

It is also true, as contended by counsel for appellant, that Captain Thomas did not show the contract to Mrs. Draper until after it was executed; but that does not make any difference. Mrs. Draper stated that he was her agent in making the contract, and this constituted him as her general agent. She stated specifically that she gave him power to act as her agent in the matter. Therefore being her general agent to make the contract, she was bound by its terms as soon as her father made it, regardless of the fact of whether he had shown it to her, or stated the terms of it to her before he signed it for her as her agent.

Again it is urged that the judgment should be reversed because the complaint alleges that if the contract

had not been entered into the plaintiff could and would have raised the necessary funds and would have saved her land from sale under the foreclosure decree. This allegation was immaterial and had no part in the case. It was not treated as material to the issues raised by the pleadings, and no evidence was introduced relative to it. The reason is apparent. The parties had entered into a contract with regard to the matter and the terms of this contract, which, if valid and binding, fixed their rights and the measure of damages for a breach of it. We have held the contract to be a valid and binding one, and the undisputed evidence shows a breach of it by O. M. Battle. This suit was brought by Mrs. Draper against him within the period of the statute of limitations, and she had a right to maintain it.

The court correctly instructed the jury on the measure of damages. It is claimed that the verdict is excessive. That the verdict was excessive is not made one of the grounds for a new trial, and the defendant, having failed to include it in his motion for a new trial, can not for the first time raise the question on appeal. Moreover, the evidence for the plaintiff was sufficient to warrant the jury in returning the verdict in the amount found by it.

It follows that the judgment must be affirmed.

POE v. POE.

Opinion delivered May 30, 1921.

1. DIVORCE—CRUELTY AND INDIGNITIES.—The remedy of divorce for cruelty and for indignities to the person, provided by Crawford & Moses' Digest, § 3500, is intended for evils which are unavoidable and unendurable, and which can not be relieved by reasonable exertion by the parties.
2. DIVORCE—CRUELTY TOWARD STEPCHILD.—A husband is not entitled to a divorce on acount of his wife's cruelty toward his children by a former wife where it appears that her cruelty is not habitual nor exercised with the intent of causing suffering to the husband.

3. DIVORCE—ALLOWANCE OF ALIMONY.—An allowance of alimony to a wife, in the absence of any showing that it was excessive, will be presumed to be fair, and will not be disturbed until the changed conditions of the parties render alteration or modification necessary.

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

STATEMENT OF FACTS.

H. E. Poe brought this suit against his wife, Laura Poe, to obtain a divorce on the statutory grounds of cruel and barbarous treatment endangering his life and of such indignities offered to his person as render his condition in life intolerable.

The wife denied the allegations of the complaint and asked for alimony.

It appears from the record that the first wife of the plaintiff was killed in a cyclone, and that some of their children were injured so badly that they were carried to a hospital for treatment. The defendant was a nurse in the hospital and nursed the plaintiff's children while there. This led to the plaintiff's hiring her to become his housekeeper. She went to his home as housekeeper and remained there in that capacity until their marriage about two years after they first became acquainted.

Edgar Poe, the oldest son of the plaintiff, was a witness for him. According to his testimony, he was thirteen years of age, and during most of the time that plaintiff and defendant lived together as husband and wife the latter treated the children well. Sometimes she would whip them and sometimes she would make them do without their dinner. Sometimes they had been doing wrong and sometimes they had not when she punished them. She struck the witness four or five times with something other than a switch. She hit him once with a shovel and once with a stick of stove wood. One time she hit him in the mouth and knocked six of his teeth loose, and it was about a month before his mouth got well. The defendant was a Seventh Day Adventist and

would not let the children do any work on Saturday, but sometimes attempted to make them work on Sunday. At one time his stepmother bruised his face and eye when she attempted to correct him, and also choked him so that she left her finger prints on his throat when she got through. All the matters testified to happened while the plaintiff was away from home.

Albert Poe, the second son of the plaintiff, testified that most of the time their stepmother treated the children well, but that she whipped them with the first thing she could get her hands on; that she would get mad quickly, and at one time got mad and tied him and his older brother with a rope; that his father was out in the back yard when this was done. He also corroborated the testimony of his brother about their stepmother hitting him in the mouth with a shovel and knocking six of his front teeth loose. The teeth became tight again in about a month.

The plaintiff was a witness for himself. According to his testimony a great many Seventh Day Adventist preachers called at his home, and he objected to this. His wife was good to her stepchildren the greater part of the time, but when she got mad she used no judgment and would whip them with anything that she got her hands on. She could not control her temper. He was not present at any time when she abused the children, except once when she tied two of them with a rope. He went into the house and cut the rope. His oldest son, Edgar, left home while the plaintiff was absent because he could not get along with his stepmother. The defendant wrote the plaintiff about this and said that Edgar had run away. She said in her letter that she did not think the matter was serious, but that she had not seen Edgar since he left. Edgar went to his aunt's home when he left. The plaintiff went to see Edgar before he returned home. When he got home he asked his wife what she meant by treating his children the way she did while he was gone. He told his wife that it looked like she could not get along

with his children while he was away. His wife told him that it was all Edgar's fault, and that she had not hurt him. The plaintiff then told her that they would have to move from the country into town because his work was in town. The defendant said that she would not go to town with him, and then he took his children to their aunt's and left home. This was in May, 1919, and the plaintiff and the defendant have not lived together since. The plaintiff made no effort to find any particular place to live, but told the defendant that if she wanted to go to town that he would find a place, but it was on the condition that she would treat the children better. He further stated that she had never offered to go back to him.

On cross-examination he admitted that he had been keeping company with other women since he and his wife had separated. He further admitted that he could not afford to take his wife back the way his children felt about her. He also stated that there was no possible chance for him and his wife to ever live together and get along, and that he was afraid to trust his children with her. His children showed great distress at being carried back to the defendant, and he did not have the heart to do this.

Two other witnesses for the plaintiff testified that they had worked at the plaintiff's house and had seen the defendant whip the children "awful hard." One of them said that the husband would bring home meat to be cooked and that the defendant refused to cook it because it was against her religion to eat meat. She would only feed them on milk, potatoes and bread.

The defendant was a witness for herself. She admitted tying the two boys together one time with a rope, but said that she was playing with them. She denied positively that she had whipped the children severely as testified to by them. She said that she had only whipped them moderately for the purpose of correcting them, and had required them to do but little work on Sunday. She stated that the plaintiff had left their home in the country

in May, 1919, and had wilfully remained away ever since. She continued to reside at their home after the plaintiff had left for nearly a year and left there because her husband came home during her absence and took the furniture out of the house. She stated that she had always treated her husband kindly and still wanted to make up and live with him. He left her on account of her alleged mistreatment of his children. She denied having mistreated them and asked him not to leave her. Her testimony was corroborated by that of her mother, who had made frequent and lengthy visits at their home while they lived together as husband and wife.

Several other witnesses in the neighborhood testified that they visited the home of the plaintiff and defendant frequently, and that the defendant always treated the plaintiff well and never cruelly whipped or mistreated his children.

The chancellor found the issues in favor of the defendant, and dismissed the plaintiff's complaint for want of equity. He allowed the defendant alimony in the sum of $20 per month until further orders of the court.

A decree was entered of record according to the findings of the chancellor, and to reverse that decree the plaintiff has prosecuted this appeal.

James E. Hogue, for appellant.

It was error to dismiss the plaintiff's bill for divorce. In those States where the courts have held the abuse of stepchildren is not a cause for divorce, the decisions were rendered under the common-law unaffected by statutes. 9 Ark. 507-516. Besides the abuse of appellant's children was the principal indignity complained of, yet there were others rendering his condition intolerable and entitled him to a divorce under our statute. C. & M. Digest, § 3500.

A. J. Murphy, for appellee.

HART, J. (after stating the facts). The grounds for divorce are statutory merely. Among other causes our

statute provides that the chancery court shall have power to dissolve and set aside a marriage contract where either party shall be guilty of such cruel and barbarous treatment as to endanger the life of the other, or shall offer such indignities to the person of the other as shall render his or her condition intolerable. Crawford & Moses' Digest, § 3500.

In the first place, it may be said that the remedy of divorce, under this clause of our statute, is for evils which are unavoidable and unendurable, and which can not be relieved by reasonable exertion by the parties seeking the aid of the courts. *Meffert* v. *Meffert,* 118 Ark. 582.

In the second place, it may be said that the main grounds relied upon by the plaintiff in support of his bill for divorce is cruel treatment by his wife to his children by his first wife.

In discussing similar statutes, it is generally held by text writers that mistreatment of a stepchild in itself alone will not afford grounds for a divorce. It is only where the cruelty toward the child is habitual or exercised with the intent of causing suffering to the parent that a cause of divorce on this account will arise. Bishop on Marriage, Divorce and Separation, § 1586; Nelson on Divorce and Separation, § 301; 9 R. C. L., § 129, p. 347; 19 C. J., p. 50; *Barker* v. *Barker* (Okla.), 26 L. R. A. (N. S.) 909; *Friend* v. *Friend,* 53 Mich. 543; *Melvin* v. *Melvin,* 130 Penn. St. Repts., p. 6, and *Rigsby* v. *Rigsby,* 82 Ark. 278.

The stepmother might be guilty of great cruelty to her stepchildren, and yet not be guilty in that respect to her husband. This is well illustrated in the present case. According to the testimony of the children and of the father, the stepmother had a very violent temper which she could not control, and when she got mad she would whip them with the first thing she got her hands on. The whippings were all done in the absence of the husband, and, according to the testimony of the children themselves, their stepmother whipped them only when

she became mad at them. The stepmother denies having whipped them too severely at any time. If the testimony of the children is to be accepted, it does not show that the stepmother whipped them because she was mad at their father and intended by so doing to make him suffer. The children testified that for the most part she treated them kindly. So it may be said that the plaintiff has failed in the respect just set forth to establish any grounds for divorce under the statute. The testimony showed that, on account of their difference in religion, the mistreatment of plaintiff's children by his first wife by the defendant and from other causes, their marriage was an unhappy one. Our statute, however, has not made these things a ground of divorce, and the parties must bear the consequences of having made an unwise marriage.

Therefore the chancellor was right in dismissing the plaintiff's complaint for want of equity.

No point is specially made on the fact that the chancellor allowed the defendant alimony in the sum of $20 per month. This allowance was in the usual form, "until the further orders of the court." It does not appear from the record that the allowance was too much. In the absence of any showing to that effect, it must be presumed that the allowance was fair, and it will not be disturbed until the changed condition of the parties makes it necessary for the chancellor to alter or modify it.

It follows that the decree must be affirmed.

THOMAS v. STATE.

Opinion delivered May 30, 1921.

1. PERJURY—INDUCING WIFE TO MAKE FALSE AFFIDAVIT.—One who induces his wife to make a false affidavit is not guilty of perjury, as defined by Crawford & Moses' Digest, §§ 2588-9, though he might be guilty of subornation of perjury as defined by § 2592, *Id.*, by inducing her to commit wilful and corrupt perjury.

2. PERJURY—SUBORNATION OF PERJURY.—One who induced his wife to make a false affidavit was not guilty of subornation of perjury, under Crawford & Moses' Digest, § 2592, unless the wife knew the statements in the affidavit were false.

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

H. K. Toney and *DeWoody Lyle,* for appellant.

1. The motion for new trial should have been granted, as the verdict was not responsive to the law and the evidence. Defendant, under the facts, could neither be indicted as an accessory or principal for the crime of perjury; if guilty at all, it was subornation of perjury. 27 Ark. 275; 96 *Id.* 62; 102 *Id.* 594; 104 *Id.* 245; 108 *Id.* 450. The decision in 102 Ark. 596 is conclusive of this case and settles that the court erred in giving instructions asked by the State and refusing those asked by defendant.

2. It was error to admit a letter directed to the Belt Automobile Ins. Ass'n, purporting to have been signed by Mrs. Virginie Thomas, as there was nothing to show that she wrote it.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. Under § 2311, C. & M. Digest, defendant was guilty, as he was *present,* aiding and abetting his wife in making the affidavit. 1 Bishop, Cr. Law, § 803; 7 Car. & P. 881; 108 Ark. 447; 102 *Id.* 245. See, also, Kirby's Dig., § 1561; 37 Ark. 274; 41 *Id.* 173; 50 *Id.* 313; C. & M. Dig., §§ 2588, 2592, 2304. Appellant, under these authorities, was guilty of commanding his wife to commit the crime, and he was as guilty as if he had himself committed the crime. 13 R. C. L. 1237.

2. There is no error in the instructions, and no error in admitting or refusing to admit testimony. The testimony sustains the verdict and is conclusive, as there are no errors of law.

SMITH, J. Appellant Lee Thomas was tried and convicted under an indictment charging him with the crime

of perjury. The indictment alleges that he falsely, wilfully and corruptly made affidavit before a notary public that a certain automobile, owned by his wife, had been stolen, when in truth and in fact it had not been stolen, and the false affidavit was made for the purpose of collecting certain insurance against the theft of the car.

The testimony in the case shows that Thomas did not make the affidavit, but that it was made by his wife in his presence. Thomas admits the recitals of the affidavit were false, and that he knew they were false, but he says his purpose was to deceive his wife about the car and make her believe it had been stolen. The testimony tended to show that Mrs. Thomas did not know the recitals in the affidavit she made were false.

At the trial the court charged the jury that "it is not necessary to sustain a conviction that the defendant be present at every step of the commission of the crime, but if the defendant was present at any time and while present aided or assisted, encouraged or being present consented to its commission, then he would be guilty."

The court refused to give an instruction requested by appellant which told the jury that a conviction could not be had unless the affiant, Mrs. Virgie Thomas, appellant's wife, knew that the car had not been stolen at the time she made the affidavit.

It is apparent from the instruction given and the one refused that the cause was submitted upon the theory that, if appellant had induced his wife to make a false affidavit in regard to the theft of the car, and was present when the affidavit was made, he was as guilty of the crime of perjury as he would have been if he had himself made the false affidavit. Appellant was not indicted as having coerced his wife, in his presence, to commit the crime of perjury.

We think a fundamental error was made in the trial of the cause. Under the laws of this State one who himself swears falsely and corruptly, commits the crime of perjury. If he induces another to do so, he commits the

crime of subornation of perjury. These are distinct offenses and are separately defined in our statutes.

The definition of perjury as contained in sections 2588 and 2589 of C. & M. Digest is as follows:

"Section 2588. Perjury is the wilful and corrupt swearing, testifying or affirming falsely to any material matter in any cause, matter or proceeding before any court, tribunal, body corporate or other officer having by law authority to administer oaths.

"Section 2589. The wilful and corrupt swearing, affirming or declaring falsely to any affidavit, deposition or probate authorized by law to be taken before any court, tribunal, body politic or officer shall be deemed perjury."

Subornation of perjury is defined in section 2592 as follows:

"Section 2592. Subornation of perjury is the procuring of any other person, by any means whatsoever, to commit any wilful and corrupt perjury in any cause, matter, proceeding, affidavit, deposition or probate in or concerning which such other person shall be legally sworn, affirmed or declared."

Appellant's offense, under the State's testimony, consisted in inducing his wife to make a false affidavit, and that offense is not perjury, but is subornation of perjury.

The conviction must, therefore, be reversed, because appellant has been convicted upon a charge for which he was not indicted.

Inasmuch as the cause is to be remanded, and appellant may be reindicted for the offense of subornation of perjury, we take occasion to say that the instruction requested by him set out above should be given when he is placed upon his trial for subornation of perjury.

In 21 R. C. L., p. 276, it is said: "Subornation of perjury is the crime of procuring another to commit perjury either by inciting, instigating or persuading the guilty party to do so. It is necessary that the perjury

be actually committed to complete the crime. The suborner must also be aware that the person suborned intended to commit perjury." A similar statement of the law is found in Wharton's Criminal Law, vol. 2 (11 ed.), § 1593; 30 Cyc. 1423; vol. 21, Standard Enc. of Procedure, 328.

Such is the necessary meaning of section 2592 of C. & M. Digest set out above. It is not sufficient that the suborner procures another person to testify falsely; but the requirement of the statute is for the person procured, "by any means whatsoever, to commit any wilful and corrupt perjury," that is the person swearing must know the fact sworn to is false.

The judgment of conviction will, therefore, be reversed and the cause remanded.

ILLINOIS BANKERS' LIFE ASSOCIATION *v.* DOWDY.

Opinion delivered May 30, 1921.

INSURANCE—SUFFICIENCY OF PAYMENT OF PREMIUM.— Where an insurance company authorized a bank to collect premiums, and insured, having a sufficient deposit in the bank, directed the cashier to pay the premium and to charge the amount thereof to his account before the premium became due, and the cashier agreed to do so, this was a sufficient payment though the amount therof was not charged to insured's account until after expiration of the time of payment.

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

T. E. Helm and *Garner Fraser,* for appellant.

1. The bank was the agent of appellant for no purpose except to collect premiums, and had no authority except that delegated in printed and written instructions. The premium for January, 1920, was due and was not paid, and under the terms of the policy it was void.

2. It was error to admit evidence to show that plaintiff had a deposit in the bank for the purpose of paying the premiums as they fell due, and that the bank

had formed the habit of collecting premiums after the period of grace allowed had expired. This testimony was not competent, as it was not within the pleadings and was entirely in reference to a new issue, and further, because it was not shown that defendant association ever had any knowledge that the bank had at any time exceeded the specific instructions delegated to it by collecting any premiums beyond the time allowed under the contract. The evidence distinctly shows that the association never knew that any premium was collected by the bank after the thirty days of grace had expired.

3. Failure to pay the premiums at maturity rendered the policy absolutely null and void without further notice or action. 112 Ark. 178-9; 187 U. S. 335; 93 *Id.* 24; 104 *Id.* 88; 104 *Id.* 252. The policy was never reinstated as provided for and was forfeited. 139 Pa. St. 546. The remedy of plaintiff, if any, is against the bank, as it was no fault of the association that the premium was not paid in time. 68 N. C. 11.

4. The bank was simply a depository bank. It had no authority other than to collect premiums and deliver receipts and could not waive any provisions of the policy and the rules and instructions of appellant association as to payments. 138 Ark. 442; 52 S. E. Rep. 536; 35 *Id.* 342. No affirmative action of the company was necessary to forfeit the policy after the thirty days of grace expired. 198 S. W. 74. The premiums must be paid when due or the policy is void. 112 Ark. 178-9; 3 Cooley's Briefs, pp. 2260-1; 2 Joyce on Ins., §§ 555 and 555a. Notice to the bank to pay the premium by a depositor is not sufficient unless a check is made. 78 Ark. 127. An agent authorized to deliver policies and receive premiums but not to issue policies can not extend the time for payment. 53 Iowa 405; 3 Cooley's Briefs 2484; 54 Ark. 75; 138 *Id.* 442. An agent who is only authorized to collect and transmit premiums can not waive conditions of forfeiture in a policy. 3 Cooley's Briefs 2486; 129 Ark. 159; 24 Ohio St. 67.

5. The court erred in its instructions, and the peremptory instruction asked by defendant should have been given. The evidence is uncontradicted that the policy was forfeited.

M. P. Hatchett, for appellee.

1. The Bank of Shirley had authority to receive premiums, and the premium was duly paid and the policy kept in force. 142 Ark. 132; 143 *Id.* 143; 3 A. L. R. 615.

2. The Bank of Shirley was the agent of the insurance company, and under the proof in this case is estopped by the conduct of its agent; the knowledge of the agent is that of the principal. 142 Ark. 132; 79 *Id.* 375; 111 *Id.* 435; 26 Col. 252; 103 Ark. 171; 142 *Id.* 132; 138 *Id.* 442; 129 *Id.* 159.

SMITH, J. On the trial from which this appeal comes the court gave, over the objection of appellant, an instruction reading as follows:

"No. 2. If you find, from a preponderance of the evidence in this case, that the said Tom M. Dowdy, as the agent of his wife, the said Julia A. Dowdy, during the latter days of December, 1919, or the early days of January, 1920, directed the cashier and assistant cashier of the Bank of Shirley, or either of them, to pay the premium due or coming due on said policy, and that said Tom M. Dowdy, from the time of such direction to the expiration for the payment of said premium, had sufficient funds on deposit in said bank to his credit to pay said premium, you will find for the plaintiff."

This instruction, in effect, directed a verdict against the appellant insurance company, as there is no dispute about the facts which the jury was there told would warrant a finding for the plaintiff.

The court refused to give instructions asked by appellant which were the converse of the instruction set out above. These instructions declared the law to be that the insured had no right to rely on the promise of the officers of the bank to pay the premium, and that the payment of the premium was not made until the insur-

ance company had received credit therefor on the books of the bank, and that such payment must have been made and credit given within thirty days of the due date of the premium.

Mrs. Dowdy was the insured, and her husband, Tom M. Dowdy, was the beneficiary. It was his custom to pay the premiums, and the payments were ordinarily made by him in the manner in which he had directed the payment in dispute to be made.

The premiums on the policies were ordinarily payable quarterly, although policy holders had the option of paying the premium semi-annually or annually in advance, the due dates being January 1, April 1, July 1, and October 1, of each year. The insurance company mailed out in advance to the policy holders notices of the time within which their premiums would be due and the place where they would be payable, and there were a number of policy holders in appellant company residing in Shirley, Van Buren County, Arkansas.

It was the custom of the company to send to the Bank of Shirley a list of its policy holders residing there with a statement of the premium due by each and signed receipts for premiums to be delivered when payments were made; and for this service the insurance company paid the bank a collection charge of one per cent. The names of the policy holders were written on a printed form, which contained the following direction to the bank: "Please report as soon as all are paid and in any case not later than the maturity of said collections. Remit to cover all collections and return all unpaid notes and receipts."

Mrs. Dowdy died March 11, 1920, and payment of the policy on her life, which was for a thousand dollars, was refused for the alleged reason that the premium due thereon January 1, 1920, was not paid at that time nor within the thirty days of grace thereafter allowed for payment. The policy in question provided that failure to pay premiums at maturity "shall render the policy

absolutely null and void, and the same shall be forfeited without further notice or action of the directors of the association, unless reinstated as herein provided." The bank had no authority to collect premiums after the thirty days of grace had expired.

It was shown that a few days before January 1, 1920, Mr. Dowdy inquired of the cashier of the bank whether the insurance list had been received, and was told that it had not been received. Dowdy thereupon directed the cashier of the bank to pay the premium when the list was received from the company and to charge the amount thereof to his account, and the cashier agreed to do so. Dowdy was a customer of the bank, and carried a deposit there sufficient to have covered the premium. He supposed his request had been complied with, and that the premium had been paid in accordance with his request and his usual method of paying premiums.

The cashier of the bank made up his report on February 7, and mailed it to the company with draft to cover the premiums collected, and the list of such premiums included the January premium on the Dowdy policy. It was the custom of the cashier to make up and forward this report after the expiration of the thirty days of grace. The premium due on the Dowdy policy was $3.17, but the charge ticket made therefor by the cashier of the bank against Mr. Dowdy was not actually entered against his account on the books of the bank until February 12, 1920. The transmittal letter of February 7 miscarried in the mails, and after an exchange of letters and telegrams in regard to it a duplicate list and draft went forward to the company, which was not received by the company, however, until after the date of Mrs. Dowdy's death.

Under the facts thus stated the court did not err in giving the instruction as set out above. This case is ruled by the cases of *Sovereign Camp W. O. W.* v. *Newsom,* 142 Ark. 132; *N. Y. Life Ins. Co.* v. *Allen,* 143 Ark. 143; *Security Life Ins. Co.* v. *Bates,* 144 Ark. 345.

In the case of *New York Life Ins. Co.* v. *Allen, supra,* the authority of an agent to collect and the fact of collection of a premium note were in dispute. The payment of the premium was there claimed to have been made in a manner substantially identical with the method of payment employed here by Dowdy. In that case the court said: "Allen (the insured) had already told the cashier to pay the note and charge his account with the amount. He had money to his personal credit in the bank more than sufficient to discharge his indebtedness to the insurance company. This direction to cashier was sufficient, we think, to show a payment to the cashier if he had authority to receive it."

The doctrine thus announced was reaffirmed in the case of *Security Life Ins. Co.* v. *Bates, supra.*

No error appearing, the judgment is affirmed.

T. A. THOMAS & SONS *v.* WOLF.

Opinion delivered May 30, 1921.

MASTER AND SERVANT—ASSUMED RISK.—The danger attendant upon unloading logs from a wagon standing on rough, sloping ground, in passing on the lower side to a point between the front and hind wheels and releasing the bumper which held the logs in place on the wagon was obvious to an experienced servant, and the risk was assumed by him.

Appeal from Clark Circuit Court; *Joe Hardage,* Special Judge; reversed.

John H. Crawford and *Dwight H. Crawford,* for appellants.

1. The court erred in refusing to direct a verdict for defendant. Wolfe was experienced, knew of the danger and assumed the risk. 90 Ark. 407; 96 *Id.* 387; 96 *Id.* 206; 108 *Id.* 483; 82 *Id.* 11; 68 *Id.* 316; 93 *Id.* 564; 101 *Id.* 197; 92 *Id.* 102; 95 *Id.* 560; 116 *Id.* 56; 118 *Id.* 304. See, also, 67 *Id.* 209; 226 S. W. 1055; 88 Am. St. 841; 158 Ind. 609; 92 Am. St. 319; 129 N. C. 173; 85 Am.

St. 740; 101 *Id.* 945; 109 *Id.* 917. See, especially, 115 Wis. 332; 95 Am. St. 947.

2. Appellee's second, third and fifth instructions were wrong and prejudicial.

3. The fourth was also wrong and prejudicial. 135 Ark. 341.

4. It was error to refuse the fifth and sixth instructions asked by appellant.

5. It was error to permit plaintiff to prove that there was a defective cable, because it was not shown that it was in any way connected with plaintiff's injury. 90 Ark. 210.

W. H. Mizell, for appellee.

1. The peremptory instruction was properly refused. The testimony of plaintiff was undisputed.

Statements by a person soon after an injury and while suffering from pain are entitled to slight credence and credit. 14 Ency. of Ev., p. 192. The citations of Arkansas cases by appellants do not sustain their contention. The only question is, did Wolfe assume the risk, and was he guilty of contributory negligence? We say he did not and was not. This case falls within the rule in 77 Ark. 367. See 110 Ark. 456; 77 *Id.* 367; 183 S. W. 189.

2. There was no error in the instructions given. Similar ones have been approved in the cases cited above.

HUMPHREYS, J. Appellee instituted suit against appellants, a partnership composed of T. A. Thomas and his sons, in the Clark Circuit Court, to recover damages in the sum of $8,500, on account of the loss of a leg, occasioned through the alleged negligence of said appellants in providing a defective wagon from which, and a rough, sloping yard upon which, to unload logs.

Appellants filed an answer, denying that the injury resulted on account of their negligence, and interposed the further defenses of assumed risk and contributory negligence by appellee.

The cause was submitted upon the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment in favor of appellee for $500. From the judgment, an appeal has been duly prosecuted to this court.

At the conclusion of the evidence, appellants requested the court to direct a verdict in their favor, which the court refused to do, over their objection and exception. Appellants now insist that the court committed reversible error in refusing to grant the request.

The facts necessary to a determination of this question are as follows: Appellee was forty-eight years of age and experienced in cutting and hauling logs. Appellants were operators of a sawmill. They employed appellee to haul logs to their log yard situated upon their tramway. They maintained a contrivance called a log boom in the yard for the purpose of pulling the logs by a wire cable from the yard and loading them upon the tramcars. The wire cable was short, and this necessitated the unloading of the logs near the tramway. In loading the logs on the cars by this process, trash and dirt were drawn toward the tramway, which made the ground rough and sloping at that point. Nathan Thomas, one of the appellants, told appellee in unloading to drive as close to the track, or tramway, as he could conveniently do, so that the logs, when unloaded, could be picked up easily by the loader. Appellants furnished appellee an 8-wheel wagon, for the purpose of hauling the logs, which contained a defect in the front bumper block that caused the buck pin to stick, so that it had to be knocked loose with an ax in order to release, or throw out, the bumper block. The purpose of removing the bumper blocks was to permit the logs to be rolled off the wagon. The pin could have been removed with the use of a canthook by one standing at the front end of the wagon, or by going to a point between the front and hind wheels on either the upper or lower side of the wagon, or under the wagon. There was no danger inci-

dent to removing the pin by the canthook method or by pulling or knocking it out from the upper side or under the wagon, but there was great danger incident to removing it if standing on the lower side of the wagon. It was possible for an active, alert man without being injured to remove it while standing on the lower side of the wagon. The condition of the yard at the point where appellee was directed to unload the logs, as well as the condition of the bumper, was obvious and known to appellee. In obedience to instructions theretofore given, appellee, on the morning of August 11, 1919, drove the wagon loaded with dogs in the open space near the tramway and boom so that it stood on rough, sloping ground. He passed on the lower side of the wagon, and, when he reached a point between the front and hind wheels, he knocked the pin loose with an ax, which released the front bumper block, and, before he could get out of the way, a log rolled off and crushed his leg, which necessitated amputation. Appellee was alone when the injury occurred. He had knocked out the bumper and unloaded logs in the same way and at the same place before that time without being injured.

According to the undisputed facts detailed above, the danger attendant upon unloading logs from a wagon standing on rough, sloping ground, in passing on the lower side to a point between the front and hind wheels and releasing the bumper which held the logs in place on the wagon by knocking or pulling out the buckpin, was obvious. The danger was obvious and necessarily appreciated by appellee, for he was intelligent and experienced in this particular character of work. He was cognizant of the defect in the bumper which caused the buckpin to hang, as well as the sloping condition of the yard where he stopped the wagon for the purpose of unloading the logs. There were other methods by which he could have released the bumper with safety to himself; for example, by the use of the canthook, or by going on the upper side or under the wagon and knocking or pulling out the buckpin. The undisputed facts bring the instant case

clearly within the doctrine of assumed risks. Precedent for the application of that doctrine to the facts in the instant case will be found in the cases of *Williams Cooperage Co.* v. *Kittrell,* 107 Ark. 341; *Wisconsin & Ark. Lbr. Co.* v. *Price,* 125 Ark. 480; *St. L. S. W. Ry. Co.* v. *Compton,* 135 Ark. 563; *Hunt* v. *Dell,* 147 Ark. 146.

For the error in refusing to direct a verdict in favor of appellants, the judgment is reversed and the cause dismissed.

WILSON *v.* PANNELL.

Opinion delivered May 23, 1921.

1. VENDOR AND PURCHASER—INNOCENT PURCHASER.—One who purchased a lot from a husband, having knowledge that he had abandoned his wife twenty-three years previously, that she had had actual possession of the lot during such abandonment, had paid the taxes and a personal indebtedness of the husband to prevent his creditors from seizing the lot, is not an innocent purchaser, and took only such title as the husband could have asserted against the wife.
2. EQUITY—LACHES.—Under the rule that equity aids the vigilant, not those who slumber on their rights, a husband who abandoned his wife and left her in actual possession of a lot for twenty-three years, and permitted her to pay all the taxes and assessments and a considerable amount of his personal indebtedness to protect the lot from his creditors, is not in position to ask a court of equity to clear his title as against her.
3. EQUITY—LACHES.—Laches may be pleaded in a suit in equity brought to establish a purely legal right.
4. QUIETING TITLE—NECESSARY PARTIES.—In a suit to quiet the title to a lot, where defendant by cross-bill set up estoppel and asked for general relief against the plaintiff, her husband's grantee, and moved to make her husband a party, such motion being overruled, it was error to quiet her title.

Appeal from Clark Chancery Court; *James D. Shaw,* Chancellor; affirmed.

John H. Crawford, Dwight H. Crawford and *T. D. Crawford,* for appellant.

1. The court erred in dismissing the complaint for want of equity. There was no abandonment of the lot

by Pannell and no proof of an intention to abandon the property. 101 Atl. 305.

2. Nor was he guilty of laches in allowing his family to receive the rents and profits and pay the taxes. 9 Wheaton 241, 288; 126 Ark. 93; 103 *Id.* 251; 140 *Id.* 100; 99 *Id.* 500.

3. There is no presumption of a lost grant in this case, as Mrs. Pannell testifies that she never had any deed and that the only title she had was possession of the deed to Pannell from his grantor. She holds the land merely by virtue of her marital rights.

4. There was no plea of estoppel in this case and that defense was waived. 21 C. J. 1246, § 257; 155 Ala. 648; 12 Ark. 769. Nor was there any equitable estoppel. 99 Ark. 260; 97 *Id.* 43.

5. The chancellor erred in his conclusion on the issue of *adverse possession.* In the absence of evidence to the contrary, the presumption is that the possession is in accord with the legal title. 89 Ark. 19; 23 *Id.* 735; 43 *Id.* 469-485. The rightful owner is deemed to be in possession until he is ousted or disseized. 57 Ark. 523. Permissive possession is not such hostile possession as will start the statute of limitation. 84 Ark. 140; 133 *Id.* 589; 130 *Id.* 28; 114 *Id.* 376; 55 *Id.* 59.

Where possession is originally taken and held under the true owner, a clear, positive and continued disclaimer and disavowal of title and assertion of adverse right brought home to the true owner are indispensable before the statute of limitations begins to run. 2 C. J 134; *Ib.* 75. The doctrine of adverse possession is to be taken strictly. It can not be made out by inference or implication. The presumptions are all in favor of the true owner, and the proof to establish adverse possession must be clear, strict and unequivocal. It must be visible, open, exclusive and hostile and continue for twenty years. The exclusive possession by a husband of a wife's lands is not necessarily adverse. 234 Ill. 240. It results from the community of possession of husband and wife that neither can obtain title by adverse possession as

against the other by mere occupancy. Peck on Dom. Rel., § 50; Schouler on Mar. and Div., p. 223.

Title can not be required by one spouse against the other by adverse possession. 195 Ala. 457; 39 S. W. 48; 215 Ill. 552; 67 N. J. Eq. 165; 105 Ind. 410; 88 S. C. 184; 57 Am. St. 521; 81 Wis. 151; 37 Ala. 536; 179 Pa. 89; 128 N. Y. S. 772; 116 S. W. 43; 94 N. W. 332; 86 Ark. 448. The cases cited for appellee below (29 Pac. 1117 and 110 Pac. 313) do not apply, as the facts are entirely different from this case. See 76 S. W. 790-3; 43 Upper Can. Q. B. 406; 3 Can. App. Rep. 577; *Blair* v. *Johnson,* 215 Ill. 552. The payment of taxes and assessment in the wife's name were not necessarily open and notorious and not hostile nor adverse. 224 S. W. 629. Payment of taxes without color of title, no matter how long, does not start the statute of limitations. 45 Ark. 81.

6. Appellant was an innocent purchaser and paid valuable consideration and acquired the legal title.

J. E. Callaway, for appellee.

Mrs. Pannell was in possession when this suit was instituted, and it should have been at law, ejectment. But both parties acquiesced to a trial, and appellant must come into court with clean hands. He did not attempt to bring W. G. Pannell before the court to explain his attitude. Counsel cite 2 C. J. 29 as being against the presumption of a lost grant, but the chancellor did not base his opinion on that case. 135 Ark. 369; 114 *Id.* 65. There were other stronger equities, notwithstanding the courts generally hold that after twenty years' peaceable possession a lost grant will be presumed. 2 C. J. 292.

2. There is no error in the chancellor's findings as to estoppel, as collusion is shown by the evidence. 21 C. J., p. 1245, § 254. Appellant's purchase was in fraud of appellee's rights, and he paid an inadequate price. A wife can acquire title to a husband's land by continuous, exclusive, adverse possession. 158 Cal. 149; 110 Pac. 313; 29 Pac. 1117. See, also, 132 *Id.* 291. The husband had abandoned the lot, and appellee acquired title by

adverse possession, and the chancellor so found, and justice and equity have been done.

HUMPHREYS, J. Appellant instituted suit against appellees in the Clark Chancery Court, to quiet his title to lot 12 in block 24 in Browning's survey of Arkadelphia, alleging that he was the owner of the legal title, and that appellees claimed title thereto without right, and that their claims cast a cloud upon his title.

One of the appellees, Arkadelphia Motor Company, answered that it was in possession under a lease from its coappellee, Mrs. S. A. Pannell. The other appellee, Mrs. S. A. Pannell, answered, setting up, among other defenses, facts, which, if true, constituted an estoppel on the part of appellant to assert his title in a court of equity.

The cause proceeded to a hearing upon the pleadings and evidence, which resulted in a decree dismissing appellant's bill for the want of equity, from which decree an appeal has been duly prosecuted to this court, and the cause is here for trial *de novo*.

There is little or no dispute in the testimony, and, in substance, the record reflects that, in the year 1897, the then owner of said lot, who is the husband of appellee, became enamoured of another woman and abandoned his family, consisting of his wife and three small boys, and moved with his paramour to Oklahoma City, where they have since lived in adultery; that, after that time, he never contributed to the support of his family or communicated with his lawful wife, the appellee herein; that a short time after the abandonment he returned, disposed of all his assets, except the lot in question, and appropriated the proceeds thereof to his own use, leaving unpaid debts to the amount of $800 or $1,000; that, prior to the abandonment, he had run a blacksmith shop upon the lot in question, which had a high fence around it; that, immediately after the abandonment, his wife, Mrs. Pannell, took possession of the lot and shop in question and, through her boys, conducted the blacksmith shop for fifteen years; that the city compelled her to

move the shop off the lot, after which time she rented it for a small rental to other parties, and, at the time of the institution of the suit, had leased it to her co-appellee, Arkadelphia Motor Company, who was paying her a small rental therefor; that, in the year 1899 she assessed the lot in her own name for the purposes of taxation and thereafter paid the State, county, city and special improvement taxes upon said lot in the sum of about $200, and, out of her individual earnings, paid the indebtedness of her husband to the amount of about $1,000, in order to prevent the lot from being sold to satisfy his debts; that appellant was cognizant of the abandonment and familiar with the lot and uses to which it had been put by the appellee, Mrs. S. A. Pannell, having seen it every day, and sometimes oftener, during the entire period of abandonment; that J. J. Pannell, a son of the appellee, Mrs. S. A. Pannell, had often talked to appellant concerning the affairs of Mrs. Pannell and W. G. Pannell, and had been told that the property belonged to said appellee; that, about thirty days before appellant purchased the property from W. G. Pannell, he had inquired of J. J. Pannell whether the lot was for sale, and was informed that it belonged to his mother and that she did not want to sell it; that, on the 6th day of September, 1920, appellant purchased the lot in question and obtained a quitclaim deed thereto from W. G. Pannell for $500; that, according to the opinion of various witnesses, the property ranged in value from $1,500 to $3,000 at the time he purchased it.

Appellant insists that the court erred in dismissing his bill for want of equity. This must depend upon whether his grantor, W. G. Pannell, was in position to assert his legal title as against the equitable rights of Mrs. S. A. Pannell in a court of equity, for appellant can not be regarded as an innocent purchaser, as the record reflects that he had a personal acquaintance with his grantor, W. G. Pannell, and the appellee, Mrs. S. A. Pannell, and understood that they had lived apart for twenty-three years; that said appellee had been in the

actual possession of the lot during that period, paying taxes thereon and claiming ownership thereto. As appellant was in possession of facts sufficient to put a reasonable man upon inquiry as to the exact situation, he merely succeeded to whatever rights and equities his grantor possessed. W. G. Pannell, appellant's grantor, abandoned his family, consisting of his wife and three small boys, about twenty three years before the institution of this suit, and showed no further interest in them. At the time of his departure, he sold his personal property and took the proceeds with him, leaving an indebtedness of between $800 and $1,000 unpaid. Mrs. S. A. Pannell, thus abandoned, assumed the burden of the support of herself, the children, and the payment of this large indebtedness. In order to meet these burdens, she took immediate possession of the lot in question, and continued the blacksmith business, with the aid of her children, which had been theretofore conducted by her husband. During the entire period of abandonment, she paid the taxes upon the property, amounting to about $200, and liquidated an indebtedness against her husband, which, together with reasonable interest thereon, exceeded, perhaps, the value of the property at the time her husband sold it to appellant. During all this time, the property was assessed in her name, and she openly asserted ownership thereto. Mrs. Pannell testified that she paid the personal indebtedness of her husband to prevent his creditors from taking the lot. In saving the property from his creditors and from sale for taxes, she expended large sums of money. In that way, this delay in asserting his right to the lot has worked disadvantage to said appellee. This unconscientious conduct on the part of appellant's grantor, in the language of Mr. Pomeroy (Pomeroy's Equity Jurisprudence, vol. 1, 4 ed., § 404), would "repel him from the forum whose very foundation is good conscience." To uphold the right of appellant's grantor to sell the lot under these circumstances would operate as a fraud upon the rights of appellee and calls for the application of the equitable doctrine announced

above. Appellant insists, however, that the doctrine of laches is not applicable where one is attempting to enforce a legal right in a court of equity. This court applied the doctrine of laches in the case of *Osceola Land Co.* v. *Henderson,* 81 Ark. 432, in which it attempted to assert its legal title to 1280 acres of land in a court of equity by seeking to remove a cloud upon its title. In doing so, this court reiterated the doctrine announced by Lord Camden in *Smith* v. *Clay,* 3 Brown, Ch., 638, in the following language: "Nothing can call forth this court into activity but conscience, good faith and reasonable diligence." This court also took occasion to reiterate the following maxim of law: "Equity aids the vigilant, not those who slumber on their rights." The following cases also support the application of the doctrine of laches where equitable remedies were invoked in the assertion of purely legal rights. *Clay* v. *Bilby,* 72 Ark. 101; *Turner* v. *Burke,* 81 Ark. 352; *Craig* v. *Hedges,* 90 Ark. 430; *Rachels* v. *Stecher Cooperage Co.,* 95 Ark. 6; *Burbridge* v. *Wilson,* 99 Ark. 455. We think the facts in this case bring it within the rule announced in these cases. Appellee prayed in the alternative that, in the event appellant's bill was not dismissed, her husband, W. G. Pannell, be made a party, and that she be decreed a reasonable sum against him for maintenance and support, together with a reasonable attorney's fee, and that a lien be declared against the lot in question for support and alimony and for taxes paid upon said lot, and for the sum of $1,000 paid by appellee upon his debts, and that the lot be sold to satisfy the lien. She also prayed for general relief. The motion to make her husband, W. G. Pannell, a party was overruled. No answer was filed by appellant to appellee's cross-bill. Under the issues joined, it was technical error to render a decree quieting the title to said lot in appellee, Mrs. S. A. Pannell, as against appellant. The decree will therefore be modified in that respect, but will be affirmed in other respects.

Mr. Justice HART concurs in part and dissents in part; Mr. Justice SMITH dissents.

HART, J. (dissenting in part). The facts necessary to a proper understanding of the case are these. W. G. Pannell and his wife lived in Arkadelphia, Arkansas, and in 1897, without cause, the husband deserted his wife and their three minor children. Since that time he has absented himself from her and the children. When he deserted her, he converted all of his available assets into cash and carried away about $1,000 in money. He left debts to the extent of $1,000. He also owned the lot in controversy on which was located a blacksmith's shop. To prevent the lot from being sold for her husband's debts, Mrs. Pannell paid off his debts and took possession of the lot. She has had possession of it ever since. When he deserted his wife, W. G. Pannell left the State, and has contributed nothing to the support of his family since. In September, 1920, Pannell temporarily returned to Arkadelphia and sold the lot to Thos. N. Wilson for $500. He executed a quitclaim deed to Wilson. Wilson knew that Pannell and his wife had separated and were not living together when he purchased the lot. It is also inferable that he knew that Pannell had deserted her and the children. When Pannell deserted his wife, he went to Oklahoma City with another woman. The present value of the lot is estimated from $1,500 to $3,000. The lot in controversy is located on one of the business streets of Arkadelphia, and Wilson knew that Mrs. Pannell was in possession of it when he bought it. Wilson brought this suit against Mrs. Pannell, alleging that she was claiming title to the lot without right; that her claim constituted a cloud upon his title, and asked that his title to the lot be quieted.

Mrs. Pannell filed an answer and cross-complaint. She set up substantially the facts stated above and asked that a lien be declared against the lot for her support and alimony, including the taxes paid by her and the sum of $1,000 paid by her on her husband's debts, and that the lot be sold to satisfy her lien.

The court found the issues in favor of Mrs. Pannell. It was decreed that the plaintiff's complaint be dismissed for want of equity, and there was a decree in her favor quieting and confirming the title in her.

I am of the opinion that the court was right in dismissing the complaint of the plaintiff, but also believe that its decree was too broad with respect to the cross-complaint. The chancellor should have allowed her the relief prayed for in her cross-complaint. Under the facts stated the wife had a clear-cut case for alimony and also the right of reimbursement for the payment of her husband's debts.

Of course, a wife does not ordinarily stand in the relation of a creditor to her husband, and therefore can not set aside a conveyance made by him of his property as a fraud against his creditors. But, when the interest in the subject changes, a different rule prevails. When the husband wilfully deserts his wife and minor children, the wife has a right to institute suit for alimony. *Wood* v. *Wood,* 54 Ark. 172, and *Horton* v. *Horton,* 75 Ark. 22.

Upon the institution of such suit the wife becomes a creditor of her husband. The wife as a special creditor of her husband is within the protection of the statute against fraudulent conveyance and may proceed according to its provisions. On a proper showing of the fraud the conveyance will be set aside and the property of the husband will be declared subject to the decree for maintenance, or alimony. Nelson on Divorce and Separation, vol. 2, § 938.

In 19 C. J., § 734, p. 318, it is said that a conveyance made by a husband in anticipation of his wife's suit for divorce and to prevent her from recovering alimony is fraudulent and may be set aside unless the purchaser take without notice and for value. Where a husband wilfully deserts his wife and refuses to support her and his minor children, he knows she is likely to become his creditor with the right to attack a fraudulent convey-

ance of his property as being against her marital interests.

In *Harrington* v. *Johnson,* 44 Pac. 368, the Court of Appeals of Colorado said that on this point the better authorities agree on the rule just announced, and several cases are cited in support of the doctrine.

In *De Ruiter* v. *De Ruiter,* 62 N. E. (Ind.) 100, the appellate court of Indiana, in a suit by the wife for divorce and to recover alimony, held that she is a present and continuous creditor of her husband, and that on a proper showing of fraud the husband's conveyance of his real property will be set aside. According to the principles anounced in that case the wife may be either an actual creditor or a subsequent creditor, or holder of equities which afterward ripen into a claim. In the instant case the husband made the conveyance after he had deserted his wife. He had no other property in the State. The lot in controversy was not worth more than $3,000, and it was the only property out of which she could enforce her claim for alimony and for reimbursement for the payment of her husband's debts. She had a right to pay his debts to prevent the lot in controversy from being sold at a sacrifice for the payment thereof and thus deprive her of her lien on it for support and maintenance.

Under our statute it is not necessary to obtain judgment at law in order to maintain a suit to set aside a fraudulent conveyance. Crawford & Moses' Digest, § 4880. Section 4874 provides that every conveyance of real estate made to defraud creditors shall be void as against creditors and purchasers prior and subsequent.

The record shows that Wilson knew of the separation of Pannell and his wife and that the husband had left the State and was not contributing anything to the support of his wife and minor children. Therefore, he was not an innnocent purchaser and stood in no better attitude in this case than Pannell.

Hence the court properly dismissed his suit for want of equity.

The appeal of Wilson brought up the whole case. The right of appellee to have Wilson's complaint dismissed depended upon her right to alimony and to be reimbursed for the $1,000 paid on her husband's debts. Hence the court should have heard her complaint and made her husband a party so that the rights of all should be settled in one suit.

On cross-complaint the court should have decreed that the conveyance from Pannell to Wilson be set aside as in fraud of the wife's marital rights and a lien should have been declared on the lot to reimburse Mrs. Pannell for the amount of her husband's debts paid by her and for whatever amount of alimony the court should allow her.

Therefore, I respectfully dissent from the opinion of the court in this respect.

STEELE v. BUCHANAN.

Opinion delivered June 6, 1921.

HIGHWAYS—INJUNCTION AGAINST COLLECTION OF ASSESSMENTS.—In a suit to enjoin the collection of assessments for the preliminary expenses of a road improvement district created by Road Laws 1919, vol. 1, p. 530, it was error to grant a writ of injunction and to order the return to the taxpayers of an assessment levied to pay the preliminary expenses of certain sections of the district, which were not built, in view of section 27 of above act providing that, if for any reason the improvements therein authorized shall not be made, all expenses shall be charged against the real property of the district, and the amount necessary to discharge all such indebtedness shall be assessed and apportioned and paid in the manner therein provided.

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

H. B. McKenzie, for appellants.

All lands in sections 1 and 3 should bear all the necessary and legitimate preliminary expenses, and the court should have ordered the return of the taxes paid by the landowners. 50 Ark. 116. A law directly in conflict wtih a later act is repealed by the latter act. Act 130, Acts 1919, is in conflict with the later act and is repealed.

J. O. A. Bush, for appellees.

There is no error in the decree, as road district No. 2 had no right to collect a tax on territory included in district No. 1.

SMITH, J. In 1918 Road Improvement District No. 1 of Nevada County was organized under the provisions of act 338, of the Acts of 1915, page 1400, which act was carried into Crawford & Moses' Digest as § 5399 *et seq.*

At the 1919 session of the General Assembly, act No. 130 (Special Road Acts, vol. 1, p. 330) was passed creating Road Improvement District No. 2 of Nevada County. The territory embraced in the act of 1919 was divided into five sections, each of which, for all practical purposes, was a separate road district. Sections 1 and 3 of district No. 2 overlap and include all of the territory of district No. 1. The proposed roads in district No. 1 and in sections 1 and 3 of district No. 2 have the same termini and follow the same route, with the exception of four or five miles of section 1 of district No. 2 between the village of Boughton and the city of Prescott and the lateral running from the village of Emmett southeastwardly to the village of Antioch. There are approximately 22,000 acres in district No. 1 and about 80,000 acres in sections 1 and 3 of district No. 2.

This act 130 of the Acts of 1919 is very similar to, and in may respects identical with, a number of other special road acts passed at the 1919 session of the General Assembly. A study of its provisions would appear to indicate that legislative sanction and authority had been given to construct the improvements committed to each of the five subdistricts or sections of Road Improvement District No. 2. But there appears in the act a section numbered 22, which reads as follows:

"Section 22. If the commissioners and the county court find that it is feasible, practicable, and desirable to construct sections 1 and 3 of the roads, as provided for in this act, and shall file the plans therefor with the county clerk, as provided in this act, or shall make the assessment of benefits in said sections 1 and 3, and said as-

sessment of benefits in each of these sections shall be sufficient to complete the improvement in each, and this act and the said assessment of benefits shall not be held invalid, and the commissioners are ready to let the contract for the construction of the improvements in each of sections 1 and 3, they shall file a statement to this effect with the county court, and the county court is thereupon authorized to enter an order terminating the existence of Road Improvement District Number 1 of Nevada County. Appeals from such order shall be taken within thirty days after its entry, and not thereafter. If the county court does not enter an order terminating the existence of said Road Improvement District Number 1, as herein provided, then its existence and the proceeedings of its commissioners and assessors shall not be affected by this act, but they may proceed to make the improvements in their district, under the provisions of the law under which said Road Improvement District No. 1 was created.

"It was found and hereby declared that the surveys, plans and other expenses incurred by said Road Improvement District Number 1 produced results that will inure to the benefit of sections 1 and 3 of the respective roads and the respective territory set forth in this act, and in the event the existence of Road Improvement District Number 1 shall be terminated, as herein provided, the said sections 1 and 3, created under this act, shall assume and pay each one-half of such expenses and other indebtedness."

This section is somewhat ambiguous, and the difference of opinion as to its meaning resulted in the litigation which was terminated January 17, 1921, by the decision of this court in the case of *Pittman* v. *Road Improvement District No. 1,* 147 Ark. 87.

It was insisted by the commissioners of district No. 2 that it was mandatory upon the county court, under the provisions of section 22 of the act of 1919, to terminate Road Improvement District Number 1 when the commissioners of said district No. 2 filed a statement with the

county court in accordance with the requirement of section 22 of said act 130. We held against that contention, and expressed the opinion that the word "authorize" as there used was directory because the section itself provided that, in the event the county court did not enter an order terminating the existence of said Road Improvement District Number 1, then its existence and the proceedings by its commissioners and assessors should in no wise be affected by the act.

In other words, our holding was that the county court was vested with a discretion to determine whether Road District Number 1 should be allowed to proceed with the construction of the improvement which it was organized to construct. The county court upheld district No. 1, and we affirmed the judgment of the circuit court on the appeal from the judgment of that court, which had affirmed the judgment of the county court, in the case of *Pittman* v. *Road Imp. Dist., supra.*

It appears that the General Assembly in its wisdom so provided that the judgment and decision of the county court as to whether district No. 1 should be terminated, or should be continued, was not to be invoked until certain preliminary expenses had been incurred by district No. 2. In fact, portions of these expenses were to be incurred in acquiring the information upon which the county court would act, in part, in making up and rendering its judgment.

The commissioners of district No. 2, pursuant to the authority conferred by law, proceeded to assess—and did assess—the betterments against the lands in sections 1 and 3 of district No. 2 to result from the improvement of the roads lying therein. In other words, district No. 2 was authorized to proceed, and did proceed, just as if district No. 1 was not existent until the period of time had arrived when the judgment of the county court was to be invoked as to the termination of district No. 1. As to the wisdom of that course, we are not concerned, as the manner of procedure was within the control of the Legislature. Betterments were assessed and extended

on the tax books as provided by act 130. Thereupon certain citizens and taxpayers who owned land in district No. 1 and in sections 1 and 3 of district No. 2 brought this suit agaist the commissioners of the district and the collector of the county to enjoin the collection of any assessment of benefits against the lands in district No. 1 on account of the preliminary expenses incurred by sections 1 and 3 of district No. 2. The court held that such assessments were unauthorized and illegal, and that they should be canceled and set aside and the collection thereof be enjoined and restrained. The court further ordered that certain taxes which had been paid be returned to the landowners who had paid them.

We think the court below erred in its action. It was within the contemplation of the Legislature that the improvement authorized by act 130 might never be constructed, and section 27 of that act provided against that contingency. It reads as follows:

"Section 27. If for any reason the improvements herein authorized and directed shall not be made, all expenses and costs accrued to that time shall be charged against the real property of the district, and the amount necessary to discharge all such indebtedness shall be assessed and proportioned and paid in the manner herein provided. The commissioners shall have the right to pay such reasonable expenses as may have been incurred in preparing this act and securing the information therefor."

We do not have before us the items properly chargeable against the lands in sections 1 and 3 of district No. 2 under the authority of this section 27.

The betterments were assessed against the lands in sections 1 and 3 of district No. 2, and those assessments became final and would be now collected in the manner provided by act 130 but for the action of the county court in refusing to terminate district No. 1.

Preliminary expenses were incurred by authority of law and for the prospective benefit of all the lands in 130 directs that these expenses be paid, and that they

be "paid in the manner herein provided"—that is, that sections 1 and 3 of district No. 2, and section 27 of act they be paid just as the cost of the improvement would have been paid, had it been constructed.

It follows, therefore, that all the lands in sections 1 and 3 should bear all the necessary and legitimate preliminary expenses of those sections, and these preliminary expenses should be borne in the same proportion as the cost of the proposed improvements would have been borne, and the court should not have ordered the return of the taxes paid by the landowners.

The decree of the court below is therefore reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

SMITH, J. (on rehearing). Appellees have filed a petition for rehearing and for a modification of the opinion.

It is insisted that the levy of any tax in sections 1 and 3 was premature, and therefore unauthorized. This question was considered on the original submission, and we adhere to the view that sections 1 and 3 had the authority to collect a sufficient tax to pay the preliminary expenses incurred by those sections.

We are also asked to modify the opinion so as to relieve the property owners in sections 1 and 3 from any liability except their proportional part of the preliminary expenses. The insistence is that the act of 1919 divided the territory of district No. 2 into five sections, and that the preliminary expenses were incurred in the name of, and for the benefit of, all these five sections or districts, and that these expenses should be apportioned among all these districts, and it is asserted that the effect of the opinion herein is to hold sections 1 and 3 liable for expenses which inured to the benefit of all five sections.

No such result was intended by us. We do not undertake to say what items are properly chargeable as preliminary expenses against any of these sections, as that feature of the case was not fully developed or passed upon by the court below. Nor have we undertaken to apportion these expenses.

It is said there are certain general expenses which inured to the benefit of all five sections of district No. 2, and that certain other expenses were incurred for the separate benefit of particular sections of district No. 2. Of course, those expenses which were for the common benefit of all five sections of district No. 2 should be borne by all of them and should be paid just as the cost of the improvement would have been paid had it been constructed as is provided in section 20 of the act. Special expenses for the special benefit of particular sections should be borne and paid by that section, just as the cost of the improvement local to that section would have been paid had it been constructed.

These equities must be worked out on the remand of the cause.

SANDERSON v. MARCONI.

Opinion delivered June 6, 1921.

1. TRIAL—REQUESTS FOR PEREMPTORY INSTRUCTION—EFFECT.—Where each party asks for a peremptory instruction, no other instruction being asked for, this was tantamount to an agreement that the court might decide the issue, and it was not error to give a peremptory instruction to render verdict for the plaintiff if the evidence was legally sufficient to sustain the verdict.
2. INDEMNITY—RECOVERY OF MONEY NOT USED.—Where money was paid to bondsmen as indemnity against loss, there was an implied promise to return any of the money not used in discharging liability under the bond.
3. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Where no exception was saved in the trial court to the exclusion of testimony, the appellate court is not called on to decide anything in that regard.

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

T. E. Webber, Jr., and *M. E. Sanderson*, for appellants.

Appellee can not recover any part of the money deposited, because it was put up by appellee for the express purpose of obstructing or perverting the due ad-

ministration of justice. 46 Ala. 523; 81 Ark. 41. Contracts to suppress evidence, or in any way interfering with or obstructing the course of justice, are against public policy and void. 80 Ark. 332. Where a claim or right to recover depends on a transaction *malum in se* or prohibited by law, and that transaction must necessarily be proved to make out the case, there can be no recovery. 91 Ark. 205. Money paid or advanced under an unlawful agreement, there was but one issue left, viz.: Plaintiff vanced it. 119 Ark. 502. See also note to L. R. A. 1918 C, p. 73.

John N. Cook, for appellee.

1. The material allegations of the complaint—putting up the money, paying out $350 in compromise of the judgment on the bond and the conversion of the remaining $350 by appellants—are not denied by the answer or evidence. The court properly ruled that there was an implied promise or assurance that any part of the money put up and not used would be returned. 110 Ark. 578; 140 *Id.* 512.

2. The second paragraph of the answer does not allege the corrupt agreement appellants now contend for —that the bond was executed for the purpose of enabling appellee's son to get out of jail and run off.

The law presumes every man is honest until the contrary is shown. 87 Ark. 358. A party can not complain that the court did not give an instruction on matter which the court held was not an issue in the case and to which no objection was made. 113 Ark. 120. When the court ruled that paragraph one of appellants' answer was not a defense, and that their answer alleged no fraudulent agreement can not be recovered by the person who adfurther understood from defendant Frank Carrara and from the advice of defendant M. E. Sanderson that none of this money would be returned to him in case his son failed to appear under the requirements of the bond. This phase of the case was never presented to the court by any kind of request, and it was a provision for a penalty and would not be enforced. 73 Ark. 432; 106 *Id.*

274. A defense not relied on in the lower court can not be relied upon on appeal to the Supreme Court. 71 Ark. 242. The answer of appellants and the evidence constituted no defense to the suit, and the peremptory instruction was proper. See 48 Ark. 491; 103 *Id.* 114.

3. The testimony for appellants was not uncontradicted or undisputed, and the court properly refused the peremptory instruction asked by appellants. 142 Ark. 240: 82 *Id.* 86; 113 *Id.* 190.

4. Both parties aske a peremptory instruction, and the court's findings are the same as the verdict of a jury. 142 Ark. 100; 118 *Id.* 134; 100 *Id.* 71.

McCULLOCH, C. J. The plaintiff, Louis Marconi, instituted this action against the defendants alleging that he delivered to them the sum of $700, consisting of $600 in cash and a bond of the United States of the denomination and value of $100, to indemnify them against loss as sureties on the appearance bond of plaintiff's son; and that the defendants accepted said sum and executed said bond on condition that the funds would be returned to him in the event plaintiff's son complied with the terms of the bond, and that the defendants should use such part of the funds so paid over as would be required to discharge their liability in event of forfeiture on the bond. plaintiff delivered the money to defendants "with any bond and a judgment in favor of the State which had been compromised by defendants on the payment of the sum of $350, and the prayer of the complaint was for the recovery of the balance of the money so paid over. Defendants answered, admitting the receipt from plaintiff of said funds and government bond, but denied that Plaintiff alleged that there had been a forfeiture of the promise or assurance whatever from said defendants that any part of this money would be returned in case a forfeiture was taken upon said bond." The answer contained a further statement "that the plaintiff well understood, and it was so explained to him, * * * that if he executed said bond that his son * * * would flee the country and would not be in attendance when his case was

called in said court, and that if plaintiff put up the money for said bond the whole of the same * * * would be entirely lost to him. The plaintiff further understood * * * that none of the money would be returned to him in case the son failed to appear under the requirements on said bond." There was a trial before a jury which resulted in a verdict in favor of the plaintiff for the sum of three hundred and fifty dollars. This verdict was rendered on the peremptory direction of the court.

The facts of the case, as related in the pleadings and set forth in the testimony, are that plaintiff's son was arrested and held in custody on a charge of felony, and, in order to induce one of the defendants, Frank Carrara, to sign a bail bond, the plaintiff delivered to one of the banks in Texarkana, where Carrara resided, the sum of $600 in money and a government bond of the denomination of $100 and drew a check in Carrara's favor for the amount of the money. Carrara signed the bond, and the accused, after being liberated on the bond, fled the country. A forfeiture was taken on the bond, and judgment was rendered against the sureties in the sum of $500, which appellants compromised for the sum of $350 and paid it. The contention of plaintiff is that he paid over the money under a promise that it was to be returned to him if there was no forfeiture of the bond, and that any part of it not used in paying a judgment on the bond was to be returned to him. The defendants contend that there was no express promise to return the money, but, on the contrary, that the money was received from plaintiff with the understanding that none of it was to be returned to him in any event, whether there was a forfeiture on the bond or not. One of the defendants offered to testify concerning an agreement that the money was paid with the understanding that the accused was to flee the country, but the court excluded that testimony on the ground that such agreement was not pleaded in the answer. There was no exception saved to the ruling of the court in that regard.

The state of the proof is such that the jury might have found that the agreement between the parties was

that the money was to be paid over to defendant Carrara as compensation to him for making the bond, and that no part of it was to be returned in any event, or the jury might have found from the testimony that the money was paid over to Carrara merely to indemnify him against any loss which he might sustain by reason of becoming surety on the bond. Each party asked for a peremptory instruction, and the court granted the plaintiff's request and refused the request of the defendants. This was tantamount to an agreement that the court should decide the issue, and it was not error to give a peremptory instruction under those circumstances, if the evidence was legally sufficient to sustain the verdict, no other instructions being asked for or given. *St. Louis S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71. There was, as before stated, sufficient evidence to warrant the jury in finding that, while there was no express promise to return the money, there was in fact an agreement that the money was paid to Carrara as indemnity against loss, and under those circumstances there was an implied promise to return any of the money not used in discharging liability under the bond.

It is argued here that there was evidence offered sufficient to show that the contract was unlawful, in that it was especially agreed that the money was paid over in consideration of the fact that the defendants would make the bond and the boy was to flee the country. There was no exception saved to the ruling of the court excluding this testimony, therefore we are not called on to decide anything in that regard. Even if the language of the answer be regarded as sufficient to present this issue, the findings of the court on the request for a peremptory instruction are sustained by sufficient evidence on such issue.

The judgment is therefore affirmed.

SPIVEY v. SPIVEY.

Opinion delivered June 6, 1921.

NEW TRIAL—TIME OF PRESENTING MOTION.—Where a judgment was rendered against plaintiffs on the day before the court adjourned, but was not presented to the circuit judge in vacation until after thirty days after its rendition, as required by Crawford & Moses' Digest, § 1314, plaintiffs were in the same attitude as if they had permitted the term to lapse without having filed a motion for new trial or having had the same passed upon by the court within the time allowed by law.

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

John T. Cheairs, Jr., for appellants.

1. Argues the merits of the controversy which are not passed on by the court, citing Kirby's Digest, §§ 2698-9, 2700 to 2715; 52 Ark. 193-201; 40 Cyc. 1966; 21 *Id.* 568; 53 Ark. 261.

2. The widow of Louis Spivey was absolutely barred from participating in the fund. She must renounce the will in order to claim dower. 40 Cyc. 1968; should be divided among the appellant heirs.

Danaher & Danaher and *DeWitt Poe,* for appellee.

1. The statute has not been complied with, and there is no bill of exceptions. C. & M. Digest, § 1314. The motion for new trial was not presented to the judge within the time prescribed by law. *Ib.*

2. The provision in the will was not in lieu of dower, and it was not necessary for the widow to renounce the will to take dower. 52 Ark. 200. The money 64 Ark. 1; 117 *Id.* 144; 121 *Id.* 479. Jarman on Wills, p. 502; C. & M. Dig., § 3526.

McCULLOCH, C. J. Appellants are the next of kin and heirs at law of Louis Spivey, who died testate and by his will disposed of all his property except a certain sum of money. The testator by his will gave certain land and personal property to his widow, and the balance of his estate, except a sum of money not disposed of, was devised to certain of his relatives, and to his wife's grandchildren—these last being the descendants of children born to the widow of the testator by a former marriage.

The executor named in the will administered the

estate, and this proceeding was begun in the probate court to require the executor to pay appellants the sum of money not disposed of by the will. The case was heard in the probate court, and an appeal was duly prosecuted to the circuit court, where a trial of the issue was had. The decision there turned upon the question of the duty of the testator's widow to elect whether she would take under the will or not. The court rendered judgment in favor of the widow on August 25, 1920, and on the following day adjourned for the term. A motion for a new trial was filed on August 26, the day of adjournment, but the motion was not presented to the court until the 28th day of September, when the same was heard by the judge in vacation and overruled. In overruling the motion for new trial the court did not endorse on the back of the motion therefor an order granting an appeal and specifying a time within which a bill of exceptions might be filed.

In prosecuting this appeal appellant has proceeded under section 1314, C. & M. Digest, which reads as follows:

"The application for a new trial must be made at the term the verdict or decision is rendered, and, except for the cause mentioned in subdivision seven of section 1311, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented; provided, that where the verdict or decision is rendered within three days of the expiration or adjournment of the term, a motion for a new trial, with an alternative prayer for appeal to the Supreme Court in case said motion be overruled, may be presented, upon reasonable notice to the opposing party or his attorney of record, to the judge or chancellor, or his successor in office, of the district in which said verdict or decision was rendered, wherever he may be found, at any time within thirty days from the date of said verdict or decision, and such judge or chancellor shall pass upon said motion and indorse his ruling thereupon, upon the back of the motion, either granting the motion or overruling same; and if said motion be overruled he shall also indorse upon said

motion, his order granting an appeal to the Supreme Court, and his further order specifying a reasonable time allowed in said cause for filing a bill of exceptions. Upon filing such motion and the judge's order thereon with the clerk of the court where the cause is pending, it shall become a part of the records and files of the cause, and shall have the same legal force and effect as if same had been filed in term time, as now provided by law."

It is insisted that this statute has not been substantially complied with, and that there is, therefore, no bill of exceptions bringing into the record for review the testimony in the case.

This contention appears to be well taken. The statute requires that the motion for a new trial be presented to the court for its action and be acted upon by the court within thirty days of the date of the verdict or decision. This was not done within the time limited by law; nor did the court fix the time within which a bill of exceptions might be filed. The statute not having been substantially complied with, appellants are in the same attitude they would be in if they had permitted the term to lapse without having filed a motion for a new trial or of having had the same passed upon by the court during the term at which it was filed, and the judgment must, therefore, be affirmed. *Field* v. *Waters,* 148 Ark. 325, and cases there cited.

It is so ordered.

JORDAN *v.* ADAMS.

Opinion delivered June 6, 1921.

1. EVIDENCE — PAROL EVIDENCE TO EXPLAIN WRITING.—Where a written contract required the buyers to accept all apples on the ground after a certain date, parol testimony was admissible to prove that it was the seller's duty to take away the fallen apples on such date; such testimony being introduced, not for the purpose of varying or adding to the terms of the contract, but for the purpose of showing what was essential to a compliance with its terms.
2. APPEAL AND ERROR—HARMLESS ERROR.—In an action by buyers of a crop of apples to recover the balance of a deposit advanced by

the buyers to be held by the seller in reserve, where the latter defended on the ground that the buyers broke the contract by refusing to pay for the last car load delivered, to seller's damage, the buyers contending that the amount so held in reserve was more than sufficient to pay for that car and for the remainder of the crop, it was harmless error to permit cross-examination of the seller as to why he refused an offer of the buyers to place an additional sum in a bank to cover any subsequent indebtedness; such testimony being admitted to test the seller's good faith and credibility, and there being no dispute in the case that the written contract controlled.

3. SALES—BREACH OF CONTRACT.—Where the contract price of the remainder of a crop of apples to be delivered amounted to a comparatively small sum in excess of a balance on deposit held by the seller in reserve to apply upon final settlement, on the buyer's refusal to pay for a car load upon the ground that the amount so held in reserve was sufficient to pay for such car load and for the balance of the crop, the seller was not justified in treating the contract as broken by the buyer, and selling the apples to third persons at a price less than the contract price, and holding the buyer liable for the difference.

4. APPEAL AND ERROR—HARMLESS ERROR.—Where the contract price of the remainder of a crop of apples to be delivered amounted to a comparatively small sum in excess of a balance on deposit held by the seller in reserve to apply upon final settlement, an instruction that the buyer did not break the contract by refusing to make further payment for the last car load delivered, so as to justify the seller in treating the contract as rescinded, if the buyer, in good faith, believed that the deposit would be sufficient to pay for the remainder of the crop, *held* harmless.

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

Rice & Rice, for appellant.

The court erred in the admission of testimony and its rulings thereon and in giving the third instruction for plaintiff. This instruction is erroneous because it permits plaintiff to breach their contract, which carries with it the legal duty to pay for all apples on delivery, "if they acted in good faith as reasonable men, etc." 56 Ark. 320. This is a similar case and is controlling here.

McCULLOCH, C. J. Appellant and appellees entered into a written contract on August 7, 1919, for the sale and delivery by appellant to appellees of all apples

grown on certain farms in Benton County during the year 1919, at the price of $2.50 per cwt. The contract specified that appellees were to take, at the price mentioned, all of the apples "except what is called rots and knots, a knot being defined as an apple so badly misshapen as to be unmerchantable." The contract also contained the following provision: "Purchaser also agrees to take all apples on the ground after September 15 that are not knots and rots, except that for Jonathan date to be August 22, and Peerless September 1." The stipulation in the contract with reference to mode of payment and delivery reads as follows:

"Fifteen hundred dollars to be paid upon the signing of the contract, this amount to be held in reserve to apply upon final settlement. Payment for all fruit shall be due when delivered to the said Lowell Fruit Company, f. o. b. cars at Centerton, Arkansas.

"The said J. N. Jordan agrees to place the fruit on the screen and stand expense of removing rots and knots, also stand the expense of delivering the fruit to Centerton, Arkansas, to the car or the evaporator, whether in package or in bulk."

The parties proceeded under the contract until most of the fruit from the orchards mentioned had been delivered, the last delivery being a carload on November 5, 1919, the price of which amounted to $712.75, and a controversy arose between the parties after this carload had been hauled away from the place of delivery by the railroad company as to whether or not appellees should pay this amount to plaintiff or charge it against him on the amount advanced as a reserve on final settlement. Appellant insisted on payment of the amount, and appellees refused to pay the money, claiming that the amount due on that car and the price for the remainder of the apples would not be sufficient to exhaust the sum of $1,500 which had been advanced. Appellant then refused to deliver any more apples under the contract and gave appellees written notice to that effect. He sold the remainder of

the apples to other parties at a price which he claims resulted in a loss to him.

Appellees instituted this action against appellant to recover the sum of $608.60, alleged to be due on the balance of the sum of $1,500 advanced, after crediting the price of the last carload of apples delivered and also after crediting a certain amount paid into court by appellant after the commencement of the suit, leaving a balance of six hundred eight dollars and sixty cents. Appellant answered alleging that appellees broke the contract by refusing to pay for the last car delivered and asked for damages for loss on the remainder of the apples, and he also included in his counterclaim certain items of charges against appellees for improper culling of appellees, making the total of his counterclaim $608.60, the precise amount claimed by appellees. It will be observed from the foregoing recitals that this action is to recover the balance of the money advanced as a guaranty under the contract after crediting the last shipment of apples and the counterclaim represents items for damages claimed against appellees for alleged breach of the contract in refusing to accept apples. The issues were submitted to the jury, and there was a verdict in favor of appellees for the sum claimed, $608.60, and appellant has prosecuted his appeal.

There were numerous assignments of error in the motion for new trial, but we will only discuss those which are argued in the brief. In the first place, it is argued that the court erred in permitting witnesses to testify concerning the duty of appellant to clean up under the trees—in other words, to take away the fallen apples—on the dates specified in the contract for appellees to begin taking apples. The argument is that the contract is unambiguous, and that additional requirements can not be engrafted upon it by parol testimony. This testimony was introduced, not for the purpose of varying the terms of the contract or to add terms, but for the purpose of showing what was essential to a compliance with the terms of contract. Appellees being bound under the con-

tract to accept all apples on the ground after a certain date, this testimony tended to show that it was essential that the fallen apples be cleared away from the trees on the date mentioned so as to determine what appellees were to accept. We think the court was correct in permitting this testimony to be introduced.

The next assignment argued here relates to the ruling of the court in requiring appellant, on cross-examination, to give the reason why he was unwilling to accept a certain offer made to him by the agent of appellees for the deposit of $2,000 in a bank at Centerton. When the last carload of apples was delivered, the price amounting to $712.75, a controversy arose between the parties as to whether this price should be paid to appellant or whether it should be credited on the amount of the $1,500 held as reserve. The testimony shows that appellees claimed that the amount held in reserve was more than sufficient to pay for that car and the remainder of the apples. A witness for appellees testified that during the controversy he made an offer to appellant that appellees would put up in a bank at Centerton an additional sum of $2,000 to cover the price of any additional apples and that appellant refused this offer. On the cross-examination of appellant he was asked to give his reason why he refused this offer. Appellant's reply was that the deposit might be withdrawn from the bank as soon as he finished delivering apples. We are unable to see any prejudice whatever in this question and answer. It merely occurred in the cross-examination of appellant for the purpose of testing his good faith and credibility. It was undisputed in the trial of the case that the written contract between the parties controlled, and the court adhered to that view in is various rulings.

The last assignment urged here is that the court erred in giving its third instruction, which reads as follows

"I charge you that if the plaintiffs acting in good faith as reasonable men, and upon reasonable observation or inspection, believed that the $1,500 deposited with de-

fendant would be sufficient to pay defendant for the last car of apples and those remaining undelivered, then there would not be such a breach of contract as would justify or authorize the defendant in treating the contract as rescinded and selling the remaining apples for the account of plaintiff."

It is clear that appellees were entitled to recover the balance of the reserve fund left in appellant's hands unless appellant has sustained damages for a breach of the contract on appellees part. The only issue really in the case is whether or not appellees broke the contract by refusing to pay and whether appellant sustained loss by reason thereof. The verdict of the jury is necessarily a finding against appellant as to any loss sustained by him on account of the improper culling of the fruit by appellees or by reason of the sale of the fruit on hand after the alleged breach. Appellant claims to have sold the apples at a price less than his contract price with appellees, but the whole amount of the remainder of the apples at the contract price amounted to a comparatively small sum in excess of the balance held by appellant in reserve, and it follows that if appellant could have gotten the contract price by delivering the same to appellees under the contract and credited the same on the advance he was not entitled to claim compensation for loss on the sale made at a lower price to other persons. This instruction, though perhaps erroneous, was harmless, for, as before stated, appellees were entitled to recover the balance of the money held in reserve unless appellant suffered damages which he was entitled to recover on his counterclaim.

Our conclusion is that there was no prejudicial error committed, and the judgment should be affirmed. It is so ordered.

TEXARKANA & FORT SMITH RAILWAY COMPANY v. ADCOCK.

Opinion delivered June 6, 1921.

1. HUSBAND AND WIFE—WIFE SUING FOR PERSONAL INJURIES.—Under Vernon's Civ. Stat. of Texas, supplement of 1918, art. 4621a, declaring that all property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, etc., a married woman may in Texas maintain a separate action for personal injuries.

2. VENUE—ACTION FOR PERSONAL INJURIES.—An action for personal injuries is transitory and may be brought in a State other than that in which it arose.

3. CONTINUANCE—CUMULATIVE TESTIMONY.—It was not error to refuse a continuance on account of a witness suffering from a temporary paralysis of the throat, rendering him unable to speak, where the testimony of such witness would have been cumulative merely.

4. APPEAL AND ERROR—INSTRUCTION—SPECIFIC OBJECTION.—Inaccuracies in the phraseology of an instruction, substantially correct, will not be reviewed where they were not pointed out by specific objections.

5. TRIAL—REFUSAL OF REQUESTS ALREADY COVERED.—The refusal of requests for instructions already covered by the charge given was not error.

6. TRIAL—INSTRUCTION—SPECIFIC OBJECTION.—The giving of an instruction not in good form is not error where no specific objection was made.

7. TRIAL—INSTRUCTION—WEIGHT OF EVIDENCE.—Though it is proper to charge that the jury are the sole judges of the weight of the evidence and the credibility of the witnesses, it was improper to add that their authority as such was "illimitable, final and unfettered."

8. EVIDENCE—DETERMINATION OF PREPONDERANCE.—In determining the preponderance of the evidence, it is proper for the jury to take into consideration the number of witnesses, but the preponderance is not necessarily in favor of the one who produces the greater number of witnesses to a proposition, as that depends upon the weight which the jury may give to the testimony of the respective witnesses, taking into consideration their interest, relationship, bias, means of information, manner of testifying, etc.

9. CARRIERS—OPPORTUNITY TO PASSENGER TO ALIGHT SAFELY.—It is the duty of a carrier to allow passengers a reasonable opportunity to alight, and, in determining what is a reasonable time, to take into consideration any special condition peculiar to the passenger and to the surroundings at the station and to give a reasonable time under the circumstances.

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

James B. McDonough, for appellant.

1. The court should have directed a verdict for defendant. The injury occurred in Texas, and under its laws damages for personal injuries to the wife are community property for which alone the husband can sue, and the complaint does not state a cause of action. Under the laws of Arkansas defendant never waives the failure of the complaint to state a cause of action. C. & M. Digest, § 1192, and cases cited. The right of plaintiff to recover was raised. As to matters of evidence the law of the former governs. 113 Ark. 265; 142 *Id.* 159. However, the right of the wife to maintain the suit depends upon where the injury occurred. 67 Ark. 295; 50 *Id.* 155; 155 U. S. 190; 98 Ark. 240; 194 U. S. 120; 26 Cyc. 1079. See, also, 79 Fed. 934; 59 N. Y. S. 66; 28 *Id.* 446; 35 Am. Rep. 705; 39 Kan. 56; 126 Pa. 296. The Texas law governs. 60 Tex. 334; 67 S. W. Rep. 438; 65 Tex. 281; 73 *Id.* 29; Speer on Married Women, § 227; 223 S. W. 270. The husband alone can sue for personal injury to the wife where the injury occurs in Texas. 79 S. W. 345; 72 *Id.* 78; 193 *Id.* 137; 149 *Id.* 347; 96 *Id.* 26. Nor can the wife sue for personal injuries in the State of Washington. 182 Pac. 630. The same rule exists in California and Nevada. 108 Pac. 328; *Ib.* 98. The husband alone can sue in Texas. 100 S. W. 791; 124 S. W. 149; 214 S. W. 250.

2. It was error to overrule the continuance. While a matter of discretion, yet the courts must not abuse their discretion. 100 Ark. 301; 126 *Id.* 483; 99 *Id.* 394; 85 *Id.* 334; 21 *Id.* 460; 142 *Id.* 15. A proper case was made and good grounds shown for continuance.

3. The court erred in refusing to give instruction 4 for defendant. The carrier was not bound to give personal notice to the passenger that her station had been reached. 134 Ark. 265. The jerk was purely accidental and not due to negligence, and plaintiff can not recover. 129 Ark. 369.

4. It was error to give plaintiff's instruction No. 1. A reasonable time was allowed by the carrier for passengers to get off and on trains and a reasonable opportunity was given plaintiff. 128 Ark. 479, and cases cited. 101 Ark. 183-190; *Ib.* 128; 105 *Id.* 261.

5. It was error to give plaintiff's request No. 2.

6. It was error to give plaintiff's request No. 3. It gives plaintiff the absolute right to stop anywhere on her journey out and wait until all other persons would come in, without notice to the brakeman. Besides, the instruction comments upon the testimony.

7. It was error to give plaintiff's request No. 4. It does not cure the errors in other instructions given.

8. It was error to give plaintiff's request No. 5. It does not properly declare the law as to the weight of evidence, and the duty of the jury is to be governed by the preponderance of the evidence. 99 Ark. 69. It comments on the testimony.

9. It was error to refuse instruction No. 5 asked by defendant. If plaintiff's detention was due to her own neglect, she can not recover.

10. It was error to refuse No. 6 for defendant. The evidence shows that plaintiff was extremely rash and negligent in attempting to alight from the train and can not recover. The instruction duly submitted to the jury the question whether or not her injury was due solely to the negligence of defendant or to her own negligence. It was good law.

J. M. Carter, for appellee.

There is no error in the instructions, and the verdict is sustained by the evidence. Under the evidence the jury would have been warranted in awarding punitive damages had plaintiff asked them.

WOOD, J. This action was brought by the appellee against the appellant. The appellee alleged that she was a passenger on appellant's train from Texarkana, Arkansas, to Bloomburg, Texas; that when the appellant stopped its train at Bloomburg for the purpose of allowing the appellee and other passengers to alight, there were standing on its platform other persons who desired to take passage on that train, and, before the appellee, in the exercise of ordinary care had time to debark, other persons were allowed to board the train in such numbers that appellee thereby was prevented from getting off until the incoming passengers had sufficiently cleared the passage way; that immediately after the passage way was cleared appellee was going down the steps to debark, and the train was put in motion, and the appellee was thrown off her balance. Appellee alleged that the step leading from the coach to the platform was high and dangerous; that the appellant failed to furnish any stool or step on which to alight and failed to furnish any one to assist her in alighting from the coach; that these acts of negligence caused appellee to fall from the coach upon the hard surface of the platform and produced serious personal injuries, which she set forth in detail, to her damage in the sum of $3,000, for which she prayed judgment.

The appellant answered, denying specifically the allegations of negligence, and set up as an affirmative defense contributory negligence on the part of the appellee.

Appellee testified that she and her husband were passengers on appellant's train as alleged in her complaint. and that when the train stopped at Bloomburg, Texas, they got up to get off, and when they got to the door people were crowding in so that appellee and her husband could not get out. They started out as quickly as they could. Her husband was ahead of her. She had no baggage except a little hand satchel. Just as soon as they could get out, her husband stepped off, and she started to get off, and the train gave a jerk and threw her backward. She first realized that the train was moving when she made her step. Nobody was there to help her off. There was no stool to step on. She then described

her injuries, which it is unnecessary to set forth. Other witnesses corroborated the testimony of the appellee.

There was testimony on behalf of the appellant tending to contradict the testimony introduced on behalf of the appellee. It was shown that a white man by the name of Marshall was brakeman on the train on that occasion; that he was at his place on the platform where the passengers get on and off and had a step stool. Marshall was not present to testify at the trial, and the appellant moved to continue the cause on that account. Appellant alleged that Marshall was present at a former term of the court when the cause by mutual agreement was continued, and that he could not be present at this term because he was afflicted with paralysis which at this time rendered him, and for some time to come, would render him unable to talk; that his testimony was material because the appellant expected to prove by him facts, which it set forth, directly contradicting the testimony of the appellee as to the acts of negligence to which she had testified. Appellant alleged that it thought that if the cause was continued there would be a reasonable chance of either procuring the attendance of the witness, or his deposition.

The motion for continuance was filed December 8, 1920, and accompanying the motion was a certificate of a physician made on December 2, 1920, to the effect that Marshall was afflicted with throat trouble in the nature of paralysis rendering him unable to talk and that he would not be able to attend court.

The rulings of the court in the giving and refusing prayers for instructions will be considered as we proceed. The trial resulted in a verdict and judgment in favor of the appellee. The appellant by this appeal seeks to reverse the judgment.

1. Appellant contends that the appellee can not maintain this suit since the injury occurred in Texas, and under the laws of that State damages for personal injuries to the wife are community property for which the husband alone can sue. The Legislature of Texas in 1915 enacted the following statute: "All property or money received as compensation for personal injuries

sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills, and all other expenses incident to the collection of said compensation." Art. 4641a of 1918 Supplement to Vernon's Texas Civil & Criminal Statutes.

Since the passage of the above act, compensation for personal injuries sustained by the wife is no longer community property, and such compensation is now the separate property of the wife. In the absence of a decision of the highest court of Texas holding that under the above statute the husband alone can maintain a suit to recover compensation for personal injuries to his wife, we are constrained to hold that the wife under the above statute should be permitted to maintain a suit in her own name and right. Such would undoubtedly be the proper construction if the injury had occurred in this State under a similar statute, when construed in connection with section 5577 of Crawford & Moses' Digest. That statute expressly confers upon married women the right to sue and to be sued and to enjoy all rights and to be subject to all the laws as though she were a *femme sole.* Learned counsel for appellant cite us to cases of the court of Civil Appeals of Texas holding that the husband alone can sue for community property, and that damage for personal injuries to the wife are community property. *Ainsa* v. *Moses,* 100 S. W. 791; *Cone* v. *Belcher,* 124 S. W. 149; *Allemania Fire Ins. Co.* v. *Angear,* 214 S. W. 450. But counsel have not directed our attention to any decision of the Court of Civil Appeals of Texas, or of the Supreme Court, since the passage of the above act holding that compensation for personal injuries to the wife is community property, and that the husband alone can sue for the same. Our own research has not discovered a holding of the courts of Texas to that effect. Therefore, we must construe the statute as we believe it should be construed in harmony with our own laws upon the subject. The action is one *ex delicto,* personal, transitory, and therefore may be brought in

this State. *St. L., I. M. & S. Ry. Co.* v. *Brown,* 67 Ark. 295; *K. C. So. Ry. Co.* v. *Ingram,* 80 Ark. 269; *St. L., I. M. & S. Ry. Co.* v. *Hesterly,* 98 Ark. 240; *St. L. & S. F. Rd. Co.* v. *Coy,* 113 Ark. 265; *Hines* v. *Rice,* 142 Ark. 159.

2. Appellant next contends that the court erred in overruling its motion for a continuance. On the allegations of negligence set forth in the complaint the testimony of the absent witness, Marshall, as alleged in the motion for continuance would have been very material, because he was the brakeman who was stationed at the door where passengers got on and off the train and his testimony as set out in the motion directly contradicted the testimony of the appellee and her witnesses, tending to sustain the allegations of negligence set up by the appellee. But, upon careful consideration of the testimony of several other witnesses on behalf of the appellant, we find that their testimony tended to establish the same facts as would have been testified to by the witness Marshall, if present. Marshall's testimony, therefore, would have been only cumulative, and the rule has been thoroughly established by this court that the trial court can not be reversed for overruling a motion for continuance where the testimony of the absent witness is but cumulative. See *Carpenter* v. *State,* 62 Ark. 286; *St. L., I. M. & S. Ry. Co.* v. *Fisher,* 80 Ark. 376; *A. L. Clark Lumber Co.* v. *Northcutt,* 95 Ark. 291; *James* v. *State,* 125 Ark. 269, and other cases collated in 1 Crawford's Digest, p. 1023—"Continuance"—12 (6).

3. The appellant next contends that the court erred in giving and refusing certain prayers for instructions. We have examined the several prayers in the light of the criticisms by the learned counsel for the appellant, and we find that there are some inaccuracies, but they are mere errors of verbiage and do not relate to matters of substance. The attention of the trial court should have been drawn to them by specific objection which was not done. Some of the prayers of the appellant which the court refused were correct, but these were covered by other instructions which the court gave. Instruction No.

5* (set forth in marginal note) was not in good form, and, if specific objection had been made to it, the court should not have given it. The jury are the sole judges of the weight of the evidence and the credibility of witnesses. After thus instructing the jury, it was surplusage and wholly unnecessary and improper to add by way of accentuation the words "illimitable, final and unfettered."

In determining where the preponderance of the evidence lies on the facts at issue, it is proper for the jury to take into consideration the number of witnesses testifying pro and con, but the preponderance is not necessarily in favor of the one who produces the greater number of witnesses to a proposition. That depends entirely upon the weight or degree of credit which the jury may give to the testimony of the respective witnesses after taking into consideration all the elements or tests by which the credibility of witnesses is determined, such as interest, relationship to the parties, bias, means of information, manner of witness in testifying, etc. See *St. L., I. M. & S. Ry. Co.* v. *Evans,* 99 Ark. 69, 76; *Newhouse Mill & Lbr. Co.* v. *Keller,* 103 Ark. 538-547; *Martin* v. *Vaught,* 128 Ark. 293. But, while the instruction can not be approved as a precedent, it is not erroneous in substance, and, in the absence of specific objection, it was not prejudicial error calling for a reversal of the judgment.

The charge as a whole was in conformity with the law applicable to the facts of this record as announced by this court in many decisions, some of them quite recent. In *St. L., I. M. & S. Ry. Co.* v. *Aydelott,* 128 Ark. 479, we said: "It is the duty of carriers to allow their passengers a reasonable opportunity of getting on and off their trains, and they must stop at stations long

* No. 5. It is not the number of witnesses who testify in a case that creates the greatest weight of evidence. One witness may be opposed by many witnesses, and still the jury would be justified in accepting this one witness' testimony, as against a number of other witnesses, as to how the thing happened, provided you believe his testimony more nearly comports with the truth, and as to whether their testimony or his more nearly comports with the truth you are the sole, illimitable, final, and unfettered judges.

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 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 trains." See, also, *Payne* v. *Thurston,* 148 Ark. 456.

The issues of negligence and contributory negligence were submitted under instructions free from prejudicial error. There was evidence to sustain the verdict. The judgment is therefore affirmed.

VAUGHAN *v.* ODELL & KLEINER.

Opinion delivered June 6, 1921.

1. BROKERS—QUESTION FOR JURY.—In an action by a broker for his commission for procuring a purchaser of timber, which the owner refused to convey to the purchaser procured, *held* that it was error to direct a verdict for defendants where the evidence would have sustained a verdict for the plaintiff.
2. BROKERS—RIGHT TO COMMISSION—DEFENSE.— Though a contract employing a broker to sell timber stipulated that his commission depended upon the completion of the contract, the owners of the timber can not set up the failure to complete the contract as a defense to the broker's claim for his commission where such failure was due to their refusal to carry out the contract by executing a deed to the purchaser.
3. ESTOPPEL—PREVENTING PERFORMANCE.—He who prevents a thing from being done shall not avail himself to his own benefit of the nonperformance which he has occasioned.

Appeal from Arkansas Circuit Court, Northern District; *W. B. Sorrells,* Judge; reversed.

James E. Hogue and *J. E. Ray,* for appellant.

The court erred in directing a verdict for defendants. 78 N. E. 106, 191 Mass. 483, was a different case and does not apply here. See 111 N. E. 37, a case similar to this. 87 Ark. 506 is in point and is decisive of this.

Where a real estate broker contracts to produce a purchaser who shall actually buy, he has performed his contract by producing one financially able to buy and pay and with whom the owner actually makes an enforcible contract, he is entitled to his commission. The failure to carry out the contract, even if the default be that of the purchaser, does not deprive the broker of his right to his commission. 44 L. R. A. 593 and note.

The fact that appellant was postponed in his right to receive the commissions until the purchase money was paid could not relieve appellee of the duty of collecting the money and paying appellant his commissions when collected. By dismissing his suit in chancery to enforce the contract he immediately became liable to appellant for the commissions.

This case can not be differentiated from *Boysen* v. *Frink,* 80 Ark. 254. See, also, *Hill* v. *Jebb,* 55 Ark. 574.

The allegation in the answer that the purchasers procured by appellant were not financially able to carry out their contract and unable to purchase the timber, and did not purcahse it, is, of course, to be treated as denied by appellant. C. & M. Digest, § 1231. On this point appellees held the affirmative of the issue, and the burden was on them, but the evidence shows that the purchasers were financially able to pay for the timber.

Upon the evidence it was error to direct a verdict for appellees.

John L. Ingram, for appellees.

As the timber was never sold and as the common fund out of which appellees were to receive their fees or pay and appellant his compensation was never created, the judgment is right. Appellant's interest was in the *proceeds of the sale,* which was never made, and appellant failed in his part of the undertaking. Walker on Real Estate Agency, § 456; 78 N. E. 196; 81 Ark. 96.

HART, J. T. L. Vaughan brought this suit against Odell & Kleiner in the circuit court to recover a broker's commission for effecting a sale of certain timber belonging to the defendants.

In the circuit court a verdict was directed for the defendants, and from the judgment rendered upon the verdict the plaintiff has duly prosecuted an appeal to this court.

T. L. Vaughan was a witness for himself. According to his testimony, he made a contract for Odell & Kleiner to sell the timber on a thousand acres of land which they owned in Arkansas County, Ark. They gave him a price of $6 per acre for the timber, and Vaughan was to get all over that price for his commission. Odell & Kleiner did not think that he could get over $7 an acre for the timber. Vaughan sold the thousand acres of timber of Odell & Kleiner to Carver & Russell of West Plains, Mo., for $8 an acre, and a written contract for the purchase of the timber was duly signed by Carver & Russell, and they deposited $1,000 in a bank at West Plains to guarantee the performance of their contract to purchase the timber. Vaughan then went to Stuttgart and reported to Odell & Kleiner what he had done. They told him that there was another forty acres of timber which was not included in the contract.

The contract was subsequently modified to include the forty acres, and some changes were also made in the time of making some of the payments of the purchase money. The total purchase price under the modified contract was $8,320, of which $4,000 was to be paid in cash when the deed was signed and of the remainder $2,000 was to be paid in ninety days and $2,320 in four months. It was also agreed that the deposit of $1,000 formerly made in the bank at West Plains should be applied on the first payment. Subsequently Vaughan made a contract to sell the timber for Carver & Russell to R. R. McIntosh for $11,520. Under this contract McIntosh was to pay the $7,320 due from Carver & Russell to Odell & Kleiner. When Odell & Kleiner found out that Carver & Russell had made a contract to sell the timber for more than they had paid for it, they refused to execute a deed to the timber to Carver & Russell under their other contract. When the contract was originally entered into between Carver & Russell and Odell & Kleiner by

Vaughan, the latter made an investigation of the solvency of Carver & Russell at the bank in West Plains and found that they were financially able to carry out the contract on their part.

On cross-examination ,Vaughan admitted that he had brought suit against Carver & Russell to recover his commission, and that his complaint in that case states that Carver & Russell "have no property in this State from which the money due herein could be made, except that which comes from the interest which they may have from the property herein described, and are wholly insolvent." Vaughan explained that what he meant by that was that Carver & Russell had no property in this State, except the timber which they had contracted to purchase from Odell & Kleiner, and which the latter had refused to convey to them.

R. R. McIntosh was a witness for the plaintiff, and testified that he made a contract with Vaughan to purchase the timber in question for $11,520, of this amount he was to pay Odell & Kleiner $7,320 in cash; that he was anxious to buy the timber, and was able to pay for it at the time he entered into a written contract for the purchase of it as above stated.

E. C. Carver was also a witness for the plaintiff. According to this testimony, Odell & Kleiner gave him an extension of time within which to pay for the timber, and, before the extension of time had expired, Vaughan made a contract with R. R. McIntosh for them to sell him the timber for $11,520. The contract provided that he was to pay for them to Odell & Kleiner $7,320 of this amount. They were prevented from carrying out this contract because Odell & Kleiner refused to convey the timber to them. Subsequently McIntosh purchased the timber from another party for $16,500 and sold it for $19,000.

Some evidence was adduced by the defendants tending to show that Carver & Russell had failed to perform the contract on their part, and that they were unable to carry out their contract for the purchase of the timber without borrowing money with which to pay the pur-

chase price. Other evidence tended to show that the contract of purchase had been abandoned before they made a contract through the plaintiff to sell the timber to R. R. McIntosh.

In this state of the record the court erred in directing a verdict for the defendants. The evidence for the plaintiff warranted the jury in finding for him. According to the evidence adduced in his behalf, he was the agent of the defendants to sell the timber for them, and was to receive as his commission all that he might sell the timber for above $6 per acre. In other words, under the original contract, he sold to Carver & Russell a thousand acres of timber at $8 per acre and under the modified contract he sold them one thousand and forty acres at $8 per acre, amounting in the aggregate to $8,320. He was to have all over $6 per acre that he could get for the timber as his commission. The original contract for the sale of the timber to Carver & Russell was in writing. Odell & Kleiner made some objections to it because it did not include an additional forty acres of timber which was in the tract they intended to sell. The contract was modified so as to include this tract, and the modified contract was also in writing. This was a valid and binding contract, and, according to the evidence of the plaintiff, the purchasers were able to complete the contract and were anxious to do so. They were able to pay the purchase money upon the execution and delivery to them of a timber deed, and the defendants refused to execute such a deed.

It is true that, under the contract between the plaintiff and the defendants, the sale was to be completed and the plaintiff was to receive as his commission any excess over $6 an acre which the defendants might receive for the purchase price of the timber. However, according to the evidence for the plaintiff, the defendants, by their own misconduct in refusing to execute a timber deed to Carver & Russell, prevented the fulfillment of the contract on their part, and the defendants can not set up their own refusal to carry out the contract by executing

a timber deed as a ground of defense to the plaintiff's claim for his commission.

It is a well settled and sound principle of law that he who prevents a thing from being done shall not avail himself to his own benefit of the nonperformance which he has occasioned. We think this rule was recognized by the Supreme Court of Massachusetts in *Munroe* v. *Taylor,* 78 N. E. (Mass.) 106. In that case the broker was to receive all over a certain stipulated price as his commission. He sold the land at a price largely in advance of the stipulated amount and entered into a binding contract for the sale of the property. In that case it did not appear that at any time the defendant had refused to make a proper deed of conveyance. It was the plaintiff's contention that, having found a customer who became bound to buy, his commission had been earned. The court held that he was entitled to a commission only in the event of procuring the consummation of the sale, and not on procuring the execution of a contract of sale which was never performed. He failed to make out his case by not introducing evidence tending to show that the defendant had wrongfully refused to carry out the contract upon his part. This is clearly shown by the concluding part of the opinion. It reads as follows:

"What the plaintiff really undertook was, not only to find a purchaser at a fixed price, but to effect a sale, which meant a payment of that price, and, this having been done, he would have earned the excess, but, until the consideration became payable, or the defendant refused to convey, he could not demand any remuneration, or maintain an action for breach of the contract."

The rule was also recognized by this court in *Lewis* v. *Briggs,* 81 Ark. 96. In that case the owner of the land was to receive $8,000 net, and the balance of the purchase price was to be paid to the broker as a commission for the sale of the land. The court held that under the terms of the contract the broker did not make out a case for recovery against the owner by showing that he secured a contract with solvent parties to purchase the land. In discussing the question the court said:

"He must under this contract show either that defendants have received some part of the balance of the purchase money to which they were entitled, or that the parties who agreed to purchase were ready, willing and able to perform their part of the contract, and that they were prevented from doing so by the default or failure of the defendants to perform their part of the contract."

In concluding the opinion the court said that under the contract, so long as the purchase price was unpaid, and so long as the defendants were not to blame for its nonpayment, they were not liable. This was a clear recognition of the rule as we have stated it. Upon the principle stated in these cases, the broker might have a claim for his services if the sale had failed through the fault of the defendant.

As above stated, in the case at bar, it is fairly inferable from the plaintiff's testimony that Carver & Russell were solvent and were able to carry out the contract on their part, and that they were anxious to do so, but were prevented by the failure of the defendants to execute the timber deed.

It follows that for the error in directing a verdict for the defendants the judgment must be reversed and the cause will be remanded for a new trial.

HAWKINS v. RANDOLPH.

Opinion delivered June 6, 1921.

1. CONTRACTS—MENTAL CAPACITY.—The law does not draw any discriminating line by which to determine how great must be the imbecility of mind which will render a contract void, but each case will be found influenced by its own peculiar circumstances.
2. MORTGAGES—RELEASE SHOWING MENTAL INCAPACITY.—In an action to set aside for mental incapacity a release of a mortgage for $10,000, bearing 6 per cent., executed by an aged and illiterate mortgagee in consideration of the mortgagor's unsecured undertaking to pay the mortgagee $480 per year during the remainder of his life, evidence *held* to show the latter's incapacity.
3. CONTRACTS—FIDUCIARY RELATIONSHIP.—The rule that transactions between persons connected by fiduciary relations will be closely scrutinized will be applied whenever the relation between parties gives one a controlling influence over the other.

4. CONTRACTS—INADEQUACY OF CONSIDERATION.—Where parties are capable of contracting, courts will not set aside their contracts for mere inadequacy of price; but where the inadequacy is accompanied with other facts showing concealment on the part of one who obtains a benefit on account of old age, ignorance, incapacity, etc., on the part of the one granting the benefit, equity will grant relief.

Appeal from Franklin Chancery Court, Ozark District; *J. V. Bourland,* Chancellor; affirmed.

STATEMENT OF FACTS.

Robert H. Randolph brought this suit in equity against S. B. Hawkins to annul and set aside a contract whereby the plaintiff released in favor of the defendant, a mortgage on a tract of land to secure an indebtedness of $10,000.

On the 7th day of July, 1919, R. H. Randolph executed to S. B. Hawkins a deed to 183 acres of land in Franklin County, Arkansas, for the consideration of $12,500. Of this amount $500 was in cash and the balance in five promissory notes. The first note was for $2,000, and the remaining four notes were for $2,500 each. The first note fell due on January 1, 1920, and one each year thereafter. Hawkins gave Randolph a mortgage on the land purchased to secure the payment of these notes. The defendant paid the first note when it fell due, and subsequently the parties entered into a contract as follows:

"This agreement, made and entered into this 9th day of March, 1920, between S. B. Hawkins, party of the first part and R. H. Randolph, party of the second part, witnesseth, that, in consideration of the release of a certain mortgage dated September 10, 1919, and the return to the said S. B. Hawkins of the notes secured by said mortgage, it is hereby understood, contracted and agreed that the said party of the first part, his heirs and assigns, executors and administrators shall pay unto said R. H. Randolph or his assigns, during the period of his natural life the full sum of four hundred and eighty dollars ($480) each and every year during such life, payable quarterly on the first days of April, July, October and

January, beginning on the first day of April, 1920, with the amount of $120 and paying said amount as aforesaid at the beginning of each quarter thereafter so long as said R. H. Randolph shall live; it being the idea of this contract and the intention of the parties to afford said party of the second part an annuity of $480 for the term of his natural life, payable quarterly in advance, and that at the time of his death such payments shall cease and no further obligations shall thereafter rest upon the said S. B. Hawkins by virtue of this contract or the securities surrendered in consideration of this contract.

"In witness whereof the parties have hereunto set their hands this 9th day of March, 1920."

Pursuant to the terms of the contract, Randolph on the same day executed a release deed to Hawkins to the property described in the mortgage. The object of this suit is to cancel the contract and the release deed executed by Randolph to Hawkins.

R. H. Randolph was a witness for himself. According to his testimony, he resided on his land in Franklin County, Ark., but transacted his business at Mulberry, in Crawford County, Ark. For many years he had transacted his business with a bank at that place of which S. B. Hawkins was the cashier. Randolph was an uneducated man and could not read or write, except to sign his name. Hawkins had acted as his confidential adviser for about thirty years. Randolph was a widower without children and was about eighty years of age when he conveyed his land to Hawkins and took a mortgage back to secure the payment of the purchase money. The contract which is the basis of this lawsuit was written by the attorney of Hawkins in a back room of his bank. The lawyer commenced to read the contract to Randolph and Hawkins took it from him saying that the contract was all right, and that it was not necessary to read it over to Randolph. Randolph was just getting over a case of influenza and did not recollect signing the release deed. Hawkins gave Randolph a certificate on the bank for $120 on April 1, 1920. Subsequently he mailed Ran-

dolph a quarterly payment for a similar amount. Randolph then began to realize what had been done and sent the money back to Hawkins.

On cross-examination Randolph admitted that he had attended to his own affairs all of his life and felt that he was competent to do so when at himself. He stated that he was sick when the contract in question was executed. He admitted that he boarded with Jack Underwood in March, 1920, but denied telling him that he wanted to sell his land for the reason that the road and other taxes were eating it up. He denied telling Underwood that he would like to turn his mortgage over to some one and draw $40 a month on it like he (Underwood) was doing with the government. Randolph further stated that as soon as Mr. Chew explained the meaning of the contract to him he immediately authorized him to bring this suit.

The defendant, S. B. Hawkins, was a witness for himself. He admitted having known Randolph for thirty years, and that he had bought the land from him at the time and on the terms described above. In March, 1920, Randolph came to Hawkins and wanted him to pay him a pension. Randolph called it a pension. He reminded Hawkins that he had sold the land to Stewart, and that the mortgage would be in the way. Randolph wanted to release the mortgage so that Hawkins could go on with his trade. Hawkins wrote for his attorney to come down, and on the next day the attorney came to town and the contract in question was executed. Hawkins asked Randolph how much he wanted, and Randolph said that he would have to have $440 per year. Hawkins replied, "That is all right. If that will keep you comfortable. It is all right with me." The attorney prepared the papers and they were signed in duplicate the next day. After he had acknowledged the release deed, Randolph said, "You ought to have this recorded." Hawkins replied that he would mail it right away. Randolph then said, "No, that is a valuable paper, it might miscarry or get lost in the mail. You ought to send it by some one." Hawkins said, "All right, I will send it by my son and

have it recorded," and he did so. Randolph came to Hawkins a few days later, and said he ought to have $480 a year. Hawkins said, "All right, Uncle Bob, if you need $480, we will make it $480." Hawkins then took both copies and changed them to read $480 per year. On the first day of April, 1920, Hawkins placed $120 to Randolph's credit and Randolph seemed satisfied. On July 1, 1920, Hawkins mailed him a check for $120 and Randolph returned it. When they first talked about the contract in question, Randolph told Hawkins that the taxes were eating him up, and the people were wanting him to invest his money.

C. R. Starbird, the attorney for Hawkins, said that when he first got to the bank, Randolph was there waiting for him. Hawkins introduced them and sent them into the back room to fix up the business. From the way Randolph commenced talking, Starbird thought that he wanted to make a will. Randolph replied that he did not want to make a will, but that Hawkins was to give him a pension. He told Starbird that he wanted one just like Uncle Jack Underwood was drawing. Starbird then asked him what amount the pension was to be, and Randolph said that they had not yet agreed on the amount. Hawkins was called into the room, and Starbird told him that they would have to agree on the amount. Hawkins said, "Uncle Bob, tell us how much you want?" Randolph said that he thought about $440 a year. Hawkins said that is all right and left the room. Starbird then took a memorandum of the contract and prepared it at his office and then mailed it to Hawkins.

According to the testimony of Jack Underwood, Randolph was boarding at his house and told him that a new road was being built past his place, and that he had sold his land to get rid of the taxes which were eating it up. He stated further that he had a mortgage for $10,000 on his land and that the taxes would eat that up. That he wished some one would take that and give him a pension like he (Underwood) was drawing. Underwood then suggested that he should talk with Hawkins about it, and Randolph said that he would go right up

and see Hawkins about it. A few days later Randolph told Underwood about the execution of the contract in question.

Mrs. Jack Underwood testified that she heard Randolph tell her husband that the taxes were eating him up and that he wished he could arrange to have some one pay him a pension just like her husband drew from the government and that he would turn over his $10,000 mortgage for it. Subsequently she heard Randolph tell her husband that he had drawn his pension.

Mrs. Bettie Conatser testified that Randolph told her that he had released the mortgage which Hawkins had given him, and that Hawkins had agreed to pay him $40 a month as long as he lived.

A physician who treated Randolph for influenza in March, 1920, testified that he could not see that Randolph's mind was affected by the disease.

An employee of the bank of which Hawkins was the cashier took Randolph's acknowledgment to the release deed and corroborated Hawkins as to what took place when the contract and deed were executed.

The chancellor found in favor of the plaintiff, and it was decreed that the contract of March 9, 1920, should be canceled, and that the release deed should also be canceled.

It was further decreed that the mortgage on the land and the four notes given by Hawkins to Randolph in payment of the land should be in full force and effect. The defendant Hawkins has duly prosecuted an appeal to this court.

Evans & Evans, J. P. Clayton and *Starbird & Starbird,* for appellant.

1. It is contended that the release of the mortgage by appellee and the contract were not really agreed to by appellee, but his signaure was abtained by fraud and false representations. This is denied by appellant. It is also contend that, by reason of age, sickness and mental infirmities, appellee was incompetent to make the contract entered into and the release executed by him. Ap-

pellant resists these contentions upon the facts proved. The evidence is not clear, cogent nor convincing, so as to satisfy the mind beyond reasonable doubt. 71 Ark. 615; 82 *Id.* 569; 96 *Id.* 564-6; 130 Ark. 312-22; 132 *Id.* 227-36. The testimony of interested parties is insufficient to overthrow the presumptions which the law throws around written instruments. 96 Ark. 564.

2. This was an executed contract. An accord and satisfaction for less than the amount due is good, if executed. 44 Ark. 252-4; 70 *Id.* 215-20. An executed release is good without any consideration. 44 Ark. 252. The receipt of part of a debt not yet due in satisfaction of the whole is a sufficient consideration, even if the contract is executory. 70 Ark. 215; 33 *Id.* 572; 6 R. C. L., § 74, p. 666; 46 So. Rep. 598. From these cases it follows that inadequacy of consideration is no defense to an executed contract. 23 Ark. 735-8; 129 *Id.* 377; 86 *Id.* 464; 99 *Id.* 238-241; 117 *Id.* 552.

The conveyance of one's land to another upon an agreement of support for the life of the grantor is a good contract upon adequate consideration. This was Randolph's object and intention. Great age alone is no defense. 119 Ark. 466. The decree of the chancellor is clearly against the preponderance of the evidence.

Sam R. Chew, for appellee.

1. No sufficient abstract was filed under rule 9 and the decree should be affirmed.

2. Inadequacy of price paid for land, though not controlling, is a circumstance to be given due weight in cases of this kind. The facts condemn this pretended contract as improvident, and appellee, being *non compos* and down and out with senile dementia, the contract was void. The pretended contract and release is tainted with fraud and void. Bispham on Equity Jur. (4 ed.), § 219; 38 Ark. 433; 40 *Id.* 28. Improper influence and undue influence were shown and relief was properly given. 26 Ark. 28. Where one, through age, infirmity and decrepitude or disease, is incapacitated from managing his affairs, an

unreasonable or improvident disposition of all his property will be set aside in equity. 84 Ark. 490. This case is on all-fours with the present case. The decree below is responsive to the law and the facts. After hearing all the testimony, the chancellor found for appellee, and the decree is sustained by a clear preponderance of all the evidence.

HART, J. (after stating the facts). We think the decision of the chancellor was correct. In the case of *Kelly's Heirs* v. *McGuire,* 15 Ark. 555, the court recognized that the law does not seem to have attempted to draw any discriminating line by which to determine how great must be the imbecility of mind to render a contract void; or how much intellect must remain to uphold it. The reason that no exact general rule as to incapacity to contract can be laid down is because each case will be found influenced by its own peculiar circumstances. In discussing the subject the court said:

"While the solemn contracts between men should never be disturbed on slight grounds; yet it may, perhaps, be assumed, as a safe general rule, that, whenever a person through age, decrepitude, affliction, or disease, becomes imbecile, and incapable of managing his affairs, an unreasonable or improvident disposition of his property will be set aside in a court of chancery. *In re James Barker,* 2 Johns. Ch. Rep. 232. * * *

"If a contract is freely and understandingly executed, by a party, with a full knowledge of his rights, and of the consequences of the act, it must stand. This court disclaims all jurisdiction to interfere on account of the improvidence or folly of an act done by a person of sound though impaired mind. But, on the other hand, contracts have been set aside and canceled, when want of consideration, or the improvident nature of the transaction has raised the presumption that fraud and misrepresentations were employed. Shelford on Lunacy, 267. When a gift is disproportionate to the means of the giver, and the giver is a person of weak mind, of easy temper, yielding disposition, liable to be imposed on, the court will look upon such gift with a jealous eye, and

strictly examine the conduct and behavior of the person in whose favor it is made, and if it can discover that any acts or stratagems, or any undue means have been used, to procure such gifts; if it see the least speck of imposition, or that the donor is in such a situation with respect to the donee as may naturally give him an undue influence over him; in a word, if there be the least scintilla of fraud, a court of equity will interpose." (Citing cases.)

The court has continued to recognize this as the general rule since that time. *Campbell* v. *Lux,* 146 Ark. 397, and *Nelson* v. *Murray*, 145 Ark. 247. In the application of the doctrine to the facts of the present case it may be said that the evidence shows that Randolph freely and willingly entered into the contract in question and executed the deed of release to the mortgage; but his action, measured as it must be, by the testimony of the witnesses as to the circumstances surrounding the transaction, does not show that intelligent participation characteristic of one who understands what he is doing and comprehends the nature of his act.

The evidence shows that Randolph and Hawkins had lived on the terms of the closest friendship for thirty years, and that Randolph always advised with Hawkins in regard to his affairs. He had full confidence in his judgment and integrity. He was an uneducated man and usually followed the advice of Hawkins in all his business transactions. Courts regard with a jealous eye transactions between persons connected by fiduciary relations. The principle is not confined to technical cases of fiduciary relationship. It is applicable to all cases where the relation between the parties gives one the controlling influence over the other.

It is true that, where the parties are capable of contracting, courts will not set aside their contracts for mere inadequacy of price, but where the inadequacy is accompanied with other facts showing concealment on the part of the one who obtains a benefit on account of

old age, ignorance, incapacity, etc., on the part of the one granting the benefit, courts of equity will readily grant relief.

The direct testimony of the witnesses, standing alone, shows that Randolph had always been capable of attending to his own affairs, and that he still had intellect enough to make a disposition of his property, but his situation and the surrounding circumstances are proper to be taken into consideration in determining whether a court of equity should interpose. Randolph was over eighty years of age, and was an ignorant person, unable to read or write. Hawkins had been his confidential adviser for thirty years. Randolph had already sold him his farm and had taken a mortgage back to secure most of the purchase price. His fears about the taxes eating up his lands were groundless; for after the sale he had nothing to do with paying the taxes on the land. Hawkins owed Randolph $10,000, which was secured by a mortgage on the farm. Randolph exchanged this secured indebtedness which bore interest at the rate of six per cent. per annum for an agreement on the part of Hawkins to pay him an amount annually which would be less than the interest. The only benefit that he could possibly derive was to receive this payment quarterly instead of annually. While his mortgage was taxable, there is nothing to show that exorbitant taxes were about to be assessed against it.

The whole substance of the transaction was to give up a secured debt of $10,000, bearing interest at six per cent, per annum, for an unsecured debt of $480 annually for the rest of his life. If Randolph had lived twenty years longer, which is altogether improbable, these small payments would not have consumed the principal, much less the interest. The interest would have amounted to $600 per annum as against $480 under the new contract. It is evident that Randolph thought that he was getting a pension, and that Hawkins knew that he thought so. This fact is shown, not only by the testimony of Hawkins himself, but by the testimony of the witnesses introduced by him. Now a pension is a regular allowance paid to

an individual by the government in consideration of past services, or in recognition of merit. The whole resources of the government are pledged to the payment of pensions. Here, as we have already seen, Randolph already had the obligation of Hawkins to pay him $10,000 with six per cent. interest per annum, and in addition this obligation on the part of Hawkins was secured by a mortgage on the land. Randolph exchanged this for the unsecured promise of Hawkins to pay $480 per annum as long as he lived.

The record shows that the amount promised was no more than sufficient to support Randolph in his old age if he continued in reasonable health. If he became sick and his expenses thereby materially increased, it will be readily seen that he had deprived himself of the means of being supported and cared for in that condition, while if he had retained his property he would have had ample means for that purpose. It is just such conditions and situations as this that equity scrutinizes closely and always interposes to grant relief.

It follows that the decree will be affirmed.

TAYLOR v. WALKER.

Opinion delivered June 6, 1921.

1. FIXTURES—LANDLORD AND TENANT.—Parts of a ginning plant attached to the realty by a tenant under an agreement with his landlord that they should be removed upon expiration of the tenancy did not become part of the real estate.

2. APPEAL AND ERROR—REFUSAL OF INSTRUCTIONS.—Refusal of certain requested instructions will not be held error, in the absence of a showing that, in so far as they stated the law correctly, they were not covered by instructions given.

3. APPEAL AND ERROR—OBJECTIONS WAIVED.—Where counsel urge no objections in their brief to instructions given by the court, any objections to them will be waived.

4. REPLEVIN—VERDICT IN SOLIDO.—It was not error to permit the jury in a replevin case to return a verdict *in solido* for the value of several articles if no objection was raised to the court's direc-

tion to return such a verdict until the jury had returned its verdict, although the jury had not then been discharged, where the parties in their testimony treated the property in dispute as a single unit of value.

5. REPLEVIN—WAIVER OF SEPARATE VALUATION.—The statute requiring the separate valuation of each specific article replevied (Crawford & Moses' Digest, § 8653) may be waived and will be held to be waived where the property replevied is treated as parts of a single unit.

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

R. J. Williams and *Walter Gorman,* for appellant.

A verdict should have been directed for Mrs. Taylor, as the property had become part of the realty and not subject to replevin, and the court erred in its instructions and in refusing those asked by defendant, Nos. 1 to 11. 11 R. C. L. 1071. The instructions are inconsistent with the law and with each other. 9 L. R. A., 700 and notes.

Mann & Mann, for appellee.

The instructions state that the law, and the verdict is sustained by the evidence. The different phases of the rights of the parties as to the removal of trade fixtures from the premises were properly presented by the instructions. 19 Cyc. 1067; 53 Ark. 526. Appellant has failed to specifically point out any error in the rulings of the court.

SMITH, J. This is a suit in replevin for various parts of a system gin plant. The litigation arose in the following manner: Appellant, Mrs. Taylor, owned a plantation, which she leased to the Beck Company, a corporation, for a term of five years. This lease was dated August 4, 1906, and covered the five-year period beginning January 1, 1907. On May 7, 1908, a second lease was executed for a five-year period, beginning at the expiration of the first lease. Each lease included "the steam gin and sawmill, together with all buildings of every kind" being on the land. These leases were transferred by the Beck Company to George P. Walker on January 8, 1909.

Before the termination of the last lease, a disagreement arose between Mrs. Taylor and Walker, chiefly over delay in payment of rent, and she served notice on him to vacate. He vacated the premises, but left the gin house locked and refused to surrender the key. Thereupon Mrs. Taylor put another lock on the gin house. She refused, on demand, to surrender certain pumps, belts, pulleys, gins, presses and other fixtures, whereupon Walker brought replevin therefor. This suit was commenced September 21, 1915.

It was shown on behalf of Walker that the old gin house was in a dilapidated and dangerous condition, and the gin was moved across the road into a new building. According to Walker, it was not only agreed that he should retain ownership and control of any new machinery installed by him, but it was also agreed that he should have the right to remove the building at the expiration of his lease if he desired to do so. In erecting the new plant, Walker used the old engine and certain shafting and a fan belonging to the old plant. All other parts were new.

At the trial testimony was offered as to the value of these new parts as a unit comprising a ginning plant and the usable value thereof. The jury returned into court the following verdict: "We, the jury, find for the plaintiff for the possession of the property, and fix the value at $650, and find a fair rental value of said property to be $300 for the five years said property was held by the defendant."

After the verdict had been read, but before the jury had been discharged, counsel for Mrs. Taylor objected to its form, for the reason that it did not specify the separate value of the various parts of the gin which had been replevied.

It is insisted that a verdict should have been directed in Mrs. Taylor's favor, upon the ground that the property replevied had become a part of the real estate and was not, therefore, the subject of replevin. Without a full recitation of the testimony on this issue, it suffices to

say that, according to the testimony which tends to support the verdict, Walker was unable to operate the gin on account of its age and condition, whereupon it was agreed that he might install such new parts as were necessary, with the privilege of removing them upon the expiration of his tenancy. Under this agreement the new parts of the ginning plant did not become a part of the real estate, but remained the lessee's personal property, and were therefore subject to a suit in replevin. *Buffalo Zinc & Copper Co.* v. *Hale,* 136 Ark. 10; *Cameron* v. *Robbins,* 141 Ark. 607; *Vanhoozer* v. *Gattis,* 139 Ark. 390; *Heim* v. *Brock,* 133 Ark. 593; *Bache* v. *Central C. & C. Co.,* 127 Ark. 397.

At the trial from which this appeal comes, instructions numbered from 1 to 11 were asked in Mrs. Taylor's behalf, but none were given, and counsel complain of this refusal. It is not shown, however, that these instructions, in so far as they correctly declare the law, were not covered by other instructions which were given.

Complaint is also made that the court erred in giving instructions, but no error is pointed out in the instructions given. *Reed* v. *State,* 103 Ark. 391; *Bass* v. *Starnes,* 108 Ark. 357.

It is finally insisted that the jury was permitted to return a verdict *in solido.* This point appears, however, not to have been raised until the jury had returned its verdict, although the jury had not then been discharged.

It appears that the cause was tried upon the theory that the various articles replevied constituted a single unit of value, and the testimony on both sides related to the value of the property as a whole. The request that the articles be separately valued could not have been complied with by the jury even if the request had been made when the jury first retired to consider of its verdict, because, as has been said, each side had treated the property in dispute as a single unit of value.

The statute does provide (section 8653, C. & M. Digest) for fixing the value of each specific article replevied; but this requirement is not jurisdictional. It may

be waived. *Hobbs* v. *Clark,* 53 Ark. 411; *Neal* v. *Cole,* 144 Ark. 547. And will be held to be waived in a case where, as in this, the property replevied is treated as parts of a single unit.

It is also objected that the verdict returned included the usable value, not only of the property replevied, but of other property used in connection with it owned by Mrs. Taylor. It is not made to appear, however, that such is the case. It is true that property owned by her was used in connection with other property owned by Walker, and that it took all of the property to make a complete gin plant. But there was no question in the case about what property was owned by her, or what parts of the plant had been installed by Walker, and no objection appears to have been made that the testimony in regard to usable value was not confined to the parts installed by Walker.

No error appearing, the judgment is affirmed.

ROAD IMPROVEMENT DISTRICT NO. 9 *v.* BENNETT.

Opinion delivered June 6, 1921.

HIGHWAYS—AUTHORITY TO SET ASIDE WHOLE ASSESSMENT.—Acts Special Session 1920, No. 407, § 9, relating to Improvement District No. 9 of Sevier County, did not authorize the circuit court, on appeal from the county court, to set aside the whole assessment of benefits to pay for constructing the road, but provided a method for attacking assessments of benefits against particular tracts of land; section 7 providing a method of attacking the whole assessment of benefits in the chancery court.

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

Lake & Lake, for appellant.

1. The circuit court had no jurisdiction on appeal to set aside the judgment of the county court levying assessments of benefits under act No. 407, Acts 1920, § 9.

2. The judgment of the circuit court is not supported by the evidence. 139 Ark. 322. This case dis-

poses of every contention made that the lands in zone 4 should not be taxed because not benefited. 139 Ark. 155; 133 *Id.* 118. Every question raised by complainants has been settled by this court adversely to complainants.

E. K. Edwards and *B. E. Isbell,* for appellees.

The appeal should be dismissed. The situation and condition of the parties litigant has become so changed since the institution of this suit that this court can give no relief. 97 Ark. 372; 76 *Id.* 424; 73 *Id.* 194; 55 *Id.* 633; 78 *Id.* 388; 92 *Id.* 81; 113 *Id.* 26; 132 *Id.* 462; *Ib.* 469. See, also, C. & M. Digest, § 2162.

The repeal of the act creating the district has destroyed the legal entity of appellant district. Appellant has no legal standing in any court. 78 Ark. 388; 92 *Id.* 81; 141 Ark. 301.

This court will not decide questions which have ceased to be an issue. 132 Ark. 469; 113 Ark. 26. The act was repealed, and the repealing act provides for winding up the affairs of the district and liquidating its indebtedness. There are no outstanding bonds at the time of trial, and the issue of any certificates of indebtedness was sustained, and the appeal should be dismissed.

HUMPHREYS, J. This is an appeal from the judgment of the Sevier Circuit Court, setting aside a judgment of the county court levying an assessment of benefits to pay for constructing a road in Road Improvement District No. 9 of Sevier County. Appellees, four landowners in said district, prosecuted the appeal from the judgment of the county court under section 9 of act No. 407 of the special session of 1920 of the General Assembly of the State of Arkansas, creating the district. The issue tried and determined in the circuit court on appeal related to the assessment as a whole, and the issue as to the validity or invalidity of the individual assessments made upon the lands of appellees was not developed or determined. Section 9 of said special act, under which the appeal was taken, did not confer upon the circuit court power on appeal to set aside the whole assessment. It only provided a method for attacking, on appeal to the

circuit court, assessments of benefits against particular tracts of land for good cause shown by the property owner, or owners, of the particular tract or tracts. This construction must be given section 9 of the act aforesaid, because section 7 of the same special act provides a method for attacking the whole assessment of benefits in the chancery court of said county. If both sections provide a method for attacking the assessment of benefits as a whole, there is wanting in the act any remedy or redress for unjust or inequitable assessments of benefits against individual tracts of land, since section 7 of said act provides in unmistakable terms for a remedy or redress against an unjust or inequitable assessment as a whole by suit in the chancery court. The conclusion is irresistible, that the remedy, or redress provided in section 9, has relation to redress for unjust or inequitable assessments of benefits against particular tracts of land, for it is quite unlikely that the Legislature would give two remedies for correcting unjust or inequitable assessments as a whole and no remedy for correcting individual assessments. The circuit court was, therefore, without jurisdiction to set aside the entire assessment of benefits in the district, and should have limited the inquiry to the validity of the assessments against the particular tracts of land owned by the appellees herein.

Appellees insist, however, that this cause should be dismissed, and have filed a motion for that purpose, because, during the pendency of the appeal here, the General Assembly of this State passed an act repealing the special or local act by which the district in question was created. The repealing act bears No. 291 and was approved March 21, 1921. Section 1 of the repealing act is as follows:

"That act No. 407 of the General Assembly, approved February 20, 1920, entitled 'An Act to Create Road Improvement District No. 9 of Sevier County,' be and the same is hereby repealed."

Section 2 of the repealing act provides, among other things, for a continuation of the district and the commis-

sioners thereof for the purpose of paying the indebtedness thereof. Said section, in part, is as follows: "On the expiration of said six months (referring to the time in which claims against the district may be presented to the commissioners) it shall be the duty of the commissioners to levy upon the real property of the district a tax sufficient to pay the indebtedness thereof. If the assessment of benefits of the district has been made and confirmed, said tax shall be based upon such assessment of benefits. If the assessment of benefits has not been made and confirmed, it shall be by the assessed value of the property for State and county taxation as it appears upon the county assessment." The insistence of appellant is that the repealing statute, approved March 21, 1921, is void, because it impaired the obligation of contracts, and, in that respect, infringes upon both the Constitution of the State and of the United States. So far as the issue involved on this appeal is concerned, it is unnecessary to determine whether the repealing act is valid or void. The issue here is whether the circuit court had jurisdiction on appeal to set the judgment of the county court, levying the assessments of benefits against the property in the district, aside in whole. It follows, from our conclusion that it did not, that the levy of assessment of benefits as a whole must stand, whether the repealing act be valid or void. If the repealing act is void, the judgment, levying the assessment of benefits, will stand as a whole under the original act creating the district, because not attacked by suit in the chancery court under section 7 of the original act. If the repealing act is valid, the act itself provides for a continuation of the district for the purpose of paying the indebtedness thereof and authorizes the commissioners to base the assessment of benefits upon the confirmed assessment of benefits levied under the judgment of the county court. It not being necessary to pass upon the validity of the repealing act, we withhold any opinion as to what might be deemed valid claims against the district within the

meaning of claims, as used in section 2 of the repealing act.

The motion of appellees to dismiss the appeal is therefore overruled, and, for the error indicated, the judgment of the circuit court is reversed and the cause remanded for further proceedings.

BRIN BROTHERS v. LYON BROTHERS.

Opinion delivered June 6, 1921.

1. SALES—DUTY TO INSPECT WITHIN REASONABLE TIME.—Where the buyer on receipt of goods wrote to the seller that they had been prematurely shipped and would not be opened until the buyer's customers got in their cotton, and, upon receipt of the seller's letter in response written a month later, the buyer opened the goods and rejected them as unequal to the sample, the seller can not contend that the buyer should have inspected the goods earlier.
2. ACCOUNT STATED—ACQUIESCENCE IN ACCOUNT.—Where, on receipt of goods purchased by sample, the buyer stated that the goods were shipped prematurely, and would not be opened for some time, such letter did not constitute an acquiescence in the seller's statement of the account nor entitle the seller to recover as on an account stated, though the goods were inferior to sample.
3. APPEAL AND ERROR—ISSUE NOT PRESENTED BELOW.—An issue of account stated, not presented in the trial court, can not be insisted upon for the first time on appeal.

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

Holland & Edmonson, for appellant.

1. The evidence is conclusive that the goods were shipped as ordered.

2. Appellants were guilty of no fraud. It was not the manufacturer of the goods, and the buyers had ample opportunity of inspection within ten days, as stated specifically in the bill rendered, and since the buyer exacted no express warranty, and, there being no implied wraranty as to quality, the maxim "*caveat emptor*" applies, and appellees are liable for the amount sued for.

Instructions Nos. 1 and 3, asked by plaintiff, should have been given, and it was error to refuse them. They are the law and were covered by none given.

3. A request for payment and a promise to pay amount to an account stated (21 Ark. 420), and instruction 4 for appellant should have been given.

4. Instruction No. 6, asked by appellant, should have been given without modification.

5. Upon the whole case the verdict is against the law and the evidence, and judgment should be entered here for appellant.

R. W. Robbins, for appellees.

1. No bill of exceptions was ever filed in this case, and the record is incomplete, and the presumption, upon the pleadings, is that the evidence sustains the verdict. 59 Ark. 178; 126 *Id.* 118.

2. Appellants have not filed any proper abstract as required by rule 9, and the appeal should be dismissed. 101 Ark. 252.

3. No error was committed by the lower court, and the evidence sustains the verdict. The right of the vendee to reject goods which do not come up to sample is settled. 143 Ark. 413. No proper exceptions were saved to the instructions by appellant, and the verdict is sustained by a great preponderance of the evidence.

HUMPHREYS, J. Appellants, a firm of importers residing in Dallas, Texas, instituted suit against appellees, a firm of merchants residing in Republican, Arkansas, in the Faulkner Circuit Court, to recover $408.47, representing the price of laces and other notions ordered by appellees from appellants on the 5th day of August, 1920, and shipped by parcels post on the 22d day of said month.

Appellees interposed the defense that the merchandise delivered was not equal in quality to the samples exhibited when the order was made, and the return thereof within a reasonable time after discovering the defects.

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

verdict and judgment against appellants, from which an appeal has been duly prosecuted to this court.

The evidence adduced on behalf of appellants tended to show that merchandise, corresponding to the samples exhibited to appellees by appellants' salesman when the order was made, on the 5th day of August, 1920, was shipped by appellants to appellees on the 22d day of said month; that subsequently a statement of the account, covering the shipment, was mailed by appellants to appellees; that, on September 10, 1920, in response to the statement of account, appellees wrote appellants the following letter:

"We are in receipt of your statement asking us for payment. We call your attention to the fact that when we bought these goods from your salesman we told him that we didn't need the goods for a while, that we wanted them for our fall business, but you shipped the goods at once.

"This is to advise you that we have the merchandise here in our house, haven't never looked at it as we didn't want to open it up until our customers got out some cotton so that they would have some money to pay for what they got. We are going to ask that you give us some time until our customers get some cotton out." On the 23d day of October, 1920, appellees again wrote appellants as follows:

"Answering your registered letter dated 19th, will say that we have today opened up your merchandise we bought from you, and this is to advise you that they didn't open up to our satisfaction, as some of the goods seemed to be much cheaper merchandise than we bought.

"Owing to cotton conditions this fall, we never opened up your goods until a few days ago, and it seems to us also you prefer putting us out of business. This is to advise you that we are today returning to you every dollar's worth of your goods you shipped us, and as to the future we don't want to buy anything from you. Goods shipped by express."

That the price of the goods decreased considerably between the 5th of August and the 29th day of October, 1920.

The evidence adduced on behalf of appellees tended to show that, when the order for the merchandise was given, on the 5th day of August, it was understood that shipment should not be made until later in the season; that, when the goods arrived, appellees received, but did not open and inspect, them, and, shortly after receiving them, wrote the letter of September 10, 1920, to appellants: that, two or three days before writing the last letter aforesaid, the goods were retained unopened in the store of appellees until two or three days before appellees wrote the letter of date October 23, 1920, to appellants; that two or three days before writing the last letter, appellees opened the goods and shipped them back to appellants by express, on the 29th day of said month.

The cause was submitted to the jury upon the theory that appellants could not recover if the goods were inferior to the samples exhibited when the order was made, provided the appellees rejected them within a reasonable time after they should have been delivered under the contract. The instructions given by the court, presenting these questions of fact for determination by the jury, were not objected to by appellants. For that reason, the substance, as well as the form, of the instructions must be regarded as correctly presenting the issues of fact for determination by the jury, involved in the theory upon which the cause was submitted.

Appellants, however, presented instructions which the court refused to give, over their objections and exceptions, embodying the idea that the duty rested upon appellees of inspecting and rejecting the goods within a reasonable time after receiving same, if they did not conform to the samples exhibited when the order was made. We think this theory untenable, in view of the fact that there was evidence tending to show the goods were prematurely shipped, when regarded in connection

with the contents of the letter written by appellees to appellants of date September 10, 1920. In that letter the attention of appellants was called to the fact that, according to the contract, the goods had been prematurely shipped; that they were in the house unopened, and that appellees did not want to open them until their customers got out some cotton so that they would have money with which to buy them. A direct request was also made in the letter that time be granted them until their customers got their cotton out. So far as the record shows, no answer was made by appellants until the 19th day of October. Appellants, therefore, silently acquiesced in the goods remaining in appellees' store unopened until that date. Appellants' own conduct clearly estopped them from asking instructions to the effect that appellees were bound to inspect and reject them, if inferior to sample, within a reasonable time after receiving the shipment. We think the cause was submitted to the jury upon the correct theory.

Appellants insist that they should have been permitted to recover as upon an account stated; that, on August 22, they presented an account for the goods to appellees, which was not disputed, but, in effect, acknowledged as being correct by appellees in letter of date September 10, 1920. We do not so interpret the letter. The letter informed appellants that the goods had been ordered by agreement for fall trade, and had been prematurely shipped; that they had not been opened and would not be until later. The letter at most was an admission of liability upon condition that the goods should conform to the samples when inspected. The facts surrounding the transaction do not render the account presented on August 22 an account stated. Again, the issue of an account stated was not presented or insisted upon in any form in the trial court, and can not be insisted upon for the first time on appeal.

No error appearing, the judgment is affirmed.

SATTERWHITE *v.* STATE.

Opinion delivered June 13, 1921.

CRIMINAL LAW—BILL OF REVIEW.—The only method of review in criminal cases is a writ of error or appeal or a writ of error *coram nobis,* and a "bill of review" will not lie to procure a new trial after conviction in a criminal case on the ground that the prosecuting witness on whose testimony the conviction was based had recanted her testimony by affidavit after expiration of the term at which judgment of conviction was rendered.

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

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. The appellant has no right at this time to ask for and obtain a new trial upon newly discovered evidence. 214 S. W. 44.

2. A bill of review or motion for new trial for newly discovered evidence must be filed or made during the term, while a bill of review in chancery can be filed only *after the term* at which the decree was entered. 61 N. E. 337-9. See C. & M. Dig., § 3218. The only remedy is by appeal within sixty days. C. & M. Dig., § 3393; 97 Ark. 116; 96 *Id.* 145. The appeal comes too late and should be dismissed or judgment affirmed. 136 Ark. 290; 96 *Id.* 145; 97 *Id.* 116.

McCULLOCH, C. J. Appellant was indicted by the grand jury of Clark County for the crime of rape and was tried and convicted on a day of the March term, 1919, and sentenced to the State penitentiary for life. He filed in the circuit court of Clark County, on February 1, 1921, a petition denominated as a bill of review setting forth his conviction aforesaid and alleged, in substance, that within thirty days after his conviction and incarceration in the State penitentiary the prosecuting witness in the case, Edna Satterwhite, on whose testimony the State had procured a conviction, recanted and made an affidavit to the effect that her testimony against appellant accusing him of having raped her was false.

It was further alleged in the petition that appellant filed a motion for a new trial in the Clark County Circuit Court immediately after his conviction, and that before the adjournment of the term the court overruled said motion. The prayer of the petition was that a new trial be granted on account of the change in the testimony of the prosecuting witness. The court denied this petition, and an appeal has been prosecuted to this court.

A bill of review or in the nature of a bill of review is a pleading which originated at common law, and the remedy afforded under it was one confined exclusively to courts of equity. The proceeding must be instituted in a court of equity and in the same court which rendered the decree sought to be reviewed. 10 Ruling Case Law, page 567; note to *Brewer* v. *Bowman,* 20 American Decisions, 158. The only statutory method of review afforded in criminal cases in this State is on a writ of error or appeal or on a writ of error *coram nobis,* an original proceedings in the trial court. *Howard* v. *State,* 58 Ark. 229; *Beard* v. *State,* 79 Ark. 293. Courts of equity have no jurisdiction to interfere with criminal proceedings. *State* v. *Williams,* 97 Ark. 243; *Ferguson* v. *Martineau,* 115 Ark. 317. There is no provision for a motion for new trial in criminal cases on account of newly discovered evidence after the expiration of the term at which the judgment of conviction was rendered. *Howard* v. *State, supra; Thomas* v. *State,* 136 Ark. 290. The circuit court was, therefore, correct in denying the petition of appellant.

Affirmed.

FRAUENTHAL v. MORTON.

Opinion delivered June 13, 1921.

1. ANIMALS—UNCOVERED WELL—LIABILITY FOR INJURY TO STOCK.—Under Crawford & Moses' Digest, §§ 375-6, making it unlawful to leave any shaft, well or other opening uncovered on uninclosed land, liability is not dependent on the fact that the person or

corporation against whom liability is sought to be imposed dug the well, but may be incurred by permitting a well dug by another to remain uncovered.

2. ANIMALS—LEAVING UNCOVERED WELL ON UNINCLOSED LAND.—Liability for injury to stock by leaving an uncovered well on uninclosed land, under Crawford & Moses' Digest, §§ 375-6, is imposed, without reference to the question of negligence, it being sufficient to show that an artificial well was dug on the land, and that it was left exposed in a condition which might endanger live stock.

3. ANIMALS—UNCOVERED WELL ON UNINCLOSED LAND.—The fact that a well was being used as a source of water supply does not relieve the owner from liability if he permitted it to remain uncovered on uninclosed land.

4. ANIMALS—INJURY TO STOCK BY OPEN WELL—ACTUAL POSSESSION.—Liability for injury to stock by an uncovered well on uninclosed land, under Crawford & Moses' Digest, §§ 375-6, does not depend upon the owner's actual possession of the land; his constructive possession by reason of ownership being sufficient.

5. ANIMALS—INJURY TO STOCK BY OPEN WELL—DOUBLE DAMAGES.—Where the jury, under the court's instructions, returned a verdict for the market value of a horse drowned in an open well on uninclosed land, under Crawford & Moses' Digest, §§ 375-6, it was not error to render judgment for twice the amount of the verdict, in accordance with the statute.

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

M. E. Vinson, for appellant.

1. A verdict should have been directed for defendant. In the absence of statute the general rule is that the owner or occupier of land is under no legal obligation to take special care or pains to the end of keeping it safe for the protection of the animals of others which are allowed to run at large. 57 Ark. 17; 94 *Id.* 458; 116 *Id.* 163; 117 *Id.* 1. Under the proof in this case defendant was not liable and the evidence does not sustain the verdict. 56 Atl. 498, 500; 48 So. Rep. 357-8; 3 Words and Phrases, p. 60; 226 S. W. 1058. Under the testimony plaintiff was remiss in his duty and can not recover.

2. Under the proof the court erred in its instructions.

3. The judgment is not in keeping with the verdict. The jury must assess the amount of the damages. C. & M. Dig., § 1305; 47 Ark. 120. It was error to render jdgument for double damages. 47 Ark. 120. There was no evidence showing liability to plaintiff, and a verdict should have been directed for defendant.

Geo. W. Reed and *Lawrence Neill Reed*, for appellee.

1. The complaint was drawn and action brought under C. & M. Digest, §§ 375-6 and it was an oversight that double damages were not claimed, but by amendment before the trial this was corrected and appellant was not misled at the trial. 57 Ark. 17 has no application and the decision was rendered long before our statute was enacted, but the liability of defendant was recognized in that case by citing 46 Ark. 207; 94 Ark. 458 is not in point.

By digging the well twenty feet deep and leaving it unprotected and uncovered, with water flowing, an agency was created which lured the horse to drink, and, the same being a place of danger, it constituted actionable negligence. 57 Ark. 17; 94 *Id.* 458; 116 *Id.* 163; 117 *Id.* 1; 7 Negl. Compensation Cases Ann., p. 468; 7 N. C. C. C. 495 and note V; 23 N. D. 6; 7 N. C. C. A. 497, note VI. An owner is liable for a dangerous nuisance on his land if injury occurs thereby. 4 A. L. R. 731; 16 R. C. L., § 594, p. 1076. "*Leave*" means to permit or allow to remain. Webster's Un. Dict.; 5 Words and Phrases, p. 1052; 16 Conn. 38-45; 14 N. J. L. 220-4; 43 Am. Rep. 365; 6 Wis. 377-389. The well was a dangerous agency.

2. In rendering a verdict under penalty statutes the jury assess the actual damages and the court doubles or trebles them as the statute provides. C. & M. Dig., § 2509. Many of the questions raised by appellant were settled by this court in 226 S. W. 1058.

McCULLOCH, C. J. Appellant, who was the defendant below, owns by inheritance from his father an unenclosed vacant lot in the town of Heber Springs on which is situated an exposed and uncovered well, according to

the testimony, into which appellee's horse fell and was drowned. This is an action to recover double the value of the horse, under the statute which reads as follows:

"It shall be unlawful for any corporation, company, individual person, or association of persons to leave any shaft, well, or other opening uncovered on any unenclosed land. Every corporation, company, individual person, or association of persons who shall dig any such shaft, well, or other opening, whether for the purpose of mining or other purpose, shall be required to securely enclose the same, or cover and keep covered with strong and sufficient covering." Crawford & Moses' Digest, § 375.

The next section of the statute prescribes a penalty for violation of the preceding section and liability to the owner of the injured stock for the recovery of twice the appraised value thereof.

There is a conflict in the testimony as to whether the excavation was originally a spring of water, but there is testimony tending to show that it was originally a flowing spring at all seasons of the year, and there was also testimony to the effect that it was what was called a "wet weather spring," *i. e.*, water flowing during the rainy seasons. At any rate the testimony is positive to the effect that during the year 1914 or 1915 a man named Brockman, by permission of appellant's father who then owned the lot in question, dug a well at the place in question to afford water for use at a hotel which he was operating a few blocks away. The well was dug about twenty feet deep, and, being on a hillside, it was walled up to the full height on the upper side and to the level of the ground on the lower side. Some of the witnesses say that it was above the ground on the lower side, and the testimony shows that an opening was left on the lower side, so that stock could approach and drink out of the well, and so that water could be conveniently dipped out. Originally, Brockman pumped water from the well with a gasoline engine, but the engine was removed long before appellees horse was drowned, and the well was left

in the condition described above without any protection. Brockman abandoned the use of the well, but it was, according to the testimony, used for watering stock running out on the commons and was also used at times by persons for drinking purposes.

When appellant inherited the property, it was in the condition described, and on a day in the month of August, 1919, appellee's horse, which was allowed to run at large on the commons, went to the well to drink and fell into the well and was drowned. None of the witnesses in the case saw the horse fall in, but one of them saw it a few minutes after it fell, and it was still alive. He and a companion endeavored to rescue the horse, but were unable to do so. After appellee was notified he and several other men finally dragged the horse out, then dead, by means of a rope and pulley suspended over the well so that the horse could be pulled straight out and then swung over. Circumstances indicated that the horse approached the well on the side of the opening and while reaching in for water fell into the well. The water was, according to the testimony, about on a level with the ground, and the horse was found with his head and front feet in the water with his hips on the outside of the well. There was evidence tending to show that the well was at least eight or ten feet deep at the time the horse was drowned, and was twenty feet deep when originally dug.

The principal contention here is that the evidence is not sufficient to sustain the verdict, but we think there is sufficient evidence to establish a state of facts which would constitute liability under the terms of the statute cited above. We decided in the case of *American Building & Loan Assn.* v. *State*. 147 Ark. 80, that liability is not dependent upon the fact that the person or corporation against whom liablity is sought to be imposed dug the well, but that liability is incurred by permitting a well dug by another to remain uncovered. It is also observed from a perusal of the statute that it is made unlawful to leave a well, shaft or other opening uncovered on unenclosed land, and that liability is imposed with-

out reference to the question of negligence. In other words, the statute itself describes the circumstances under which liability is imposed, and it is not a question for the determination of a trial jury whether or not those facts constitute negligence. The statute obviously applies only to artificial excavations, but the testimony in the present case is sufficient to show that this is an artificial well dug on the land, and that it was left exposed in a condition which might endanger ranging livestock. The fact that the well was being used as a source of water supply does not relieve the owner from liability if he permitted it to remain uncovered and exposed on unenclosed land, for that is the very circumstance upon which the statute expressly declares liability. Our conclusion is that there was evidence sufficient to sustain the verdict.

It is further contended that the court erred in giving an instruction which ignored the question whether or not appellant was in actual possession of the property, it being contended that liability depended upon actual possession. Such is not the effect of the statute, which declares liability against all persons and corporations who "leave any shaft, well, or other opening uncovered on any unenclosed land." It is undisputed that appellant was the owner of the lot at the time the horse was drowned in the well, and it is unimportant to consider what overt acts of ownership were exercised. The lot was vacant and unoccupied, and constructive possession follows the true ownership. There is nothing in the present case to show that there was any adverse claimant to the property, or that any other person was asserting ownership or possession.

The court instructed the jury that, in the event of a finding for the plaintiff, the damages should be assessed at the market value of the horse at the time it was killed. The jury returned a verdict in favor of appellees, assessing damages in the sum of $75, and the court rendered judgment against appellant on this verdict for $150, twice the amount of damages assessed by the jury.

It is contended that the verdict was general, assessing the full amount of the damages to which appellee was entitled, and that the court erred in rendering judgment for double damages. *Hallum* v. *Dickinson,* 47 Ark. 120. The orderly procedure in a trial of the issues under a statute of this kind is to instruct the jury as to the law in regard to double damages and permit the jury to make a finding of the full amount to be recovered. However, in the present case there was an instruction, given without objection, telling the jury to find the market value of the horse, and it is obvious that the jury did not intend by the verdict to find twice the value of the horse. This being true, it was not improper for the court to double the damages in rendering judgment on the verdict. Under the statute there is no discretion with the court or jury about allowing double damages. We think there was no error in this ruling of the court.

Lastly, it is contended that the complaint did not state facts making out a case for the recovery of double damages. We think, however, that the allegations of the complaint constitute a sufficient statement of facts to warrant a recovery under the statute, and appellee was permitted during the progress of the trial to amend the complaint so as to ask for double damages. The assessment of damages is within the testimony. While there was some conflict as to the value of the horse, there is scarcely any dispute that it was worth the sum fixed by the jury in the award of damages. The testimony of appellee and some of his witnesses would, if accepted by the jury, have justified a finding for a much larger sum.

Judgment affirmed.

CRANOR v. JENKINS.

Opinion delivered June 13, 1921.

ANIMALS—IMPOUNDING OF, WITHIN FENCING DISTRICT.—Under Crawford & Moses' Digest, §§ 4684, 4657, making it unlawful to per-

mit stock to run at large within a fencing district after the district has been inclosed by a good and lawful fence, the construction of a fence around a fencing district is required only to the extent essential to the protection of the district from stock running at large; and where a fencing district is bounded on all sides by adjacent fencing districts already established, the construction of a fence is not required.

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

J. W. Morrow, for appellant.

The district does not become operative until the fence is built, in accordance with our statute, and it means that there must be a lawful fence around the boundaries of the district except in case of a navigable river. The theory of appellant is recognized in 107 Ark. 135. It was not unlawful for stock to run at large in this district until this district had been enclosed by such a fence as the statute requires. 107 Ark. 135.

Mann & Mann, for appellee.

The construction of a fence is only required to the extent that it is essential to the protection of the district from stock ruuing at large, and where there are other adjoining districts in which the running at large of stock is prohibited, the construction of a fence is not required. C. & M. Dig., § 4656, does not apply. See, also, *Ib.*, § 4663. Statutes must be reasonably construed to carry out the intention of the Legislature. 25 R. C. L., p. 967; 65 Ark. 521; 48 *Id.* 307; 107 Ark. 135.

McCULLOCH, C. J. This case involved the right of appellee to impound certain livestock—two mules, the property of appellant—found running at large within the bounds of a fencing district in St. Francis County, formed by order of the county court pursuant to the general statutes on that subject. Crawford & Moses' Digest, §§ 4655 *et seq.*

Appellant and appellee are both residents and owners of property situated within the boundaries of said district. The original statute authorizing the organization of fencing districts and prescribing the form of proceedings in regard to such districts was enacted by the

General Assembly of 1891, but has been subsequently amended in several particulars. The original and amendatory statutes are cited in the notes to the sections of the digest referred to.

Section 4684 of Crawford & Moses' Digest was enacted as a part of the original statute (1891) and reads as follows:

"After any fencing district has been inclosed by a good and lawful fence, it shall be unlawful for any person who is the owner, or who has control of any kind of stock, to let the same run at large in said district, and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than one nor more than fifty dollars, and, in addition to the above fine, shall be liable for double the amount of any damages that any person may sustain by reason of said stock running at large in said district, to be recovered by action before any court having competent jurisdiction. Provided, this section shall not prohibit any person from fencing his or her lands, or any part thereof, separately, and pasturing the same."

Section 4657 of Crawford & Moses' Digest was an amendment to the general statute enacted by the General Assembly of 1901, and reads as follows:

"It shall be unlawful for any person owning or having control of stock that have been restrained from running at large to knowingly permit such stock to run at large within the territory comprising such fencing district, and any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars nor more than twenty-five dollars."

It is unnecessary to a decision of the present case for us to determine whether and to what extent, if any, these two sections are conflicting, or whether the former was to any extent repealed by the latter.

In the case of *Hill* v. *Gibson,* 107 Ark. 130, we recognized the force of that part of section 4684 which provides that it shall be unlawful to permit stock to run at large after "any fencing district has been inclosed by a good and lawful fence." The statute, as originally enacted, and as it stands in force today, provides, in substance, that the county court may create such districts upon the application of two-thirds of the landowners in the territory to be affected, and that a fencing board shall be appointed by the county court, whose duties are to "form plans for the building of a good and lawful fence and all necessary gates to inclose and protect said district," to procure estimates of the cost of such fence and to levy assessments on property in the district to pay for the construction of the fence. In section 4671 it is provided that the cost of keeping the fence in repair from year to year shall be paid in the same manner as the original cost of construction of the fence.

Section 4686, which was an amendment to the statute enacted by the General Assembly of 1897, expressly provides that any person finding stock running at large in a fencing district may impound the stock and, after notice, cause the same to be sold.

The district within which the stock of appellant was impounded is bounded on the south by a fencing district created by a special statute enacted by the General Assembly of 1919, Acts of 1919, page 308. It is bounded on the east by the Crittenden County line, that county being organized into a fencing district by a special statute enacted by the General Assembly of 1913, Acts 1913, page 183. It is bounded on the north and west by another fencing district in St. Francis County, created under the general statutes, the same as this district. There was no fence built around this district, it being bounded on all sides by other districts, and the sole question presented in the briefs for our consideration is whether or not the impounding of stock is authorized by the statute until after the fence has been built on the boundaries of the district, so as to completely inclose it.

It is contended that the district does not become operative until the fence is built in accordance with the provisions of the statute, and that the statute means that under all circumstances there must be a lawful fence around the boundaries of the district, except in case of a navigable river, which is expressly declared by the statute to be a sufficient barrier. On the other hand, it is contended by counsel for appellee that the statute should be interpreted to mean that the construction of the fence is required only to the extent that it is essential to the protection of the district from the intrusion of stock running at large, and that where there are other adjoining districts in which the running at large of stock is prohibited the construction of a fence is not required. Our conclusion is that the contention of appellee is correct, and that under a fair interpretation of the statute it is only meant to require the construction of a fence where necessary to constitute a barrier against the intrusion of stock from the outside. The lawmakers did not intend to require something that was wholly unnecessary for the protection of the owners of property in the district. Prohibition against permitting stock to run at large permits the farmers in the district to raise crops without inclosing their lands with fences and the lawmakers meant to protect them by requiring sufficient barriers around the outer bounds of the district so as to prevent the incoming of stock. But where there are other adjoining districts in which the running at large of stock is prohibited, there is no need of such protection.

The special acts referred to, which created the district in St. Francis County bounding this district on the south, and which created the district in Crittenden County, contained no requirements for the building of fences, but each of the statutes prohibited the running at large of stock in the respective territories, and this constituted a legislative determination in each instance that such prohibition and the penalties prescribed for the violation thereof constituted sufficient protection to the farmers who cultivate lands in those localities. This

being true, we can not assume that the lawmakers meant to require, under the general statutes, the building of a fence to keep out stock from another district where the running at large of stock is expressly prohibited. This, we think, is a more reasonable view of the statute, and which is undoubtedly the one which works out the best results. Of course, we must declare the law as we find it, but we consider the reasonableness of a requirement in order to determine the scope and extent which the Legislature meant to give it.

This view of the law affirms the judgment of the circuit court, and it is so ordered.

WOOD and HUMPHREYS, JJ., dissent.

FORT SMITH LIGHT & TRACTION COMPANY

v. WILLIAMS.

Opinion delivered June 13, 1921.

1. BRIDGES—VALIDITY OF ACT CREATING DISTRICT.—Acts 1909, No. 119, p. 325, creating the Fort Smith and Van Buren Bridge District, is valid.
2. BRIDGES—RIGHT TO EXACT TOLLS.—The right to exact tolls of the public for the privilege of crossing a public bridge must be conferred by statute, or it does not exist.
3. BRIDGES—VALIDITY OF STREET CAR TOLLS.—Under Acts 1909, p. 325, creating the Fort Smith and Van Buren Bridge District, and act No. 233 of 1913, amending same, and authorizing the bridge district to grant a right-of-way over the bridge upon such terms as might be provided by contract between the bridge district and the street car company, a contract between the bridge district and the street car company by which the latter was to charge a certain fee for transporting passengers over the bridge and to pay a stipulated portion thereof to the bridge company in payment for the right-of-way over the bridge is valid.

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

J. B. McDonough, for appellant.

1. The contract is a valid and binding contract under § 2 of act 119, Acts 1919, p. 328. See Acts 1913, pp. 1003-4. The validity of the act is settled in 115 Ark.

194-209. The traction company, as the evidence shows, complied with act 571, Acts 1919, p. 411. The contract is valid, as it provides for a *money consideration* and for the *time* and *amounts* of payment, and the act is valid. 140 Ark. 597. The traction company is the common carrier. The collection of fares makes the person a passenger of the traction company. Michie on Carriers, pp. 1503, 1491; Nelle's Street Railways, § 248. The bridge district is not a common carrier. Collectors of fares are agents of the traction company and of the bridge district. Legally, the traction company is compelled to collect the charge and can collect no more nor less. Act 571, Acts 1919; C. & M. Digest, §§ 849, 850, 917-18-19 and 1631. It performs the service and owns the compensation. The traction company is a common carrier, and to sell at a reduced rate to one class and deny it to others is a violation of constitutional rights. 173 U. S. 684. Hence it can not sell its service to landowners at one price and to non-landowners at another. This suit is an indirect, if not a direct, attack on 115 Ark. 194. A street car company is a common carrier. Beale & Wyman on Railroad Rate Regulations, § 188; 173 U. S. 684. No street car company can discriminate in its charges between passengers. 96 Ark. 410; 98 *Id.* 543; 119 *Id.* 254. The increase of value of the assessments is the sole basis for these assessments. 89 Ark. 513.

2. Sound reason supports the arrangement in the contract. A toll is a charge made against a person who walks or travels in his own conveyance over a bridge. 30 N. J. L. 447.

A common carrier has a right to refuse any ticket, detached and presented in violation of the rule that a ticket is not transferable. 77 Tenn. 180; 82 Va. 250; 51 Atl. Rep. 406; 3 Michie on Carriers, p. 2442.

The right of the State or district to charge a rental is well settled. 96 Ark. 410; 115 *Id.* 194; 79 Atl. Rep. 161.

3. The evidence does not support the findings of the chancellor. The act of 1919 prohibits discrimination.

See Acts 1919, p. 325. The act has been construed by our court. 96 Ark. 410. The right to charge public utilities for the use of the bridge is settled. 113 Ark. 493. See 94 Atl. Rep. 988; 44 *Id.* 385; 113 Ark. 493.

4. The court erred in refusing to admit testimony to show that plaintiffs were not the real parties in interest, but the real question is whether the contract is valid.

Hill & Fitzhugh, for appellant also.

The contract is within the Nakdimen decision. 115 Ark. 194. No statute has been changed since that session.

Webb Covington, for appellees.

The chancellor properly held the contract was *ultra vires* and *void.* 79 Ark. 234; 115 Ark. 207-9.

The right to demand tolls of the public for crossing a bridge exists only by reason of statutory enactment. 76 Ga. 644. No toll can be demanded not lawfully within the franchise. 26 Me. 326; 11 Am. Dec. 170. Nothing passes in legislative grants to corporations but what is granted in clear, unequivocal and explicit terms. 15 Wallace (U. S.) 500; 101 *Id.* 71. See, also, 9 Howard (U. S.) 172; 20 Ark. 625.

WOOD, J. This action was brought by the appellees, residents and real property owners of the Fort Smith and Van Buren Bridge District (hereafter called bridge district), against the bridge district and the Fort Smith Light & Traction Company (hereafter called traction company). The traction company is an Arkansas corporation engaged in the operation of a street railway in and between the cities of Fort Smith and Van Buren. The cars of the traction company run upon and over the bridge of the bridge district which spans the Arkansas River between the cities of Fort Smith and Van Buren. The appellees alleged that the bridge district was requiring of them and other owners of real property in the bridge district to pay a bridge fare or toll of 1¼ cents for each ticket purchased or five cents per passenger cash fare if no ticket had been purchased; that the traction company permitted the agents of the bridge dis-

trict to collect the fares; that no charge was made against any person for crossing the bridge except those who were passengers of the traction company; that appellees and other real property owners of the bridge district were taxed for the construction and maintenance of the bridge, and this bridge fare against them was discriminatory and illegal because other passengers of the traction company who were not owners of real property in the bridge district were allowed to cross over the bridge on the traction company's cars upon the payment of the same fare or toll as that paid by the appellees and other real property owners in the bridge district. The appellees further alleged that the bridge district was not collecting from the traction company any sum whatever for the use of the bridge; that all sums realized by the bridge district from the bridge fares collected from passengers on the cars of the traction company crossing the bridge were paid by the appellees and other passengers of the traction company, and not by the traction company; that the bridge had therefore been converted by the bridge district into a toll bridge contrary to the provisions of the act creating the bridge district.

The appellees instituted the action for the benefit of themeselves and all others similarly situated, and prayed that the bridge district and the traction company be restrained from charging and collecting the bridge fares mentioned.

The bridge district and the traction company answered separately, setting up substantially that the act creating the bridge district and act 233 of the Acts of 1913 amending the same authorized the bridge district to grant a right-of-way over the bridge upon such terms as might be provided by contract between the bridge district and the public utility, which contract was required to be submitted to the electors of the bridge district through referendum; that a contract was entered into by the bridge district and the traction company which was duly submitted to the legal voters through referendum as provided by the act and was ratified and ap-

proved by them; that the bridge district and the traction company were complying with the terms of that contract, and they set up the contract as a justification for the charges of which the appellees complain and as a complete defense to their action. The contract was made an exhibit, and attached to the answers, and was proved and introduced in evidence.

The contract is too long to set forth *in haec verba.* It is in sections, and we will abbreviate and state in substance such of its provisions as we deem necessary.

In the first section the bridge district, for the considerations thereinafter named, grants to the traction company the right to use the free bridge and its approaches for the term thereinafter mentioned for the transportation of its passengers. This section specifically sets forth the things that the traction company is authorized to do in order to enable it to operate its passenger cars across and over the bridge and its approaches. It also specifically sets forth the things which the traction company is not authorized to do, confirming what had already been done by the traction company under a former contract and reserving in the bridge district the right to supervise and approve such improvements as the traction company should make in the future.

In the second section it is expressly agreed that, in consideration of the execution and performance of all of the terms of the present contract, any and all claims of the bridge district growing out of the use of the bridge and its approaches by the traction company prior to the execution of the present contract are waived. If the contract is not performed, then the bridge district does not relinquish its claim for rentals under former contract.

The third section contains reciprocal obligations by which the bridge district is to maintain the bridge and its approaches in good condition, and the traction company is to maintain in good condition its rails, wires, railway feeders, and ties on the approaches to the bridge.

The fourth section provides that the traction company shall not have exclusive use of the bridge, and that the trolley erected by the traction company may be used by any other public utility upon payment of just compensation, and that the use of the bridge by the traction company shall not interfere with the use of the bridge as a public highway.

By the fifth section the traction company agrees to maintain a schedule of cars, and the bridge district permits the traction company to stop its cars at both ends of the bridge to receive and discharge passengers, "but in so doing there shall be collected, as hereinafter provided, a fare for the benefit of the bridge for every passenger who rides over the bridge or any part thereof, or any part of the approaches thereto. It is expressly agreed that the traction company shall aid the bridge district to collect the fare for the benefit of the district and shall do nothing which will tend to defeat the right of the district to collect the rental by way of fare as herein provided. The fare collected for the benefit of the district is the rental to be paid by the company for the use of the bridge. The method of collecting the fare in no manner changes the fact that said fare collected for the bridge district is a rental paid by the traction company for the use of the bridge. The company will therefore aid in every way the collection of a fare of 1¼ cents from each passenger, if the fare be a bridge ticket, and, if the fare be cash, the sum of five cents for each passenger. Said fare, when so collected, shall entitle the passenger to ride across and over the bridge and the approaches one way for each fare. The traction company will not maintain any station for the taking up or setting down of passengers at any point on the bridge or on the approaches, and will not take up or set down passengers on the bridge or its approaches unless said passenger pays the bridge fare as above provided."

By the sixth section the traction company agrees, "in consideration of the rights herein granted, that it will not permit any one except as herein provided to ride

as a passenger on its said cars across the said bridge without permitting said bridge district to collect from each of said passengers a bridge ticket or cash fare as provided in this contract. The bridge district, through its employees as herein provided, will take up and collect from each passenger either a bridge ticket for 1¼ cents or a cash fare of five cents for each passenger, and the employees of the traction company, if necessary, will aid the collectors of the bridge district in collecting such ticket or fare from each and every passenger as herein provided."

Sections seven and eight relate to the means and methods used by the collectors of the bridge district in collecting the fares.

Section nine again provides that the fares when collected shall be full compensation for the use of the bridge and the approaches by the traction company and exempts certain employees of the traction company from payment of fares, and then provides that the traction company will not give to any passenger who stops on the bridge or its approaches a transfer enabling him to ride on a car after he has walked across the bridge.

Section ten provides for the printing of tickets at the expense of the traction company under the supervision of the bridge district and the delivery of the printed tickets in packages to the bridge district and the purchase of these tickets by the traction company from the bridge district, the traction company paying 1¼ cents cash for each ticket. If, at the termination of the contract, the traction company has on hand any tickets, the bridge district agrees to redeem them at the price the traction company paid for same. This section also contains a provision to the effect that all sums of money paid by the traction company to the bridge district for tickets and the cash fares collected "shall be deemed rentals for the use of the bridge and is the funds and property of the bridge district."

Section eleven provides that the tickets shall be in books containing twenty tickets each to be sold by the traction company at twenty-five cents per book, the tickets not to be transferred or transferrable.

By section twelve the traction company binds itself to pay $50 per month toward the salary of bridge fare collectors if the cars crossing the bridge are operated by two men, or $100 per month if the cars are operated by one man.

The thirteenth section makes the traction company responsible to the bridge district for any damage it may do to the bridge or its approaches.

By section fourteen the bridge district binds itself to charge all other public utilities a reasonable toll or rental as the law requires for the use of the bridge.

Section fifteen prescribes the period of duration of the contract.

Section sixteen makes it the duty of the bridge district to keep the books and accounts with reference to the bridge tickets and bridge cash fares collected, and exempts the traction company from responsibility for any of the acts of the collectors or bookkeepers, who, under the terms of the contract, are the agents of the bridge district.

One of the appellees lived in Fort Smith, and the other in Van Buren. Their testimony was to the effect that each paid the traction company seven cents as passenger fare for transportation over its lines in the cities of Fort Smith and Van Buren, and an additional fare of 1¼ cents each to the bridge checkers on the free bridge while on the street cars if a ticket is used, or five cents cash without a ticket. They own real property in the bridge district and each pays annually the sum of $1.35 as a bridge tax. In buying a ticket from the traction company from Fort Smith to Van Buren they each had to pay 8¼ cents if they used a bridge ticket, or twelve cents without a bridge ticket. The bridge fares are col-

lected at each end of the bridge by collectors who get on the cars at the respective ends, ride across, and take up the fares at the other end of the bridge.

There was testimony to the effect that the conductors of the traction company on the cars had nothing to do with the collection of the bridge fares.

D. C. Green testified that he was the general manager of the traction company; that the traction company had a regular tariff of fares on each passenger on cars between the two cities. This schedule of fares is on file with the Corporation Commission as required by law. His testimony and the schedule show that the fares were as above indicated, and that children under twelve years of age were charged four cents. Green testified that the seven cents covered the transportation charges from any point in Van Buren to Garrison Avenue in Fort Smith with free transfer privileges. In other words, a man gets on the car at the smelter in Van Buren and pays seven cents and can transfer to any point within the city limits of Fort Smith. An additional fare of five cents is collected from each passenger crossing the bridge for a cash fare. The traction company did not charge any more than was set forth in its standard public schedule. This schedule was introduced in evidence by the appellees, and it showed that the fares were as above indicated.

There is a provision in the schedule under the title of "Bridge Contract" as follows: "Under contract as entered into with the Fort Smith and Van Buren Bridge District, bridge collectors selected and employed by the bridge district board the cars at or near the approach of the bridge and collect from each passenger crossing the free bridge between Fort Smith and Van Buren five cents in cash or one bridge ticket, and the money thus collected from the passengers is retained by the bridge district."

There was testimony on behalf of the appellees to the effect that the deputy sheriff, who was employed by

the bridge district to clean and repair the bridge, some times in cases of necessity assisted the collectors in the collection of fares.

The assistant secretary of the collector of taxes testified that he was the custodian of the records in the collector's office and kept all contracts with public utilities using the bridge. There was no contract with any public utility other than the traction company. The district made charges against persons regardless of the kind of transportation for crossing the bridge. It charged taxicabs and other concerns that carried passengers for pay.

It was admitted that the contract in evidence had been ratified by the legal voters of the bridge district under the referendum provided by special act. Upon the above issues and facts, the court decreed "that the aforesaid contract is *ultra vires* and void; that the taking of said fares by the district is contrary to law. Therefore, the said Fort Smith and Van Buren District, its commissioners, agents, employees and representatives are perpetually enjoined from taking, receiving, or attempting to take or offer to receive said fares under said contract." From that decree is this appeal.

The bridge district was created under act 119 of the Acts of 1909, page 325. The act is valid. *Shibley* v. *Fort Smith & Van Buren Bridge District,* 96 Ark. 410; *Nakdimen* v. *Fort Smith & Van Buren Bridge District,* 115 Ark. 194. Section 2 of the act provides in part as follows: "The commission (of the bridge district) shall have the power to grant a right-of-way over said bridge to any public utility upon such terms as the commission shall determine, provided, however, that the concessions which may be granted to public utilities shall not interfere with the reasonable use of such bridge as a public highway."

Section 39 of the act is in part as follows: "The bridge district herein created shall have the power * * * to receive rents from the concessions heretofore author-

ized from the public utilities for the purposes of construction, repair, and maintenance of the public improvement herein contemplated."

Section 2 of the act was amended by the Legislature of 1913, act 223 of the Acts of 1913, page 1001, so as to read in part as follows: "The commission shall have the power to grant a right-of-way over said bridge to any public utility upon such terms as the commission shall determine, provided, however, that the concessions which may be granted to public utilities shall not interfere with the reasonable use of such bridge as a public highway. Provided, further, when the commission and the public utility shall agree upon a right-of-way or concession over the bridge to be enjoyed by any public utility, a contract setting forth fully the terms thereof shall be signed by the commission and the public utility subject to a referendum thereon."

There are further provisions in the amendatory act providing for carrying the referendum into effect, and the amendatory act also provides: "That no exclusive privileges shall be granted under this section or any other provision of this act to any such public utility."

In *Nakdimen* v. *Fort Smith and Van Buren Bridge District, supra,* construing section 2 of the original act, we said: "We hold that the commission under section 2 of the act could only receive money for the grant of the right-of-way to the street car company, and the word 'terms' has reference to the time and amount of money paid, but that a discretion was left to the commission as to the amount of money to be charged therefor and the terms of the payment thereof."

Learned counsel for appellees has made a vigorous attack upon the contract under review, the gist of his contention being that under the contract, as he construes it, the bridge district has granted to the traction company a right-of-way over the bridge for which the bridge district "forces the traveling public to pay tribute and designates the money thus received rental paid by the

company." To support his contention counsel relies mainly upon the case of *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 Howard 172. In that case the canal company was granted a charter by Maryland, Delaware and Pennsylvania to cut and maintain a canal connecting the Chesapeake and Delaware bays. The charter gave the company the right to collect tolls on certain articles on vessels carrying commodities, enumerating the articles and the tolls thereon. Empty boats or vessels were required to pay $4, "except an empty boat or vessel returning whose load has already paid the tolls fixed, in which case she shall pass toll free." The eleventh section of the charter provided: "The said canal and works to be erected thereon by virtue of this act, when completed, shall forever thereafter be esteemed and taken to be navigable as a public highway free for the transportation of all goods, commodities or produce whatsoever on payment of the toll imposed by this act, and no tax whatsoever for the use of the water of the said canal, or the works thereon erected, shall at any time hereafter be imposed by all or either of the said States." Perrine proposed to install a line of passenger boats through the canal, and the company required him to pay a toll of $1 for each passenger. Perrine resisted the payment of this toll, and the Supreme Court of the United States held that the company had no right under its charter to demand toll from passengers who passed through the canal, or from vessels on account of the passengers on board; that the company could only exercise the powers conferred upon it by its charter.

Counsel also relies upon the case of *Reed* v. *Hanger*, 20 Ark. 625. In that case the county court granted a charter to erect a certain toll bridge which provided "that the bridge should ever remain free and open to the citizens of the county." It was held that the charter should be construed so as to give the citizens of the county the free use of the bridge whether they crossed on foot or otherwise, and also for the free passage of

any means of transportation employed by them in their lawful business.

As already observed, counsel for appellees, as a basis for the application of the doctrine of the above cases, assumes that the contract under consideration requires the traveling public generally, and not the traction company, to pay the bridge district for the right-of-way over the free bridge exercised by the traction company. This assumption which the counsel takes as his premise and the argument based thereon are plausible, but the premise is unsound, and his argument, however forceful, necessarily leads to an erroneous conclusion. Therefore, it occurs to us that the doctrine of the above cases is not applicable to the contract under consideration, when correctly construed.

We shall not undertake to analyze and comment upon the various provisions of the contract. It evidenced an agreement by which the bridge district is to receive a certain sum of money from the traction company for the right granted the latter to run its cars for the transportation of passengers over the bridge. The original act expressly authorized the bridge district to charge the traction company for its right-of-way over the bridge. *Nakdimen* v. *Fort Smith & Van Buren Bridge District, supra.* By the same token the traction company, having thus acquired the right-of-way over the bridge, could exercise it with all of its privileges, one of which was to charge passengers who used its facilities. The amount charged the traction company by the district is a definite and fixed sum ascertained and measured by the number of passengers which the traction company transports in its cars over the bridge and the amount which the traction company charges each passenger for such transportation. The traction company is a common carrier, and had a right to charge those whom it transported on its cars across the bridge according to the tariff of rates filed with the Corporation Commission. Act 571 of the Acts of 1919, p. 411, §§ 5, 6 and 7. See *Helena Water Co.* v. *Helena,* 140 Ark. 597. The money derived from

this source through the sale and use of tickets, and, by the payment and collection of the cash fares in the absence of tickets, was primarily the property of the traction company and not of the bridge district. It became the property of the bridge district only because under the terms of the contract the traction company agreed to let the bridge district collect and use it in payment for the right-of-way privilege granted the traction company by the bridge district, and because the bridge district agreed to accept it as such.

It is not contended by the appellees, and could not be successfully contended under the issues herein joined, that the traction company did not have the right to charge those whom it transported over the bridge on its cars a fare of 1¼ cents where tickets were used, or a cash fare of five cents without tickets, as specified in its schedule of fares. As a common carrier, it could not be compelled to furnish the public its facilities of transportation over its line across the bridge without compensation. The only authority under the law authorized to determine whether these rates are just and reasonable has approved them. See § 6, act of 1919, *supra.*

There is no provision in the original act creating the bridge district nor in the amendatory act authorizing the commissioners of the bridge district to charge the general public for the privilege of crossing the bridge. On the contrary, the power conferred upon the bridge district is "to construct and maintain a free public highway."

It is well established by our own decisions and the authorities generally that the right to exact tolls of the public for the privilege of crossing a public bridge must be conferred by statute or it does not exist. *Altheimer* v. *Plum Bayou Levee District,* 79 Ark. 234; *Nakdimen* v. *Fort Smith & Van Buren Bridge District, supra,* and other cases cited in brief for appellees.

Therefore, if the appellees are correct in the assumption that by the terms of this contract the general public

and not the traction company is required to pay the bridge district for the right-of-way which the traction company has over the bridge, then the contract is *ultra vires* and void. But, on the other hand, the original and amendatory acts confer upon the bridge district the authority to grant the traction company a right-of-way upon terms to be fully set forth in a contract between the bridge district and the traction company. Therefore, if the contract requires the traction company to pay the money, which it is authorized to receive from passengers, to the bridge district in payment for the concession or right-of-way granted by it to the traction company, and if the bridge district agrees to collect and receive this money as such payment, then the contract is valid. We are convinced that the latter is the only correct interpretation of the contract in the light of the decision of this court in *Nakdimen* v. *Bridge District, supra,* and the amendatory act of 1913, *supra.* The decree is therefore reversed, and the complaint is dismissed for want of equity.

Mr. Justice HUMPHREYS not participating.

GORDON *v.* CLARK.

Opinion delivered June 13, 1921.

1. COURTS—JURISDICTION OF PROBATE COURT.—Where the question of title to property belonging to deceased was involved in a contest between the administrator and a certain claimant, the probate court was without jurisdiction.

2. JUDGMENT—RES JUDICATA.—To render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear from the record or from extrinsic evidence that the particular matter sought to be concluded was raised and determined in the prior suit, or that it might have been litigated in that case.

3. JUDGMENT—RES JUDICATA.—The rule that a valid decree in a suit cuts off all defenses which might have been pleaded therein refers only to such matters as properly belong to the subject of the controversy, and are within the scope of the issues raised by the pleadings.

4. WILLS—RES JUDICATA.—Where the probate court ordered the statement of the wishes of a dying person as to his property to be reduced to writing and admitted as a nuncupative will, and on appeal to the circuit court probate was denied on the ground that the amount of property involved was more than $500, and that such statement was therefore not good as a nuncupative will under Crawford & Moses' Digest, § 10497, such judgment was not *res judicata* in an action to enforce a gift *causa mortis* alleged to have been made by decedent.

5. GIFTS—ELEMENTS OF GIFT CAUSA MORTIS.—The general rule is that where a person realizes that he is about to die, and under a sense of impending death gives chattels to another intending to pass title in the event of his death, and the latter accepts the gift, such facts constitute a gift *causa mortis*.

6. GIFTS—ACCEPTANCE.—Where a gift is made to one person for another, there will be a presumption of acceptance if the gift is beneficial.

7. GIFTS — SUFFICIENCY OF DELIVERY.—Where one, realizing that death is impending, gave to one person for others certain Liberty Bonds and War Savings Stamps, there was a sufficient delivery of these items to constitute a gift *causa mortis*.

8. GIFTS—DELIVERY OF DEPOSITOR'S BANK BOOK.—Delivery of a depositor's bank book, which was merely evidence of the account, was not sufficient to constitute a valid gift *causa mortis* of the money on deposit to the depositor's account.

9. GIFTS—LIFE INSURANCE POLICIES.—Life insurance policies payable to legal representatives of the insured may be transferred by mere delivery without written assignment to one person for another as a gift *causa mortis*.

10. GIFTS—DONATIO MORTIS CAUSA OF REAL ESTATE.—A *donatio mortis causa* of real estate can not be sustained.

11. GIFTS — PARTIAL INVALIDITY.—Where a decedent made a gift *causa mortis* of several classes of property, and the gift to a portion of them was invalid, this fact did not invalidate the gift as to the other classes of property.

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

STATEMENT OF FACTS.

Appellant brought this suit in equity against appellees, and the prayer of her complaint is that the title to a one-half interest in the property described in the complaint be divested out of appellees and vested in her.

The complaint alleges that on the 11th day of December, 1918, A. T. McMillan departed this life intestate in the Greenwood District of Sebastian County, Arkansas, and that he was a citizen of that county and State at the time of his death; that at the time of his death he owned personal property consisting of about $350 in Liberty Bonds; about $400 in War Savings Stamps, about $90.50 deposited in a bank and the proceeds of two policies of insurance, one in the sum of $735 and the other in the sum of $1,000.

That the said A. T. McMillan became sick, and realizing that he had but a few hours more to live, called to his bedside Wilmot Clark, Jr., and delivered to him an envelope containing the Liberty Bonds, War Savings Stamps, insurance policies, bank book showing the amount deposited to his credit in the bank, and some deeds to real estate. That he directed said Wilmot Clark, Jr., to divide said property equally between appellant, who was the mother of his deceased wife, and his own mother. Appellant further states that William M. McMillan and Susan McMillan, who were defendants in the court below, were respectively the father and the mother of A. T. McMillan, deceased, and that the other appellees, who were also defendants in the court below were his brothers and sisters.

Appellee, Wilmot Clark, Jr., filed an answer, in which he admitted that A. T. McMillan, realizing that he was about to die, called him to his bedside and gave him a packet containing Liberty Bonds, War Savings Stamps, insurance policies, bank book and deeds, and directed him to divide his property equally between his mother and the mother of his deceased wife; that he hold said property subject to the orders of the court.

Appellees allege that the chancery court has no jurisdiction over the cause, and say that the property claimed by appellant is now in the control of the probate court, which has exclusive jurisdiction of the distribution thereof. They allege that Wilmot Clark, Jr., is the administrator of the estate of A. T. McMillan, deceased,

and that he holds the property described in the complaint to be distributed to the heirs at law of A. T. McMillan, deceased, in accordance with the laws of the State, and that said estate is now in process of administration in the probate court of Sebastian County.

Appellees also interposed a plea of *res judicata,* based on the following facts:

After the death of A. T. McMillan, deceased, Wilmot Clark, Jr., appeared in the probate court and stated to said court that A. T. McMillan, realizing that he was about to die in a few hours, gave to him in a package the property described above, consisting of Liberty Bonds, War Savings Stamps, bank book, insurance policies and deeds.

The proceedings had before the court were those prescribed for the proving of nuncupative wills. The court reduced the transaction had between A. T. McMillan just prior to his death and Wilmot Clark, Jr., to writing and admitted the same to probate as a nuncupative will.

The heirs at law of A. T. McMillan duly prosecuted an appeal to the circuit court. The circuit court found that on the 14th day of January, 1918, A. T. McMillan and Etta McMillan, his wife, each made a will in writing devising to the other all of his or her property; that said Etta McMillan died a few days before her husband, and that all of her property vested in her husband under her will; that her husband, A. T. McMillan, died intestate on December 14, 1918, and that under section 10497 of Crawford & Moses' Digest, no nuncupative will is good where the estate bequeathed exceeds the value of $500; that the oral directions given by A. T. McMillan to Wilmot Clark, Jr., for a distribution of his estate, bequeathed property exceeding the value of $500, and for that reason could not be reduced to writing and probated as a nuncupative will.

It was therefore adjudged by the court that the judgment of the probate court, reducing said directions to writing and admitting the same to probate as a nuncupative will, should be canceled and set aside.

It was further ordered and adjudged that a copy of the judgment of the circuit court be transmitted to the probate court and entered on the records of that court. No appeal was taken from this judgment.

Upon this state of the record the case came on for hearing in the chancery court on October 18, 1920, and it was decreed that the complaint of appellant should be dismissed for want of equity. The case is here on appeal.

Webb Covington and *G. L. Grant,* for appellant.

1. There is only one question in this case, *i. e.,* has the chancery court jurisdiction to try and determine the cause? The question of *res judicata* can not be considered, for that is an affirmative defense to be heard in the trial below, and, as there was no trial and no testimony introduced by either party, nothing is open now except the question of jurisdiction. There was a gift to appellant. The delivery to Clark of the property was the best one that the nature of the property at the time admitted. The gift was intended *in presenti* and accompanied by delivery and sufficient. 59 Ark. 96; 93 *Id.* 563. The probate court has no jurisdiction of this case. 110 Ark. 119. Probate courts can not try the title to property. 111 Ark. 357; 72 *Id.* 330; 227 S. W. 1-3.

2. The chancery court has jurisdiction, as a trust was involved. 3 Am. L. Rep. 912-13; 101 Ark. 455; 227 S. W. 1-3.

W. A. Falconer, Jos. R. Brown and *Geo. W. Johnson,* for appellees.

1. Appellant's brief is not in conformity with rule 9 of this court.

2. The appeal presents only a moot question, which this court will not decide. 90 Ark. 165; 91 *Id.* 292; 92 *Id.* 242.

3. The complaint stated no cause of action, and was properly dismissed. If the judgment was correct on any ground, whether that ground was relied on by the lower court or not, the cause should be affirmed. 88 Ark. 140; 107 *Id.* 462; 126 *Id.* 159; 117 *Id.* 304.

4. The case was properly dismissed, as it was *res judicata.*

The complaint attempts to set up a gift *causa mortis.* Under the circumstances here the law presumes a gift *causa mortis* and not *inter vivos.* 131 Ark. 507. Real property is not the subject of a gift *causa mortis.* 20 Cyc. 1242. Where the donor intended to give property as a whole, a gift of part of it only will not suffice, and the whole gift must fail. 20 Cyc. 1231. The complaint shows that McMillan made Clark his agent to make delivery after his death, and this is a nullity. 44 Ark. 42.

Money in bank and the proceeds of an insurance policy do not pass by delivery. 99 Ala. 441; 12 So. Rep. 420; 92 Am. Dec. 481.

No trust is involved here, and the cirucit court had jurisdiction. 10 N. E. Rep. 352. The judgment of the circuit court is not open to collateral attack, and every presumption is in favor of the court's jurisdiction. 77 Ark. 497; 101 *Id.* 390. Want of jurisdiction was not pleaded in the lower court, and appellant is now precluded. 119 Ark. 413; 110 *Id.* 119. The probate court is a court of superior jurisdiction, and its judgment not subject to collateral attack. 92 Ark. 611, 616.

The judgment against Mrs. Gordon is not void, and by long acquiescence of the parties jurisdiction may be conferred on the probate court. 110 Ark. 119; 44 *Id.* 42.

HART, J. (after stating the facts). The chancery court erred in sustaining the plea to the jurisdiction of the court. It is true that the estate of A. T. McMillan, deceased, was in course of administration in the probate court. The question of the title to the property did not arise in that court as a necessary incident to the administration of other matters over which the probate court had jurisdiction.

The present case involves a contest between the administrator and a claimant to certain property of the estate, and it is well settled that the probate court has no jurisdiction of a contest between an executor or ad-

ministrator and others over the title of property belonging to the deceased. *King* v. *Stevens,* 146 Ark. 443, and cases cited, and *Union & Merc. Trust Co.* v. *Hudson,* 147 Ark. 7.

Again it is contended that the decree of the chancery court should be upheld on the appellees' plea of *res judicata.* To sustain that plea it was shown that Wilmot Clark, Jr., had represented to the probate court that A. T. McMillan, deceased, on his death bed had delivered to him a packet containing certain property and directed that he should divide it equally between appellant, the mother of his deceased wife, and his own mother. The probate court ordered the statement to be reduced to writing and to be admitted to probate as a nuncupative will, and, on appeal to the circuit court, probate was denied on the ground that the property involved amounted to more than $500, and that, under section 10497 of Crawford & Moses' Digest, no nuncupative will is good where the estate bequeathed exceeds the value of $500. To render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear from the record, or from extrinsic evidence that the particular matter sought to be concluded was raised and determined in the prior suit; or that it might have been litigated in that case. *Livingston* v. *Pugsley,* 124 Ark. 432, and *Morton* v. *Linton & Plant,* 138 Ark. 297.

The rule that a valid decree in a suit cuts off all defenses which might have been pleaded therein refers only to such matters as properly belong to the subject of the controversy, and are within the scope of the issues raised by the pleadings. *Fourche River Lumber Co.* v. *Walker,* 96 Ark. 540. The title to the property in controversy in this suit was not involved in the probate proceeding. The only question raised or that could have been raised in that proceeding was whether or not the statement of Wilmot Clark, Jr., to the probate court formed a sufficient basis to warrant it in being reduced to writing and filed for probate as a nuncupative will.

The circuit court held that no nuncupatve will was established under the facts presented and no appeal was taken from that judgment. Hence that judgment is conclusive that no valid will was made by A. T. McMillan. But appellant might be entitled to the property and still not be entitled to it as a legatee under a nuncupative will, The fact that a nuncupative will was not probated does not prevent appellant from claiming the property under a gift *causa mortis*. The reason is that the question of whether or not the decedent had given the property to her, in view of his impending death, did not become an issue in the proceeding to probate a nuncupative will, and could not have been made an issue in such proceeding. Such an issue could only be raised in an independent suit between the claimant and the administrator of the decedent, like the present one. Therefore the issues raised in the present case were not adjudicatd in the probate proceedings.

The general rule is that where a person realizes that he is about to die, and under a sense of impending death gives chattels to another intending to pass title in the event of his death, and the latter accepts the gift, such facts constitute a gift *causa mortis*. *Lowe* v. *Hart*, 93 Ark. 548.

It is generally held that where such a gift is made to one person for another there will be a presumption of acceptance where the gift is beneficial. *Ammon* v. *Martin*, 59 Ark. 191; *Pyle* v. *East* (Iowa), 3 A. L. R. 885, and case note at page 917, and *Varley* v. *Sims* (Minn.), 8 L. R. A. (N. S.) 829.

In the present case A. T. McMillan, realizing that he was about to die in a short time, gave to Wilmot Clark, Jr., a packet containing Liberty Bonds, War Savings Stamps, two insurance policies, his check book, and some deeds to real estate and directed him to divide the property equally between his own mother and his deceased wife's mother. There was about $350 in Liberty bonds, and about $400 in War Savings Stamps. Under the rule just announced, there was a delivery of these items and

they constituted a gift *causa mortis*. There was about $90.50 deposited in the bank to the credit of A. T. McMillan. The question is presented as to whether or not the delivery of the depositor's bank book constituted this a gift *causa mortis*. The deposit of A. T. McMillan could not be withdrawn from the bank by the production of his bank book, but could be withdrawn only on his check. The delivery by McMillan to Clark of his bank book did not give the latter dominion and control over the money which McMillan had on deposit in the bank. The deposit was just as subject to check, without the production of the book as with it. The book was only evidence of the state of the account between the bank and McMillan. Therefore, we hold that the facts stated are not sufficient to constitute a valid gift *causa mortis* of the money on deposit in the bank to the credit of deceased. *Jones* v. *Weakley* (Ala.), 12 So. 420, and cases cited; *Ashbrook* v. *Ryon,* 2 Bush (Ky.), 228; 92 Am. Dec. 481, and *Szabo* v. *Speckman* (Fla.), L. R. A. 1917 D, 357.

Our own case of *Lowe* v. *Hart,* 93 Ark. 548, is not opposed to the view herein expressed, but rather confirms it. In that case the bank through its cashier had issued a written certificate of deposit, and the certificate recited that the amount deposited was payable to the order of the depositor on the return of the certificate properly indorsed. The depositor on his deathbed had given the certificate to Mrs. Hart and spoke of it as a check for the money. Under the circumstances the court held that there was a valid gift *causa mortis*.

As we have already seen, the bank book in the present case was merely evidence of the amounts which from time to time had been placed in the bank by the depositor, and the delivery of the book could not pass the title thereto.

The delivery of the life insurance policies was complete, and it is well settled that life insurance policies payable to the legal representatives of the insured may be transferred by a mere delivery without a written assignment. *Gledhill* v. *McCoombs* (Me.), 45 L. R. A. (N.

S.) 26, Ann. Cas. 1914 D, 294. In a case note to the latter citation on page 297, it is said that the general, if not universal, rule is, that a policy of insurance on the life of the donor may be made the subject of a gift in the same manner as any other chose in action and numerous decisions are cited in support of the rule.

Again on page 298 it is said that the gift of a policy of life insurance is valid in the absence of a written assigment, provided there is a delivery of the policy by the donor to the donee, and numerous cases are cited in support thereof. In such cases the courts make no distinction between bonds or promissory notes and policies of life insurance. Each is held to be a contractual obligation to pay money at a certain time, so that it is said that, if the mere delivery of a promissory note without indorsement is sufficient to entitle the donee as against the donor and his representative to demand and receive the money from the obligor, no reason can be perceived why under like circumstances the donee of a life insurance policy should not be vested with like rights.

The attempted gift of the real estate was not a valid gift *causa mortis*. It is almost universally held that a gift of real estate as a *donatio mortis causa* can not be sustained. 12 Cyc. 1242 and cases cited; *Meach* v. *Meach,* 24 Vt. 591; and *Johnson* v. *Colley* (Va.) 99 Am. St. Rep. 884, and case note at page 908.

It results from the views we have expressed that there was a valid gift *causa mortis* of the Liberty Bonds, the War Savings Stamps and the insurance policies, but that no title passed to the money deposited in the bank or to the real estate.

Finally, it is contended that there was no intention on the part of the donor to make the gift otherwise than as a whole, and that the failure of a part must defeat the whole. To support this contention, counsel cite *McGrath* v. *Reynolds,* 116 Mass. 566, and *Knight* v. *Tripp* (Cal.), 54 Pac. 267.

We do not think that the facts in those cases control here. In each of them direction was given to a third

person as here to pay certain bequests to others, but here the analogy ends. In each of those cases the donor directed the donee to give the property to various persons, and different amounts were directed to be given to them. It was the evident purpose of the donor to distribute his property to all these persons, and there was nothing to indicate that a portion of the property would have been given to some of them if the whole gift was not held valid.

In the case at bar the donor directed the donee to divide his property equally between two persons, and a failure of a part of the intended gift could in no wise affect the remainder. It is not to be supposed that the donor would not have intended a part of his property to be divided equally between the parties because his gift to the whole of it failed. On the contrary, it was the evident intention of the donor to divide all of his property between his own mother and his deceased wife's mother. The reason of his course is perfectly apparent, He and his wife had made wills in favor of each other. His wife had died but a few days before he realized that he was about to die. Therefore, he wished to divide his property equally between his own mother and his deceased wife's mother. A failure to accomplish his purpose as a whole should in no sense be held to defeat it entirely.

It follows that the decree must be reversed, and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

HOWELL v. LAMBERSON.

Opinion delivered June 13, 1921.

1. TAXATION—RIGHT OF TAXPAYER TO PAY PART OF HIS TAXES.—In the absence of a statute to the contrary, a taxpayer always has the right to pay the amount of any one tax listed against his land, while refusing to pay other taxes listed separately against it.

2. STATUTES—CONSTRUCTION.—The primary object in the construc-

tion of statutes is to ascertain the intention of the Legislature from the language used.

3. TAXATION—FAILURE OF COLLECTOR TO COLLECT DRAINAGE TAX.—Under Crawford & Moses' Digest, § 3618, imposing a penalty upon a tax collector failing to collect drainage taxes along with the other taxes unless enjoined, and 1 Road Laws, 1919, p. 529, § 21, imposing a penalty on him if he shall "omit to advise" any taxpayer of the amount of his road improvement assessment when he pays his general taxes, a collector does not incur the above penalties where he demands the drainage tax or road assessment and endeavors to collect them.

4. TAXATION—PAYMENT OF GENERAL TAX ALONE.—Under Crawford & Moses' Digest, § 3618, and 1 Road Laws 1919, p. 529, § 21, a tax collector could not refuse to accept payment of general taxes because the landowner refused to pay his drainage or road improvement assessments, wishing to contest the same; the statute being directed against the collector and not against the landowner.

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

STATEMENT OF FACTS.

On May 17, 1920, G. W. Lamberson and A. D. Lamberson filed a petition in the circuit court against Homer Howell as collector of the revenue of Craighead County, Arkansas, for a writ of mandamus to compel Howell, as such collector, to accept their payment of said county and school taxes upon certain lands situated in the county and owned by them which the collector had refused to accept.

As a defense to the action, the collector alleged that the petitioners owned lands in Drainage District Nos. 15 and 16 of Craighead County, Arkansas, and in the Tri-County Highway Improvement District, and that certain assessments were due and unpaid on said lands in said improvement districts.

The collector further alleged that he had refused to accept the tender of the general taxes for the reason that the petitioners had refused to pay at the same time these local assessments due as aforesaid.

The case was tried in the circuit court on an agreed statement of facts substantially as stated above. It was

adjudged by the circuit court that the collector be commanded to receive from G. W. Lamberson and A. D. Lamberson the State and county taxes tendered by them upon their lands as described in the complaint, and that he as such collector issue them a tax receipt therefor without payment or tender by them of the local assessments alleged to be due in Drainage Districts Nos. 15 and 16 in the Tri-County Highway Improvement District. No injunction had been issued prohibiting the collector from collecting the improvement district taxes. The case is here on appeal.

Lamb & Frierson, for appellant.

It is the duty of the collector to collect drainage and road taxes at the same time he collects the general taxes. C. & M. Digest, § 3618. This section is constitutional. It is not vague nor indefinite. All legislative enactments not prohibited by the Constitution are valid. 45 W. Va. 415; 74 N. Y. 183; 44 Minn. 97; 15 Fla. 410 (421); 76 Ala. 603.

Due process of law is secured if the laws operate on all alike and do not subject an individual to an arbitrary exercise of authority and powers of the government. 152 U. S. 377; 184 *Id.* 540; 183 *Id.* 471; 68 Tenn. 202; 38 Miss. 424 (458); 40 Ark. 296-300. C. & M. Digest, § 3618, does not deprive appellees of any vested right. 20 Miss. 347; 115 Ia. 220; 44 S. W. 981; 172 Mo. 318; 16 Serg. & R. 169 (191); 9 Gill 299 (309). It was error to refuse the declarations of law asked by appellant.

H. M. Mayes, for appellees.

It is clear, under the statute (C. & M. Dig., § 3618), the collector is not forbidden to accept any part of one's taxes, but it is his duty to collect all drainage and road taxes at the same time he collects the general taxes. The judgment below is clearly right. 28 Ark. 518-19. The collector should have accepted and receipted plaintiffs for such taxes as they desired to pay, as he has no discretion in the matter. 28 Ark. 518.

Sloan & Sloan, amici curiae.

Taxpayers have the right to pay their general taxes without regard to the drainage and road taxes, and the collector must receive them when offered without regard to other local assessment taxes.

HART, J. (after stating the facts). The record shows that the drainage districts were organized under the general drainage act. Section 3618 of Crawford & Moses' Digest, relative to the collection of drainage taxes in such districts, reads 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 of the county along with the other taxes, and for his services in making such collection the collector shall receive a commission of one per cent.; 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. If any collector shall fail to collect the drainage tax along with the other taxes, he shall be subject to a penalty of one hundred dollars for each instance in which he shall collect from an individual the other taxes and omit the drainage tax, unless the drainage tax has been enjoined by a court of competent jurisdiction, to be recovered in a suit brought by the commissioners to the use of the district; and the county clerk shall be subjected to a like penalty for each case in which he shall fail to enter the drainage tax on the tax books."

The Tri-County Highway Road Improvement District was created under special act No. 186 of the Acts of 1919. Road Acts of 1919, vol. 1, p. 510. Section 21 of that act reads as follows:

"The county collector of each of the respective counties in which lands in said road improvement district are situated shall collect the several installments of the assessments of benefits during each year at the time he collects the general taxes; and if he shall omit to advise any taxpayer of the amount of his installment of the assessment of benefits during that year, at the time such tax-

payer is paying his general taxes, he shall be subject to a penalty of one hundred dollars for each instance, which may be collected by the commissioners by civil action or by deducting said penalty from any fee due the collector from said district."

It is the contention of the collector that the effect of these statutory provisions is to prohibit him from accepting a tender of the State and county taxes on the lands in question unless the owners would pay the drainage and road taxes due and unpaid upon said lands at the same time.

The agreed statement of facts in this case shows that the plaintiffs tendered to the collector the amount of State, county and school taxes levied on their lands, but refused to pay the drainage and road improvement taxes on the ground that they had not been legally assessed and levied, and that they were going to contest the same The collector refused the tender on the ground that under the statute he was not allowed to collect the general taxes without also collecting the improvement district taxes. The object of this lawsuit is to compel him to receive the general taxes without the payment of the improvement district taxes.

In the absence of a statute to the contrary, a taxpayer always has the right to pay the amount of any one tax listed against his land while refusing to pay other taxes listed separately against it. Cooley on Taxation (3 ed.), vol. 2, pp. 808 and 809; 37 Cyc. 1164.

Among the cases cited in Cyc. is *Coit* v. *Claw,* 28 Ark. 516. In that case the court said that whether the owner of real estate shall pay all taxes or pay one kind and not another, or let his lands go to sale for all or part, are questions for him and not for the collector to determine. The question of whether this right of the landowner has been taken away by the drainage and road improvement district statutes set out above is the issue raised by this appeal.

The primary object in the construction of statutes is to ascertain the intention of the Legislature from the language used, where that can be done. Tested by this rule, we do not think that either of the statutes referred to makes it obligatory upon the landowner to pay the local assessments imposed upon his land by the drainage improvement districts, or by the road improvement district, when he makes payment of his general taxes, State, county and school. The language of the statute shows that it is directed against the collector, and not against the landowner. The word "fail," as used in the drainage statute above copied, imports to become deficient or lacking, to leave unperformed, to omit, to neglect. Century Dictionary and Bouvier's Law Dictionary. The statute in question provides that if any collector shall fail to collect the drainage tax along with the other taxes, he shall be subject to a penalty of $100 for each instance in which he shall collect from an individual the other taxes and omit the drainage tax unless the drainage tax has been enjoined. We think the word "fail" implies in this statute an imposed duty upon the collector to collect the drainage tax at the same time he collects the general taxes, and is applicable only in case of neglect or omission of the collector to perform such duty. The word "fail", as used in the statute, covers both the intentional and unintentional nonperformance on the part of the collector. Where the collector has demanded the tax and endeavors to collect it from the landowner at the time he collects from him the general taxes and the landowner should tender his general taxes and contest the payment of the drainage tax and refuse to pay it, it could not be said that the collector failed to act or to perform his duty in the premises so as to subject himself to the penalty prescribed by the act. In such case he would be guilty of no delinquence, and failure to perform his duty could not be ascribed to him for the reason that he had done all that he was authorized to do in the premises. Under the terms of the statute, the collector could not refuse to accept a voluntary payment of the general taxes because

the landowner wished to contest the payment of his improvement taxes and on that account refused to pay the same. The language of the statute is in no sense directed against the landowner, and his right to pay his general taxes without paying the improvement taxes can not be taken away by any supposed intendment on the part of the Legislature. Such a right is a valuable one to the landowner and could in no event be taken away without direct and express language to that effect on the part of the Legislature.

The road improvement district statute uses the words "omit to advise." The reasoning we applied above to the use of the word "fail" in the drainage district statute applies with equal force here.

An argument is also made that a statute imposing a duty upon the landowner to pay his drainage and road improvement taxes as a prerequisite to his right to pay his general taxes would be unconstitutional. The views we have expressed render it unnecessary to pass upon this question.

It follows that the judgment must be affirmed.

SMITH and HUMPHREYS, JJ., dissenting.

CARTER v. STEWART.

Opinion delivered June 13, 1921.

1. ADVERSE POSSESSION — PRESUMPTION OF GRANT.—Uninterrupted possession for fifty years of land originally belonging to the State, with payment of taxes during the entire period, is sufficient to sustain a presumption of fact that the State made a grant of the land.

2. ADVERSE POSSESSION—PRESUMPTION OF GRANT—SILENCE OF STATE RECORDS.—The fact that the State's land records do not show that any grant was ever made of the tract in controversy is merely negative evidence, and does not overcome the presumption of a grant from fifty years' uninterrupted possession of the land and payment of all taxes thereon during that period.

3. ADVERSE POSSESSION—PASTURING CATTLE AND CUTTING TIMBER.—Where defendants and their privies had been in actual possession

of a 40-acre tract of land adjoining the forty acres in controversy, claiming the entire 80-acre tract as their homestead, though all of the improvements were on the 40-acre tract not in controversy, the continuous use of the disputed tract, which was swamp land, for cutting firewood and for pasturing cattle is actual possession of the tract in controversy.

4. ADVERSE POSSESSION — CONSTRUCTIVE POSSESSION.—Where the grantee under a deed by one without record title goes into actual possession of part of the land described in the deed, his possession gives him constructive possession of the remainder.

5. ADVERSE POSSESSION—CONSTRUCTIVE POSSESSION—EXCEPTION.—The exception to the rule that possession of a parcel of land under a deed conveying an additional tract is constructive possession of the latter tract, namely, where the deed covers separate tracts owned by different owners, is limited to cases where the different owners are different private individuals, and does not apply where the legal title to the additional tract was in the State, the source of title to both tracts.

6. ADVERSE POSSESSION—PRESUMPTION OF GRANT.—The presumption of fact of a State grant arising from long-continued possession of land and payment of taxes assessed thereon is not in conflict with the rule that the State is not estopped by the unauthorized act of its tax officer in listing the land for taxation, since the State can, by rebutting the presumption, recover the land, regardless of such unauthorized act.

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

STATEMENT OF FACTS.

Edna W. Carter instituted an action of ejectment in the circuit court against Oscar Stewart and Mary Jeter Stewart to recover 40 acres of land situated in Phillips County, Arkansas. She alleged that the land was granted by the United States to the State of Arkansas on August 14, 1858, under an act of Congress commonly known as the Swamp Land Grant. She further alleged that she obtained a patent to said land from the Commissioner of State Lands on the 6th day of June, 1917, and under it she has title to said lands and is entitled to the possession of the same.

The defendants asserted title to the land in themselves and moved to transfer the case to equity, which was done.

On the 26th day of April, 1873, S. D. Thomas conveyed by warranty deed to Benjamin Jeter, 80 acres of land in Phillips County, Arkansas. The deed conveyed the 40 acres in controversy and another 40-acre tract adjoining it. The deed of S. D. Thomas and wife to Benjamin Jeter is dated April 26, 1873, and was acknowledged on the same day. It was duly filed for record in the clerk's office on the 1st day of August, 1873. The consideration recited in the deed is the sum of $600, the receipt of which is acknowledged.

J. R. Fielder was a witness for the defendants. According to his testimony, S. D. Thomas was his stepfather. He did not know how Thomas acquired title to the land in question, but stated that he was satisfied he thought he had a title to it, or he would never have executed a deed to Jeter to the land. The land was then situated in Monroe County, and some years ago many of the deed records of that county for that time were burned in a fire. The defendants are both negroes and are husband and wife. Gertha Jeter Stewart is the daughter of Ben Jeter. Ben Jeter lived on the land and paid the taxes on it until he died. Since that time Gertha Jeter Stewart has lived on the land and paid the taxes on it. Witness helped Thomas to clear some of the land about three years before he sold it to Jeter. Mr. Thomas is now dead, and witness does not know where his old land papers are. Thomas commenced clearing the place for a home. Between 25 and 30 acres are now cleared, but the cleared land is not on the tract in controversy.

According to the testimony of Gertha Jeter Stewart, she was the only heir at law of her father. Her father commenced to pay taxes on the land in 1874 and paid taxes continually until he died. She was residing with her father when he died and continued to reside on the land with her mother until she died in 1912. They continued to pay taxes on the land until 1912. Since that

time the witness has paid the taxes on the land. In other words, the Jeters have paid the taxes on the land since they bought it down to the time the case was heard in the chancery court on September 25, 1920. The cleared land and the dwelling house is on the 40-acre tract adjoining the 40 acres in controversy. The Jeters built a six-room house and cleared and cultivated between 25 and 30 acres of land on the 40 acres adjoining the 40 acres in controversy. Since they obtained the deed from Thomas, they have regarded the 80-acre tract embraced in the deed as their homestead. They have continuously cut firewood from the 40 acres in controversy and have used it for a pasture. It is low, swampy ground, and none of it has been put into cultivation. The Jeters have been cutting timber ever since they have been on the land, and they have cut off all the oak and hickory timber, so that there is no timber on the land except some gum timber. The record shows that Gertha Jeter Stewart is 59 years old, and that she is erroneously sued as Mary Jeter Stewart; J. R. Fielder is somewhat older.

A clerk in the State land office testified that he had examined the records kept in the State land office carefully, and that the records do not show any conveyance of the land to any one prior to the deed that was made to Edna W. Carter on June 6, 1917. The original patent of the United States to the State of Arkansas for said lands is shown by the records of the State land office. It is dated August 14, 1858.

The chancellor found the issues in favor of the defendants, and a decree was entered of record dismissing the complaint of the plaintiff for want of equity. To reverse that decree, the plaintiff has duly prosecuted this appeal.

A. D. Whitehead and *E. L. Carter,* for appellant.

The testimony shows that the land was wild, unoccupied and unimproved. There never has been any adverse actual possession, and the only use it was put to is cutting timber and wood. Cutting timber and gathering wood from wild land does not constitute actual or ad-

verse possession, neither does the payment of taxes. 81 Ark. 258; 68 *Id.* 551. The case of *Carter* v. *Goodson,* 114 Ark. 62, is not a similar case on the facts. Grants in the country are not presumed from the government, except in cases of very ancient possession, running back to colonial days.

The records of the State Land Office clearly show that the land had been patented by the United States to the State of Arkansas and by the State to appellant in 1917. But the rule that a person who takes possession of a part of a tract under cover of title thereby obtains possession of the entire tract is subject to one important exception which applies in this case. An adjoining tract was sold by the sheriff and tax deed issued to S. D. Thomas in November, 1869. Defendant's possession of the southeast quarter could not be construed to extend to the southwest quarter of the southeast quarter of section 30. 83 Ark. 377; 98 *Id.* 367; 81 *Id.* 141; 104 S. W. 191.

Defendant had never improved the land, nor put any of it in cultivation, nor fenced any of it. Their sole claim is based on the payment of taxes, but for those they may be reimbursed under Kirby's Digest, §§ 7180-1. The State is responsible for the unauthorized acts of its officers in putting these lands on the tax books and collecting taxes thereon. Nor can laches be imputed to the State, and the statutes of limitation do not run against her. 115 U. S. 408; 95 Ark. 70. The land belonged to the State from the time of swamp land grant in 1858 until June, 1917, when it was conveyed to appellant, and the decree was erroneous and should be reversed.

R. B. Campbell and *W. H. Pemberton,* for appellees.

After fifty years' possession of the land, peaceable and uninterrupted, and clearing it and making improvements and payment of taxes, a grant from the State will be presumed. 114 Ark. 62; 135 *Id.* 232, 353-369.

HART, J. (after stating the facts). The principal question raised by the appeal in this case is whether fifty years' peaceable and uninterrupted possession of the land in controversy in the defendants and those under whom they claim, together with the payment of taxes during all that time, affords sufficient ground to presume a grant from the State to the lands in question. The chancellor held under the facts and circumstances adduced in evidence that he had the right to presume and find that a patent had been formerly issued by the State to the land in question under the authority of *Carter* v. *Goodson,* 114 Ark. 62, and *State* v. *Taylor,* 135 Ark. 232. See, also, *Wallace* v. *Hill,* 135 Ark. 353.

In the case of *Carter* v. *Goodson, supra,* the court held that where appellee and her grantors had held possession of land for fifty years, improving the same and paying taxes thereon, a finding by the court that a grant of the land had been made by the State to appellee's grantors was justified. The court further held that the presumption of a grant from continued and uninterrupted possession is one of fact for the court or jury trying the case.

It is claimed that the facts in the case at bar do not bring it within the principles decided in that case. It is pointed out by counsel that the notations or marks on the State land records in that case tended to show that the land had been sold by the State, while no such inference can be drawn from the State land records in the present case. For instance, the letter "S" was written on the original plat in the land office, and it was shown that it was the practice to place the letter "S" there when the State had sold the land. The establishment of the fact or circumstance, however, was not controlling in that case. This is shown by the decision of the court and the authorities cited in the subsequent case of *State* v. *Taylor, supra.* In that case the court clearly recognized that where the possession of land has continued uninterrupted for a great length of time a presumption arises as against

the State and claimants under it that a grant from the State has duly accompanied the first possession and consequently avoids any subsequent patent. It was there settled that a patent to land in cases of peaceable and uninterrupted possession of many years, together with the payment of taxes, may be presumed to have been formerly issued. We there pointed out from the decisions of other States that the courts have been constantly in the habit of presuming grants from the State upon the uninterrupted and peaceable possession of the lands for many years. The presumption springs from a lapse of time, the probable loss of evidence and motives of public policy in settling titles and quieting possession.

Under its sovereign power, a State imposes the burden upon all its citizens to pay taxes on the property owned by them for the purpose of supporting the government. It is the duty of the officers of the State to place the land in the State on the tax books for that purpose as soon as the State has parted with its title to them. Hence where the State has for a long time demanded and collected taxes on property and the property owner has acquiesced therein by paying the taxes, there arises a presumption that there was a legal liability to pay the taxes, and this furnishes a strong circumstance from which a court may infer a grant from the State. Of course, from the very nature of the thing the person or persons paying the taxes must be in the uninterrupted and continued possession of the land in order to warrant the court in finding a grant from the State. In such cases the possession of the adverse claimants could have had a legal inception, and the doctrine of presumption of a grant from the State under such circumstances is recognized in many cases.

In such cases the fact of the claimant not producing the patent may have been owing to the general practice of the country at the time to take a conveyance of land without requiring all previous title deeds, or the failure to record deeds. Indeed, where a large grant of land from the State has been divided between the children of

the grantee, the original patent must remain in the hands of only one of them and might have been lost without the fault of the others.

The facts in the present case show that Thomas commenced to clear the 80 acres of land which he subsequently conveyed to Jeter in about 1870. According to the testimony of his son-in-law, he intended to make it his home. He conveyed the land to Jeter in 1873. At the time Thomas conveyed the land to Jeter, it was situated in Monroe County, but was subsequently annexed to Phillips County, where it is now situated. Thomas is dead, and the deed records of Monroe County for the year in which Thomas conveyed to Jeter have been burned. Jeter is also dead. He left surviving him his widow and one child, who continued to reside on the land until the widow died. The daughter then continued to reside on the land until the present time. The Jeters commenced to pay taxes on the land from the time Thomas executed the deed to Ben Jeter in 1873, until the case was heard in September, 1920, in the chancery court. Of course, if Thomas and Jeter had lived, or if the deed records in Monroe County had not been destroyed, evidence might have been produced to show a grant from the State to Thomas. The fact that the State land records do not show such a grant does not repel or overcome, as a matter of law, the presumption of a grant. Such omission may be regarded as negative testimony only.

But it is insisted that there has been no possession by the Jeters of the land in question. It is true that the house and cleared land are all on the adjoining 40 acres which was also embraced in the deed from Thomas to Ben Jeter, but the evidence shows that Thomas intended to have the whole 80 acres for his homestead, and that the Jeters did claim the whole 80 acres as their homestead. The evidence shows that the 40-acre tract in controversy is low, marshy land, and for that reason was not cleared and put into cultivation. During all these years, how-

ever, the Jeters have cut their firewood from it and have used it to pasture their cattle. In fact, they have cut all the valuable oak and hickory timber off of it, and there is no timber left on it now except a small quantity of gum. These acts were not of a fitful and disconnected character, but they were continued and uninterrupted for nearly 50 years. Therefore, the chancellor was justified in holding that they held such actual possession of the 40-acre tract in controversy as was practical under the circumstances.

Moreover, it is well settled that where the grantee under a deed by one without record title goes into actual possession of part of the land described in the deed, his possession gives him constructive possession of the remainder.

It is claimed, however, that the facts in this case bring it under the exception to that well known rule as declared in *St. L., I. M. & S. Ry. Co.* v. *Moore,* 83 Ark. 377, and other cases of like character. In that case the court said that where one takes possession of one of two adjoining tracts of land under a deed, conveying both tracts to him, if the actual title to the two tracts are in different persons, his actual possession of one tract will not give him constructive possession of the other so as to oust the owner of that tract. The reason is that the possession of one tract would be no notice to the owner of the other tract that his land was claimed adversely. The court said further that, if the law were otherwise, one by buying a small tract and taking a deed conveying adjacent unimproved lands, might, by taking possession of the small tract, become constructively in the possession of all of the land within the calls of his deed without any visible act to notify the owners of such adverse claim.

In the application of the exception to the present case, counsel point to the fact that the legal title to one of the 40-acre tracts was in Thomas, and that the legal title to the 40-acre tract in controversy was in the State, at the time Thomas conveyed both tracts to Jeter. Now the State is the source of all land titles in this State, and

the general rule announced above would illy serve its purpose and would really be worth nothing, if the exception could be applied to cases like the present one. The exception to the rule is applied in cases where different individuals claim and hold the legal title to the lands. We hold that it has no application when the facts are like those in the present case.

Finally, it is again contended that the rule laid down overturns the well-settled rule that the State in its sovereign capacity is not estopped to assert a claim to its own property by the unauthorized acts of its officers. Hence it is claimed that the act of the officers in placing the land on the tax books was unauthorized, and the State is not estopped by such unauthorized act. That principle, however, has no place under the facts as disclosed by the record. If the plaintiff had introduced evidence tending to oppose or repel the presumption of a grant from the State arising from the peaceable and uninterrupted possession of the Jeters and Thomas under whom they claimed for over fifty years, then it could not be said that the State, or its subsequent grantee would be estopped from claiming title to the land by reason of the said officers placing the land on the tax books. But, as has already been pointed out, the plaintiff has introduced no testimony tending to rebut the presumption of a grant except the fact that the records of the State land office do not show such a grant. We have already seen that this does not, as a matter of law, overcome the presumption of a grant as found by the chancellor. Consequently, the estoppel of the State from the unauthorized acts of its officers does not arise in the case. If the findings of the chancellor was correct, the State had already granted the land to Thomas, and the land was rightfully placed on the tax books.

It is true, as said in *Oaksmith's Lessee* v. *Johnston,* 92 U. S. 343, that in this country there can be seldom occasion to invoke the doctrine of presumption of a grant from the Government or the State except in cases of ancient possessions. But it is equally true that, where the facts

justify it, this rule of presumption is a safe one and has a salutary effect; and the doctrine serves a reasonable and necessary purpose.

It follows that the decree must be affirmed.

McCULLOCH, C. J. (dissenting). There is nothing in this case to show that the defendants ever had possession, either actual or constructive, of the lands in controversy. Fitful acts of possession, such as cutting timber or grazing stock, do not constitute continuous actual possession so as to put the real owner on notice or to ripen into title by adverse possession. *Scott* v. *Mills,* 49 Ark. 266; *Driver* v. *Martin,* 68 Ark. 551; *Connerly* v. *Dickinson,* 81 Ark. 258; *Earle Improvement Co.* v. *Chatfield,* 81 Ark. 296. In the case last cited the court said: "The disconnected acts of cutting timber would indicate oft-repeated trespasses upon the land, but they were not sufficient, in our opinion, to show such continuous and notorious occupation and domination over the land as would indicate to the true owner an unmistakable intention by another to own and exclusively appropriate the land."

Nor was there constructive possession by reason of the defendants being in actual possession of an adjoining tract of land under a deed which constituted color of title to both tracts. Under the doctrine announced by this court in several cases, beginning with the case of *Haggart* v. *Rainey,* 73 Ark. 344, there is no constructive possession for the reason, as stated by Judge RIDDICK in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Moore,* 83 Ark. 377, that "the possession of the tract is no notice to the owner of the other tract that the land is claimed adversely." The majority say in their opinion that this doctrine does not apply to a case where the legal title is in the State. I am unable to see why it would not apply if the statute of limitations could run against the State under any circumstances, but, as the statute of limitations does not run against the State, I fail to see why, under those circumstances, the defendants could be said to have had possession so as to raise the presumption that the title had passed from the State.

If there is a presumption at all of a grant from the State, the only ground upon which it can be based is that the defendants have continuously paid taxes on the land under color of title for a long period of time. The land being wild and unoccupied, this would constitute adverse possession so as to ripen into title by limitation as against private owners, but, since the legal title remained in the State up to a very recent date, and since the statute of limitation does not run against the State, it can not successfully be pleaded against the State's grantee within seven years of the date of the grant.

The three cases cited by the majority as supporting their conclusion that the presumption of a grant from the State is raised do not, in my opinion, support their views, as the facts of those cases are altogether different from the facts of the present case. In *Carter* v. *Goodson,* 114 Ark. 62, there was a confusion in the records of the State Land Commissioner, sufficient to raise a doubt whether or not the lands had been conveyed by the State, and this confusion was made the basis of the conclusion announced in that case that a presumption of grant would be indulged in favor of the occupant of the land. The same state of facts substantially existed in the case of *State* v. *Taylor,* and the decision was based on the same ground. In *Wallace* v. *Hill,* 135 Ark. 353, there was a right of redemption in the occupants, who were the former owners, and who held over after the sale of the land to the State for overdue taxes, and this court held that the continuous payment of taxes, coupled with possession, was sufficient to raise the presumption that the land had been redeemed through regular channels.

In the present case there is no evidence at all of any confusion in the records in the State Land Office. The undisputed evidence is that, according to those records, there had never been any grant by the State. Without actual possession of the land and without any evidence whatever of a grant, I do not think that the payment of taxes under color of title is sufficient to raise the presumption of the grant by the State in the face of a per-

fectly clear record which fails to show any defects in the State's title. It seems to me that under the circumstances of this case the following language of the late Justice Field in the case of *Oaksmith's Lessee* v. *Johnston,* 92 U. S. 343, very appropriately announces the only conclusion which ought to be reached on this subject:

"But in this country, at the present day, there can seldom be occasion to invoke the presumption of a grant from the government, except in cases of very ancient possessions running back to colonial days, as, since the commencement of the present century, a record has been preserved of all grants of the government, and of the various preliminary steps up to their issue; and provision is made by law for the introduction of copies of the record when the originals are lost."

Mr. Justice SMITH concurs in this dissent.

RUSSELL v. BARNHART MERCANTILE COMPANY.

Opinion delivered June 13, 1921.

1. SALES—FAILURE TO GIVE SHIPPING DIRECTIONS—WAIVER.—Where a buyer, suing for breach of a contract of sale, failed to give shipping directions within sixty days as agreed, and the seller subsequently set aside and stored the goods, insisting that the buyer take them, this did not constitute a waiver of the buyer's breach in failing to order the goods shipped, and the court properly directed a verdict in favor of the seller.
2. GARNISHMENT—ALLOWANCE OF INTEREST TO DEFENDANT.—A judgment allowing defendant 6 per cent. interest on the total sum of money impounded by garnishment was proper, where the garnishment was discharged.

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

Rowell & Alexander, for appellant.

The court erred in giving a peremptory instruction for appellee. There is only one disputed fact in the case, and that in reference to the amount of damages which appellant alleged he sustained by reason of the failure of appellee to deliver the peanuts.

No shipping instructions were given prior to the expiration of the sixty days provided for in the contract, but the contract called for shipment at "buyer's option within sixty days," and the failure of the buyer to exercise his option is equivalent to a demand for delivery on the last day. 35 Cyc. 582.

Appellee elected to treat the contract as still in force and weighed up the peanuts, invoiced them to appellant and stored them in its warehouse and sent the invoice to appellant. This action of appellee was acquiesced in by appellant and operated as a complete transfer of title to the peanuts from appellee to appellant. 35 Cyc. 315. Under the facts and proof it was error to direct a verdict for appellee. 24 R. C. L. 94. There were no disputed facts for submission to a jury. The action of appellee in weighing the peanuts, storing them in its warehouse and invoicing them to appellant, constituted a mere extension of time in which shipment might be ordered and gave appellee no right to impose other restrictions or additional obligations upon appellant to secure delivery. The failure of appellee to ship the peanuts when ordered out prior to November 1, 1919, constituted a breach of the contract by appellee, and it was error to instruct a verdict. Judgment should be entered here for appellant for $527.73 and interest at six per cent. from October 29, 1919.

Crawford & Hooker, for appellee.

There was no waiver on part of appellee, as the testimony shows it complied strictly with the rules of the Peanut Cleaners and Shellers Association in weighing up the peanuts and invoicing them out to appellant, and appellant's failure to pay was a breach of contract on his part, which appellee has never waived. A waiver to be binding must either operate as an estoppel or be supported by a valuable consideration. 72 Ark. 529; 29 A. & E. Enc. Law (2 ed.) 1097. There was no waiver by appellee. 102 Ark. 442. See, also, 88 Ark. 491; 22 *Id.* 258; 38 *Id.* 174.

Where there is a mutual contract for the performance of successive acts, the refusal upon one side to perform will justify the other party in treating the contract as rescinded. 38 Ark. 174; 78 *Id.* 336; 64 *Id.* 228; 65 *Id.* 320.

SMITH, J. Appellant is a merchandise broker engaged in business in the city of Pine Bluff. Appellee is a corporation engaged in the business of selling edible nuts, with places of business in Petersburg, Virginia, and St. Louis, Missouri.

Through the St. Louis office, on July 7, 1919, appellant ordered six hundred sacks of fancy hand-picked peanuts, and this order was evidenced by a written sales contract. In this contract the following provisions appear:

"Time of Shipment. Buyer's option within sixty days.
"Terms of Sale, Net Cash. SD B-L attached F. O. B. Petersburg, Va.

"Quantity	Grade and Description	Price
600	Sax Magnolia Fancies	11

"Endorsed on Face: 'Shipment in 60 days as wanted.' "

It was further provided that "All contracts subject to rules and regulations of the National Peanut Cleaners and Shellers Association."

It is not disputed that appellant failed—although frequently requested—to order shipment of peanuts within the sixty days from the date of the contract. An extended correspondence in regard to the peanuts occurred, and a number of telegrams were exchanged. On September 29, 1919, appellee wrote appellant the following letter:

"We weighed up on the 27th inst. the 600 bags of Magnolias we had booked for you and stored these goods on our second floor, also rendering you an invoice covering this purchase. We must have shipping instructions on these goods before November 1, as we will need our room for new crop after this date. It will be necessary for us to charge you 3 cents per bag per month storage

on these 600 bags to comply with rules of the association. We shall expect for you to remit us covering this purchase within ten days from the date of invoice. This will comply with the terms of purchase."

It appears to be undisputed that in weighing up and invoicing the peanuts, and in charging the price thereof to appellant's account, appellee was acting within its rights under the rules and regulations of the National Peanut Cleaners and Shellers Association. Later appellee drew on appellant, with invoices attached, for the price of the peanuts, but the draft was not protected and was returned unpaid. Appellant appears, at all times, to have admitted his obligation to accept and pay for the peanuts. He had difficulty in disposing of them without sustaining a loss, and he asked indulgence in the way of furnishing shipping orders for the peanuts, although appellee continued to insist on these directions being given. There was correspondence, by letter and by telegram, in regard to a proposed resale of the peanuts for appellant's account, but the parties were unable to agree on the price at which they might be resold.

As the time for the new crop of peanuts to move came on appellee became more insistent in its demands for payment of the purchase price of the peanuts, and several letters of a peremptory character were sent, in which appellant was advised that if remittance was not made forthwith the peanuts would be sold for appellant's account at the best price obtainable. During all this time the quotations on peanuts were under the sales price, yet appellant, at all times, professed his intention to comply with his contract.

On October 25, 1919, appellant sent the following shipping instructions to appellee:

"Ship to ourselves c-o Jno. H. Poston Warehouse, Inc., at Memphis, Tenn., via rail. Terms: Draft through Bank of Commerce & Trust Co., Memphis, Tenn. Mail invoice to us at Pine Bluff, Ark., 300 sx. Magnolia Peanuts 11c and storage.

"Remarks: Examine carefully for worms or webs before shipping."

In response to this telegram appellee wired appellant as follows:

"Letter received; will not make shipment Memphis car fancies until you remit us covering our invoice September twenty-seventh; also storage and insurance; terms were net cash ten days from date of invoice; account been standing thirty days; wire immediately if you are sending New York Exchange or not."

On October 29 appellant sent the following telegram:

"We decline to remit for peanuts. Ship both cars to Memphis, include storage and insurance in drafts. Mr. Russell was absent from office yesterday."

On October 30 appellee sent the following telegram:

"Telegram received; we decline to make shipment until you pay our invoice and charges; will sell goods immediately best price possible."

On the same day appellant wired as follows: "Replying we renew demand for shipment; if you sell peanuts, you will do so at your own peril."

To this telegram the following reply was received: "Telegram rec'd; we demand cash before making shipment; ultimatum."

Thereafter several telegrams and letters passed between the parties, and appellant offered to file a bond for a thousand dollars to insure prompt payment of draft covering invoices and all charges, but appellee continued to refuse to ship until receipt of exchange for the full amount of the invoices and charges.

In the meantime the price of peanuts commenced to advance, and appellant brought suit for breach of contract and prayed judgment for the difference between the contract price and the market quotations of the peanuts. There was a trial before a jury, which terminated in an instructed verdict for appellee, from which is this appeal.

Appellant admits that he did not comply with the contract by furnishing shipping directions within sixty days, but he says this breach was waived when appellee weighed up and stored away the peanuts for his account, that this act of appellee operated as a complete transfer of the title to the peanuts, and that thereafter appellee should have shipped them in accordance with his directions. Appellant further contends that invoicing and storing the peanuts was a mere extension of time in which shipment might be ordered, and that he had the right to order shipment made pursuant to the terms of the original contract, towit: with draft attaached to the bill of lading issued by the railroad over which shipment had been ordered made.

We think the court properly directed a verdict in this case. The undisputed testimony shows that appellee waived none of its rights under the contract, that it at all times offered to perform and insisted on performance.

Under the contract and rules of the National Peanut Cleaners and Shellers Association, it was appellant's duty to furnish shipping directions within sixty days from the date of the contract, and if this was not done appellee had the right to invoice and store away the peanuts for the purchaser's account and to demand payment within ten days after invoicing the peanuts to the purchaser. Appellant failed to furnish shipping directions, or to honor draft with invoice attached. He was, therefore, in default and had no right to demand shipment after the sixty days under the terms which were available for sixty days or until peanuts had been stored and invoiced. In other words, appellant attempted on October 25 to avail himself of a right which his contract required him to exercise within sixty days after July 7, 1919, or before the peanuts had been invoiced or stored. Appellee was guilty of no waiver which gave appellant this right, and the verdict was therefore properly directed in appellee's favor.

Appellant prayed judgment in his complaint for $1,130.31 with six per cent. interest from the date of the filing of the complaint until paid, and for a writ of garnishment against the Hammett Grocery Company and C. M. Ferguson & Son to impound any funds in their hands belonging to appellee.

The garnishees, C. M. Ferguson & Son and the Hammett Grocery Company, filed answers, stating that they had in their hands and possession the sum of $649.44 and $949.32, respectively. The court gave judgment for interest at six per cent. on the amount of money in the hands of the garnishees, towit: $1,598.76, from the date of the garnishments until paid.

Appellant insists, upon the authority of the case of *Brown* v. *Yukon National Bank,* 138 Ark. 210, that it was error to render judgment against appellant for interest on the total amount in the garnishees' hands—the amount sued for and the costs being the basis for computing the interest. In the case cited the facts were that the sum garnished bore no fair proportion to the sum sued for. The sum sued for was $210, and the sum garnished was $2,303.50. The costs in the case amounted to only $20. After a recitation of these facts we held that interest should have been computed only on the $230, the amount of the debt and costs.

Here, however, neither garnishee owed the amount claimed by appellant. It required the sum due by both to equal the sum sued for, and we think no error was committed in rendering judgment for interest on the total sum impounded.

SCHOOL DISTRICT OF NEWPORT *v.* J. R. HOLDEN LAND & LUMBER COMPANY.

Opinion delivered June 13, 1921.

1. DEEDS—CONDITIONS SUBSEQUENT.—Restrictions in a deed as to the estate granted are presumed not to constitute conditions subse-

quent, which are not favored in law and must be clearly shown by the words of the deed.

2. LOST INSTRUMENT—BURDEN OF PROOF.—In a suit to quiet title where plaintiff claimed under an alleged lost deed which defendants admitted having executed, the burden was on defendants to show that the deed contained a condition subsequent claimed by them.

3. LOST INSTRUMENTS—EVIDENCE.—In a suit to quiet title, based on an admittedly lost deed, the chancellor's finding that the deed from defendants to plaintiff contained a condition subsequent *held* not supported by the evidence.

Appeal from Jackson Chancery Court; *L. F. Reeder,* Chancellor; reversed.

Boyce & Mack, for appellant.

1. From the pleadings and evidence it appears fully that appellant took possession of the land under an oral gift; that the terms of the gift had been fully complied with, and that the school district was in possession and claimed to be the owner since it first took possession in 1916, and had been in actual, open, notorious, exclusive and adverse possession, claiming to be the owner against all the world, and the district's claim had ripened into a perfect title when the suit was commenced. 33 Ark. 155. Possession of land during the full period of limitation, under circumstances as would make a valid defense, amounts to *investiture of title,* which may be actually asserted in all respects as effectually as if acquired by deed. 34 Ark. 534-40. Possession for the statutory period not only bars the remedy of the holder of the paper title, but extinguishes his title and vests a fee simple title in the adverse occupant. 1 Cyc. 1135.

Trespass may start the statute of limitaions. 74 Ark. 302-5; 51 *Id.* 231-271. Claim of ownership need not exist at the time of entry. 2 C. J., p. 129, § 217; *Ib.,* pp. 133-4. A tenant may hold adversely to his landlord. 1 R. C. L., p. 747; 114 Ark. 376.

The fact of appellant's adverse possession and its claim of ownership for the full period of limitation, and

appellee's knowledge thereof, has been established beyond question, and the decree is against the clear preponderance of the evidence. The rule is that there must be proof, not only of the existence of a deed, but that its loss must be proved before secondary evidence of its contents is admissible, and the same character of evidence and degree of evidence are required to prove the loss as is required to prove the existence of a deed. 25 Cyc., pp. 1625-7.

2. Title by adverse possession is sufficient to found an action to quiet title. 1 Cyc. 1138; 32 *Id.* 1330; 5 R. C. L. 650; 9 L. R. A. 772; 46 L. R. A. (N. S.) 499; 94 Am. Dec. 722; 92 Ark. 289; 83 *Id.* 534. The chancellor erred in quieting title on the condition named in the decree.

Gustave Jones, for appellee.

Appellant has wholly failed to establish its right to specific performance in any particular. Specific execution of a contract, where there has been part performance, will not be decreed unless the contract be clear and unambiguous, and it must be proved with a reasonable degree of certainty. 63 Ark. 100; 82 *Id.* 33, 43; 135 *Id.* 586, 591.

A chancellor's findings of facts will not be disturbed on appeal unless against the clear preponderance of the testimony. 120 Ark. 323; 122 *Id.* 600. See, also, 98 *Id.* 328; 126 *Id.* 46. The question of adverse possession being one of fact, the court's finding will not be disturbed on appeal. 84 Ark. 140.

SMITH, J. Appellant school district brought this suit to quiet its title to a certain block in the city of Newport. It alleged it was in possession of the block, and was occupying it for school purposes—one of the public school buildings being located thereon. It was alleged that a deed to the land had been executed, and thereafter appellant entered into the possession of the block and built an expensive and valuable school building thereon. That this deed had never been delivered and had never been recorded.

The answer admitted the execution of the deed, and alleged that the deed had been delivered. The answer further alleged that the block was donated to the appellant school district, and that the deed contained a condition subsequent to the following effect: Upon the condition that said district erect a brick school building and maintain a public school on said premises, to be equipped and have the same facilities and the same length of term as was conducted by said district in the main city of Newport, and that said block was conveyed with the condition that said premises should be so used, and that, upon failure to build, maintain and construct such a school, the land should revert to the grantor.

There is no question about the execution of the deed. The question is, what its terms and conditions were, and there is irreconcilable conflict in the testimony of a number of witnesses. These witnesses testified about a transaction then about fourteen years old, and much of this conflict can be ascribed to infirmities of memory.

On behalf of appellant district the following persons testified: S. R. Phillips, Tom J. Gregg, T. P. Umsted, H. O. Walker, E. L. Boyce, P. H. Van Dyke, A. L. Best, J. F. Parish, R. F. Drummond, W. T. Parish, and Charles Myer. The witnesses on behalf of appellee were: W. D. McLain, Gustave Jones and J. R. Holden.

The land in question was owned by McLain and Holden. It was a part of an addition to the town of Newport which had just been platted as an addition, and it is quite obvious that they were anxious to have a schoolhouse built in this addition. They executed a deed for the land on April 26, 1906, to the McLain & Holden Land & Lumber Company, a corporation, whose stock was owned almost entirely by themselves. The name of this corporation was later changed to J. R. Holden Land & Lumber Company. Shortly after the execution of this deed to the corporation by Holden and McLain, the corporation executed the deed in question to the school district. The deed was executed on behalf of the corporation by Holden as president and McLain as secretary.

The minutes of the meeting of the school board held on January 27, 1906, were read in evidence. At this meeting the following resolution was adopted:

"Whereas, said W. D. McLain and J. R. Holden propose to donate to the Newport Special School District of Newport, Arkansas, said block designated number eighteen, provided said district construct and supply a school building thereon, therefore, be it resolved that said offer of W. D. McLain and J. R. Holden be and the same is hereby accepted upon the conditions of said offer. Resolved, further, that the building committee of the board of directors of said special school district be and it is hereby designated to provide for and construct and supply a school building upon said block designated eighteen on said quarter section.

"On roll call, voted, J. M. Jones, 'yes;' C. West, 'yes;' R. F. Drummond, 'yes;' Charles Meyer, 'yes,;' W. R. Thompson, 'yes;' and Gustave Jones, 'yes;' carried."

The roll call shows that all of the directors present voted for the resolution, and included in this number was Mr. Gustave Jones. The minutes of the school board further recite that McLain was present at this meeting and presented a petition enlarging the boundaries of the school district.

Thus it appears that two of the three witnesses for appellee were present when the resolution was adopted. At a later meeting of the board held on February 24 McLain was employed to assist in the construction of the school building.

According to the testimony of McLain, Holden and Jones, the deed contained the condition subsequent that the property should revert to the grantors if the grantee ceased to maintain a white school on the block conveyed.

It is quite clear that the gentlemen who so testified have that recollection of the transaction, and Mr. Jones testified that he was the only lawyer on the school board, and that he was for that reason requested to write the deed, and that he wrote it, and that it recited an agree-

ment on the part of the district to put up a schoolhouse and maintain a school there for white people for an equal length of time and with equal facilities with reference to teachers and equipment as the Walnut Street school, this latter being the principal school in Newport, and that the deed recited that the lot was to be used for school purposes only, and when it ceased so to be used was to revert to the grantors.

It was the purpose of the district to conduct a white school on the land conveyed, and that purpose has since been followed. But it is a different matter to say that the deed incorporated a recital of that purpose as a condition subsequent.

The only writing on the subject offered in evidence is the resolution of the board set out above. This resolution was prepared and adopted at a meeting attended by both McLain and Jones. It purports to set out the condition on which the donation was to be made. The donation had not then been made. It had been proposed, and one of the men who proposed it was present when the board determined whether the donation would be accepted. The resolution of acceptance recited the condition upon which the donation was proposed, and that recital is that the district should construct and supply a school building thereon. This condition was met, and, whatever may have been the idea of any of the participating parties as to the subsequent use the district would make of the land, we think the testimony does not show that there was written into the deed any condition not contained in the resolution of acceptance.

The deed was not produced, and the testimony is conflicting as to its loss. A strong affirmative showing on the part of the district was made that the deed was never delivered. It is also insisted on behalf of the district that the deed was shown to have been in the hands of McLain after the controversy arose over its recitals. It is fair to McLain to say, however, that, while he made statements about the deed, leaving the impression that he knew where the deed was, he furnished the explanation

that his statement had been made under a misapprehension of the facts—it being his impression that the deed had been found by the secretary of the school board among the papers belonging to the district, when it had not been so found. There was also testimony to the effect that Holden, one of the parties who executed the deed, had made admissions in regard to its provisions which were in conflict with his contention and testimony at the trial.

If the deed itself was before us for construction, there would be a presumption that the restrictions of the estate granted did not constitute a condition subsequent. In the case of *Bain* v. *Parker,* 77 Ark. 170, the court said: "Conditions subsequent that defeat the estate conveyed by the deed are not favored in law. The words of the deed must clearly show a condition subsequent, or the courts will take it that none was intended; and when the terms of the grant will admit of any other reasonable interpretation, they will not be held to create an estate on condition. Now, if we treat the deed as containing the words referred to, there are still no words of condition in the deed, and no words indicating that the estate should be forfeited if the road was not completed at the date named. These words then import nothing more than a covenant which, upon the acceptance of the deed by the grantee, became binding upon him, and for the breach of which the grantor may recover damages suffered thereby, but the deed remains valid." (Citing cases).

So here we think it fair to say that, the execution of the deed being admitted, the burden is upon the grantors to show that it contained a condition subsequent.

In addition to the testimony set out above, the district makes the most unequivocal showing that the deed was not to contain a condition subsequent, and that the terms of the donation were met when the schoolhouse was built.

The gentlemen named as having testified on behalf of the district either were the directors thereof at the

time of the donation or succeeded others in office, and all gave testimony tending strongly to support the district's contention.

Meyer, who voted for the resolution accepting the donation, testified that no conditions were discussed other than that the land was donated to the school district to be used for school purposes and to erect a schoolhouse on. The minutes of the school board show that this witness was unusually attentive to his duties, and that he rarely missed a meeting of the board. He testified that no deed was ever delivered to the board. Mr. Drummond, who also voted for the donation resolution at the meeting of the school board, testified that the only condition he remembers anything about was that the land was to be donated to the school district, and the board was to erect a building on it.

The court entered a decree divesting the title out of the corporation and vesting it in the school district "so long, and only so long, as the same is used for school purposes, and for white children only." It was also ordered that each party pay half of the costs, and both parties have appealed.

Without setting out in further detail the testimony of the various witnesses, we announce our conclusion to be that the finding of the chancellor is contrary to the preponderance of the evidence, and that the only condition of the donation was that the school district should construct and supply a schoolhouse, and that, if this was a condition, instead of a covenant, it was a condition precedent, which was performed when the district erected the schoolhouse, and that the title to the land immediately vested in the district upon the happening of that event.

The decree of the court below is therefore reversed and the cause will be remanded with directions to enter a decree quieting the title of the school district in accordance with this opinion.

MASSEY v. KISSIRE.

Opinion delivered June 13, 1921.

1. DEEDS—INCAPACITY OF GRANTOR.—A deed and contract conveying all of his property, real and personal, executed by a father, who had recently suffered a paralytic stroke, to one of his sons for a nominal consideration named and the son's agreement to support the father during his life and to give the other two sons such part of the property as the grantee wished *held* invalid as executed by the father while incapable of transacting business.

2. APPEAL AND ERROR—APPELLANT'S ABSTRACT, WHEN CURED.—Rule 9, requiring appellants to abstract the pleadings, is intended to get the issues presented before the Supreme Court, and this purpose is accomplished where appellee supplied all the evidence omitted from appellant's abstract necessary to enable the court to determine the case upon the merits.

3. APPEAL AND ERROR—OMITTED EVIDENCE NOT SHOWN BY AFFIDAVITS. —Affidavits are inadmissible on appeal to show that evidence heard at the trial was omitted from the transcript.

4. APPEAL AND ERROR—PRESUMPTION AS TO TRANSCRIPT.—A transcript filed in a case in the Supreme Court will be presumed to be a true and perfect copy of the record, if properly certified by the clerk.

5. APPEAL AND ERROR—SUFFICIENCY OF CERTIFICATE TO TRANSCRIPT.—The clerk's certificate to a transcript in a chancery case on appeal to the Supreme Court that it contains all the testimony on file in the clerk's office was complete and sufficient, unless there was a conflict between the certificate and the decree.

6. APPEAL AND ERROR — DECREE CONFLICTING WITH CERTIFICATE.—Where there is a conflict between the decree of the court and the certificate of the clerk as to the evidence upon which the cause was heard, the decree will control.

7. APPEAL AND ERROR—CONFLICT BETWEEN DECREE AND CERTIFICATE.—There is no conflict between a decree reciting that the case was heard upon the "proofs" and the clerk's certificate to the transcript certifying that it contained all the testimony on file in his office.

8. APPEAL AND ERROR—PROCEDURE WHERE TRANSCRIPT INCOMPLETE.—Where a transcript is complete on its face, if oral evidence was heard in the trial and not incorporated in the transcript, appellee was privileged to suggest a diminution of the record and to request time to obtain a *nunc pro tunc* order showing that oral evidence was heard, not in the transcript, whereupon he would

be entitled to an affirmance unless appellant brought the oral evidence into the record.

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

J. W. Johnston, for appellant.

The decree is contrary to the weight of the evidence. H. C. Kissire, the father, was insane and mentally incapable of making the contract and deed, and there was fraud and wrongful intention on part of appellee. There were confidential relations between appellee and his father, and undue influence was used such as to avoid the contract and deed, and both should be canceled. 40 Ark. 28; 102 *Id.* 232; 9 Cyc. 456; 161 S. W. 532; 69 L. R. A. 393; 86 N. E. 568; 26 Ark. 604; 15 *Id.* 555; 123 *Id.* 134.

J. Allen Eades, for appellee.

Independent advice is not necessary to the validity of a deed in this State. 128 Ark. 143. Old age, physical infirmity and partial eclipse of the mind does not prevent one from making a valid will or deed, if the party knew and understood what he was doing and comprehended his acts. 49 Ark. 472. The presumption is that the father was sane when he made the transfer, and the burden was on appellant to show insanity. 70 Ark. 166. The chancellor's finding is sustained by a clear preponderance of the testimony.

HUMPHREYS, J. On the 10th day of March, 1920, appellee, H. L. Kissire, instituted suit in the Conway Chancery Court to compel the Citizens' Bank of Morrilton to cash a check for $3,578.49, drawn in his favor by his father, H. C. Kissire, against his father's checking account in said bank.

The Citizens' Bank of Morritlon interposed the defense that H. C. Kissire was insane, and, on that account, incapacitated to issue the check.

On the 19th day of April, 1920, appellant, W. O. Massey, the duly appointed guardian of H. C. Kissire, instituted suit against the appellee, H. L. Kissire, in the same court, to cancel a contract and deed of date February 24, 1920, purporting to have been executed by

H. C. Kissire to H. L. Kissire, transferring and conveying all his personal property and real estate, upon the ground that H. C. Kissire was insane at the time the contract and deed were executed.

Appellee, H. L. Kissire, filed an answer, admitting the execution of the instruments, and alleging that, at the time of the execution of them, his father, H. C. Kissire, was of sound mind.

The causes were consolidated and submitted to the court upon the pleadings and evidence, which resulted in a decree sustaining the validity of the contract and deed, and vesting all the property, both personal and real, of H. C. Kissire in H. L. Kissire, from which decree is this appeal.

The record reflects that H. C. Kissire was stricken in the late summer or early fall of 1919 with paralysis; that he never transacted any business after that time except to execute the contract and deed on February 24, 1920, transferring all his property to his son, H. L. Kissire, and to sign his name in order to cash a stamp at the postoffice. The deed in question conveyed lots 1, 2 and 3, in block 8, Brown's Addition to the town of Morrilton, Arkansas, which constituted H. C. Kissire's home, to his son, H. L. Kissire, for a recited consideration of $25 in cash, support for the balance of his life, and love and affection. The contract, in substance, transferred all the personal property of H. C. Kissire to his son, H. L. Kissire, consisting of a bank account of $3,578.49, $700 in bonds and stamps, and a few other items of personal property, for a recited consideration of love and affection, $25 in cash, and support and burial expenses, and such assistance as H. L. Kissire might desire to render his other two sons, Oliver and Melvin, and to furnish Oliver and Melvin a home as long as they conducted themselves in a manly way and were not abusive to H. L. Kissire or his wife. The contract contained a proviso to the effect that, should H. L. Kissire fail to furnish H. C. Kissire support, or fail to render assistance to Oliver and Melvin as agreed upon, such failure should

abrogate the contract, in which event the cash consideration of $25 should be paid back and such property as was remaining turned back to H. C. Kissire, except the lands conveyed by deed. H. L. Kissire was thirty-four years of age and almost blind, and resided in the home of H. C. Kissire, with the other two sons who were also blind at the time the instruments aforesaid were executed.

On behalf of appellant, T. J. Kissire, a brother of H. C. Kissire, W. O. Massey, the duly appointed guardian of H. C. Kissire, Mrs. Addie Crook, a neighbor, and M. H. Dean, county and probate judge of said county, testified that H. C. Kissire was mentally incapacitated to transact business at the time he executed the contract and deed. T. J. Kissire stated that he had visited H. C. Kissire frequently after he suffered the paralytic stroke until the early days of March, 1920; that his mental and physical condition was "pretty sorry," and that, during the entire period, he was incapable of transacting business; that he was incapable of understanding the nature of a contract or a conveyance of any kind. Mrs. Addie Crook stated that she had seen him, during the period he had lived near her, from one to three times a day; that she had heard him talk, and was of the opinion that he was unfit to transact business of any kind during the entire time. W. O. Massey testified that H. C. Kissire had not been able to transact any business since his misfortune in the late summer of 1919; that he came to the bank the latter part of August, 1920, in company with his son and W. J. King. The following interrogatory and answer appears in the evidence of W. O. Massey:

"Q. What did he say to you at that time, if anything, about his business at the bank?"

"A. He came into the bank and said he come to see about his business. Wanted to see about $116 worth of cotton. I asked him about it, and he kept talking about cotton, and I told him we had no record of a deposit of that kind, and I asked his son what the old man meant by it, and he said he did not know, and the old man said something about coming to the Bank of Morrilton to see

about his account, and I told him I had been over there and looked after that, that his account was square with the Bank of Morrilton, but they had $100 bond over there, and I got the bond and had it put away for him. Then his mind flashed a little bit, and he said something about the boys had pretended to take care of him, and stood awhile and did not say anything more for a few minutes. I went and got his account and told him the amount he had on deposit, and also told him that the interest due on his account at that time would amount to about $150, but he did not seem to realize the amount he had to his credit. His mind seemed to be on, and he kept asking about, some cotton, $116 worth of cotton. Then he turned around and went out and said, 'Take care of my money until I call for it.' That was all."

Judge M. H. Dean testified that he saw H. C. Kissire often during the fall of 1919, and later visited him at his home and tried to engage him in conversation; that he became convinced, from his visits and conversations, that H. C. Kissire was not capable of transacting business or protecting his interests; that he saw him during the latter part of January and through February, 1920, and found him wholly incapable of transacting business; that, on March 12, 1920, H. C. Kissire's mind was a blank on what one might ask him; that, on one occasion, in February, he tried to talk with him on business matters; that he could not talk intelligently, and denied that he owned his home upon which he was residing at the time, and which belonged to him.

On behalf of appellee, he, Oliver Kissire, Melvin Kissire, Oma Kissire and J. A. Eades, who prepared the contract and deed and took the acknowledgment of H. C. Kissire to the deed and the acknowledgments of both of the parties to the contract, all testified that the contents of the instruments were suggested by H. C. Kissire himself, and that his mind was clear and mental condition good at the time he executed the instruments; that he understood the nature and effect of both instruments. H. L. Kissire, in describing the general condition of his

father's mind, said that "part of the time he talked with good sense, and part rambling." He said, however, that, on the day he executed the instruments, his mind was clear.

After a careful reading and consideration of the evidence. we are convinced that H. C. Kissire was not capable of comprehending the nature and effect of the contract and deed executed by him to his son on the 24th day of February, 1920. The son, to whom he conveyed the property, was almost blind. The provision made for his two younger sons, who were blind and in a way helpless, was dependent in a large measure upon the will of H. L. Kissire and his wife. Considering the condition of himself, that of his two younger sons, as well as the affliction of the son to whom he conveyed all the property, the contract, in its very nature, was an improvident one. When the nature of the contract is considered in the light of the evidence of disinterested witnesses, who had ample opportunity to judge of the mental capacity of H. C. Kissire from association and conversation, we think the great weight or preponderance of the evidence supports the view that H. C. Kissire was incapable of transacting business when he executed the deed and contract in question. The chancellor's finding was contrary to the weight of the evidence, and, for that reason, the decree is reversed and the cause remanded with instructions to cancel the contract and deed.

HART, J. (dissenting). It seems to me that the case of *Turpin* v. *Beach,* 88 Ark. 604, is against rather than in favor of the majority opinion. In that case the decree recited that the case was heard upon the pleadings and the depositions of three named witnesses and other evidence. The clerk certified that the transcript contained a true and compared transcript of all the pleadings, papers, files and entries of proceedings in the action. There were certain exhibits which had not been attached to the depositions as required by statute. The court said that the statute intended greater certainty in proving the exhibits which were held to be independent

evidence, and that the words, "other evidence," should be taken to refer to them. This is an application to the well known doctrine of *ejusdem generis*. The record recites that the case was heard on the depositions and other evidence, meaning other evidence of like character.

In the present case the record recites that it was heard upon the pleadings and proof. The word "proof" is broad enough to include oral as well as written evidence. The certificate of the clerk is that the "foregoing record contains all testimony on file in my office in the case." There is nothing to indicate that the oral testimony was ordered to be reduced to writing and filed. The clerk is careful to certify that the transcript only contains the testimony on file. If oral testimony was heard, it would not be on file and therefore is not included in the transcript.

Counsel for appellee called our attention to this matter before the case was heard and asserted that the case was heard partly on oral evidence. I think that the burden was on appellant to correct the record, so as to show that the case was not heard on oral evidence, if that was a fact. The affidavits introduced by appellee were not introduced to contradict the record or to correct it here. They were introduced merely to show good faith on the part of appellee. They have not been controverted, and so it seems certain then that the case was heard partly on oral evidence. If such was the case. I think the ends of justice would have been better served by allowing a correction of it to have been made in the chancery court, and that the hearing of the case should have been continued in this court until there was an opportunity to apply for a correction of the record in the court below so as to make it speak definitely on the question of whether the case was heard partly on oral evidence. If the court thought it was the duty of appellee to do this, it should have so declared and have given him an opportunity to do so. This is especially true when we take into consideration that appellee had a finding of fact in his favor by the chancellor. Family ar-

rangements are favorites of the law and should not be disturbed when fairly made. In *Pate* v. *Johnson,* 15 Ark. 275, the court said that amicable and family settlements are to be encouraged, and, when fairly made, strong reasons must exist to warrant interference on the part of a court of equity. This doctrine was applied in a much later case where there was a conveyance made by a daughter to the father which the court said was not a donation to the father, nor, strictly speaking, a sale and purchase, but was more in the nature of a family settlement. *Giers* v. *Hudson,* 102 Ark. 232.

In the case at bar all the parties concerned were practically blind except appellee, and he was partly so, The family seem to have had that sensitiveness peculiar to blind people and wished to seclude themselves from the world and to live together as one family. The deed was executed pursuant to this family agreeement, and all the family wished it to stand. It may be that the omitted evidence would have abundantly established the correctness of the finding of the chancellor, and I think that the opportunity should have at least been given appellee to make application in the court below to amend the record so as to show with certainty that the case was heard partly on oral evidence.

Therefore, I respectfully dissent.

HUMPHREYS, J. (on rehearing). Our attention is again called to the fact that we took no notice in the original opinion of the suggestion of appellee that appellant had not complied with rule 9 in reference to abstracting the pleadings. It is urgently insisted that appellee is entitled to an affirmance of the decree of the chancery court because appellant failed to abstract any of the pleadings, in keeping with the rule, and omitted entirely to abstract appellee's answer and demurrer to appellant's bill. The purpose of the rule invoked is to get the issues presented in the trial court clearly before this court. This purpose was accomplished by appellee supplying all the evidence necessary, omitted from appellant's abstract, to place the case fairly before this

court. The reason we did not refer in the original opinion to this insistence of appellee was because it was stated by appellee that he would "make such additional abstract of the testimony as will place the case fairly before the court." Appellee did this in such way that the real issue in the case became apparent and enabled this court, with the issue thus defined, to determine the case upon its merits.

Appellee suggested in his original brief that the transcript did not contain all the evidence heard by the trial court, and insisted then, and strenuously insists now, that he was entitled to an affirmance of the decree under the well-known presumption that the evidence omitted was sufficient to sustain the decree. On motion for rehearing, appellee supports his suggestion that evidence heard in the trial was omitted from the transcript by filing affidavits to that effect. These affidavits add nothing to the original suggestion, because incorrect or incomplete transcripts can not be corrected by affidavit. *Memphis Land & Timber Co.* v. *Bd. Dir. of St. Francis Levee Dist.*, 70 Ark. 409. The presumption must be indulged that a transcript of a case filed in this court contains a true and perfect copy of the record, if properly certified by the clerk. Upon the suggestion that the record in this case was incomplete, we examined the certificate of the clerk and the decree of the court. That part of the clerk's certificate relating to the evidence incorporated in the transcript is that the "foregoing record contains all testimony on file in my office, in the cases," properly styling them. The contention is made that the certificate is insufficient because it says that the evidence on file in the clerk's office is the evidence incorporated in the transcript. This is the only evidence that could be incorporated in the transcript. It would be improper to incorporate in the transcript evidence not appearing in the record of the case. This certificate is therefore complete, unless there was a conflict between the certificate and the decree of the court. Certificates in substan-

tial conformity with this certificate were held to be complete in the cases of *Turpin* v. *Beach,* 88 Ark. 604, and *Kampman* v. *Kampman,* 98 Ark. 328. This court is committed to the doctrine that where there is a conflict between the decree of the court and the certificate of the clerk, as to the evidence upon which the case was heard, the decree will control. *Weaver-Dowdy Co.* v. *Brewer,* 129 Ark. 193. In the instant case, the decree of the court recites that the case was heard upon the "proofs." The proofs upon which the case was heard, according to the decree, may have been the identical proofs incorporated in the transcript and certified by the clerk. There is not necessarily any conflict between the decree of the court and the certificate of the clerk, so the transcript on its face is complete. This court ruled, in case of *Turpin* v. *Beach, supra,* that, where the decree recited that the cause was heard upon "the depositions of three witnesses, and other evidence," and no other evidence appeared in the transcript except exhibits that were attached to the three depositions, no conflict existed between the decree of the court and the certificate of the clerk, for the reason that the words, "and other evidence," could be construed as relating to the exhibits.

As the transcript in this case on its face is complete, and oral evidence was heard in the trial court, not incorporated in the transcript, appellee was privileged to suggest a diminution of the record and to request time to obtain a *nunc pro tunc* order showing that the case was heard upon oral evidence not incorporated in the transcript. After obtaining a correction of the record to that effect, then he would have been entitled to an affirmance of the decree, unless appellant, upon request, had been able to complete the record by bringing the oral evidence into the transcript by proper proceedings.

After a thorough consideration of the other grounds suggested in the motion for rehearing, we adhere to the conclusions reached as announced in the former opinion.

Mr. Justice HART dissents.

FORRESTER v. LOCKE.

Opinion delivered June 13, 1921.

1. SALES — BREACH OF WARRANTY.—Where cotton sold with warranty of quality was shipped to the buyer with bill of lading attached to the draft for the purchase price, and the buyer had no opportunity of inspection until after payment of the draft and freight, acceptance of part of the cotton as complying with the contract did not constitute an acceptance of the entire shipment nor bar an action for breach of warranty as to the rest of the cotton.

2. TRIAL—QUESTION FOR JURY. — Whether plaintiffs constituted a partnership or a corporation, *held* under the evidence to be a question for the jury.

3. COMMERCE—PURCHASE OF COTTON FOR DELIVERY IN STATE.—The purchase of cotton in the State for delivery within the State, the drafts for the purchase price being paid by local banks, did not constitute interstate commerce, though the final payment of the purchase price was made in another State.

4. APPEAL AND ERROR—ISSUES IN LOWER COURT.—Where plaintiffs suing as partners alleged that they were doing business in this State, and no issue was made in the trial court as to the particular transaction being an interstate one, and there is no evidence in the record changing the nature of such allegations in the complaint, plaintiffs were bound by the allegations of the complaint and the evidence in their support.

5. CORPORATIONS — PARTIES.—Individuals composing a partnership are not authorized to bring a suit on a contract entered into by a corporation not made a party to the action.

6. EVIDENCE—HEARSAY.—Testimony of the manager of a company's branch office that an officer of the company told him that the company was a partnership and not a corporation was hearsay and inadmissible.

7. EVIDENCE—TESTIMONY BASED ON BOOK ENTRIES.—In an action by a buyer of cotton for breach of warranty of quality, testimony as to the sale by the buyer of the defective cotton and the expenses incurred in such sale, deduced from the buyer's books not kept by the witness and relating to an account between the buyer and third persons to whom the cotton was sold, and not to transactions between the parties, was inadmissible.

8. EVIDENCE—CUSTOM.—Testimony as to the seller's custom in selling cotton was inadmissible where there was a contract between

the parties respecting the sale of the cotton, as the contract, and not the custom, must control.

9. SALES—BREACH OF WARRANTY—MEASURE OF DAMAGES.—The measure of damages for breach of a seller's warranty of the quality of cotton was the difference between the market value of the defective cotton at the time its condition was discovered and the contract price.

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

James B. McDonough, for appellants.

1. The general rule is that the vendee of personal property is entitled to recover from the vendor the difference between the fair market value of the goods and the contract price, provided the article is not as good as the quality represented in the contract. 121 Ark. 150. Here was but one sale. The contract was an entirety. If plaintiff had any remedy at all, he was entitled to recover only the difference between the fair market value of the entire lot of cotton and the contract price, provided the cotton was not merchantable. 121 Ark. 150. Plaintiffs can not recover, because they kept the whole lot after discovering forty-four "bollies" therein. They had the right to accept or decline; they accepted, and, hence, no recovery.

2. The court erred in directing a verdict for plaintiffs on the issue of whether or not S. B. Locke & Company was a foreign corporation.

3. The court erred in its instructions given for plaintiff and in refusing those asked by defendants. It was error also to take the issue from the jury and direct a verdict. 136 Ark. 135; 113 *Id.* 190; 82 *Id.* 86.

4. Where an unimpeached witness testifies directly and positively to a fact and is not contradicted, and there is no circumstance from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established and a verdict directed on such evidence, but the rule is subject to many exceptions, and where the witness is interested in the result of the suit, or facts shown that might bias his testimony, the

case should go to a jury. 113 Ark. 190; 82 *Id.* 86; citing 58 Hun (N. Y.) 121; 92 *Id.* 491; 42 Ala. 431; 64 Conn. 55; 101 Ind. 503; 6 Enc. Pl. & Pr. 696; 100 N. W. 256; 102 N. Y. 93; 118 Ark. 128; 124 *Id.* 490. See, also, 129 Ark. 369; 139 *Id.* 236.

5. If the business transacted by S. B. Locke & Company, a corporation of the State of Oklahoma, either directly or indirectly, the paintiff could not recover. 136 Ark. 52; 141 *Id.* 38; 233 U. S. 16; 246 *Id.* 500.

6. It was error to permit W. R. Locke to give hearsay testimony as to the existence of a partnership. Hearsay testimony is not admissible. 10 Ark. 638; 16 *Id.* 628; 22 *Id.* 477; 103 *Id.* 522; 79 *Id.* 204; 186 S. W. 302.

7. It was clearly erroneous for the witness, J. M. Locke, to testify as to the contents and recitals and other matters in the books of S. B. Locke & Company, which were in Muskogee, there being no showing that the books could not be produced. 121 Ark. 150; 2 *Id.* 397; 57 *Id.* 257; 117 *Id.* 442; 79 *Id.* 338; 72 *Id.* 275; 134 Ark. 284. Even if the books had been in the courtroom, it would be necessary to prove that they were properly kept, and that the entries were made at the time of the transactions. 65 Ark. 316; 57 *Id.* 402. The complaint was not sworn to. The answer denied the indebtedness. 113 Ark. 417. It was error to admit this hearsay testimony. 152 Pac. 468. Even a record is not admissible unless the original is shown to be lost. 11 S. W. 410. The loss of a contract must be proved before oral evidence may be admitted. 116 Ark. 268.

The abstract of an assignment of a patent is inadmissible. 208 Fed. 145. Freight bills are secondary evidence and inadmissible. 166 Pac. 96. Secondary evidence of the contents of a writing is not admissible unless it is shown that the original can not be produced. 160 N. W. 15; 190 S. W. 959; 140 N. W. 1006; 71 Atl. Rep. 263. See, also, 229 Ill. 272; 120 Fed. 925; 55 S. C. 214; 77 Ark. 244. The original must be shown to be lost before copy can be introduced. 122 Cal. 358; 55 Pac. 132;

45 S. E. 443; 98 Ill. App. 352; 55 Ind. 194; 135 Mo. 608; 60 Pac. 270, 207; 148 Ala. 659; 41 So. 411. Copies may be excluded where it is not shown that the originals could not be obtained. 72 Ark. 47; 109 Iowa 25; 67 Kan. 787; 40 S. W. 743; 94 *Id.* 173.

Parol evidence of a written instrument is inadmissible where the instrument itself can be produced. 174 Ky. 665; 192 S. W. 853; 99 Atl. 619. Entries in books are not admissible until it is shown that the books are correctly kept and contemporaneous with the facts recorded. 65 Ark. 316; 57 *Id.* 402. The exhibits were not verified, and the complaint contains no verified account, and the evidence does not fall within the rule. 51 Ark. 368; 103 *Id.* 522; 12 Ark. 775. It was error to permit J. M. Locke to testify as to the contents of these books. 111 Ark. 593; 94 *Id.* 183.

8. It was error to admit evidence as to interest on the eight bales of cotton and as to the storage and handling charges on them and also the thirty-six bales.

9. It was error to refuse the peremptory instruction and in refusing instructions 2 and 3, asked by defendants.

Hill & Fitzhugh, for appellees.

1. The evidence shows that bollies were not merchantable cotton, and without an express warranty this action could be maintained. 113 Ark. 169; 78 *Id.* 327. The law of this case is well settled. The shipment was an interstate one. 87 Ark. 562; 113 *Id.* 118; 187 U. S. 617. Transactions of interstate commerce are not within the statute prohibiting a foreign corporation doing business in the State. 85 Ark. 278; 113 *Id.* 505; 136 Ark. 52; 141 *Id.* 38.

2. There was no error in admitting testimony nor in the instructions given and refused.

HUMPHREYS, J. This is a suit by appellees against appellants, in the circuit court of Sebastian County, Fort Smith District, for damages on an alleged implied warranty as to the quality of forty-four bales of cotton, in-

cluded in a purchase and sale of 188 bales of cotton. It was alleged, in substance, that appellees, an Oklahoma partnership, maintained an office in Fort Smith, Arkansas, for the transaction of a general cotton business in Arkansas, and, during the cotton season of 1919, purchased 188 bales of merchantable cotton, according to custom, for delivery at Fort Smith, at an agreed price of 36 cents per pound; that there were 44 bales of unmerchantable or "bollie" cotton included in the shipments, which occasioned a total loss of $4,383.91 to appellees.

Appellants interposed two defenses—the first being that appellees were not a partnership, but a foreign corporation engaged in the business of buying and selling cotton in the State of Arkansas, in violation of act No. 313 of the Acts of 1907 of said State; and the second being that the cotton was sold and purchased without regard to grade, at an average price of 36 cents for the entire lot, including the "bollie" cotton.

The cause was submitted upon the pleadings, exhibits thereto, the evidence and instructions of the court, which resulted in a verdict and judgment against appellants in the sum of $3,846.53, from which an appeal has been duly prosecuted to this court.

The facts reveale by the record, in so far as necessary to determine the vital questions on this appeal, are, in substance, as follows: S. B. Locke & Company, an Oklahoma corporation composed of S. B. Locke, J. M. Locke and J. C. Fahnestock, was organized on May 29, 1913, for the purpose of conducting a general cotton business, with its main office at Muskogee, Oklahoma, and a branch office at Fort Smith. W. R. Locke, an uncle of J. M. Locke, was manager of the organization, and H. B. Hunt, bookkeeper of the branch office at Fort Smith, after 1917, and they had been retained in those positions and paid for their services from the Muskogee office with checks of S. B. Locke & Company. Neither W. R. Locke nor H. B. Hunt filed the articles of incorporation in the office of the Secretary of this State, as required by law

before commencing business, or during the time the corporation continued business in Arkansas. J. M. Locke, the vice-president and secretary of the corporation, also testified that he did not file the articles of said incorporation in this State. W. R. Locke testified that S. B. Locke was president, J. M. Locke, vice-president and treasurer, and W. P. Cowen, secretary of the corporation. When first asked whether S. B. Locke & Company was a corporation or partnership, he stated that it was a partnership for about two years before he bought the cotton in question from appellants. He was then shown the articles of incorporation, and stated that it was a corporation in Oklahoma, but a partnership in Arkansas. Being interrogated further upon this point, he made the following answers:

Q. Then you do not know whether you were dealing as a corporation or a partnership?

A. I know what I have done.

Q. That is all you know about it?

A. That is all.

Q. Then you did not know of your own knowledge whether you were dealing as a partnership or as a corporation?

A. No, sir; I did not know. I just knew I was buying cotton.

Later, and on cross-examination, over the objection and exception of appellants, W. R. Locke stated that J. M. Locke told him S. B. Locke & Company became a partnership about two years before the cotton in question was bought.

J. M. Locke testified that, on October 10, 1918, the corporation became dormant, and the business was conducted by S. B. Locke & Company as a partnership, being composed of S. B. Locke, J. M. Locke and W. P. Cowen. He produced an authenticated certificate of the partnership, appearing on the register of the district clerk in Muskogee, which is as follows:

"This is to certify that the partnership of S. B. Locke & Company doing business in the city of Muskogee, Muskogee County, Oklahoma, is composed of S. B. Locke, J. M. Locke, and W. P. Cowen, and that each of said partners' postoffice and residence is Muskogee, Muskogee County, Oklahoma.

"Dated this 10th day of September, 1919.

"S. B. Locke & Company,
"By S. B. Locke,
J. M. Locke,
W. P. Cowen."

The certificate was filed with the register October 16, 1919. He further testified that the cotton business in the branch office at Fort Smith was conducted by the partnership of S. B. Locke & Company, and that the money invested was the money of said partnership, and that the drafts drawn for the cotton in question were paid by the partnership, and denied that any of the business conducted since the 10th day of October, 1918, in Arkansas, was conducted by the corporation of S. B. Locke & Company. Letter heads and other exhibits introduced each carried the name of S. B. Locke & Company, and also the individual names of S. B. Locke, J. M. Locke and W. P. Cowen.

The contract for the sale and purchase of the cotton in question was made on December 13, 1919, between W. R. Locke, representing S. B. Locke & Company, and Charles E. Forrester, representing himself and the other appellants. The contract was oral.

W. R. Locke testified that, as the representative of S. B. Locke & Company, he purchased from Charles E. Forrester, representing himself and others, 188 bales of merchantable cotton, situated at Waldron, Arkansas, to be shipped and delivered to his company at Fort Smith, Arkansas; that it was agreed the cotton should contain no "bollies" or "dogs;"—"bollies" being descriptive of cotton taken by machinery from the bolls before they opened, and "dogs' descriptive of cotton which had fallen on the ground and been damaged in the field.

Charles E. Forrester testified that, representing himself and others, he sold to W. R. Locke, as the representative of S. B. Locke & Company, the entire lot of 188 bales of cotton, "hog round," delivery f. o. b. Waldron after it had been inspected by..... Heard, the representative of S. B. Locke & Company.

The cotton was billed out in several shipments, and the bills of lading, bearing the word "hog," were attached to drafts and mailed to S. B. Locke & Company at Fort Smith, Arkansas. The drafts were approved in the Fort Smith office and paid through the Fort Smith banks, and then sent through the Muskogee banks to S. B. Locke & Company at Muskogee, who made final payment. The entire 188 bales arrived in Fort Smith at the same time, early in January, 1920. The freight was paid, and, according to the evidence of appellees, upon examination it was discovered that there were forty four bales of "bollies" contained in the shipments. Appellees disposed of 144 bales of the shipment, and, in the latter part of January, offered to return the forty-four bales of "bollies" to Charles E. Forrester, upon repayment of the purchase price of 36 cents per pound. Forrester refused to accept the "bollies" and return the purchase price. Appellees disposed of the "bollies" in June at 16 cents a pound, deducted all expenses for handling same from the amount and instituted this suit against appellants for the difference between the net amount received for the "bollies" and the contract price of 36 cents per pound paid for it.

In the course of trial, appellants offered to prove that, during the cotton season of 1919, Charles E. Forrester's custom was to sell his cotton in lots, "hog round" and the court, over the objection of appellants, refused to admit evidence of that character.

J. M. Locke was permitted to testify in relation to the damages, over the objection and exception of appellants, to the sale of the "bollies" by his office in his absence, and to the items of expense attached to the handling of same, from a statement made by him from the

books of S. B. Locke & Company, in the Muskogee office, without showing that the books were properly kept or that the books were kept by him.

Appellants' first contention is that appellees can not recover because the undisputed evidence shows that, after the cotton was examined in Fort Smith and the discovery made that the shipments contained forty-four bales of "bollies," it accepted 144 bales of the cotton, which, on account of the indivisibility of the contract, constituted an acceptance of the entire lot of cotton. We can not agree with learned counsel for appellants in this contention, because, under appellees' version of the contract, payment of freight and the contract price of the cotton was to be made before an opportunity was given to inspect it. After paying the freight and the purchase price of the cotton and receiving same, the only remedy available to appellees was to sue for damage on account of the inferiority of any or all the cotton upon the implied warranty that it all should be merchantable, and, under appellees' version of the contract, no opportunity was given them to inspect and elect before receiving same.

Appellants' next contention is that the court erred in refusing to submit the question of whether S. B. Locke & Company was a foreign corporation at the time the contract was entered into for the purchase of the cotton with appellants, without first having filed its articles of incorporation in the office of the Secretary of State, in the manner required by act No. 313 of the Acts of 1907, of the General Assembly of the State of Arkansas. Appellants requested the court in two instructions, numbers 2 and 3, to submit this question to the jury. Appellees specifically objected to the instructions on the ground that the undisputed testimony showed that appellees were not a corporation, but were a partnership at the time they entered into the contract in question. The court refused to give either of these instructions, and, in effect, by so refusing, took that issue of fact from the jury. The evidence of appellants tended to show that, after the organization of the corporation in Oklahoma,

it opened an office in Fort Smith and transacted a general cotton business for a number of years in violation of the Arkansas laws; that, up to and including the time the contract in question was made, there had been no change in the management of the business; that the manager and bookkeeper were paid in the same manner for their services during the entire time with checks issued in the Oklahoma office by S. B. Locke & Company. The manager, W. R. Locke, first testified that S. B. Locke & Company were a partnership, and, afterward, that it was a corporation in Oklahoma and a partnership in Arkansas. Later, he testified that he did not know whether it was doing business in Arkansas as a corporation or as a partnership. No change was made after the organization of the corporation in Oklahoma in the letter heads. They did not indicate whether S. B. Locke & Company was a corporation or a partnership. The offices were maintained throughout in the same place. J. M. Locke testified that the corporation became dormant and was supplanted by a partnership on the 10th day of October, 1918. The certificate evidencing the partnership was dated September 10, 1919, sworn to September 16, 1919, and filed in the office of the district clerk on October 16, 1919. The certificate on its face showed that S. B. Locke & Company were doing business as a partnership in the city of Muskogee. There is nothing in the face of it to indicate that the partnership assumed control of the corporation's business outside of that city. In fact, the only evidence in the record to the effect that S. B. Locke & Company at Fort Smith was conducting its business as a partnership was that of J. M. Locke, who is an appellee and a plaintiff in this action, and he did not make any explanation why the corporation became dormant, and, without dissolution, permitted its activities to be prosecuted by a partnership composed of practically the same parties composing the corporation. In addition, it appeared that the Lockes who composed the corporation were related. W. R. Locke was an uncle of J. M. Locke, and S. B. Locke, the latter's son.

It is true that J. M. Locke swore positively that the business at Fort Smith was a partnership business at the time the contract was made; but, not only was he an interested party, but his evidence is in effect disputed by that of W. R. Locke, as well as by other facts and circumstances heretofore referred to. In this state of the record, it can not be said that the undisputed evidence showed that S. B. Locke & Company was a partnership at the time it purchased the cotton in question. *Skillern* v. *Baker,* 82 Ark. 86; *Briggs* v. *Collins,* 113 Ark. 190; *Poinsett Lbr. & Mfg. Co.* v. *Traxler,* 118 Ark. 128; *Yazoo & Miss. V. Rd. Co.* v. *Altman,* 124 Ark. 490; *Furst & Thomas* v. *Dewberry,* 136 Ark. 135. Appellees insist, however, that, even though appellee was a foreign corporation when it entered into the contract in question, it pertained to an interstate transaction. If this contention be correct, then any foreign corporation may open an office in this State, purchase its goods out of the State for shipment into the State and sell its commodities for shipments to points out of the State, and in that way evade the statutes of the State, requiring foreign corporations doing business in this State to file their articles of incorporation with the Secretary of State. We can not subscribe to that doctrine. Again, it is alleged in the complaint in this case that S. B. Locke & Company was doing business in this State. No issue was made in the trial court that this particular business was an interstate transaction. There is no evidence in the record changing the nature of that allegation in the complaint. We think appellees are bound by the allegations of the complaint and the evidence adduced in support thereof. Moreover, a complete answer to appellees' position is that this suit was brought by them as individuals composing a partnership, and the corporation was not made a party by them.

Appellants also insist that the court erred in permitting W. R. Locke to give hearsay testimony to the effect that S. B. Locke & Company was a partnership at the time the contract in question was entered into. He

was permitted to say that J. M. Locke had so informed him. We think the evidence clearly hearsay and inadmissible.

Appellants also insist that the court erred in permitting J. M. Locke to testify to the sale of the "bollies," when not present, from the records made on the books in the Muskogee office, and to testify what expenses were incurred in the sale thereof, from a statement he made up by reference to the books. The record does not show that the books were kept by J. M. Locke or that the book account related to transactions between J. M. Locke and appellants. The book entries from which the statement was made related to an account between S. B. Locke & Company and third parties to whom the "bollies" were sold. We think this evidence inadmissible.

Appellants also contend that the court erred in excluding evidence to the effect that Charles E. Forrester's custom was to sell his cotton in lots "hog round." It is admitted by both appellants and appellees that there was a contract with reference to the sale and purchase of this cotton. The contract, and not the custom, must control. The court did not err in excluding that character of evidence.

Appellants' last insistence is that the measure of damages laid down by the court was incorrect. The measure of damages adopted by the court permitted the jury to deduct the net amount received by appellees for the forty-four bales of "bollies" from the contract price of 36 cents per pound. The evidence shows the "bollies" were received in the early part of January and not sold by appellees until the month of June following. The correct measure of damages was the difference between the market value of the "bollies" at the time it was discovered that the shipment contained this inferior cotton and the contract price. No evidence was introduced to meet this rule.

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

STATE v. MARTINEAU.

Opinion delivered June 20, 1921.

1. PROHIBITION—NOTICE REQUIRED IN SUPREME COURT.—Crawford & Moses' Digest, §§ 6251, 7023, requiring ten days' notice of application for the writ of prohibition, do not apply to original proceedings in the Supreme Court, whose jurisdiction is derived from the Constitution.

2. PROHIBITION—NOTICE REQUIRED IN SUPREME COURT.—Since there is no statute regulating the practice on original applications to the Supreme Court for the writ of prohibition, and no established rule of the court on the subject, the writ may be issued after reasonable notice of the application; the reasonableness depending upon the circumstances of the case.

3. PROHIBITION—REQUIREMENT OF OBJECTION TO JURISDICTION.—The general rule that objection to jurisdiction must be raised in the inferior court and overruled before the writ of prohibition will issue is subject to certain exceptions.

4. PROHIBITION—REFUSAL TO RULE ON OBJECTION TO JURISDICTION.—Where the State properly objected to the jurisdiction of the chancellor to issue writs of habeas corpus to procure the discharge of men under sentence of death, but the chancellor refused to pass on the question of jurisdiction or on the merits of the case until the Supreme Court passed upon the question of jurisdiction, but did exercise jurisdiction to the extent of enjoining the execution of the sentence of death, his action was tantamount to overruling the objection to jurisdiction.

5. EQUITY—JURISDICTION TO REVIEW CRIMINAL PROCEEDINGS.—Courts of equity have no jurisdiction to review proceedings in criminal cases, or to interfere with such proceedings, either by injunction or by habeas corpus.

6. HABEAS CORPUS—SCOPE OF INQUIRY.—If a petitioner for habeas corpus is in custody under process regular on its face, nothing will be inquired into save the jurisdiction of the court whence the process came.

7. HABEAS CORPUS—FEDERAL STATUTE.—Act of Congress, February 5, 1867 (U. S. Comp. Stat., § 1281), which enlarged the jurisdiction of the United States courts in habeas corpus proceedings, did not enlarge the jurisdiction of the State courts in such proceedings.

8. CRIMINAL LAW—NEW TRIAL FOR NEWLY-DISCOVERED EVIDENCE.—A new trial of a criminal case for newly-discovered evidence, or for

retraction of testimony by witnesses for the State, which in effect is newly-discovered evidence, can not be granted after expiration of the term.

Prohibition to Pulaski Chancery Court; *J. E. Martineau,* Chancellor; writ of prohibition granted.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellants.

E. L. McHaney, Scipio Jones and *J. H. Carmichael,* for appellee.

McCULLOCH, C. J. Frank Hicks, Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, who had previously been indicted and convicted of the crime of murder, and who were being confined in the State penitentiary awaiting execution of the death sentences, filed a petition for habeas corpus in the chancery court of Pulaski County, praying that they be discharged from custody and from said judgments of conviction. This petition was filed and presented to the chancellor on June 8, 1921, who immediately ordered the issuance of a writ of habeas corpus directed to the keeper of the penitentiary, and the chancellor also ordered the issuance of a writ of injunction restraining the said keeper from executing the death sentences upon said petitioners in accordance with said judgments of conviction and the proclamation of the Governor fixing the date of executions. The writs were issued and made returnable for hearing before the chancery court at 2 o'clock p. m. on June 10, 1921, and E. H. Dempsey, keeper of the penitentiary, was made respondent in the proceeding, and copies of the proceedings and process were served on him and on the Attorney General, who appeared before the chancellor on behalf of the State and the keeper of the penitentiary and made objections challenging the jurisdiction of the chancery court.

A petition has been filed here praying for a writ of prohibition to restrain the chancery court from proceeding in the matter, alleging that it is not within the jurisdiction of that court. The chancery court postponed

further hearing on the matter until a decision of this court could be rendered as to the jurisdiction of that court. The petitioners in the proceeding below, as well as the chancellor, have responded to the present petition, and the former seek to uphold the jurisdiction of the chancery court. Relators presented the present petition to the justices of the Supreme Court on June 9, 1921, for a temporary writ of prohibition pending the presentation of the matter to the court in session, but, on objection being made by respondents to the hearing at that time, it was postponed to the first session of the court on Monday, June 13, 1921, and the cause was set down for hearing on that day.

At the outset of the hearing by this court respondents were opposed to proceeding at this time on the ground that the notice was not given for the length of time required by statute. There is a statute regulating the practice on applications for mandamus and prohibition, which provides that ten days' notice of an application shall be given. Crawford & Moses' Digest, 6251 and 7023. This statute manifestly applies only to proceedings of this nature in courts of original jurisdiction It defines a writ of mandamus, treated in the chapter, "as an order of a court of competent and original jurisdiction," and defines a writ of prohibition as "an order from a circuit court to an inferior court of limited jurisdiction prohibiting it from proceeding in a matter out of its jurisdiction." Crawford & Moses' Digest, §§ 7021-22. This does not apply to proceedings in the Supreme Court where jurisdiction is derived from the Constitution, but there is no statute regulating the practice. *Prairie C. C. M. Co.* v. *Kittrell,* 107 Ark. 361. This leaves the matter of notice as one to be fixed by rules of this court. This seems to have been the thought in the mind of the court deciding the case of *Ex parte Tucker,* 25 Ark. 567, which arose shortly after the adoption of the Civil Code containing the provision referred to in regard to notice. In the opinion it was said, following the common-law practice, that a writ of prohibition should not be "issued un-

less an opportunity be offered those sought to be prohibited of showing cause against it," but no reference was made to the statute requiring notice. There is no established rule of this court on the subject, and it is a question to be determined in each instance whether reasonable notice has been given. In the present case we concluded that the notice was, under the circumstances, reasonable and the request for further postponement was denied. In fact, there was no contention that the notice was unreasonable if we concluded that the statute referred to did not apply.

Again, it is urged that the remedy should not be awarded under the writ of prohibition for the reason that proper objection had not been made to and overruled by the chancellor to the exercise of jurisdiction. The rule has often been recognized in decisions of this court that prohibition is not available until objection to the wrongful attempt to exercise jurisdiction has been raised in the inferior tribunal and overruled; but exceptions to that rule have been found. *Reese* v. *Steel,* 73 Ark. 66; *Monette Road Imp. Dist.* v. *Dudley,* 144 Ark. 169.

The state of the matter as presented here is this: The chancery court has already exercised jurisdiction by issuing an injunction staying execution of the judgments in the criminal cases and has set the cause for final hearing. Relators made objection to the exercise of jurisdiction, but the chancery court declined to decide either the question of jurisdiction or the merits of the cause until after this court determined the question of jurisdiction. The chancery court on June 10 postponed the hearing indefinitely until this court decides the present case. The effect of the court's attitude is therefore to retain jurisdiction and to further exercise it in due time unless prohibited by this court. The case, therefore, falls within the exceptions stated in *Monette Road Imp. Dist.* v. *Dudley, supra.* Relators are now under restraint of the writ of injunction issued by the chancery court in the attempt to exercise jurisdiction which it is alleged that

court did not rightfully possess, and the failure of the court on the request of the relators to relinquish jurisdiction is tantamount to overruling the objection.

This brings us to the consideration of the main question in the case, whether or not, upon the allegations of the petition filed below, the chancery court possesses jurisdiction, either by injunction or under the writ of habeas corpus, to review the proceedings in which the accused respondents were convicted of the crime of murder or to interfere with the judgments of conviction. The facts are stated in detail and at great length in the petition filed, and include the record of the proceedings in which the accused respondents were indicted, tried and convicted, the record of the appeal to this court, the judgment of affirmance and the opinion of this court, and also the record of the application to the Supreme Court of the United States for a writ of certiorari to review the proceedings.

The accused respondents were indicted by the grand jury of Phillips County for the crime of murder in the first degree, alleged to have been committed by shooting one Clinton Lee. It was charged in the indictment and proved at the trial that the killing of Lee occurred on October 1, 1919, and the indictments were returned by the grand jury on October 29, 1919, and on the 3d day of November, 1919, the trials occurred, Frank Hicks was tried separately and the other five were tried together, and each trial resulted in a conviction of murder in the first degree. When the accused were brought into court and arraigned, they had no attorneys to represent them, and the court appointed counsel, certain members of the Phillips County bar, who represented the accused throughout the trials. There were no exceptions saved during the progress of the trials, but the records show that counsel for the accused cross-examined all of the State's witnesses at length. Before the final adjournment of the circuit court for the term and within the time allowed by law, the accused or their friends employed to represent them the counsel who now appear in their be-

half in the present proceedings, and they filed a motion for new trial, supported by affidavits, which was heard by the court and overruled on December 18, 1919. The motion set forth, as grounds therefor, that the verdicts were contrary to the law and the evidence, and that the court erred in rendering judgment upon the verdict. The motion also set forth at considerable length and in detail the circumstances surrounding the accused at the time of the killing of Clinton Lee and from then up to and throughout the trials of the causes, stating among other things that "at the time of the returning of said indictment and trial said excitement and bitterness of feeling among the whites of said county against the negroes, especially against the defendants, was unabated and still at the height of intensity." It alleged, in substance, that the trials of the accused occurred during a period of great excitement; that the accused were given no opportunity to consult with friends or to employ counsel, and, while they were confined awaiting trial, a mob composed of several hundred armed white men surrounded the jail and courthouse, and that the excitement and feeling against the accused among the white people of the county was such that it was impossible to obtain an impartial jury. The substance of the ground thus pleaded was that they had not been given a fair trial on account of the alleged domination of a mob over the court and jury. Upon overruling the motion for new trial, the circuit court allowed the accused sixty days within which to prepare and file a bill of exceptions, which was filed within the time allowed, and an appeal was duly prosecuted to this court, and after arguments the case was decided by this court affirming the judgment of conviction. All of the assignments of error in the motion for new trial were reviewed in the opinion of this court and decided against the contention of the accused. *Hicks* v. *State,* 143 Ark. 58. Thereafter a petition was presented to the Supreme Court of the United States for a writ of certiorari, which was by that court refused. Since that time the accused respondents have remained

in the custody of the keeper of the penitentiary awaiting the action of the Governor in fixing the date of execution, and the proclamation of the Governor fixing the date of the execution on June 10, 1921, has been suspended by the injunction of the chancery court.

The petition filed below contains a repetition of the allegations contained in the motion for new trial with reference to the excitement prevailing at and before the trial in the circuit court and the alleged domination of mob violence. It also contains a charge, which was also stated in the motion for new trial, that the accused, being negroes, were denied the right and privilege guaranteed by the Constitution of the United States by the exclusion of their race from the grand jury and from the trial jury in Phillips County. The petition recites facts in regard to publications in newspapers and resolutions passed by civic and fraternal organizations prior to the trial and subsequent thereto alleged to be calculated to arouse the people of Phillips County to a high pitch of excitement. It also gives a history of the events which are said to have led up to the killing of Clinton Lee, and declares the innocence of the accused of the crime charged in the indictment. It also alleges that the witnesses introduced by the State in the prosecution of the accused were tortured into giving false testimony, which said witnesses had retracted since the trial. It contains an allegation that prior to the indictment of the accused there had been an investigation by a committee of white citizens in Phillips County for the purpose of ascertaining who were the guilty parties in the homicide which had occurred, and it is stated in the petition that "the entire trial, verdict and judgment against them was but an empty ceremony; that their real trial and condemnation had already taken place before said 'Committee of Seven,' that said committee, in advance of the sitting of the court, had set in judgment upon their and all other cases and assumed and exercised the jurisdiction of the court by determining the guilt or innocence of those in

jail, had acquired the evidence in the manner herein set out, and decided which of the defendants should be electrocuted and which sent to prison and the terms to be given them, and which to be discharged; that when court convened, the program laid out by said committee was carried through, and the verdict against petitioners was pronounced, not as the independent verdict of an unbiased jury, but as part of the prearranged scheme and judgment of said committee; that in doing this the court did not exercise the jurisdiction given it by law and wholly lost its jurisdiction by substituting for its judgment the judgment of condemnation of said committee."

The doctrine has been announced by this court that courts of equity in this State are not clothed with jurisdiction to review proceedings in criminal cases or to interfere with such proceedings, either by injunction or under the writ of habeas corpus. *State* v. *Williams,* 97 Ark. 243; *Ferguson* v. *Martineau,* 115 Ark. 317. In *State* v. *Williams,* there was an instance where the chancellor had, after indictment of the accused in the circuit court, issued a writ of habeas corpus for the purpose of allowing bail, and we held that the circuit court acquired exclusive jurisdiction of the cause upon the return of the indictment, and that the chancery court had no jurisdiction to interfere, even to the extent of allowing bail. In disposing of the matter, we said: "The chancellor has nothing to do with the administration of the criminal laws nor right to interfere with them, neither has he appellate jurisdiction over criminal trials nor appellate or supervisory jurisdiction over the actions of chancellors or circuit judges granting or refusing bail."

The case of *Ferguson* v. *Martineau, supra,* was one where the chancellor issued an injunction to restrain the keeper of the State penitentiary from executing a death sentence, the writ being issued to suspend proceedings and stay the execution until the sanity of the accused could be inquired into in the probate court. In disposing of the case, in which we held that the chancery court was proceeding beyond its jurisdiction, we said: "Courts

of equity have to do with civil and property rights, and they have no jurisdiction to interfere by injunction with criminal proceedings. They can not stay processes of courts having the exclusive jurisdiction of criminal matters, where no civil or property rights are involved."

These two decisions seem to be conclusive of the controversy now before us, and to settle the question that the chancery court is without jurisdiction. But it is insisted that, while such is the effect of our decisions in establishing the jurisdiction of courts, they do not reach to the particular question now presented, which is that, under the "due process of law" provision of the Constitution of the United States, any court having authority to issue a writ of habeas corpus possesses jurisdiction to inquire into and review the proceedings in criminal cases for the purpose of determining whether or not the judgment was the result of "due process of law within the meaning of the Federal Constitution." In other words, the contention is that the provision of the Constitution with reference to due process of law and the Federal statutes prescribing the remedies whereby the constitutional guaranty may be enforced must be read into the State laws, so that the prescribed remedies may be afforded in the State courts.

Counsel for respondents rely on the case of *Frank* v. *Mangum,* 237 U. S. 309, as sustaining this contention, but an analysis of that decision and a consideration of the language employed by the learned justice who wrote it shows very clearly that such is not the effect of that decision. The court distinctly recognized the well-established rule at common law and under the British statutes, that on habeas corpus a court was confined in its inquiry to the face of the process of the judgment under which the prisoner was held in custody. The case of *Ex parte Watkins,* 3 Peters 193, was cited where Chief Justice Marshall, in delivering the opinion of the court, followed the common-law rule stated above and decided that a court could not, under habeas corpus, look beyond the face of the judgment of a court of competent juris-

diction to determine whether or not a prisoner was being unlawfully held. This is in accordance with repeated decisions of our own court holding that, if a petitioner for habeas corpus "is in custody under process regular on its face, nothing will be inquired into save the jurisdiction of the court whence the process came." *State* v. *Neel,* 48 Ark. 283; *Ex parte Barnett,* 51 Ark. 215; *Ex parte Perdue,* 58 Ark. 285; *Ex parte Foote,* 70 Ark. 12; *Ex parte Byles,* 93 Ark. 612; *Ex parte Williams,* 99 Ark. 475.

But the Supreme Court of the United States in the Frank case, *supra,* held that Congress had, by the act of February 5, 1867 (Revised Statutes, §§ 753 *et seq.*), conferred upon the Federal courts express authority to inquire beyond the face of the process or judgment under which a prisoner is being and had "extended the writ of habeas corpus to all cases of persons restrained of their liberty in violation of Constitution or law or treaty of the United States." Further speaking on this subject, the court said: "The effect (Acts 1867) is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.' "

The statute referred to does not apply to any courts except to the Supreme Court and circuit and district courts of the United States, and it defines the practice in those courts and the powers of the courts under the remedy afforded by the writ of habeas corpus. The statute does not purport to apply to the courts of the States, and Congress had no authority, had it attempted so to do, to prescribe the powers of the State courts and the practice to be followed in matters within their jurisdictions. The court in the Frank case in effect held that the statute had no application to the State courts, for it said

this: "But repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with."

And again, in speaking of the due process mandate in the Constitution, the court said: "The prohibition is addressed to the State; if it be violated, it makes no difference in a court of the United States by what agency of the State this is done; so, if a violation be threatened by one agency of the State but prevented by another agency of higher authority, there is no violation by the State. It is for the State to determine what courts or other tribunals shall be established for the trial of offenses against its criminal laws, and to define their several jurisdictions and authority as between themselves. And the question whether a State is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does no violence to the Federal Constitution, can not ordinarily be determined, with fairness to the State, until the conclusion of the course of justice in its courts."

And again the court said on this subject: "As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution and conducted according to the settled course of judicial proceedings, as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense."

What the result would be of an application to a Federal court under the statute referred to and upon the

facts stated in the petition we need not inquire. A perusal of the opinion of the Supreme Court of the United States in the Frank case, *supra,* is, however, illuminative of the subject. The court, after reviewing all of the facts as narrated in the petition and referring to the various proceedings in the State courts, said: "The narrative has no proper place in a petition addressed to a court of the United Sattes except as it may tend to throw light upon the question whether the State of Georgia, having regard to the entire course of the proceedings, in the appellate as well as in the trial court, is depriving appellant of his liberty and intending to deprive him of his life without due process of law. Dealing with the narrative, then, in its essence, and in its relation to the context, it clearly appears to be only a reiteration of allegations that appellant had a right to submit, and did submit, first to a trial court and afterward to the Supreme Court of the State, as a ground for avoiding the consequences of the trial."

The court further said that "this familiar phrase, 'due process of law,' does not mean that the operations of the State government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the State courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases."

Further discussion would seem to be useless. It was not contended in the argument here that there is any other charge in the motion upon which relief could be granted, except the one to the effect that the trial court was dominated by a mob, which suspended the functions of the court and prevented a fair trial. There are no other facts in the petition which would warrant a review of the judgment of the circuit court of Phillips County. The allegations with regard to newly discovered evidence

and the retraction by the State's witnesses, which is, in effect, an allegation of the discovery of new evidence, affords no grounds for a review of the judgments of conviction, for there is no provision in the laws of this State for the granting of a new trial after the lapse of the term on the ground of newly discovered evidence. *Howard* v. *State,* 58 Ark. 229; *Thomas* v. *State,* 136 Ark. 290; *Satterwhite* v. *State, ante* p. 147.

It follows that the chancery court is without jurisdiction to proceed, and the writ of prohibition will therefore be granted, and the writ of habeaus corpus as well as the injunctive order issued by the court will be quashed.

FOWLER *v.* PINE BLUFF SPOKE COMPANY.

Opinion delivered June 20, 1921.

1. APPEAL AND ERROR—QUESTION RAISED.—Where a demurrer was sustained and the cause dismissed as to one defendant, and the cause placed on the calendar as to the other defendant, the only question presented on plaintiff's appeal is whether the court erred in dismissing the cause as to one of the defendants.
2. LOGS AND LOGGING—PRIVITY OF CONTRACT.—A complaint which alleges that plaintiff sold timber to a third person for a per cent. of the price of the manufactured products, and that such vendee sold to defendant all of such manufactured products, and that defendant knew of the agreement between plaintiff and vendee, and made payments to plaintiff on the purchase price, does not show a privity of contract between plaintiff and defendant.

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

E. B. Stokes, for appellant.

The court erred in sustaining the demurrer to the complaint.

Where a vendee acquires personal property under actual notice as to the conditions relating to title and liens, he, the vendee, can only acquire such right, title or interest as the vendor may have.

Where one, with actual or constructive notice or knowledge of the facts, induces, by his words or conduct, another to believe that he acquiesces in a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, the former is estopped from repudiating the transaction to the other's prejudice. 72 Ark. 494, 82 S. W. Rep. 836; 76 Ark. 282, 88 S. W. 983.

Rowell & Alexander, for appellee.

1. Timber, until it is severed from the soil, is real estate; where the timber was cut into material at the mill, it became personal property, and was disposed of by Jordan, the active manager, and Doctor Fowler is estopped to object, as he can not take advantage of his own voluntarily made partnership agreement. The property had passed into the hands of innocent purchaser for value. 91 Ark. 218. Personal property and the title thereto will pass and the sale be completed, if it is the intention of the parties to transfer the title on the one part and to accept same on the other part, even though something remains to be done, as the fixing of the quantity or value of the property or the payment of the purchase money. 91 Ark. 240.

2. There must be an assent or agreement between parties competent to contract to do, or not to do, certain specified things. 6 R. C. L. 592. It is not alleged in the complaint that appellee assented or in any way agreed to pay Doctor Fowler twenty-five per cent. of the proceeds, and neither the complaint nor amendment thereto stated a cause of action, and the demurrer was properly sustained. 91 Ark. 240.

The cases in 91 Ark. 218 and *Ib.* 240 are not in point and have no bearing here.

McCULLOCH, C. J. Appellant instituted this action in the circuit court of Jefferson County against the Pine Bluff Spoke Company and W. A. Jordan, alleging in his complaint that he was the owner of certain tracts of timber land in Arkansas County; that he entered into an oral contract with defendant, W. A. Jordan, whereby he

sold to Jordan all of the hickory timber on said lands suitable for certain purposes; that he was to receive for said timber as stumpage 25 per cent of the price of the manufactured products of the timber sold by Jordan, and that the latter has sold to the Pine Bluff Spoke Company all of the manufactured products of the timber so purchased from appellant. The complaint contains a further allegation that the Pine Bluff Spoke Company kenw of the agreement between appellant and Jordan, and that "on numerous occasions during the period stated executed and delivered to this plaintiff their check for the said twenty-five per cent, of the materials so inspected, as stumpage charges." It is alleged in the complaint that there is a balance of $587.06 due on the price of the timber, and there is a prayer for judgment against both of the defendants. The record before us does not show that Jordan appeared, but it does show that appellee, the Pine Bluff Spoke Company, appeared by attorneys and filed a motion to require appellant to make his complaint more definite and certain, which was sustained by the court, and then filed a demurrer to the complaint as amended, which the court sustained. The judgment reads as follows:

"Now on this day comes on to be heard the demurrer of the defendant, the Pine Bluff Spoke Company, to the complaint herein; and the court, being well advised in the premises, doth sustain said demurrer as to The Pine Bluff Spoke Company. Plaintiff declining to plead further, it is ordered that the complaint be dismissed, and that the defendant, the Pine Bluff Spoke Company, have and recover from the plaintiff all its costs herein expended. Plaintiff excepts and prays an appeal to the Supreme Court, which is granted by the court and noted of record."

After the transcript was lodged in this court the circuit court made an order correcting its record so as to affirmatively show that the cause was not dismissed as to defendant Jordan, and ordered the cause redocketed against Jordan, and directed the issuance of process for service upon Jordan. It is clear, we think, from the lan-

guage of the first entry of the judgment that the cause was dismissed only as to appellee, the Pine Bluff Spoke Company. The other defendant did not appeal at all, and the demurrer did not call for a ruling of the court as to Jordan, the other defendant. The correction by the court, however, makes this plainer ,and from the record, as is now appears, the cause is still pending against Jordan.

The only question, therefore, presented on this appeal relates to the correctness of the court's ruling in holding that no cause of action is stated in the complaint against the Pine Bluff Spoke Company. We think the ruling of the court on this point is correct. The complaint contains no statement of facts which shows any privity of contract between appellant and Jordan, except as vendor and vendee, nor any statement of facts to constitute privity of contract between Jordan and appellee, except that of vendor and vendee. All that the complaint shows is that appellant sold the timber to Jordan and that Jordan resold it to appellee. This statement of facts does not give a right of action to appellant against appellees for the unpaid balance on the price of the timber thus sold to Jordan by appellant and resold by the former to appellee. Nor does the fact that appellee made payments to appellant on the purchase price render the former liable for the unpaid balance. In the absence of an express allegation to the contrary, the presumption is that appellee made the payments for Jordan and not as an assumption of Jordan's contract to pay. There is no theory upon which there can be extracted from the language of the complaint a cause of action in favor of appellant against appellee.

The judgment is therefore affirmed.

PERKINS v. GILLETT WAREHOUSE COMPANY.

Opinion delivered June 20, 1921.

MASTER AND SERVANT—DISCHARGE FOR ACCEPTING OTHER EMPLOYMENT.—Where the officers of a warehouse company permitted its warehouse manager, who had agreed to "devote his entire time to the work required of him by the company," to continue his work for two months without objection after discovery that he was employed as food inspector by the government, and he devoted all the time that was required of him in performance of his duty to the company, and one of such officers was receiving one-half of the manager's salary as food inspector, the company was not authorized to discharge him on the ground that he had accepted other employment, since, if there was a breach of the contract, it was waived by the company.

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

Botts & O'Daniel, for appellant.

The contract was entire for a certain sum of money, and appellant, having been dismissed without cause prior to the expiration of his contract, was entitled to recover the full amount of his salary at the expiration of his time. 57 Ark. 374, 383. The decree of the chancellor is not sustained by any evidence whatever, and the facts are undisputed. The case is fully developed, and decree should be entered here for appellant for $495, the full amount due him. 56 Ark. 128, 131. The cases relied on by appellee are not in point.

T. J. Moher and *John L. Ingram,* for appellees.

The contract was an entire one and was breached by appellant, and he was not entitled to recover. 57 Ark. 374 does not apply, nor does 102 Ark. 79.

One who sues on a special contract to recover compensation due on its performance must show performance on his part if that matter is put in issue. 13 C. J., § 762, and cases cited; *Ib.* 635, § 706; see 128 Ark. 535-541; 65 Ark. 320; 93 *Id.* 478; 88 *Id.* 491. The decree is in all things correct.

McCULLOCH, C. J. This is an action instituted by appellant in the chancery court of Arkansas County to

establish his claim for a debt due under contract by the Gillett Warehouse Company, a dissolved corporation. Appellant alleged that he was employed by said corporation to perform services for ten months beginning on August 15, 1918, and ending on June 15, 1919, at a stated salary of $1,500 for the term; that he had been paid the sum of $1,050 in monthly installments, leaving a balance due in the sum of $450, and that he was wrongfully discharged on May 1, 1919, and was unable to procure other employment during the remainder of the term. The answer of appellee admitted the execution of the contract, but alleged that, according to the terms thereof, appellant was to "devote his entire time to the work required of him by the company," and that appellant had broken the contract himself by accepting other employment. The cause was heard by the chancery court on the testimony adduced by each side, and the court found the issues against appellant and rendered a decree dismissing his complaint for want of equity.

The Gillett Warehouse Company, a domestic corporation, was engaged at Gillett, Arkansas, in the business of buying, storing and selling rice. Appellant was an expert rice grader and weigher with many years experience, and in August, 1918, the corporation employed appellant as manager of the business for a period of ten months, as stated in the complaint, at a salary of fifteen hundred dollars. The contract was oral, but the terms thereof are recited in a resolution of the board of directors of the corporation at a meeting at which, according to the testimony, appellant was present. This resolution recited that appellant was employed as manager for ten months at $150 per month, and that it was agreed that appellant "would devote his entire time to the work required of him by the company." E. L. Chaney was president of the corporation and L. L. Chaney, his son, was secretary and treasurer. Early in September, 1918, appellant was employed as inspector under the United States Food Administration at a salary of $100 per month. When offered the appointment to this place, he stipulated

in his contract with the Food Administration that his services were to be performed at the warehouse of the Gillett Warehouse Company, and that he was not required to perform any duties which would require his absence from that place.

Appellant testified that before he accepted this appointment he submitted the matter to E. L. Chaney, the president of the corporation, who consented to his accepting it and performing the work. L. L. Chaney worked at the warehouse, and he and appellant worked together in the operation of the business of the corporation, and also shared the work and salary of appellant under the appointment by the food administrator. E. L. Chaney denied that he was consulted by appellant as to the appointment as food inspector. The duties of appellant as food inspector were to grade and weigh rice, which were also a part of his duties in the management of said corporation. L. L. Chaney admitted that he knew about appellant's employment as food inspector, and that in December, 1919, he began the acceptance of part of the salary, and that he received half of the salary for four months. Appellant said that L. L. Chaney accepted the salary from September 15, 1918, up to the time of appellant's discharge on May 1, 1919.

It is conceded that all of the parties, including the directors of the corporation other than E. L. Chaney and L. L. Chaney, ascertained in January, 1919, that appellant had been employed as food inspector and was receiving a salary as such, and no objection was made until he was discharged on May 1. Appellant testified that, when he was discharged, the only grounds stated for the discharge were that the corporation was not making any money on that year's business, and that his discharge was essential for economy in the operation of the business. Each of the two Chaneys testified that appellant was discharged on account of giving a portion of his time to the service of the United States Food Administration. It is also conceded that appellant properly performed all of his duties as manager of the business of his employer,

Gillett Warehouse Company, and that he did not neglect his work in any respect; that all of his services performed for the Food Administration were at the warehouse and that the corporation suffered no loss or injury by reason of neglect on the part of appellant to perform his duties.

It is unnecessary to determine where the preponderance of the testimony lies as to some of the issues in the case, for we are clearly of the opinion that, according to the uncontradicted evidence, appellant is entitled to recover on the ground that appellees waived the alleged breach of the contract by appellant, if there was indeed a breach, according to the testimony, by permitting him to continue in the performance of the contract for at least two months without objection after discovering that he was working in other employment. It will be observed that, according to the terms of the contract as specified in the resolution adopted by the board of directors of the corporation, appellant was not expressly prohibited from accepting other employment, but that he would "devote his entire time to the work required of him by the company." According to the uncontradicted testimony, appellant did devote all the time that was required of him, and he did not to the least extent neglect his duty to his employer. And, according to the undisputed testimony, the directors of the corporation, including the two Chaneys, who were its active managers, ascertained that appellant was performing other work in January, and they permitted him to continue without objection until he was discharged on May 1, 1919. In the meantime one of the Chaneys was getting half of appellant's salary as food inspector.

Counsel for appellees rely on the case of *Van Vleet* v. *Hayes,* 56 Ark. 120, as sustaining their contention that the failure to object to appellant's employment as food inspector and his retention in the employment did not constitute a waiver of the breach of the contract. The facts of that case are entirely different, and have no application to the present one. In that case Hayes was employed as a traveling salesman, and was to receive a

certain salary unconditionally. Under the contract he was to receive an additional salary on certain conditions, and the issue in the case was whether or not he had broken the contract by failing to perform those conditions. The court held that, under those circumstances, the employer did not waive the breach by retaining the employee in the service, for the reason that part of the contract and the salary pertaining thereto was unconditional, and that the employer had the right, without waiving the breach, to permit the employee to remain in the service and receive the unconditional salary. In the present case the condition related to the whole of the contract, which was indivisible, and the breach of the contract was entirely waived by the retention of appellant in the employment and failure to make objection to the breach.

The decree is therefore reversed with directions to render a decree in favor of appellant for the sum of $450, the balance due him on his salary, with interest at legal rate from June 15, 1919, the date on which the final payment of his salary was due.

JENKINS v. INTERNATIONAL LIFE INSURANCE COMPANY.

Opinion delivered June 20, 1921.

1. APPEAL AND ERROR—AMENDMENT OF COMPLAINT TO CONFORM TO PROOF.—In an action on a written policy of life insurance, where testimony tending to prove an oral, instead of a written, contract of insurance was introduced without objection, the complaint will be treated as amended to declare on such oral contract.
2. INSURANCE—DELIVERY OF POLICY.—Since contracts of insurance may be made by parol, delivery of the policy is not essential to the completion of the contract.
3. INSURANCE—WHEN CONTRACT COMPLETE.—Where the minds of the insured and the insurer for a valuable consideration have met upon all the terms of the contract, it is complete and enforceable, even though it was intended by the parties to be evidenced by a policy which by some fortuity was not delivered before the death of the insured.

4. INSURANCE—DELIVERY OF POLICY DURING GOOD HEALTH.—The parties to a contract of life insurance may agree, as a condition precedent to a complete and enforceable contract of insurance, not only that there shall be a delivery of the policy, but also a delivery while the insured is in good health.

5. INSURANCE—APPROVAL OF APPLICATION BY MEDICAL DIRECTOR.—In view of the practice of life insurance companies not to issue policies except upon approval of the application therefor by a medical examiner or director, the issuance of a policy on the terms called for in the application and for the premium therein mentioned, and providing that it was to take effect as of the day previous, and the fact that the policy was registered and secured as required by the insurance department of another State, made a *prima facie* showing that the application had been approved by the medical director, and made a case for the jury on that issue.

6. INSURANCE—PREMIUM RECEIPT AS PART OF APPLICATION.—Where an application for life insurance provided that, if the premium be paid with the application, such payment is made subject to the conditions in the attached receipt, and the receipt provided that no conditions or agreements other than those printed therein and in the application should be binding, the receipt must be considered in connection with, and as a part of, the application.

7. INSURANCE—UNDELIVERED POLICY AS EVIDENCE.—A policy of insurance which has been issued and sent to the insurer's agent to be delivered on certain conditions, among which was that it should not take effect until the first premium was paid and the policy delivered to the insured while in good health, was competent evidence to be considered, in connection with the application and receipt, in determining when the insurance was to take effect.

8. INSURANCE—PAYMENT BY NOTE IN LIEU OF CASH.—Where an application for life insurance provided that the insurance should not take effect until the premiums had been paid in full in cash and the policy delivered to insured while in good health, and that if the premium was paid with the application the payment was to be subject to the conditions in an attached receipt, and the receipt provided that, if a full settlement has been made with the application, the insurance would be in force from the date of approval of the application by the medical director, payment partly by cash and partly by note was not such a full cash settlement as was required to make the insurance effective from the approval of the application.

9. INSURANCE—AUTHORITY OF AGENT IN ACCEPTING PAYMENT OF PREMIUM.—Where an insurance agent has authority to solicit applications for insurance and to conduct the negotiations in closing up an insurance contract, he may accept notes or cash or both, unless his authority is limited as to the time and mode of payment of the premiums.

10. INSURANCE—WHEN CONTRACT COMPLETED.—Where an application for life insurance provided that the insurance should not be in effect until the premium had been paid in full in cash, and the policy delivered to the insured during good health, and that such payment was made subject to the conditions in an attached receipt, which provided for payment by cash or notes, and that, if a full cash settlement had been made with the application, the insurance should be in force from the date of approval of the application by the medical director, the policy would become effective either (1) when the premium was paid in full in cash with the application on the approval of the application by the medical director, or (2) when payment of the premium was partly or wholly by note on delivery of the policy while the applicant was in good health.

Appeal from Clay Circuit Court, Eastern District; *R. H. Dudley*, Judge; affirmed.

W. E. Spence and *Oliver & Oliver*, for appellant.

1. The contract of insurance, according to its express terms, was complete and in force from the date of its approval by the company's medical director and binding, and the company was without power or right to modify, change or attach further conditions to the contract or to the delive— of the policy. The contract was consummated. 66 Ark. 612; 40 N. J. L. 103; 1 Bacon on Ben. Soc., § 272, p. 538; Cooley's Briefs on Ins., p. 442 (a) and cases cited; *Ib.* 451 (f), 453 (g).

2. The issuance of a policy of insurance is acceptance and an approval of the application for insurance. 44 S. E. 28.

3. If policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view should be adopted, if possible, which would sustain rather than forfeit the contract. 102 Ark. 1. It should be most strongly construed against the insurance company. 113 Ark. 174; 58 *Id.* 528. The ac-

ceptance by an insurer of the insured's note for the first premium binds the company. Cooley's Briefs on Ins., p. 586 (e); 94 Ark. 578.

A contract of insurance may be by parol. 25 Cyc. 716 A; Cooley's Briefs on Ins. 395 (d)-396-7; 124 Ark. 505; 49 U. S. App. 548; 23 C. C. A. 365; 83 Fed. 631. Signature is not always essential to bind an agreement. 13 C. J., § 128.

4. Where correct answers are given by an applicant for insurance and the agent, through fraud, mistake or negligence, writes them incorrectly, the company is estopped to take advantage of the wrongful act of its agent. Cooley's Briefs on Ins. 2555 *et seq.;* 81 Ark. 205. The authority of the agent to take and fill out applications for insurance requires him to do everything needed to perfect the policy. A practical construction given to the construction of a contract by an insurer in his dealings with the insured will be accepted by the courts. Cooley's Briefs on Ins. 643 (k); 109 Ark. 17-23.

The application, receipt and note for the first premium make a complete contract. Cooley's Briefs on Ins. 413 (c); 115 Fed. 81. See, also, 90 U. S. 85; 41 S. W. 319; 72 Am. Dec. 379; 94 N. W. 211; 99 *Id.* 130; 115 Pac. 779; Cooley's Briefs on Ins., p. 428 (i).

Here the terms of the proposition expressly provide that the insurance shall be in force from the date of the approval of the application. The judgment should be reversed, and, as the case is fully developed, judgment should be entered here for appellant. 116 Ark. 420.

M. P. Huddleston and *Chas. G. Revelle*, for appellee.

It is permissible and perfectly lawful for parties to agree to the payment of the first premium and delivery and acceptance of the policy conditions of the contract. Until this is done, there is no contract. 66 Ark. 612; Cooley's Briefs on Ins. 2555, 643 (k), 413 (c). Without assent or mutual meeting of minds, there can be no contract. 90 U. S. 85; 129 Ark. 137; 187 S. W. 265. A note

is not *cash,* and the first payment was not made. 46 C. C. A. 393; 92 U. S. 161; 104 *Id.* 18; 59 N. H. 298; 158 Mass. 132; 140 N. Y. 79; 67 N. W. 876; 48 Neb. 870; 8 N. J. L. (3 Halst.) 172; 30 Pac. 1064; 136 U. S. 257; 36 Pa. (12 Casey) 204. See, also, 8 Vt. 252. See, also, 46 C. C. A. 393; 103 Mass. 78; 30 Fed. 545; 28 *Id.* 705; 51 Iowa 679; 18 Minn. 448; 140 Mo. 599; 50 S. W. 519; 151 Mo. 620; 52 S. W. 356.

To be effective, an acceptance of an application for insurance must be in the very terms offered. 14 R. C. L., p. 71; 44 S. W. 28. Under the evidence there was no approved of the application, and the policy was not binding on appellee.

WOOD, J. This is an action brought by the appellant as administrator of the estate of M. E. Jenkins against the appellee on a contract of insurance on the life of M. E. Jenkins made payable to his estate. The appellant set up the policy and alleged that it insured the life of M. E. Jenkins for the sum of $3,000. He alleged the death of M. E. Jenkins, the compliance with the terms of the policy on his part, the refusal of the appellee to pay, and prayed judgment for the sum mentioned, and for penalty, attorneys' fees and costs.

The appellee answered, denying all the material allegations of the complaint. It tendered to appellant a note executed by M. E. Jenkins and the cash paid by him. The policy and application were introduced in evidence by the appellant. The application signed by appellant was dated February 21, 1920. It contained among others the following provisions: "(3) The insurance herein applied for shall not be in effect until the premium has been paid in full in cash and the policy delivered to me during my good health. (4) If the premium be paid with this application, such payment is made subject to the conditions in the receipt hereto attached." The receipt attached to the application is as follows:

"RECEIPT.

"This receipt not valid for more than first year's pre-

mium, nor in excess of a premium on $50,000 insurance.

....., 19.....

"Received from ..... an application for insurance on h..... life for $..... on the ..... plan; also ..... dollars in cash, and note for $..... due ..... to be applied in payment of premium on said insurance, provided a policy of insurance upon such application is issued by the company. If full cash settlement required has been made with the application, the insurance will be in force from date of approval of the *completed* application by the company's medical director. If said application is not approved by the *company,* the settlement herein acknowledged will be returned by me forthwith, upon surrender of this receipt.

"No conditions or agreements other than those printed herein and in the application shall be binding. Conditions on back of this receipt a part thereof same as if printed herein.

"..... 51829."

On the back of the receipt is the following: "The agent is not authorized to give this receipt to persons exceeding the limits of height and weight indicated in the table below, or to those who have been rejected by another company, or who are not in good health."

The application contained blanks to be filled out by the soliciting agent of the appellee, one of which required him to show how, if at all, the first premium had been settled. This was filled out, and showed that the premium had been settled by note. The application was approved by the appellee's medical director on March 4.

Among the provisions of the policy are the following: "After the delivery of this policy to the insured, it takes effect as of the 4th day of March, 1920. This contract of insurance shall not be deemed to have been made until the first premium is paid, and the policy delivered during the lifetime and good health of the insured."

E. R. Winton testified that he was the soliciting agent of the appellee, and took the application of M. E. Jenkins. When an applicant made settlement of the premium, wit-

ness signed the receipt and gave it to the applicant. In this case Jenkins made settlement by paying seventy-one cents in cash and executing his note payable to witness for the sum of $100. Witness accepted that in full settlement. Witness did not detach the receipt from the application and give it to Jenkins because they were in a hurry. The witness accepted the note unconditionally, just like he would have accepted the cash. After witness received the policy, he did not see Jenkins again before his death. When witness received the policy for delivery, it was accompained by a letter which instructed witness to deliver the policy only during the lifetime and continued good health of the applicant, and that the signature of the applicant must be obtained showing that he was in good health. Witness never delivered the policy nor collected the note. Witness offered to return the note and the seventy-one cents to the administrator, and he refused it. Witness returned the policy to the company on March 19. The policy sent witness for delivery was the kind of policy applied for by Jenkins.

On behalf of the appellee, Anthony Gazert testified that he was the manager of the policy department which has jurisdiction over applications and the writing of policies. Appellee had a form letter, "7-B," one of which was sent to appellee's agent, Winton, on or about the 6th of March, 1920, together with the policy on the life of Jenkins. The records would usually show if this letter had been returned. Witness had made a careful search for it and could not find it. Winton was recalled by the appellant, and stated in addition to his former testimony that form "B" referred to and which he received with the policy was a kind or receipt showing that the applicant for insurance had received the policy, and that he was in good health and had had no sickness since his examination. The applicant had to state in this form letter that neither he, nor any of his family, had had influenza since his examination. It instructed witness not to deliver the policy unless witness first obtained the signature of Jenkins to the receipt form 7-B.

At the conclusion of the testimony the court, at the request of the appellee, instructed a verdict in its favor. Judgment was rendered in favor of the appellee dismissing appellant's complaint, and for costs, and from that judgment is this appeal.

The appellant contends that the contract of insurance upon which he bases his action was consummated upon the approval of the application by the company's medical director and became a complete and binding contract without the issuance and delivery of the policy. As there was no objection on the part of the appellee to the testimony adduced by the appellant, we will treat the complaint as amended to declare upon an oral contract of insurance, such as appellant contends was evidenced by the documentary and oral testimony in the case. *Bank of Malvern* v. *Burton,* 67 Ark. 426; *Wrought Iron Range Co.* v. *Young,* 85 Ark. 217; *Griffin* v. *Anderson-Tulley Co.,* 91 Ark. 292; *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 567; *Oakleaf Mill Co.* v. *Cooper,* 103 Ark. 79; *Aetna Ins. Co.* v. *Short,* 124 Ark. 505.

There was no completed contract of insurance under those provisions of the application and the policy to the effect that the insurance shall not be in force until the payment of the premium and the delivery of the policy while the assured was in good health. The general doctrine is that contracts of insurance may be made by parol, and, such being the case, of course delivery of the policy is not essential to the completion of the contract of insurance; and where the minds of the insured and the insurer for a valuable consideration have met upon all the terms of the contract, the contract is complete and enforceable, even though it was intended by the parties to be evidenced by a policy, but which because of some fortuity was not delivered before the death of the insured. *Mutual Life Ins. Co.* v. *Parrish,* 66 Ark. 612; 1 Cooley's Briefs, 442 (a), 395 (d), 396, and cases cited in note: *Aetna Ins. Co. v. Short,* 124 Ark., *supra;* 25 Cyc. 716 (a). But of course the parties may agree, as a condition precedent to a complete and enforceable contract of

insurance, not only that there shall be a delivery of the policy, but also a delivery while the insured is in good health. *McCully* v. *Phoenix Life Ins. Co.,* 18 W. Va. 782; *Kohen* v. *Mutual Reserve Fund Life Assn.,* 28 Fed. 705; 1 Cooley's Briefs, 444, 445, and other cases there cited. See *Nat. Life Ins. Co.* v. *Speer,* 111 Ark. 173.

The liability or nonliability of the appellee turns upon the meaning of the following clause in the receipt, towit: "If full cash settlement required has been made with the application, the insurance will be in force from date of approval of the completed application by the company's medical director." It is the usual, and so far as we know the universal, practice of life insurance companies not to issue policies of insurance except upon approval of the application therefor by a medical examiner or director as the case may be. The issuance of the policy on the 5th of March upon precisely the terms called for in the application, and, as shown by the recitals in the policy, for the premium mentioned therein, and which policy was to take effect when delivered as of the 4th day of March, were facts tending to prove that the completed application was approved by the company's medical director. The policy was registered and secured as required by the insurance department of Missouri. It occurs to us that these facts raised a presumption, and were sufficient to constitute, at least, a *prima facie* showing, that the completed application had been approved by the company's medical director. These facts made a case for the jury on that issue and shifted the burden to the appellee to show to the contrary.

In *O'Grier* v. *Mutual Life Ins. Co.,* 132 N. C. 542, 44 S. E. 28. it is held: "The issuance of the policy is acceptance of the application and should be based upon the status at the time the application is made."

The undisputed testimony shows that the appellee's agent accepted a promissory note of $100.71 in cash in settlement of the first premium "just like he would have accepted the cash."

The only remaining inquiry, therefore, is, was appellee's agent authorized to accept part cash and a promissory note for the balance in full cash settlement of the premium as required by the above clause of the receipt? The application and the receipt each contain provisions which show that the receipt must be considered in connection with and as a part of the application. The application contained the following provision: "If the premium be paid with this application, such payment is made subject to the conditions in the receipt hereto attached." The receipt contained the following provision: "No conditions or agreements other than those printed herein and in the application shall be binding."

The policy, having been issued and sent to the appellee's agent to be delivered on certain conditions, was also competent evidence, and its provisions in regard to the payment of the first premium should also be considered in connection with the above provisions of the application and receipt to determine the meaning of the clause in the receipt quoted. After considering the various provisions of the application, the policy, the receipt and the oral testimony of the appellee's agent who conducted the negotiations for the appellee, we have reached the conclusion that the agent had no authority to accept a promissory note as "cash" in compliance with the "full cash settlement" required by the above clause to make a complete and binding oral contract of insurance.

"The fact that an agent has authority to collect premiums does not imply that he has authority to accept property or anything but cash in the payment of premiums." 2 Cooley's Briefs on the Law of Insurance, page 96, and cases cited. To so construe the words "full cash settlement" would obliterate all distinction between the word "cash" as it is defined by lexicographers and commonly understood, and the word "note," or any other property that the agent might see proper to accept as cash in settlement of the premium. Such interpretation would also destroy the difference in mean-

ing between the words "cash" and "note" appearing in the receipt. These words have an entirely different meaning and as used in the receipt were intended to perform an entirely different function. "Cash" is "current money in hand—money paid down." "Note" is "a written promise to pay money." Webster's New International and Funk & Wagnall's Dicts. If the words "cash" and "note" do not have a different signification as used in the receipt, then it was wholly unnecessary to use the word "cash" at all in the clause under review, because "full settlement" would have embraced either a "cash" settlement or a settlement by "note," or both. "A note is an agreement to pay money; it can not be treated as cash." *Pierce* v. *Bryant,* 5 Allen (Mass.), 91-93; *Cox* v. *State Bank of Trenton,* 8 N. J. Law, 172; *Dazet* v. *Laundry,* 30 Pa. 1064.

In insurance terminology, the words "cash" and "note" are not used synonymously, and where these words are used in insurance contracts or negotiations, they should be given effect according to their ordinary meaning. The authority of the agent in this case must be determined by the terms of the receipt, as he had no authority to bind the company to a contract of insurance contrary to the express terms of the receipt. Therefore, if the word "cash" in the clause under review means "cash" and not "note," the settlement of the premium in the manner disclosed by this record was *ultra vires. State* v. *Moore,* 167 N. W. 876; *Hoffman* v. *Hancock Mutual Life Ins. Co.,* 92 U. S. 161-164.

In *Dunham* v. *Morse,* 158 Mass. 132, A, in order to obtain insurance upon his life at once, instead of waiting for the action of the insurance company on his application, gave a promissory note for the amount of the premium payable to B, an agent of the company, who signed and delivered to A a contract purporting to give such insurance, which was expressed to be subject to certain conditions printed on the back, one of which was that the contract was not valid unless the premium was "actually paid in cash." B tendered the policy

to A, but the latter would not receive it and repudiated the contract. In an action by B against A upon the note, the court held that the note was without consideration. Among other things the court said: "If this premium was not paid in cash, the contract of insurance was not binding on the company. * * *" The insurance company had no knowledge that the defendant had not paid his premium in cash, and did not waive the condition printed on the back of the contract. They might be willing to allow their agent to bind them by a contract if he received the premium in cash, even though he was permitted to deposit it in his own bank account, when they would not be willing to be bound on his promise to pay them if he had no cash, but only a promissory note, as his reliance for the means of performing his promise."

In *Mutual Reserve Fund Life Assn.* v. *Simmons,* 107 Fed. 418-424, it is said: "Aside from any statutory regulations a life insurance company has a direct interest in maintaining the solvency of its agents, through whom large sums are often transmitted to or from it. It has therefore a direct interest in prohibiting them from involving themselves by incautious credits for amounts for which they, the agents, are holden responsible in cash and from loading themselves with unavailable assets with reference to any sum for which they must account."

Where an insurance agent has authority to solicit applications for insurance and to conduct the negotiations on the part of the company in closing up an insurance contract, unless such agent's authority is limited as to the time and mode of payment of premiums, he may accept notes or cash or both. "When no special mode of payment is stipulated for, any mode of payment which is accepted without objection on the part of the insurers or their agent will suffice." 2 May on Insurance, § 345; 1 Joyce on the Law of Insurance, § 80 (a), p. 293, and cases cited in notes. Now, when the provisions of the application, the policy, and the receipt in regard to the

payment of premiums are considered, it is clear that two modes were specified for the payment of premiums. By the one method there is no completed contract of insurance until the premium is paid in cash in full, or by cash and note, and until the policy has been issued and delivered while the applicant is in good health. By the other method, the one adopted by the agent and the applicant in this case, the insurance took effect immediately upon the approval of the completed application by the company's medical director, regardless of whether the policy had been issued and delivered or not.

By the one method which we will call the "first," the premium must be paid "in full in cash" and the policy must be delivered while the applicant is in good health. But the first part of the receipt shows that the agent is authorized to waive the full payment in cash and to accept in payment of the premium part cash and a note for the residue. Where the agent and the applicant adopt this, the first method, if the company issues the policy and same is delivered to the assured, it will be conclusively presumed, in the absence of fraud, that the requirement of full "cash" payment was waived, and that the policy was delivered during the good health of the applicant. The insurance will then be in full force and effect from the date of the policy. *O'Grier* v. *Mutual Life Ins. Co., supra.; Kendrick* v. *Ins. Co.,* 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592. See *Home Fire Ins. Co.* v. *Stancill,* 94 Ark. 578; *American Trust Co.* v. *Life Ins. Co.,* 92 S. E. (Va.) 706.

By the other, the "second", method, there must be a full "cash" settlement of the premium with the application. If there is, and the company's medical director approves the completed application, then the insurance takes effect and becomes a completed contract as of the date of such approval. It will be observed that the word "cash" has the same signification, whether the "first" or "second" method be adopted, and there is no conflict between the provisions of the application, the policy, and the receipt concerning the payment of the premium.

We are not confronted with any issue of waiver, or estoppel by course of conduct on the part of appellee, because there is no evidence upon which to predicate such issues. Under the first method above outlined, while the premium was paid, there was no delivery of the policy and hence no completed contract of insurance. Under the second method, while there was evidence tending to prove that the completed application was approved by the appellee's medical director, there was no "cash" payment of the premium, and hence no completed contract. Therefore, the appellee is not liable either under the allegations of the original complaint, or the complaint treated as amended to conform to the proof.

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

ARKANSAS SHORTLEAF LUMBER COMPANY v. WILKINSON.

Opinion delivered June 20, 1921.

1. MASTER AND SERVANT—INSTRUCTION AS TO MASTER'S DUTY.—In an action by a servant for a personal injury, alleged to be due to the master's negligence in failing to inspect lumber handled by the servant, an instruction that it was the master's duty to protect the servant from danger while in the performance of his duty, and that the master was liable if negligent in making inspection, provided such negligence was the proximate cause of the injury, was erroneous in ignoring the master's contention that it was the servant's duty to inspect the lumber.

2. MASTER AND SERVANT—FAILURE TO INSTRUCT.—Where, in an action by a ripsawyer for a personal injury, it was the master's contention that it was the duty of the plaintiff, and not of a fellow-servant, to inspect boards for defects for the purpose of protecting plaintiff, it was error to refuse an instruction which would have submitted this issue to the jury.

3. MASTER AND SERVANT—DUTY OF INSPECTION—INSTRUCTION.—In an action by a servant for personal injuries, where it was the duty of a fellow-servant to inspect lumber to see that the same was free from defects liable to injure plaintiff, and such fellow-servant was negligent in discharge of this duty, the master was liable.

4. MASTER AND SERVANT—LIABILITY OF CORPORATE EMPLOYER—INSTRUCTION.—In a servant's action against a master for personal injuries, an instruction as to the liability of a corporate employer which is a literal copy of Crawford & Moses' Digest, § 7144, though abstractly correct, is erroneous and misleading when given without hypothetical statements showing how it would be applicable to the facts in the case; being tantamount to a peremptory instruction for plaintiff and in conflict with other instructions.
5. MASTER AND SERVANT — ASSUMED RISK.—An instruction that a servant assumes only known risks, the danger of which is comprehended by him was erroneous where it ignored the issues (1) whether the injury was due to the servant's failure to perform his duty of inspection, in which case he assumed the risk whether he knew of the danger resulting from his failure to perform such duty or not, and (2) whether he assumed the risk of the injury complained of because it was obvious.
6. MASTER AND SERVANT—BURDEN OF PROOF—INSTRUCTION.—In an action by a ripsawyer for injury to his eye struck by a splinter from defective lumber, an instruction was erroneous which placed on the defendant the burden of showing that the plaintiff knew and appreciated the danger; it being proved that he was an experienced employee of mature years.
7. MASTER AND SERVANT—ASSUMED RISK.—If a ripsawyer, injured by a splinter from a defective board, knew that the board was defective, or if the board was so obviously defective that a man of ordinary care must have known it, he assumed the risk, even if a fellow-servant neglected his duty to inspect the board.

Appeal from Grant Circuit Court; *W. H. Evans,* Judge; reversed.

Mike Danaher and *Palmer Danaher,* for appellant.

1. There was misconduct of counsel for plaintiff in examining veniremen. The statements made were not true, and were prejudicial and resulted in an excessive verdict. 104 Ark. 1, 9; 38 Cyc. 1479.

2. There was also misconduct of counsel for appellee in his opening statement to the jury which constituted reversible error. 81 Ark. 231. Counsel have no right to introduce matters foreign to the issues before the jury. 38 Cyc. 1500; 43 A. L. R. 146, 451; 41 N. H. 325; 9 Am. St. Rep. 560.

3. It was error to admit testimony as to mental an-

guish of plaintiff and as to appellee's family. Such testimony was not admissible. 54 Ark. 354. Mental suffering cannot be proved directly by any one except the sufferer. 7 Allen (Mass.) 118-124; 169 Ala. 131; 53 So. Rep. 80. Appellee was also permitted to state that he was worried because he did not know how he was "going to get by with his little children." This was clearly inadmissible. 89 Ark. 58. Mental suffering from apprehension as to the future of one's family is not the natural results of the injury, but depends upon pecuniary conditions and social relations of his family in the future, and this was a direct appeal to the sympathy of the jury, and prejudicial. 69 Tex. 694; 7 S. W. 77; 57 Kan. 40; 45 Pac. 60; 79 N. E. 685. Testimony as to the size of his family, and that he was its sole support, and that his wife was dead, etc., was clearly inadmissible. 74 Ark. 326; 100 *Id.* 535.

4. Testimony of witness that he relied on inspection was erroneous and prejudicial and was not cured by the court's remarks that it was not competent. 60 Ark. 76; 100 *Id.* 116. The testimony was wholly irrelevant. The testimony as to the reliance of the witness or appellee upon the inspection of others was not admissible. 22 C. J. 617; 97 Ill. App. 7; 12 N. Y. S. 306.

5. The testimony of the optometrist as to the condition of plaintiff's eye and the chance of improvement was incompetent, as he was not a physician or oculist and was not an expert, and his opinion was worthless and inadmissible.

6. Doctor Crump's testimony as to what would happen to the other eye and plaintiff's condition if the other eye were destroyed, was mere conjecture and inadmissible, as was also the testimony of W. H. Walker, the superintendent. Testimony regarding similar accidents is inadmissible. 58 Ark. 154; 130 *Id.* 491; 99 N. W. 114; 40 Cyc. 2420.

7. Improper questions were asked Doctor Jones. A question in the form of an assertion suggests an af-

firmative answer and is objectionable. 40 Cyc. 2425. See, also, 40 Cyc. 2433 and 2517; 15 Ark. 252.

8. Testimony as to the price of lumber was palpably irrelevant and hormful.

9. Appellee's testimony that he relied on another inspection and thought there was no danger. This was by the use of glaringly leading questions, and was prejudicial and error. 97 Ill. App. 7; 12 N. Y. S. 306.

10. Testimony as to what would have happened under circumstances which did not really exist was not admissible. 22 Cyc. 514.

11. A question answered is properly excluded. 40 Cyc. 2437. Leading questions are improper and should not be allowed. 40 Cyc. 2422.

12. Hearsay evidence is not admissible. 22 C. J. 199.

13. The corporate existence of appellant was not proved. None of the testimony introduced by appellee to prove that appellant was a foreign corporation was admissable or sufficient for that purpose. 14 Cyc. 174. Our courts do not take judicial knowledge of the laws of other States. 71 Ark. 177. The evidence was wholly insufficient to show the existence of a foreign corporation.

14. The court erred in its instructions to the jury, both in giving and refusing those asked. No. 1 was obscure and unintelligible and it further assumes certain facts as proved. 38 Cyc. 1600. It should have left it to the jury to find the facts, and not assumed them as true 38 Cyc. 1658 and Arkansas cases cited. No. 2 was also error, as it makes the master liable as an insurer of the safety of an employee and imposes on him an impossible degree of care, ignoring the rule that he is required to exercise only ordinary care. 26 Cyc. 1102. The defenses of appellant were wholly ignored. 17 C. J. 1061.

15. It was error to give the third request for appellee. 99 Ark. 69-76. Also error to give the fifth instruction for plaintiff. The definition of contributory negligence on part of appellant is error.

16. The seventh request of appellee was error, as it singles out and unduly emphasizes a proposition of law. 75 Ark. 76-86; 38 Cyc. 1680.

17. Instruction No. 8 for appellee was a peremptory instruction and should not have been given. C. & M. Digest, § 7144; 63 Ark. 477-484. The interpretation of the language of statutes is for the court, and not for the jury. 102 Ark. 205-7.

18. The ninth instruction for appellee was palpable error. It ignored the facts that only the present value of the reduction of future earnings should be awarded. 17 C. J. 906. Nor did it correctly state the rule as to the assumption of risk. 26 Cyc. 1204. And it further placed the burden of proof on appellant to show that appellee knew and appreciated the dangers, while the contrary is the rule—that the servant is presumed to know the ordinary risks of his employment. 82 Ark. 11, 17.

19. The eleventh instruction for appellee was error. Appellee assumed the risk.

20. The appellant's instructions correctly stated the law, and it was error to refuse them. 26 Cyc. 1092, 1248, 1297; 60 Ark. 582; 5 Thompson on Negl. (12 ed.) 69, par. 5417; 32 So. Rep. 15. It was also error to modify instruction No. 11. 32 Cyc. 745.

21. It was error to refuse appellant's thirteenth request. A servant assumes all obvious risks of the work in which he is employed. 118 Ark. 304; 95 *Id.* 560. It was error to modify it as the court did. It is the absolute duty of a servant to observe patent defects. 58 Ark. 125-130. See, also, 41 Ark. 542-9; 81 *Id.* 346; 101 *Id.* 201; 135 *Id.* 480-9.

22. Appellee assumed the risk of this accident, and the court erred in its instructions, given and refused. 135 Ark. 480-9; 26 Cyc. 1236; *Ib.* 1202-3; 97 Ark. 486-9.

23. The verdict is not sustained by the evidence. 70 Ark. 385-6.

T. M. Nall and *Rowell & Alexander,* for appellee.

1. The opening statement of counsel for appellee was not prejudicial.

2. The testimony as to mental anguish of appellee was withdrawn by the court upon objection. 100 Ark. 122.

3. The testimony of witness that he relied on inspection was not error.

4. Appellant's objections to the testimony of the optometrist are not well taken. He was qualified to treat the vision of the eye, and he was duly licensed and had been on the State board, and his profession is recognized in forty-six States, and numerous other countries. He was a competent witness under our decisions.

5. The testimony as to other accidents was invited by questions asked by appellant, and if error was invited error. 126 Ark. 615; 137 Id. 228. The decisions cited by appellant do not control this case.

6. No error in the questions asked Doctor Jones.

7. There was no error in the testimony as to the price of lumber. There was a dispute as to the grade of lumber.

8. Appellee's testimony that he relied on another inspector and thought there was no danger, was not error. The cases cited by appellant are not in point nor parallel.

9. Testimony as to what would have happened in circumstances which did not really exist was not error here.

10. No hearsay evidence was admitted, as the record shows.

11. The corporate existence of appellant was properly proved. 131 Ark. 273; 114 *Id.* 344; 134 *Id.* 23; 227 S. W. 609; 140 Ark. 135; 95 *Id.* 588.

12. Appellant has not properly set out the instructions in his abstract or brief. We do so, and no reversible error appears. On the whole, they state the law of this case. 93 Ark. 564; 109 *Id.* 288; 101 *Id.* 197; 126 Ark. 449.

13. The judgment of a lower court will not be reversed upon the weight of evidence if there be any legal

evidence to support it; there must be a total failure of evidence to sustain it. 15 Ark. 540; 97 *Id.* 87; 97 *Id.* 442.

The question of contributory negligence was for the jury, and their verdict, on proper instructions as here, is final. 143 Ark. 106. Similar cases to this are found in 102 Ark. 562; 85 *Id.* 503; 93 *Id.* 88.

The act of 1907 applies to all corporations and the burden is on defendant to prove contributory negligence. 92 Ark. 502; 174 S. W. 222. It was for the jury to say how the injury occurred, and they have settled it by their verdict. 103 Ark. 476; *Ib.* 61.

14. The verdict is not excessive, and the evidence sustains it. 107 Ark. 512.

WOOD, J. The appellant is a Missouri corporation operating sawmills in the State of Arkansas. Appellee was in its employ in the capacity of a "ripsawyer." The appellee's duties required him to take from a table near by boards of lumber that had been placed thereon and to feed these boards to the ripsaw; that is, to push the boards against the saw in order to rip them into narrow boards. When the saw thus passed through the boards, they were taken out by an employee at the other end who was called the "tailer." The boards handled by the appellee were first conveyed on endless chains from the downstairs of the plant, and as they reached the second floor they were taken off the conveyors by a negro employee called a "passer" or "puller," and were placed on a table to be handled by the appellee.

On the 30th of March, 1920, about 2 o'clock p. m., the appellee had pushed a board to the saw and was standing with another board ready to go through when the saw clicked and a splinter flew out, striking the appellee in the left eye and severely injuring him.

The appellee brought this action against the appellant to recover damages for the injury, and he alleged that the injury was caused by the negligence of the agents and servants of appellant in charge of receiving lumber from the floor below in not inspecting the lumber and dis-

carding that which was defective on account of splinters and knots, which it was their duty to do. The appellee alleged that it was his duty to run the lumber through the saw, one piece following another, without interruption, and therefore he did not have time other than to casually cast his eye to the table for a piece of lumber; that he had no time to inspect same for defects, and therefore, he did not know of this defect, but it was known, or in the exercise of ordinary care should have been known, to the servant whose duty it was to inspect the same before placing it on the table for handling by the appellee; that the failure of appellant's servant to discharge his duty as alleged was the cause of appellee's injury, for which he asked a judgment for damages in the sum of $20,000.

The appellant answered, denying all material allegations of the complaint and set up the defenses of contributory negligence and assumed risk on the part of the appellee.

The appellant testified, among other things, that when the lumber came from downstairs it was the duty of the man that stands by the chain and pushes the boards off on to the table, called the lumber passer, to inspect that lumber. Only high grade, first-class lumber, clear of knots and splinters, passed to the appellee's saw. Any lumber that was not proper to go to that saw was passed back to the other machine or thrown aside—"that was what the 'passer' was supposed to do." This passer was a colored man, who had been working at the job about a week. Witness heard Walker, the superintendent, and Mitcham, who kept up the saws, tell the passer to inspect the lumber and to put nothing but the best lumber there for appellee to handle, and he relied on the passer doing his duty. In describing his own duties, appellee stated that it was his duty to keep the lumber cut, keep the machine going, and keep them in stock, and he did not have any time to inspect the lumber on the table, and it was not his duty to do so. He had to keep his eye on the machine all the time. Witness further explained that

he received his injury on account of a shattered and splintered piece of board. The splinter came right out from the saw under the board. If the inspector had done his duty, a board with splinters could not get to the table from which the appellee took the lumber that he passed through the saw. Appellee had once filled the position of "passer," and knew what his duties required. Appellee was told that this colored passer was inspecting the lumber, and appellee relied on his performance of that duty. Other witnesses testified corroborating the above testimony of the appellee as to the respective duties of the ripsawyer and the "passer," and to the effect that if the "passer" had exercised ordinary care to inspect the lumber he could have detected a piece of lumber that had a large splinter on it, or a knot.

On the other hand, there was testimony on behalf of the appellant tending to show that it was the duty of the ripsawyer himself to inspect the lumber, before he put it through the ripsaw and "not to put through the saw any (boards) that were not fit to make into the stock he was making;" that appellee was instructed by appellant's superintendent and also by appellee's foreman not to rip anything that would not make three-eighths stuff; that it was the duty of the ripsawyer to see that they were running clear lumber on No. 3, and, in case the off-bearers from the chain put stuff on appellee's table that was not suitable for the flooring, to throw it out. It was the duty of the lumber "passer" to a certain extent to inspect the lumber as he took it off the chain to put it on the ripsawyer's table, and he had been expected to do so. The only purpose in instructing them to put good lumber on appellee's table was to get the best stock into a thin "veneering flooring." It was not to protect the appellee in any way. All of them that pulled the boards off the chain on the table were told to always pick the lumber and get good stuff for that saw, but sometimes they got a bad piece on there, and they told the fellow who was ripping to throw it out if it was not fit to make three-eighths stuff.

There was also testimony on behalf of the appellee to the effect that lumber pullers were usually negroes. They ordinarily used inexperienced common labor for that job. There was also testimony adduced by the appellant tending to prove that the machine which the appellee was operating was protected by a hood and guides so as to keep splinters and dust and particles from the saw from flying out and striking the operator above the waist line. The ripsawyer wore a leather apron to protect him against the splinters and knots that might fly from the saw and to help him hold the plank to the guide line. If he were in an erect position, it would be impossible for a splinter from the saw to strike him in the eye. Appellee had been instructed not to stoop down and look in the machine while he was operating the same. At the time the appellee received the injury, he was stooping over looking into the saw and punching with a stick about twelve or fourteen inches long. The appellant's superintendent had seen the appellee several times stooping down looking into the machine while operating the same, and he had cautioned him every time about that.

In instruction No. 1, given at the instance of the appellee, the court told the jury in substance that, if appellee was injured by want of ordinary care upon the part of the servant of appellant in failing to properly inspect the lumber placed upon the table for the appellee to handle, and this failure to inspect was the proximate cause of the injury to the appellee, the appellant would be liable; that it was for the jury to say from the evidence whether the appellee was in the performance of his duty at the time of his injury, and whether the appellant failed to exercise ordinary care to *protect the appellee from danger* while in the performance of his duty, and whether such want of ordinary care, if shown, was the proximate cause of the injury to the appellee.

In instruction No. 2 the court told the jury that the duty rested upon the appellant to permit no act of negligence whereby its servants may suffer injury and to exercise ordinary care to *protect him from danger;* that

if they believed the appellant failed to exercise ordinary care to properly inspect the lumber placed upon the table for the appellee to pass through his machine, and a piece of defective lumber was placed upon the table for appellee's use which was the proximate cause of the injury to the appellee by causing a large splinter to be thrown therefrom, striking the appellee in the left eye, while he was operating the machine and using ordinary care for his own safety, without warning to him, and injured him, and that appellant thereby failed to exercise ordinary care to *protect plaintiff from danger,* and that the act of the servants of appellant in failing to properly inspect the lumber was the proximate cause of the injury to appellee, they should find for him and assess his damages at such sums as they found from the evidence would compensate him for the injury received, unless they found that he was guilty of contributory negligence or had assumed the risk as defined in other instructions.

In instruction No. 8, given at the instance of the appellee, the court instructed the jury that "every corporation, except while engaged in interstate commerce, shall be held liable in damage to any person suffering injury while he is employed by such corporation resulting in whole or in part from the negligence of such corporation or from the negligence of any of the officers, agents or employees of such corporation."

Instruction No. 10 is as follows: "No. 10. Before it can be said that plaintiff assumed the risk in this case, you must find from the evidence that plaintiff not only knew of the danger to which he was exposed by reason of the employment and service, and which caused the injury, but also comprehended and appreciated such danger, or ought to have appreciated and comprehended the same, and the burden of showing that the plaintiff did know of and did appreciate such dangers rests on the defendant, unless this fact is shown by the plaintiff's own testimony or that of his witnesses."

Among others the appellant asked the following instruction: "No. 6. If you find from the evidence that the reason for instructing other employees to place on Wilkinson's table only high grade boards was merely to select boards suitable for the manufacture of a particular kind of finished lumber, and not for the protection of the operator, your verdict will be for defendant."

The court modified and gave appellant's prayer for instruction No. 18, the modification being indicated by the words set forth in italics, as follows: "Even if you find from the evidence that another employee of the defendant was negligent in allowing a defective board, or a board of low grade, to reach Wilkinson, if you further find from the evidence that Wilkinson knew that the board he placed in the machine was of low grade, or defective, and that it was more likely to splinter than a board of high grade, or one not defective, or if these facts were so obvious that an ordinarily prudent person, in the circumstances, would have been aware of them, and appreciated them, your verdict should be for defendant, *unless you find from the evidence that it was the duty of another employee of the defendant's to inspect the board and that Wilkinson relied on him so to do.*"

The appellant asked the instruction without the modification, and objected to the ruling of the court in modifying, and giving it as modified.

The trial resulted in a judgment and verdict in favor of the appellee. From that judgment is this appeal.

1. The court gave an instruction to the effect that the jury could not single out any one instruction given by the court, but must consider all of the instructions together as the law of the case by which they were to be guided in arriving at their verdict. In *Southern Anthracite Coal Company* v. *Bowen,* 93 Ark. 140, 149, 150, we said: "Each instruction must be read as a whole and all of its parts must be considered in determining its meaning, and when reference is made in one instruction to some other part of the charge, or when words are used in some

instructions that are correctly defined in others, the other parts of the charge referred to and the other instructions must be considered in determining whether or not the particular instruction under consideration are correct." The rule is well stated in *St. L. S. W. Ry. Co.* v. *Graham,* 83 Ark. 61, as follows: "It is generally impossible to state all the law of the case in one instruction; and if the various instructions separately present every phase of it as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others."

Applying the above rule to the instructions of the court in the case at the bar, we find that the court's charge, when considered as a whole, did not correctly declare the law applicable to the issues and to the facts which the testimony tended to prove. The appellee bottomed his cause of action on the alleged negligence of the appellant in failing to have the lumber which appellee was handling properly inspected. Appellee alleged that this duty devolved on a servant called the "passer," and that he negligently failed to discharge that duty. The appellant defended the action on the ground that it was the duty of the appellee himself to inspect such lumber, and that such inspection as was required of the "passer" was not for the purpose of protecting the appellee, but to aid the appellee in securing as the output from the ripsaw a certain quality of high grade lumber called "veneering flooring," which it was the duty of the appellee to produce, and that appellee's injury was therefore incident to the risk which he assumed and was caused by his own negligence. The appellee did not allege that the appellant was negligent in failing to exercise ordinary care to furnish him a safe place in which to work, nor appliances with which to do the work, nor in the employment of unskillful or inefficient fellow-servants to aid him in the performance of his duties.

Such were the issues, and the testimony adduced warranted the court in submitting them to the jury. But the court erred in not submitting these issues in appro-

priate and correct instructions, and its charge as a whole was not harmonious and consistent, but was well calculated to mislead the jury. For instance, the court, in its first and second instructions given at the instance of the appellee, told the jury in effect that it was the duty of the appellant to protect appellee from danger while in the performance of his duty, and, if the appellant through its agents and servants failed to exercise ordinary care to inspect the lumber placed on the table to be handled by the appellee, and such failure was the proximate cause of the injury to the appellee, then the appellant was liable. The instructions as thus framed wholly ignored the contention of the appellant that it was the duty of the appellee to inspect the lumber himself, and that no such duty was required of the "passer" in order to make appellee's place of work safe and to afford protection to the appellee.

The court refused appellant's prayer for instruction No. 6, in which appellant sought to have its theory on this phase of the case presented to the jury, and we do not find that any instruction was given covering appellant's theory and contention. There was evidence to justify such contention, and the court erred in ignoring it. On the issue of negligence, the court should have told the jury that if under the evidence it was the duty of the appellee to inspect the lumber to see that it was free from splinters, knots and other defects, and he failed to perform this duty which resulted in his injury, he assumed the risk, and the appellant was not liable; but on the other hand, if it was the duty of appellant's servant, the "passer," to inspect the lumber to see that the same was free from defects liable to produce the injury to appellee and to afford him protection from such defects while passing the lumber through the ripsaw, and the passer negligently failed to discharge this duty, and such failure was the proximate cause of the injury to the appellee, then the appellant was liable.

If it was the duty of appellee to make the inspection, then the injury resulting from the failure to perform

this duty was one of the ordinary risks of the employment which he assumed. But if the duty devolved on the appellant's servant to inspect the lumber in order to afford the appellee protection, then the appellee did not assume the risk resulting from a failure on the part of the "passer" to perform that duty, unless such failure of the "passer" subjected the appellee to a danger which was so open and obvious that appellee was bound to know of and appreciate it in the performance of his own duties and in the exercise of ordinary care to protect himself from the ordinary risks and dangers incident thereto.

Instruction No. 8, given at the instance of the appellee, is a literal copy in part of the statute, 7144, Crawford & Moses' Digest. It is therefore correct as an abstract proposition of law, but the court erred in giving it without hypothetical statements showing how it would be applicable to the facts developed in the case. Without such explanation, it was calculated to mislead the jury, and was tantamount to a peremptory instruction in favor of the appellee, and is in conflict with other instructions. *K. C. F. S. & M. Ry. Co.* v. *Becker,* 63 Ark. 477, 484; *St. L., I. M. & S. Ry. Co.* v. *State,* 102 Ark. 205-207.

Instruction No 10, given at the instance of the appellee, was erroneous because it also ignored the theory of the appellant that it was the duty of the appellee to inspect the lumber for himself. If such were appellee's duty, then he assumed the risk, whether he knew of the danger resulting from a failure to perform such duty or not. He also assumed the risk of obvious defects. It is also erroneous because it placed the burden of proof upon the appellant to show that the appellee did know and appreciate the danger. The proof shows that appellee was an employee of mature years and experience. It is not alleged and not pretended that the appellant owed him any duty of instruction or warning. If it was his duty to make the inspection, the risk of injury from failure to perform this duty was one of the ordinary risks which he is presumed to know. *C., O. & G. R. Co.* v. *Thompson,* 82 Ark. 11.

The court erred in modifying appellant's prayer for instruction No. 18 by adding the words in italics, for if the appellee knew that the board was defective, or, if the defect was so obvious that a man of ordinary care must have known it, then he assumed the risk, even if it was the duty of the appellant's "passer" to inspect the boards. *E. L. Bruce Co.* v. *Yax,* 135 Ark. 480.

It would unduly extend this opinion to comment further upon the numerous specific assignments of error concerning the rulings of the court in giving and refusing prayers for instructions. It is believed that what we have already said will be a sufficient guide to the lower court in framing its charge on a new trial. We have already pointed out errors in this respect of which the appellant has the right to complain. There were other errors in some of the prayers for instructions, but they were not prejudicial to the appellant. There were sixty-two assignments of error as grounds of appellant's motion for a new trial, but many of these rulings upon which error is predicated may not arise on another trial, and hence we do not comment upon them. For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

CITY OIL WORKS *v.* HELENA IMPROVEMENT DISTRICT NO. 1.

Opinion delivered June 30, 1921.

1. EMINENT DOMAIN—DAMAGES TO INDUSTRIAL TRACK.—In an action to condemn a right-of-way for a levee, an instruction limiting the damages to be recovered to the value of the land actually taken in the construction of the levee and denying defendant's right to recover on account of the levee being built across an industrial track to its oil mill was erroneous where it was not shown that the practical use of the oil mill had been destroyed on account of its being left outside of the levee by construction of the new levee.

2. EMINENT DOMAIN—LIABILITY OF LEVEE DISTRICT FOR FAILURE TO INCLUDE LAND.—A landowner whose property is left outside of a levee is not entitled to damages because of the failure to pro-

tect his land, or because the levee as constructed may prevent water from flowing off his land as it otherwise would or may deepen the water in an overflow of the land between the embankment and the river.

3. EMINENT DOMAIN—LIABILITY FOR DAMAGES TO PROPERTY OUTSIDE LEVEE.—Although a levee district is not liable for damages inflicted by the river upon land situated outside of the levee, it does not follow that it should not be liable for damages produced by independent causes other than being outside of the levee, if these elements of damage are proper.

4. EMINENT DOMAIN—DAMAGES TO INDUSTRIAL TRACK.—Where the usefulness of defendant's oil mill was not wholly destroyed by being left outside of a levee, it was entitled to recover damages for the building of a levee across its industrial tracks, rendering them useless.

5. EMINENT DOMAIN—DAMAGES—EVIDENCE.—In a proceeding to condemn property for levee purposes, evidence *held* not to show beyond dispute that the defendant's oil mill was rendered valueless because the levee was constructed so as to leave it on the outside.

6. EMINENT DOMAIN—DAMAGES.—In a proceeding to condemn land for levee purposes, where the evidence showed that the construction of the levee across defendant's industrial track prevented defendant from carrying freight to and from the oil mill over the industrial track, the damage so caused was not due to the oil mill being left outside of the levee, but was caused by the levee itself, and constituted a damage to the remainder of defendant's property for which the defendant should be compensated.

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

STATEMENT OF FACTS.

This action was brought in the circuit court by Helena Improvement District No. 1 against the City Oil Works to condemn a right-of-way over property belonging to the defendant in Helena, Ark., for the construction of a levee. Subsequent purchasers of the property from this defendant were also made defendants.

They answered, setting up damages by reason of the actual taking of a part of the land and the injury to the remainder.

The board of commissioners for the levee district and the engineers were witnesses for it at the trial of the

condemnation proceedings. According to their testimony, the levee was first constructed in front of the oil mill of the defendants, and the levee protected the mill from the high waters of the Mississippi River. There was a subsidence in the levee. By this is meant that the levee sank down, and the cause of it was the soft foundation. The subsidence was in that part of the levee in front of the mill. The commissioners of the levee district expended about $20,000 in trying to repair and maintain the levee in front of the oil mill. They were unable to do so, and, after the levee had sunk down again and a part of it had caved into the river, it was deemed advisable to construct the levee behind the oil mill. In doing this, they used about six-tenths of an acre of the land on which the oil mill was situated and built the levee across an industrial railroad track which had been extended from the main track of the railroad company to the oil mill for the purpose of carrying freight to and from the mill. This left the oil mill in front of a levee sixty feet high and without means of carrying its freight from the mill to the tracks of the railroad company. The value of the land upon which the mill was situated was $1,000 per acre.

According to the testimony of G. W. Willey, the president and manager of the oil mill, his company was engaged in crushing cotton seed and in the cotton seed oil business. It is impractical to operate an oil mill of that size without an industrial track. After the levee was constructed behind the oil mill, it destroyed the industrial track so that the company was unable to move its freight to and from the mill to the railroad. It was impractical to operate the mill after the levee had been constructed across its industrial track, so that cars could not be brought from the railroad track to the mill for the purpose of loading and unloading. The value of the plant before the levee was constructed behind it was $70,000. After that its value was practically destroyed, and it was necessary to sell the machinery piece by piece.

He further stated that this would have been prevented if the old levee had been permitted to remain. According to his testimony, also, the construction of the new levee made it impossible to operate the plant. The reason given was that the levee occupied that portion of the ground that had been formerly used for trackage purposes, and the construction of the levee, which was sixty feet high across the industrial track leading into its mill, damaged the property the whole value of the mill. The reason that the taking deprived them from operating the mill was because it was impossible to maintain thereafter a railroad connection. In short, the taking of the particular piece of land and the building of the levee across the industrial track practically destroyed the value of the mill, and made it impracticable to operate it.

No subsidence has occurred in the old levee in front of the mill since the construction of the new levee behind it. Accretions are forming in the river in front of the mill and willow trees are growing up there.

The jury returned a verdict for the plaintiff and assessed the value of the land taken by it in the sum of $60.

From the judgment rendered, the defendants have duly prosecuted an appeal to this court.

Moore & Vineyard and *W. G. Dinning,* for appellants.

1. The court erred in overruling appellants' exceptions to the competency of certain jurors. Residents and taxpayers of a municipality are disqualified as jurors in actions affecting the interests of the municipality. 60 Ark. 221; 119 Ind. 368; 5 L. R. A. 253; 81 Kan. 616; 28 L. R. A. (N. S.) 156; 115 La. 757; 5 Ann. Cases 920; 57 Ore. 236; Ann. Cases 1913-A, 117. The jurors objected to were not qualified jurors in this case.

2. The improvement district is liable to appellants for the damages caused to their property as a whole by

the building of the levee across a portion of their lands. Private property can not be taken or damaged for public use without just compensation therefor. Const., art. 2, § 22; *Id.*, art. 5, § 32, and art. 12, § 9. This court has settled the law as to the elements of damage arising in favor of landowners by reason of eminent domain proceedings. The owner is entitled to recover all damages caused by increased difficulty of ingress and egress caused by the construction of a railroad. 41 Ark. 431. The manner in which a railroad cuts up the land, the amount and location of the land taken, the inconvenience to the owner in passing from one part of his land to another, the absence of proper crossings and the overflow of the land, are proper elements of damage. 44 Ark. 360; 51 *Id.* 330. See, also, 39 Ark. 167. The measure of damages for taking the land for right-of-way is the market value of the land taken and the damage to the remaining land from the building of the road across it and from floods and overflows caused by its construction. 78 Ark. 83. See, also, 88 Ark. 129; 94 *Id.* 206; 5 A. L. R. 723, 727. The court below ignored the well-known rule of these cases, and prejudicial error resulted to appellant. The measure of damages and amount of recovery is not limited by the provisions of C. & M. Digest, § 3940. The provisions of said section, in so far as they attempt to deprive the owners of property in this State of the rights guaranteed by our Constitution, are void. The owner is entitled to full compensation for all the damages done by taking his land. The appellants attempted to have all the issues submitted to the jury by asking a number of instructions, but the court erroneously refused to give them. The error was prejudicial.

P. R. Andrews and *J. G. Burke,* for appellee.

1. The overruling of exceptions to the competency of certain jurors on the ground that they were owners of land in the district has never been passed on by this court, but see 43 Ark. 324. See, also, 94 Ark. 563. Under the rulings of this court the jurors were not disqualified.

2. As to the measure of damages and recovery is limited by C. & M. Digest, § 3940.

3. There was no error in the instructions given or refused. The principles were settled in 95 Ark. 345-51. That case is conclusive of this. See, also, 230 U. S. 34. There was no error in refusing to submit the issues raised by the instructions to a jury.

HART, J. (after stating the facts). There is no conflict in the testimony that it was necessary to construct the new levee in order to protect the lands within the district from the overflow of the Mississippi River. It is conceded that the commissioners acted in good faith in locating and constructing the new levee, and that this was within the power of the commissioners under the act creating the improvement district.

The evidence shows that the levee, as originally constructed, was between the oil mill of the defendants and the Mississippi River. So it may be said that the oil mill was on the inside of the levee. By the construction of the new levee the oil mill was placed outside of the levee. In other words, the oil mill of the defendants is between the new levee and the Mississippi River. There was an industrial track extending from the oil mill of the defendants westward to the main line of a railroad. The levee was constructed across the industrial track on a part of the land of the oil mill. The levee as constructed was sixty feet high and destroyed entirely the use of the industrial track of the oil mill. So that communication from the mill with the railroad by cars operating on the industrial track was entirely cut off.

In instructing the jury at the request of the plaintiff, and in refusing to give instructions asked by the defendants, the court limited the damages to be recovered to the value of the land actually taken in the construction of the levee, and denied the defendants the right to recover on account of the levee being built across the industrial track running from the main line of the railroad to the oil mill of the defendants. This was error. The

ruling on this point would have been correct if the uncontradicted evidence had shown that the practical use of the oil mill had been destroyed on account of its being outside of the levee by the construction of the new levee.

In *McCoy* v. *Bd. of Dir. of Plum Bayou Levee Dist.*, 95 Ark. 345, the court held that a levee district may rightfully build its levee across depressions, swales and low places so as to prevent the escape of flood water from a river into surrounding low lands sought to be protected, though it has the effect of raising the water higher on lands between the levee and river, without becoming liable to the owner of such interevening lands so damaged.

The court further held that a levee district, which builds a levee so as to protect lands from overflow of the waters of a stream at flood time, will not, under article 2, § 22, of the Constitution of 1874, providing that private property shall not be "taken, appropriated or damaged for public use without just compensation therefor," become liable for injuries to land lying between the levee and the river resulting from the flood water being raised higher between the levee and the river than before the levee was constructed.

In *Jackson v. United States,* 230 U. S., p. 1, and *Hughes* v. *United States,* 230 U. S., p. 24, the court held that the United States is not responsible for damages by overflow or for failure to construct additional levees along the Mississippi River so as to afford increased protection from increased overflow caused by the levees that were constructed by State and Federal authority at other points; nor do such damages amount to taking the land overflowed for public use within the meaning of the Fifth Amendment.

Under the rule announced in those cases, the landowner is not entitled to damages because of the failure to so construct the levee as to protect his land from the waters of the Mississippi, or because the levee as constructed may prevent such water from flowing off as it otherwise would, or it may deepen the water in an over-

flow on the land between the embankment and the river. The intention of the Legislature was to protect the lands in the improvement district against the waters from the Mississippi River by constructing a levee for that purpose, and, if it was necessary to construct the levee so as to leave property between it and the river, this would in the very nature of things be unavoidable. Hence it has been held that the landowner must submit to the consequent loss resulting to him as his misfortune to be borne for the general good.

Therefore, the levee district is not liable for damages inflicted upon the land by the Mississippi River. But it does not follow that the levee district should not be liable for damages produced by independent causes other than being outside of the levee, if these elements of damages are proper in other condemnation proceedings. This rule is supported by the decisions of the Supreme Court of the State of Mississippi. A section of the Constitution of that State excludes compensation for damages accruing to land "because it is left outside the levee." The court said that the words used in the Constitution presents the idea of defenselessness against the ravages of the Mississippi River.

In *Duncan* v. *Board of Mississippi Levee Comm'rs* (Miss.), 20 Sou. 839, the court said: "All damages, therefore, which accrue to lands from the ravages of the river because not protected against it by the levee are not to be compensated for. But damages produced by independent causes other than being left outside the levee, if, in their nature, allowable within the rules of law, are still recoverable."

Again in the case of *Richardson* v. *Levee Comm'rs* (Miss.), 9 Sou. 351, the court held that the landowner is not entitled to compensation because the construction of the levee renders the land lying between it and the river practically worthless for agriculture and necessitates the removal of houses to the protected side of the levee, as these are consequential damages. In discussing the ques-

tion the court said: "The landowner is not entitled to damages because of a failure to so place levees as to protect his land from the water of the Mississippi, or because the levee may prevent such water from flowing off as it otherwise would, and may deepen the water in an overflow on the land between the embankment and the river. These are consequences of the situation, and the authorized effort to promote the general good by the construction of levees, and must be borne, because they are unavoidable in the nature of things. The legislative scheme is to protect against water from the Mississippi River by an embankment sufficient for the purpose, and it is to be put where the board intrusted with the execution of the scheme may determine; and the landowner must submit to any inconvenience or disadvantage or loss resulting to him consequentially as his misfortune, to be borne for the general good, to which individual convenience must be subordinated, except where it is otherwise provided. *Commissioners* v. *Harkleroads,* 62 Miss. 807." * * * "That damage caused by the success of the scheme in confining the water of the river is excluded seems clear, and has already been announced. That all other damage which is not remote, and arises directly from the taking of part for levee purposes, resulting to the owner's adjacent land immediately from the constructing of the levee, is to be compensated for, seems as clear as the denial of damage by the river. This is consonant with natural justice, and it may be assumed that it was the legislative purpose to secure to the owner whose land is taken for a levee, indemnity for all damage done him as to the adjacent land he owns, not arising from the accomplishment of the object of the levee, and directly produced by depriving him of so much of his land as is taken from him, and converting it into such a shape as to do harm to his adjacent land. We are not willing to declare a rule more precise than this, for, while there may be a general resemblance in all cases of land near the river, there must be individual differences, and

each must be governed by its own peculiar circumstances, subject to the general rules announced."

It results from these views that if the undisputed evidence had shown that the oil mill of the defendants had been rendered practically useless by the construction of the new levee so as to place the mill outside of the levee, and the mill could not thereafter be operated, the owner could not recover damages for the consequent depreciation in the value of his property or the cost of removing the mill and its machinery to another site where the mill could be operated. The reason is that the damages suffered under such a state of the record would follow as an incident to the construction of the levee so as to leave the property outside of its protection.

The undisputed evidence in the case at bar, however, does not show that the oil mill was rendered valueless as an oil mill because the levee was constructed so as to leave it on the outside of the levee. It is true there is some confusion in the testimony on this point, but, when the evidence is given its strongest probative force in favor of the defendants, it does not appear to us that the oil mill could not be operated at all because the construction of a new levee placed it between the levee and the Mississippi River.

The evidence does show that the oil mill was greatly depreciated in value on this account. According to the testimony of the defendants' witnesses, it was rendered impractical to operate it because the new levee was constructed across the industrial track leading from the railroad to the oil mill, and thus the oil mill company was prevented from carrying cars over the industrial track to and from its mill for the purpose of loading and unloading freight. The evidence for the defendants shows that it was impractical to operate the oil mill without this connection. According to their testimony, however, it was not wholly impractical to operate the oil mill because it was on the outside of the levee. To sum up, the evidence shows that, before the new levee was con-

structed, the oil mill was worth $70,000. Suppose the uncontradicted evidence had shown that the construction of the new levee rendered the property valueless as an oil mill, and that it could not be operated as such on account of the ravages of the waters from the Mississippi River, then the defendants would be only entitled to recover the value of the land taken, and the instructions given by the court would have been correct.

It is fairly inferable, however, from all the evidence, that, while the oil mill property was materially injured by being placed outside of the new levee, still it was practical to operate it, if its industrial track had not been destroyed by the construction of the new levee. This shows that the construction of the new levee across the industrial track was an independent cause which rendered the oil mill property valueless as such and made it impracticable to operate it.

The error in the instructions of the court evidently arose from the fact that it considered the construction of the levee across the industrial track as a mere incident instead of an independent cause producing damages. It is true the only practical way to construct the new levee was to build it across the industrial track. The evidence for the defendants shows that such construction damaged their oil mill property because it prevented the defendants from carrying cars of freight to and from the oil mill over the industrial track. Manifestly this was not damage accruing because of the oil mill property being left outside of the levee, but the damage accrued because of the construction of the levee over the industrial track. In short, this damage was caused, not because the property of the oil mill company was unprotected by the levee, but it was caused by the levee itself. Whether inside or outside of the levee, the damage to the oil mill in this respect was caused by the building of the levee itself, and not by reason of the fact that the oil mill was left outside of the levee. The facilities afforded by the industrial track for the transportation of freight be-

tween the railroad and the oil mill was a valuable property right which belonged to the oil mill company, and its injury by the appropriation of the land on which it was situated and the construction of the levee across it constituted a damage to the remaining property for which the defendants should be compensated. *Chicago, S. F. & C. Ry. Co.* v. *McGrew* (Sup. Ct. of Mo.), 15 S. W. 931, and *N. Y., N. H. & H. R. R. R. Co.* v. *Blacker* (Mass.), 59 N. E. 1020.

In the latter case the court in discussing a similar question said: "The fact that his land was situated on the line of the railroad, and at a level with it, so that spur tracks could be (as they were) built, running onto it, made it valuable for any business which could be economically carried on by having freight delivered to it directly from the cars without the expense of handling and carting. That was an element which in fact gave, or might have given, value to this land, and which could properly be considered in determining what the fair market value of it was."

The holdings in those cases are in accord with our own decisions. In *K. C. So. Ry. Co.* v. *Boles,* 88 Ark. 533, the court held that, although several lots of land sought to be condemned for railway purposes are separated by an alley, they may be treated as parts of a single tract for the purpose of determining the damages if the testimony shows that they are used as a unit.

In *St. L., Ark. & Tex. R. Co.* v. *Anderson,* 39 Ark. 167, the court held that the elements of damages in condemnation proceedings are not alone the market value of the land actually appropriated, but include also the injury to the owner of the remaining land arising from the increased difficulty of communication between the parts of the several tracts, etc.

It follows that the court erred in not submitting to the jury as an element of damages the loss suffered by the defendants on account of the levee having been constructed across the industrial track so as to cut off con-

nection between the oil mill and the railroad by means of the industrial track.

For this error the judgment must be reversed and the cause remanded for a new trial.

SMITH, J., dissents.

BOTHE v. NOACK.

Opinion delivered June 20, 1921.

1. SPECIFIC PERFORMANCE—RIGHT OF BENEFICIARY OF CONTRACT.—One for whose benefit a contract for the sale of land was made is entitled to enforce it according to its terms, though he never signed the contract.
2. SPECIFIC PERFORMANCE—RIGHT OF THIRD PARTY TO.—Where a contract for the sale of land between plaintiff and one defendant provided that another defendant should sign the purchase notes, the latter, by signing the notes, accepted the terms of the contract, namely, that if he paid the notes he should be substituted to the other defendant's rights and have specific performance.
3. VENDOR AND PURCHASER—FORFEITURE FOR NONPAYMENT OF FIRST NOTE.—Where a contract for the sale of land provided that a third person should sign the purchaser's notes, and that, in the event the purchaser should be unable to complete the payment of the purchase price, the third person should pay the notes and be substituted to all the rights of the purchaser, a failure of the purchaser to pay the first note when due was not such a breach of the contract as would prevent him from having specific performance; the contract not providing for such substitution upon default as to the first note only, and there being no provision that upon default on one note all should become due.
4. VENDOR AND PURCHASER — RIGHT TO SPECIFIC PERFORMANCE.—Where a contract for the sale of land provided that, if the purchaser should be unable to complete the payment of the purchase notes which were payable on or before a certain date, a third person who signed the purchaser's notes should pay the notes and be substituted to the purchaser's rights, the purchaser had the right to have specific performance if he paid the notes on or before the maturity of the last note.
5. TENDER—SUFFICIENCY.—Where a contract for the sale of land provided that if the purchaser should be unable to complete the payment of the purchase notes, which were payable on or before a certain date, a third person who signed the purchaser's notes

should pay them and be subrogated to all the purchaser's rights, and the third person paid all of the notes before the last one became due, a tender by the purchaser of the full amount paid by the third person before maturity of the last note was sufficient, without the amount being paid into court.

6. COUNTERCLAIM AND SET-OFF—WHEN COUNTERCLAIM ALLOWED.—In an action by a purchaser for specific performance of a land contract defendant can not set up a counterclaim for the recovery of money growing out of an independent transaction; as a counterclaim is allowed only in actions for recovery of money and must tend in some way to diminish or defeat plaintiff's recovery.

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

STATEMENT OF FACTS.

B. F. Noack brought this suit in equity against H. Bothe and Chas. Scheuer and Martha Scheuer, his wife, to cancel a deed executed by the Scheuers to Bothe to 170 acres of land in Arkansas County, Arkansas, and to have specific performance of a contract in writing by Chas. Scheuer to him to the same land.

Bothe defended the suit on the ground that Noack had breached his contract with Scheuer and was not entitled to the specific performance of it, and that under its terms he was entitled to a deed to the land from Scheuer.

The contract which is the basis of this lawsuit was in writing and was signed by Chas. Scheuer and Martha Scheuer and B. F. Noack on the 26th day of July, 1919. The body of it is as follows:

"Parties of the first part have this day sold to second party under conditions hereinafter named the following lands situated in the Southern District of Arkansas County, Arkansas, towit: (Here follows description of the lands.)

"The purchase price is to be paid as follows: $100 cash in hand, the balance as follows: Second party hereby assumes the payment of one certain mortgage given to the American Investment Company, of Oklahoma City, Oklahoma, for the sum of $3,500; first parties are to pay the interest upon $3,500 to the first day

of August, 1919, and second party is to pay all interest accruing after the first day of August, 1919. Second party shall pay the remainder of the purchase price as follows: $2,000 January 5, 1920, and $2,900 January 5, 1921. However, it is agreed between the parties hereto that, in the event the year 1920 be a poor crop year, or if second party does not make an ordinary crop, and is unable to pay the sum of $2,900 January 5, 1921, then he is hereby given the option to pay the sum of only $1,450 upon said 5th day of January, 1921, and in the event he only pays $1,450 on January 5, 1921, then he shall pay the other remaining $1,450 on the 5th day of January, 1922. That part of the unpaid purchase price which is to be paid directly to the first party shall bear interest from this date until paid at the rate of eight per cent.

"First parties hereby warrant that they have a fee simple and merchantable title to the aforesaid land, and when that part of the purchase price due to them is paid in full they will make to second party a good warranty deed to said land, and will release and relinquish unto him all rights of dower and homestead in and to said lands, and to that end the said Martha Scheuer, wife of Chas. Scheuer, does release said dower rights and homestead.

"Second party shall execute to the first parties his promissory note for that part of the purchase price which is to be paid directly to first parties, and the said notes are to be signed by H. Bothe. In the event second party should be unable to complete the payment of the purchase price, then Mr. Bothe is hereby given the right to pay the aforesaid notes, and, in the event he does so pay said notes, he shall be substituted to all rights of second party under this contract, and he shall be entitled to have from first parties the said warranty deed.

"First parties agree to deliver to second party full and complete possession on or before the 5th day of January, 1920.

"Second party agrees to install a rice well, pump and fixtures, and have the same ready for operation for the pumping season of 1920.

"Two notes of $1,450 each shall be executed to secure the payment of $2,900 aforesaid, these notes shall be due and payable January 5, 1921, unless second party is unable because of poor crop to pay both of said notes at that time. In the event that he is unable to pay both of said notes January 5, 1921, then he shall only pay one of said notes on said date, and the other note shall be paid January 5, 1922."

According to the testimony of B. F. Noack, he paid Scheuer $15 to bind the contract for the purchase of the land before the written contract was executed. Bothe paid the balance of the $100 recited in the contract as having been paid upon the date of its execution. The first note described in the contract for the purchase of the land was for $2,000 due January 5, 1920. Noack did not receive notice from the bank which held the note for collection that it was due. The first Noack thought of it being due was on the 14th day of Janaury, 1920, when Bothe asked him where he was going to move. Noack responded that he was going to move on the place that he had bought from Scheuer. Bothe then said that he had paid the purchase price of the land, and that the land was his. Noack tried to get him to go to DeWitt with him so that he could get the money and pay off the notes given to Scheuer for the purchase price of the land. Bothe refused to go with him, saying that Noack would not be able to get the money. Noack told him that he could borrow the money. Afterward Noack borrowed $5,400, the balance of the purchase price due on the land and tendered it to Bothe. Bothe refused the tender. Gartus Mumsen lent the money to Noack with which to pay for the land. His testimony corroborated that of Noack to the effect that the money was tendered to Bothe, and he refused the tender.

H. Bothe was a witness for himself. According to his testimony, the bank demanded payment of him of the

$2,000 note due January 5, 1920, and, Noack having failed to pay the note, Bothe paid it. He knew that Noack had no money or property, and that nothing could be made out of him by suit. On January 14, 1920, Bothe paid off the remaining notes and demanded a deed to the property from Scheuer. The two remaining notes were made payable on or before a certain date. Bothe knew that Noack was not able to pay these notes and he elected to pay them off before they became due to stop interest. Noack had not taken possession of the land at this time. Noack at that time was a tenant on Bothe's land and owed him a supply account of $639.44, which has not been paid. The land in question has greatly increased in value since the execution of the contract copied above.

Chas. Scheuer and Martha Scheuer, his wife, executed a deed to the land to Bothe when he paid off the purchase money notes. Subsequently B. F. Noack entered into possession of the land and has held possession of it since.

The chancellor found the issues in favor of B. F. Noack, and it was decreed that the deed from Chas. Scheuer and Martha Scheuer, his wife, to H. Bothe should be canceled and the title to the land in controversy was divested out of H. Bothe and vested in B. F. Noack. Bothe was given a lien upon the land for the sum of $5,355.21, the amount of the purchase price of the land paid by him. Noack was given ninety days within which to pay Bothe said sum of money, and in the event of nonpayment, the land was ordered sold for the payment of the same. To reverse that decree H. Bothe has duly prosecuted this appeal.

Botts & O'Daniel, for appellant, Rothe.

1. Every part of a written contract must be taken into consideration in construing it; no part of it or provision of the contract must be disregarded. The whole contract should be considered as an entirety. 104 Ark. 475; *Ib.* 573. The written contract provides that all the notes were to be signed by H. Bothe, and further provides, "in event the party of the second part should be

unable to complete the payment of the purchase price, then H. Bothe is given the right to pay the notes and be substituted to all the rights of the second party under the contract and shall be entitled to have from the first parties a warranty deed." This provision must be given effect to under the contract, and Bothe had the right to be substituted as purchaser and obtain the deed under the contract. 84 Ark. 160.

A tender of money is insufficient unless the tender is kept good by putting the money in the registry of the court. See 90 Ark. 266; 30 *Id.* 505; 33 *Id.* 300; 34 *Id.* 582. In this case the complaint does not even allege that the tender was kept good, or that plaintiffs are willing to keep it good. The written contract and the uncontradicted evidence show that the contract was made between the three parties, and that Noack had the right to the deed under one condition, and that Bothe had an equal right to this deed under a condition. Bothe, as well as Noack, was a principal maker in the notes. They were joint notes, and the written contract provides that under certain conditions the deed should be made to Bothe. Bothe paid substantially the first payment of purchase money, and Noack had not paid a cent, and did not intend to pay the notes. The deed should stand, and the complaint should be dismissed.

2. Plaintiff demurred to the cross-complaint of defendant, and the cross-complaint sets up a good cause of action under our statute of 1917. The old provision relative to setoff and counterclaim was amended by act 207, Acts 1917, p. 1441. This is a very broad provision and speaks for itself. The whole object and purpose of this provision was to give an opportunity to settle all matters in dispute between the parties no matter how they arose. 134 Ark. 311 (314). The contract and facts here are entirely different from those in 135 Ark. 531. The decree of the lower court is not sustained by the law or evidence and should be reversed.

Chapline & Morrison, for appellee.

The cross-complaint does not ask for a money but

for specific performance of a contract. Since the passage of the act of 1917, the law is that a cause of action, either upon a contract or in tort, may be the subject of a counterclaim in any action to recover money. 134 Ark. 314; 135 *Id.* 535. The cross-complaint does not grow out of the contract and is inapplicable to this suit. The demurrer to the cross-complaint was properly sustained. 26 R. C. L. 643; 38 Cyc. 132. The decree is right, and should be affirmed.

HART, J. (after stating the facts). The correctness of the decree of the chancellor depends upon the construction to be given the contract for the purchase of the land signed by Noack and Scheuer on the 26th day of July, 1919.

On the one hand, it is claimed by Bothe that Noack committed a breach of the contract by failing to pay the note for $2,000 due on January 5, 1920, and that therefore he was not entitled to a specific performance of the contract.

Counsel for Bothe contend further that the contract was made for the benefit of Bothe, and that Bothe, having paid the $2,000 note when it fell due and knowing further that Noack could not himself pay the remaining notes, had a right to pay them off before they became due and to take a deed to himself to the land.

On the other hand, counsel for Noack claim that Noack had the right to pay the purchase money at any time before the last note fell due and demand the execution of a deed to himself to the land. He claims that Bothe had no rights under the contract until all the purchase money notes fell due and Noack failed to pay them.

Although Bothe did not sign the contract, it was made for his benefit, and he was entitled to the performance of it according to its terms the same as if he had signed it. The contract between Scheuer and Noack provided that the notes for the purchase money of the land should also be signed by H. Bothe. Bothe signed these notes, and thereby became bound to pay them and accepted the terms of the contract. Thereafter he became interested

in the contract and was entitled to have it performed according to its terms.

We are of the opinion, however, that the contract does not mean that, upon the failure of Noack to pay the first note when it became due, he had committed such a breach of the contract as would prevent him from having specific performance thereof. There is nothing in the contract providing that, upon the nonpayment of one note, all should become due. Neither does the language used indicate that the parties regarded time as the essence of the contract. The contract provides that Noack should assume the payment of a mortgage on the property for the sum of $3,500. Noack is designated in the contract as the second party, and Chas. Scheuer and Martha Scheuer are called the first parties. That part of the contract upon which Bothe relies is as follows:

"Second party shall execute to the first parties his promissory note for that part of the purchase price which is to be paid directly to first parties, and the said notes are to be signed by H. Bothe. In the event second party should be unable to complete the payment of the purchase price, then Mr. Bothe is hereby given the right to pay the aforesaid notes, and, in the event he does so pay said notes, he shall be substituted to all the rights of second party under this contract, and he shall be entitled to have from first parties the said warranty deed."

It will be noted that the language used is that, if Noack should be unable to complete the payment of the purchase price, then Bothe is given a right to pay the purchase money notes and be substituted to the rights of Noack. The contract does not give the right of substitution to Bothe upon the payment of the first note merely. It is true that the last two notes are payable on or before a certain date, but that fact, merely, could not give Bothe the right to be substituted in the place of Noack. It only gave him the right to pay off the notes. Noack had the right to have the specific performance of the contract if he paid the purchase money notes off before they all finally became due. It did not make any dif-

ference that he did not have the money himself. He had the right to borrow the money with which to pay the purchase price. This he did, and made a tender of the amount due to Bothe before the last two notes fell due.

We hold that under the terms of the contract Bothe had the right to pay the last two notes on the 14th day of January, 1920, because they were made payable on or before a certain date, but the fact that he paid them before they became due did not give him the right to be substituted for Noack, for the reason that Noack had until all the notes became due before he lost his right to have specific performance of the contract. He made a tender of the amount due which had been paid by Bothe and Bothe declined the tender. Therefore, it was not necessary that Noack should deposit the money in the registry of the court. He stood ready to pay the amount at any time, and the court protected the rights of Bothe by giving him a lien on the land for the purchase money paid by him. *Strickland* v. *Clements,* 83 Ark. 484.

By way of cross-complaint, Bothe asked for judgment against Noack in the sum of $639.44 which Noack owed him on account. Noack was a tenant of Bothe on another tract of land and owed Bothe this amount for supplies furnished him. This was not the proper subject of counterclaim. The suit of Noack was for the specific performance of a contract with Scheuer to convey him a tract of land. We have held that a counterclaim is allowed under our statutes only in actions for the recovery of money, and that the counterclaim must tend in some way to diminish or defeat the plaintiff's recovery.

The suit of Noack for specific performance could in no wise be affected by the recovery of a judgment by Bothe against him for supplies. The two transactions could have no relation whatever to each other and the court properly denied Bothe the right to recover on his counterclaim. *Smith* v. *Glover,* 135 Ark. 531.

It follows that the decree will be affirmed.

GRADY v. DIERKS LUMBER & COAL COMPANY.

Opinion delivered June 20, 1921.

1. FRAUDS, STATUTE OF—PROMISE TO PAY ANOTHER'S DEBT.—In determining whether a particular undertaking to pay for goods furnished to a third person is original or collateral, the intention of the parties at the time it was made must be regarded, and in determining such intention the words of the promise, the situation of the parties, and all the circumstances attending the transaction should be taken into account, the purpose of the inquiry being to determine to whom the credit was originally given.

2. FRAUDS, STATUTE OF — PROMISE TO PAY ANOTHER'S DEBT — JURY QUESTION.—Whether an oral promise to pay for supplies to be furnished to a third person was an original or collateral promise *held* a question for the jury.

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

Johnson & Shaver, for appellant.

The court erred in directing a verdict for defendant. A verdict should not be directed except in cases where, conceding the credibility of the witnesses and giving full credence and full effect to every legitimate inference that may be deduced therefrom, it is plain and certain that plaintiff has made out a case sufficient in law to entitle him to recover. 118 Ark. 432; 107 *Id.* 158.

There was a question for a jury as to whether the credit was originally extended to appellee and was an original undertaking, and it should have been submitted to a jury under proper instructions. Plaintiff's recovery was not precluded by the statute of frauds. C. & M. Digest, § 4862. The intention of the parties governs, and this does not altogether depend upon the expression used but largely upon the situation of the parties. 25 R. C. L., §§ 65-72. See also 20 Cyc., § 5, p. 163; 141 U. S. Reporter 479; 50 N. E. Rep. 529; 87 Ill. App. 409. The promise here was an original undertaking, and not within the statute of frauds. 5 Ky. 63; 16 Ky. L. Rep. 447; 35 Mass. 369. The credit was given to the one promising and not to the one receiving the goods. 19 N. W. 130 It was an

original undertaking and not a collateral one. 75 N. D. 901; 72 Pac. 367; 13 Pa. Superior Ct. Rep. 77; *Speers* v. *Knarr,* Pa. Sup. Ct. Rep. 80, Pa. Sup. Ct. Rep. 581. It was not a promise to answer for the debt of another. 69 N. W. 1004; 215 S. W. 590; 40 Ark. 429; 76 *Id.* 292; 93*Id.* 277. See also cases cited. 31 Ark. 613; 12 *Id.* 174; 45 *Id.* 67; 76 Ark. 292.

There is no better way to interpret the meaning of a contract than by the acts of the parties under it. 46 Ark. 529; 52 *Id.* 65; 55 *Id.* 414; 78 *Id.* 202; 78 *Id.* 418; 80 *Id.* 542; 91 *Id.* 350.

The question should have been submitted to a jury under proper instructions as to the statute of frauds.

Lake & Lake and *Abe Collins,* for appellee.

The court properly directed a verdict for defendant. The oral undertaking to stand for the account is within the statute of frauds and could not be enforced and there was nothing to submit to a jury. 12 Ark. 174.

The promise was collateral in form, and the credit was extended to the parties to whom the goods were delivered. The judgment is sustained by the authorities. 141 U. S. 479; 60 W. Va. 320; 70 *Id.* 475; 102 Ark. 435, etc. Holcomb's statement that he extended the credit to the men is conclusive of this case. 31 Ark. 613; 88 *Id.* 594; 12 *Id.* 174; 153 Mich. 361; 116 N. W. 1090; 67 Wash. 264. Under the law and the evidence, the judgment is clearly right.

SMITH, J. Appellant is the successor in business of the firm of Holcomb & Grady, a copartnership, and brought this suit to recover a sum alleged to be due by appellee. Appellee is a corporation, and had given its employees, Sanders and Cheshire, a contract to get out logs by the thousand, and later made a similar contract with one McWhorter. It became necessary for these men who were to do the logging to have advances of goods, wares and merchandise, and such advances were made by Holcomb & Grady.

At the conclusion of all the testimony the court gave the jury the following peremptory instruction: "Gen-

tlemen of the jury: Under the law, as the court sees it, there is no question to go before the jury in this case. We have a statute in our State, enacted by our Legislature, almost at the beginning of statehood, requiring that what we call a collateral undertaking shall be evidenced by writing, or where any one contracts to stand for the debt of another, it must be in writing; and under that law there is nothing to go to the jury, because there is no question here; no writing was signed up by any one at all, and in cases of that kind the statute says a contract made to stand for a debt, default or miscarriage of another must be signed in writing, and unless this is done it is void."

It is apparent that the instruction is a correct declaration of the law; but it is very earnestly insisted that the court erred in holding that there was no question of fact for the jury; and we have concluded that appellant is right in this insistence.

Inasmuch as the verdict was directed against appellant, we must give to the testimony that view of it most favorable to him, and if the testimony and all reasonable inferences deducible therefrom, thus viewed, have made a case for the jury, the judgment must be reversed.

There is some conflict in the testimony as to how the accounts were carried on the books of Holcomb & Grady, and it is admitted that the accounts were paid only on the approval of the person to whom the goods furnished had been charged. Appellee insists that these circumstances are important for their bearing on the proposition that both Holcomb & Grady expected nothing more from the appellee than to see that the accounts were paid in so far as what the men earned could pay them, and that any balance remaining after crediting the account of each man with what he had received on each pay day was carried, not by appellee, but by the firm of Holcomb & Grady.

Grady, who kept the books, testified that the accounts were kept in the name of appellee by the particular person who bought the goods. But, as appellee con-

tends, these book charges of appellant stand on no higher footing than the form of the promise or the situation of the parties.

It must be confessed that there are isolated statements of both Holcomb and Grady which, standing alone, appear to indicate that the credit was extended to the men themselves, and it was induced solely by the promise of McCurry, appellee's superintendent and agent, to stand for the accounts.

Grady, in his redirect examination, was asked these questions:

"Q. In response to a question by Mr. Lake (counsel for appellee) yesterday, you stated that the Dierks people (appellee) were standing for this account. What did you mean by that phrase?"

"A. Mr. McCurry told us to charge it to the Dierks Land & Coal Company, and that they would see that these accounts were paid.

"Q. Did they say they would see that they were paid or would pay them?

"A. That they would pay these accounts."

The negotiation for the opening of these accounts was conducted between McCurry and Holcomb, who stated that the contract under which the goods were furnished was as follows: "He (McCurry) called me up and said it was Mr. McCurry, with the Dierks people, and that he would have a couple of men down to go logging down at the Reunion grounds, and he would like for us to make arrangements to furnish them, and I told him we would be glad to have the business, and he told me who the two men were, and in a few days the men came down and went to logging and went to trading with us. Q. What did he say about the way for you to carry these accounts? A. He said for us to charge them to Mr. Sanders and Mr. Cheshire, and send the bills to them at Dierks, and the Dierks people would send us a check for the money."

At that time the witness Holcomb, with whom McCurry was conversing over the phone, did not know, and

had never seen, the men to whom the goods were to be furnished.

In detailing the contract made with McCurry, Grady testified: "He told us to furnish these men and make out a statement on the fifteenth and first of each month, and send it in to the Dierks Lumber & Coal Company, and they would pay these bills." And, further, that "Mr. Sanders started trading with us about the last of August, and traded with us until he left the country, and they kept paying his accounts off every time we would send in a statement."

There is an almost unlimited number of cases dealing with the question of whether a particular undertaking to pay for goods furnished to a third person is original or collateral. There is an extended case note to the case of *Mankin* v. *Jones,* 60 S. E. 248, 15 L. R. A. (N. S.) 214. A great many cases are collected and cited in this note. But it is unnecessary to review the authorities on this subject, as the law is well settled by the decisions of our own court. In the case of *Millsaps* v. *Nixon,* 102 Ark. 435, the court said that, in determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded, and in determining such intention the words of the promise, the situation of the parties, and all the circumstances attending the transaction, should be taken into account, the purpose of the inquiry being to determine to whom the credit was originally given. And when that has been done in the instant case, we think there was a question for the jury as to whether or not the credit had not been originally extended to appellee, and that question should have been submitted to the jury.

In announcing this conclusion we have, of course, taken into account only that testimony which tends to support that contention, and have not considered any question of probability or of preponderance of the testimony, as these are properly questions for the jury.

For the error in directing a verdict the judgment of the court below must be reversed and the cause remanded for a new trial.

POWELL v. STATE.

Opinion delivered June 20, 1921.

1. CRIMINAL LAW—HARMLESS ERROR.—If it was error for the presiding judge to testify in a criminal case, such error was harmless where his testimony related to a circumstance about which there was no dispute.

2. CRIMINAL LAW—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.—The jury in a criminal case are not bound to accept as true all of the testimony of the State nor of the defendant, but may find the truth to be partly on one side and partly on another.

3. CRIMINAL LAW—HARMLESS ERROR.—It was not prejudicial error to refuse to charge the jury that defendant was not guilty of rape where the jury found him guilty of carnal abuse.

4. RAPE—CONVICTION OF CARNAL ABUSE UNDER INDICTMENT FOR RAPE.—Under an indictment for rape of a female under sixteen years of age, a conviction of carnal abuse may be had.

5. CRIMINAL LAW—ORDER OF EXAMINATION OF WITNESS.—It was within the trial court's discretion to permit the State to recall a witness for further examination after the State had closed its case.

6. RAPE—PROFERT OF INFANT.—It was not error to permit the prosecutrix in a rape case to produce the child alleged to be the result of the intercourse with defendant where the age of the child was an important circumstance, and its appearance would have a probative value in determining that question.

7. CRIMINAL LAW—EVIDENCE—COMPETENCY.—It was not error to permit the prosecuting attorney, on cross-examination of defendant, to ask him whether he had not illegally cohabited with his first wife before he married her, where the court limited the competency of such testimony to the defendant's credibility.

8. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY.—Where it was the theory of the State that the child of the prosecutrix was begotten as the result of her illicit intercourse with defendant, it was not error for the prosecuting attorney to refer to the baby as the defendant's.

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

STATEMENT OF FACTS.

Appellant was indicted at the February, 1921, term of the Crittenden Circuit Court for the crime of rape, alleged to have been committed by forcibly and carnally knowing one Myrtle Johnson, a female under the age of sixteen. The presiding judge was subpoenaed as a witness for appellant, and on March 3, the day of trial, appellant filed a motion to disqualify the judge on that account. The court overruled the motion, and, in doing so, stated that he had previously advised counsel for appellant that T. W. Davis, a former prosecuting attorney, knew every fact in the case known to the judge, and that the said Davis was at the time a resident of an adjoining county. Thereupon a motion for a continuance was filed in order that the attendance of Davis might be had.

The motion for continuance was overruled, and, after the conclusion of the State's testimony, counsel for appellant examined the presiding judge as a witness in the case, after duly saving exceptions to the action of the court in refusing to vacate the bench.

At the conclusion of all the testimony in the case appellant prayed an instruction directing the jury to return a verdict of not guilty, and, when that prayer had been refused, asked another instruction directing the jury to find him not guilty of the crime of rape. This instruction was also refused, and exceptions saved.

Other assignments of error relate to the admission of testimony and the argument of the prosecuting attorney; but it is finally, and most earnestly, insisted that the testimony does not support the verdict, in which appellant was found guilty and his punishment fixed at twenty-one years in the penitentiary.

Appellant is the stepfather of Myrtle Johnson, who lived with him as a member of his family at the time of the alleged acts of sexual intercourse. At the trial she exhibited her baby which she said was the son of appel-

lant Tom Powell. She did not say when the baby was born, but she did testify that "they say it is two years old now, going on three." This witness was very ignorant. She testified that she was fifteen years old in September before the trial, that she had never gone to school, and had never kept company with boys. She further testified that no one had ever had sexual intercourse with her except appellant. That on an occasion about three years before the trial appellant gave a dance, at which time he had a keg of beer with which he regaled his guests. That, early in the next morning after the dance appellant came to the bed in which she was sleeping with appellant's little girl, that she did not consent and told him not to do it, and she called for her mother, but her mother did not answer, and appellant proceeded to accomplish his purpose.

Myrtle Johnson's statement that the act of intercourse had occurred about three years before the trial would roughly or approximately correspond with a possible date of conception. In the cross-examination of this witness she was indefinite and uncertain about the time of the intercourse, except that she said it occurred the morning following the Fourth of July.

Appellant denied his guilt and testified that he had never given but one dance on the Fourth of July, and had not given a dance since that date, and that the Fourth of July dance was given in the year 1914. Appellant and witnesses who attended this dance stated that they were sure of the year, because it was the year in which the World War began. Myrtle Johnson further testified that she became unwell for the first time the night after appellant first carnally knew her, and that he repeated the act a few days later.

The trial judge testified in the case, and in response to questions by appellant's counsel, stated that at the preceding term of the court the grand jury had under investigation the question of Myrtle Johnson's ruin, and that the grand jury came into open court with her and

reported to the court that the said Myrtle Johnson had refused to disclose the name of the father of her child, but, on the contrary, had testified that no one had ever had sexual intercourse with her.

Other facts will be stated in the opinion.

Hugh Haden and *Berry & Wheeler,* for appellant.

1. The State failed to prove that the offense occurred within three years, beyond a doubt. 110 Ark. 170; 135 *Id.* 224. It was the affirmative duty of the State to show this, and the burden was not met.

2. There is no legal evidence to support the verdict. Well known facts concerning the phenomena of life need not be proved. Courts take judicial notice of the ordinary period of gestation. 23 C. J. 146, §1969.

3. The presiding judge was disqualified; he can not be both judge and witness. Greenleaf on Ev. (16 ed.) 395; Jones on Evidence Civil Cases 95-8; Wigmore on Ed. 25, 26; Chamberlayn on Ev. 745; 44 Cyc., p. 2234; 17 Am. & E. Enc. Law & Proc., p. 724-5; 144 Pac. 725; 87 S. E. 1005; 178 N. W. 883; 59 N. Y. 374; 44 Pac. 117; 55 Atl. Rep. 644.

4. It was an abuse of discretion by the trial court to refuse a continuance.

5. The opening remarks of the State's attorney were prejudicial and reversible error.

J. S. Utley, Attorney General, and *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. The evidence fully sustains a conviction for rape or carnal abuse. 103 Ark. 119; 76 *Id.* 267. Conceding for argument that the evidence is not sufficient to show the crime of rape, if there was error it was not prejudicial. 73 Ark. 280; 69 *Id.* 76.

2. The evidence sustains the verdict.

3. There was no error in the judge testifying as a witness; no objections were made by defendant. 60 Ark. 76; but, if error, it was invited error, as appellant requested him to do so. 5 Ark. 41; 33 *Id.* 180; 115 *Id.* 392.

4. It was not error to allow the recall of the prosecuting witness after the State had closed to exhibit the child to the jury. 28 Ark. 531; 96 *Id.* 552.

5. There was no error in the ruling of the court in the admission of testimony. 114 Ark. 239; 91 *Id.* 555.

6. There is no error in the instructions, and on the whole case the judgment is correct. Defendant had a fair and impartial trial, and there is no reversible error.

SMITH, J., (after stating the facts). Counsel for appellant cite a number of authorities to the effect that the trial court cannot serve both as a witness and the court in the same trial. In the instant case the trial court might well have refused to testify, for the incident about which the judge was interrogated occurred in open court at the preceding term, and in the presence of the entire grand jury and many witnesses, including, it seems, counsel for appellant. What we have said about the judge is equally applicable to the former prosecuting attorney. The proof of the statements of Myrtle Johnson about the paternity of her child could have been made by numerous witnesses; but there was no necessity for making this proof by the judge or any other witness, for the reason that Myrtle Johnson, at the trial, admitted making the false statements before the grand jury. The circumstances about which appellant desired to examine the judge and the former prosecuting attorney stood as an admitted, undisputed fact at the trial. The witness herself admitted, at the trial from which this appeal comes, that she had sworn falsely before the grand jury; but we cannot, on that ground, say her testimony at the trial should be discarded. She made the explanation that appellant had threatened to whip her with his razor strop if she told the grand jury about him.

Neither can we say that the testimony of Myrtle Johnson as to the time and place and circumstance of the acts of sexual intercourse cannot be credited by the jury. The jury was told that there could be no conviction unless they were convinced beyond a reasonable doubt that appellant had had intercourse with Myrtle

Johnson within three years of the finding of the indictment. Testimony on appellant's behalf appears to show that the only dance given by him on July 4 occurred in the year 1914. But we do not stop to reconcile the contradictions in the testimony of the witnesses. In July, 1914, Myrtle Johnson was only nine years old. Her own age, as well as that of her baby, make it certain that the baby was not begotten at that time.

This court, in the case of *Cooper* v. *State,* 86 Ark. 30—which was a seduction case—said that the jury was not bound to accept as true all of the testimony of the State, nor of the defendant, but might find the truth to be partly on one side and partly on another. So, the jury here may have accepted portions of the testimony, and rejected other portions. Myrtle Johnson testified that appellant was the father of her child, and that the intercourse occurred in July about three years before the trial. This testimony is legally sufficient to support the verdict, and we need make no further recital of the contradictions which appear in the testimony. *Oakes* v. *State,* 135 Ark. 221; *Moore* v. *Thomas,* 132 Ark. 97; *Rose* v. *State,* 122 Ark. 509.

No error was committed by the court in refusing to charge the jury that appellant was not guilty of the crime of rape, for if it be conceded that the testimony was not legally sufficient to support a conviction of that charge, it may be said that he was not convicted upon that charge. The jury acquitted him of the crime of rape, and no error resulted, therefore, in submitting that question to the jury. *Easley* v. *State,* 109 Ark. 130; *Kilgore* v. *State,* 73 Ark. 280; *Rogers* v. *State,* 60 Ark. 76; *Baine* v. *State,* 132 Ark. 416; *Hays* v. *State,* 129 Ark. 324; *Tolliver* v. *State,* 113 Ark. 142.

The indictment in the case charged appellant with the commission of the crime of rape, and that of carnal abuse as well. It was permissible thus to indict him. *Peters* v. *State,* 103 Ark. 119; *Henson* v. *State,* 76 Ark. 267; *Rose* v. *State,* 122 Ark. 509. He was acquitted of the first charge, and was convicted upon the second, on testi-

mony which we have said was legally sufficient to sustain the conviction. No prejudice resulted, therefore, in thus submitting the case to the jury.

Complaint is made of the action of the court in permitting Myrtle Johnson to be recalled for further examination after the State had closed its case. The order of procedure rests largely in the discretion of the trial court, and the action complained of does not appear to constitute an abuse of that discretion.

The child was exhibited to the jury. But this was not error. *Cook* v. *State,* 96 Ark. 552. The age of the child in this case was a highly important circumstance, and its appearance would have probative value in determining that question.

The court permitted the prosecuting attorney, in the cross-examination of appellant, to ask him if he had not illegally cohabited with his first wife before he married her, and appellant answered that he had. In admitting this testimony the court told the jury that the testimony could not be considered upon the question of guilt or innocence of the accused, and expressly limited it to the credibility of the witness. As thus limited, the testimony was competent. *Hunt* v. *State,* 114 Ark. 239; *Ware* v. *State,* 91 Ark. 555.

It is insisted that reversible error was committed when the court permitted the prosecuting attorney to refer to the baby as "Little Tom Powell." This was not error. There was a baby, and the theory of the prosecution was that it had been begotten as a result of the illicit intercourse with which appellant stood charged, and the prosecuting attorney was within the bounds of legitimate argument in referring to the baby as the child of appellant. No error appearing, the judgment is affirmed.

AUGUSTA COOPERAGE COMPANY v. DOWDY.

Opinion delivered June 20, 1921.

1. SALES—EXISTENCE OF CONTRACT—JURY QUESTION.—In an action against a buyer for breach of a contract to purchase all of the ash and gum logs to be cut and delivered during the logging season from the sellers' lands, not to exceed one million feet, where the buyer denied having made such a contract, *held* that the question whether the buyer had entered into such a contract under the evidence was for the jury.

2. CORPORATIONS—AUTHORITY OF AGENT—JURY QUESTION.—Whether the agent of a cooperage company had apparent authority to make a contract to purchase logs *held* for the jury.

3. FRAUDS, STATUTE OF—PART PERFORMANCE.—An oral contract to purchase the entire output of logs during a logging season, not to exceed one million feet, is not void under the statute of frauds where the buyer had accepted and received a part of the logs so sold.

Appeal from Woodruff Circuit Court, Northern District; *J. M. Jackson,* Judge; affirmed.

J. F. Summers, for appellant; *Geo. B. Webster,* St. Louis, Mo., of counsel.

1. Granting that there was a contract, it was within the statute of frauds and not enforceable. The timber claimed was of more than $30 in value, and there was no memorandum of writing, nor any delivery under the alleged parol contract. 79 Ark. 338; 20 Cyc. 247.

2. The instructions given for appellee are vague and indefinite and assume as a fact that Thoma had authority to make the alleged contract. There is no proof in the record to show the quantity of logs nor any place of delivery.

3. The uncontradicted evidence shows that Thoma did not have authority to make a future contract for a season's output of logs. On the question of agency alone for the failure of proof the cause should be reversed. 105 Ark. 111. See, also, 174 S. W. 227; 215 *Id.* 646. Instruction No. 5 for appellee is especially vicious and misleading.

4. It was error to refuse the instructions asked by appellant, as they clearly state the law. 97 Ark. 613.

5. A peremptory instruction should have been given for appellant. 132 Ark. 155; 126 *Id.* 405.

H. M. Woods and *Chas. F. Cole,* for appellees.

1. The contract was not within the statute of frauds. Appellees alleged and proved that they contracted to appellant for that season's entire output of logs and appellant accepted and paid for three separate lots of logs. This was an acceptance of part of the logs and removed the statutory bar. C. & M. Digest, § 5864; 79 Ark. 338.

2. Thoma, who acted for appellant in making the contract, had authority to make it. Appellees dealt with him as a general agent, and had authority to bind appellant. The presumption is, in the absence of notice to the contrary, where one deals with an admitted agent that the agent is acting within the scope of his authority, and the burden is on the principal to show the contrary. 100 Ark. 360; 112 *Id.* 63; 137 *Id.* 418. No attempt was made to show that appellees had any notice of any limitations of Thoma's authority, and the proof shows that they had none. 105 Ark. 111, relied on by appellant, is not in point.

3. A contract was proved, and it was not void under the statute of frauds. Under the undisputed testimony plaintiffs were entitled to recover, and the verdict is not excessive but sustained by the proof.

HUMPHREYS, J. Appellees instituted this suit against appellant in the Woodruff Circuit Court, Northern District, to recover $1,568.40 for 6,000 feet of ash and 60,000 feet of gum logs alleged to have been delivered on the river at Lockhart Ferry, pursuant to an oral contract whereby appellees agreed and contracted to sell to appellant all the ash and gum appellees could cut and deliver during the season with three teams and two saws from appellees' lands in Black River bottom.

Appellant interposed the defenses to the cause of action that (1) it did not enter into the alleged contract; (2) its agent was not authorized to make the alleged

contract, and (3) if such contract was made, it was contrary to the statute of frauds and void, because the value of the logs was more than $30, and the contract was not in writing, signed by the parties.

Relative to the contract, appellees introduced the following witnesses: Arthur Wilson, Albert Wilson, R. A. Dowdy, Cecil Sexton and G. A. Patterson.

Arthur Wilson testified that, as the representative of appellees, he entered into an oral contract with Pete Thoma, as representative of appellant, on or about the 26th day of August, 1920, to sell appellant all logs, during the logging season of 60 to 90 days, that he could cut and deliver with two saws and three teams, off the appellees' lands in Black River bottom; that the price agreed upon was $22.50 a thousand for soft woods, and $35.00 for ash; that Thoma scaled and took up three lots of logs under the contract, and, after the fourth lot of about 66,671 feet was piled on the bank, the place agreed upon for delivery, Thoma refused to scale and take them up; that he said he would write the company; that, later, he stopped on his way up the river and said: "Do you want your logs scaled?" and I said "Yes." "I asked him if he would allow another scale, and he said 'Yes.'" The company's raftsman rolled 4,000 feet of this lot of logs in the river and they were taken up. The others were left on the river bank.

Albert Wilson testified that he heard a conversation between Arthur Wilson and Pete Thoma relative to the purchase of the Dowdy timber; that, after Thoma bought his timber, he introduced the parties; that Thoma told Wilson he would take all the logs he could put out, up to a million feet, and pay $22.00 a thousand for soft woods and $35.00 for ash; that Wilson said he would run two saws and three teams; that he received appellant's check for the logs he sold it; that Thoma bought a great many logs up and down the river for appellant.

R. A. Dowdy testified that appellees employed Arthur Wilson as their foreman to put out their timber in Black River bottom; that he was informed by Wilson

that Thoma had offered to take all Wilson could put out with his force during the season, for $22.50 a thousand; that he told Wilson to let Thoma have all the logs; that the first scales contained a small amount of ash, and he accepted checks in full payment of the statement, in which a small amount of ash was figured in at $27.50 and $22.50 a thousand; that he had not conferred at the time with Wilson and did not know that the agreed price for ash was $35.00 a thousand; that, after Thoma refused to take up the logs, he saw E. J. Chalfant, the manager of appellant company, and Mr. Chalfant said: "If Thoma agreed to take your logs, he will do so;" that, afterward, he saw Thoma in the presence of Wilson, and Thoma did not deny the contract, but said appellant instructed him not to take up any more logs on the bank of the river; that Thoma raised the question about appellees having sold logs to others; that they never let anybody else have logs after Thoma began taking them.

Cecil Sexton testified that he heard Pete Thoma tell Arthur Wilson to get out all the logs he could, stating how many of them he would take at the same price; that, after the logs in controversy were on the bank, he heard Thoma tell Wilson as he came back down the river he would take up the logs.

G. A. Patterson testified that, when Thoma was scaling and taking up logs, he heard him tell Wilson to go ahead and get out all the logs he could; that he would take them; that part of the last batch put on the bank by Wilson was rolled in the river and put in appellant's raft.

Several of the witnesses testified that Thoma selected binders and floats for rafting the logs on appellees' land, and had them cut and hauled to the river bank for that purpose.

Relative to the contract, appellant introduced Pete Thoma, M. F. Collins, Z. S. Massey and E. J. Chalfant.

Pete Thoma testified that he had no authority to buy logs for future delivery; that the only authority given him was to purchase logs on the bank of the river and to buy binders and floats to raft them; that he did not buy

the entire output of appellees for that reason; that he bought three separate lots, on three separate and distinct contracts, from appellees; that he told Wilson as he went up the river that he would scale and take up the logs on the bank of the river, now in controversy, as he came back, but at that time he had not received instructions from appellant company to quit buying logs; that he received notice after that time and refused to scale and take up the logs on the bank as he came back; that he only bought binders and floats which were necessary to raft the logs which he bought outright on the banks of the river as he passed along; that he bought no logs for future delivery.

M. F. Collins testified that, on September 22, 1920, he was at the Lockhart Ferry and heard a conversation between Thoma and Wilson; that Thoma asked Wilson if he wanted his logs scaled, and Wilson said "No;" that Thoma said the log market might go down.

Z. S. Massey, the log superintendent for appellant, testified that Thoma was under him, and he under E. J. Chalfant; that the extent of Thoma's authority was to buy the logs on the bank and binders and floats sufficient to raft them without waste; that Thoma bought logs up and down the river for appellant for five months, and bought one and a half million feet.

E. J. Chalfant testified to the same effect with reference to the authority conferred upon Thoma. He further testified that Mr. Dowdy came to him, and, in trying to convince him that appellant should take the logs left on the bank of the river, he told him that Thoma had gone so far as to point out trees on their land to be cut for floats and binders; that he responded to Mr. Dowdy's argument that he would take any logs which had been pointed out by Thoma and cut and delivered for that purpose; that he did not tell Dowdy that, if Thoma had contracted for the logs, he would take them.

At the conclusion of the evidence, appellant made a request for a peremptory instruction, which was re-

fused, and the refusal of the court to give this instruction is urged as reversible error.

There is a sharp conflict in the evidence as to whether Thoma agreed to buy appellees' entire output of logs to be cut and delivered in the use of two saws and three teams, during the logging season, lasting from 60 to 90 days, not to exceed a million feet, at a stipulated price. On account of the conflict in the evidence, this issue became strictly a jury question, and it was not error to submit that issue to the jury.

Whether or not there is any dispute in the evidence as to Thoma's authority to make a contract for the future delivery of logs has given us some pause, but, after a very careful consideration of the evidence, we have concluded that a reasonable inference might have been drawn from all the facts and circumstances in the case to the effect that he had apparent authority to make the contract. He was the only representative of appellant on the ground, and for five months bought a large number of logs, estimated at a million and a half feet, up and down the river. There was evidence tending to show that, when the dispute arose over the scaling and taking the logs up, the superintendent made no point that Thoma had exceeded his authority, but, on the contrary, said that if Thoma had agreed to take the logs, he would scale and take them up. Dowdy testified that Chalfant made a statement to that effect, and, if he did, it indicates that Thoma did not exceed his authority in making the contract. There being some substantial evidence therefore tending to show that Thoma acted within the apparent scope of his authority in making the contract, it was not error to submit that issue to the jury.

If Thoma had authority to make a contract for future delivery of logs on the bank of the river and made such a contract with appellees, through their agent, the contract was not void, as being contrary to the statute of frauds, for the undisputed evidence shows that he scaled and took up three batches of logs, as well as binders and floats with which to raft them. There was no controlling

issue, therefore, in the case, sustained by the undisputed evidence, which warranted a peremptory instruction, and the court properly refused appllant's request for a directed verdict.

Objections are urged to instructions given and refused. We have carefully examined both. We think every issue presented by the pleadings and evidence was presented to the jury under proper instructions.

No error appearing, the judgment is affirmed.

WITHAM v. STATE.

Opinion delivered June 20, 1921.

1. HOMICIDE—INSTRUCTIONS.—Where in a prosecution for murder there was evidence tending to prove that bad blood existed between deceased and defendant, and evidence tending to disprove that the killing was in self-defense, instructions upon murder in the first degree and upon murder in the second degree were not abstract.

2. HOMICIDE—ABSTRACT INSTRUCTIONS HARMLESS WHEN.—When, under an indictment for murder, defendant was convicted of manslaughter, error in giving abstract instructions upon the higher degrees of homicide, or upon the subject of malice and premeditation, were not prejudicial to defendant.

3. HOMICIDE—INSTRUCTION AS TO VARIOUS DEGREES.—An instruction, in effect, that if the jury found appellant was not guilty of murder in the first degree they might find him guilty of a lesser degree of homicide was not objectionable as impressing upon the jury that the court wanted the defendant convicted of some degree of homicide where the court told the jury that it was their duty to acquit defendant unless they were convinced beyond a reasonable doubt of his guilt.

4. HOMICIDE—SELF-DEFENSE—QUESTION FOR JURY.—Where the evidence was in dispute as to whether defendant employed all the means within his power, consistent with his safety, to avoid the danger to himself, and as to whether the danger was so urgent and pressing that it was necessary to kill deceased in order to save his own life, it was proper to submit that question to the jury.

5. HOMICIDE—EVIDENCE OF FAMILY QUARREL.—Evidence of a family quarrel which took place shortly before the killing was admissi-

ble where it tended to establish a motive for the killing and to show who was the probable aggressor.

6. HOMICIDE—COMPETENCY OF EVIDENCE.—Evidence that deceased was on his way to a neighbor's house to sell some mules was properly admitted as tending to prove that deceased stopped at defendant's home on his way to such neighbor's, without intention to kill defendant or do him bodily harm.

7. HOMICIDE—EVIDENCE—PHOTOGRAPHS.—Photographs purporting to represent the environment of the killing, being properly verified, were competent to show the situation of the parties and the place and conditions connected with the fatal rencounter.

8. HOMICIDE—EVIDENCE—HARMLESS ERROR.—The error, if any, of permitting the State to prove that six years before the killing the witness heard defendant say that he grudged deceased the ownership of his land, and that some day he would acquire it himself, was not prejudicial as it tended merely to prove malice, which was eliminated by the verdict of manslaughter.

9. WITNESS—INCOMPETENCY OF WIFE TO TESTIFY FOR HUSBAND.—Act 159 of 1915 and act 66 of 1919 have not changed the status of married women so as to render her competent to testify in her husband's behalf in criminal cases.

Appeal from Saline Circuit Court; *W. H. Evans*, Judge; affirmed.

Mehaffy, Donham & Mehaffy, for appellant.

1. The court erred in its instructions to the jury, and in its rulings as to the admission of testimony. The wife of defendant should have been allowed to testify. The married woman's acts of 1915 and 1919 have entirely changed the law as to the admission of the testimony of married women for or against their husbands as found in C. & M. Digest, § 3406.

2. The uncontradicted proof that the deceased was the aggressor, and that appellant acted in necessary self-defense. The jury arbitrarily disregarded the evidence, and the verdict is contrary to the law and the evidence.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock*, Assistants, for appellee.

1. There was no error in the instructions given or refused. Appellant was in no way prejudiced by any of the instructions. 109 Ark. 134. Where, under an indict-

ment for murder, defendant is convicted of manslaughter, error in defining the higher grades of homicide is not prejudicial. 60 Ark. 76.

2. There was no error in giving the instructions requested by the State. Malice is an essential ingredient of the crime of murder either in the first or second degree. It may be either express or implied. C. & M. Dig., §§ 2340-1. 136 S. W. 316-22; 3 Words & Phrases (N. S.), p. 462. Even if the court did err in its instructions defining malice, appellant was only convicted of manslaughtr, and was not prejudiced.

3. There was no error in giving the State's request for instruction No. 4. The premeditation and deliberation and determination to do murder may be formulated in the assailant's mind upon the instant; it does not have to exist any appreciable length of time. It is only necessary that it exists when the assailant commits the crime. 133 Ark. 321. But, if the instruction was error, it was not perjudicial. 60 Ark. 76.

4. No proper exceptions were saved nor objections made to the other instructions. 93 Ark. 401.

5. Photographs are admitted as evidence. Underhill's Cr. Ev., § 50; 1 Wigmore on Ev. 792; 103 N. Y. 487; 91 Ark. 179.

6. There was no error in refusing to permit defendant's wife to testify. C. & M. Dig., § 5577; Act 159, Acts 1915; Act 66, Acts 1919. This case is exactly in point with 125 Ark. 471 and is settled by that case.

7. There were no prejudicial errors of law and the verdict is supported by the evidence.

HUMPHREYS, J. Appellant was indicted and tried in the Saline Circuit Court of murder in the first degree, for killing W. L. Pritchard, on the 14th day of January, 1920, in the county of Saline and State of Arkansas, convicted of manslaughter and adjudged to serve a term of three years in the State penitentiary as punishment therefor. From the judgment of conviction, an appeal has been duly prosecuted to this court.

The evidence adduced on behalf of the State is, in substance, as follows: The deceased and accused resided

on adjoining farms, their homes being between two and three hundred yards apart. An old shop stood close to the fence and near accused's home. A sign, directed to keep people out, was posted by the accused on his property near the division line between the two places. So far as appears from the record, the family of deceased consisted of himself, his wife, Mattie Pritchard, two sons, Hampton and Henry, a daughter, Rosie, and two smaller children. The family of the accused consisted of himself, his wife, Matt Witham, a son, Loy, and a daughter, Grace. Mrs. Effie Hoskins, widow, and a daughter of the accused, resided, with her children, consisting of Julia Hoskins and others, upon his place, about three hundred yards distant from his residence and also from the residence of deceased. Both the accused and deceased had bought their respective farms some years prior to the killing, from the father of Mrs. Mattie Pritchard. The accused had tried to purchase the deceased's farm on several occasions. During the course of the trial, over the objection and exception of appellant, Mart Kelt, a witness for the State, was permitted to testify that appellant stated to him, some six years before the killing, that some day he would acquire deceased's place in some way. Ill feeling arose between the accused and deceased in the spring of 1919, occasioned, first, by the accused's dog biting deceased's girl; next, by accused's son cursing deceased's wife; next, over a small indebtedness of deceased to accused; then by a family quarrel during the afternoon before the killing on the night of January 14, 1920. This family quarrel was instigated by Grace Witham, daughter, and Julia Hoskins, granddaughter, of the accused, throwing rocks at the sign. Mrs. Mattie Pritchard came out of her house and told them to quit throwing at the sign. They thereupon reflected upon the character of Mrs. Pritchard, and she threatened to have them arrested. Mrs. Matt Witham, who was standing with her husband, the accused, and Effie Hoskins, near the old shop, witnessing the affair, said: "Come on and let that old fool alone." The evidence relating to the family quarrel was admitted over

the objection and exception of appellant. When her husband came home after sunset from his work, Mrs. Pritchard informed him of the occurrence. They decided to go down to Mrs. Hoskins' and ascertain why she permitted the girls to abuse Mrs. Pritchard. Deceased had planned to go to the home of George Aiken for the night, to purchase some mules. In going, he would pass by the Hoskins home. Mrs. Pritchard and their son went that far with him. Deceased was unarmed. He took his horses with him. The discussion of the family quarrel resulted in a personal difficulty between Mrs. Pritchard and Mrs. Hoskins. In the midst of the fight, Julia Hoskins ran up the road and hollered, "Oh, Grandpa, come down here with your gun, quick; we have got him." After the altercation subsided, Mrs. Pritchard and her son left deceased standing in the road and went to Sam Newcomb's for the purpose of getting him to induce deceased to go away. While at Newcomb's, they heard a shot, but thought nothing of it. Hampton Pritchard asked Mr. Newcomb for a gun, while at his house. Deceased did not return, and his family concluded he had gone on to George Aiken's, where he intended to spend the night. The next morning, about daylight, Henry and Hampton Pritchard went down the road singing, and discovered their father lying in the road, dead, near the place he was left standing the night before. As they approached, they saw Loy Witham and some other persons going from the place where their father was lying, toward accused's home. Deceased was lying across the road, about thirty yards from the Hoskins gate, between two embankments. The distance between the embankments was seven feet. The embankments were sloping. The embankments were from two and one-half to three feet high, and the ground above them was level for four feet or more back to the fence on either side. There were no evidences on the ground of a struggle. Deceased was killed with a shotgun. The charge entered his breast from the front, ranged downward at an angle of forty degrees, and lodged near the right shoulder blade. Sam Newcomb, who viewed the body and surroundings the

next morning, testified without objection that the party who shot deceased was necessarily standing upon the embankment. A pool of blood was found about nine yards from the body, in the direction of the Hoskins home. A barlow knife, belonging to deceased, was lying by the pool of blood, open. The handle and blade were both bloody. Deceased's horses were tied to the fence between his body and the Hoskins gate. About 9 o'clock on the night of the tragedy, the accused appeared at the home of his son-in-law, Louis Tudor, three miles distant, and informed him that he had shot the deceased, and expressed the hope that he had not killed him. The next morning the accused met the sheriff within a mile of town, inquired as to the deceased's condition, and surrendered. Loy Witham had accompanied his father to the Tudor home the night before, but was afraid to go back home. Eli Dunnivan went home with him, and they slept together that night. The next morning, they got up and went to the body. They observed the pool of blood near the body, the bloody barlow knife near the blood. The knife was open. Effie Hoskins and her family stayed at the home of the accused that night, and no one went to the place where deceased was killed. Four pictures, taken about three months after the tragedy occurred, were introduced over the objection and exception of appellant. Sam Newcomb, who was present when the pictures were taken, identified and explained them. In explaining them, he said: "Here is one that I don't understand, some way or other." He followed this statement with an explanation of the picture as representing Witham's house. In identifying and explaining the pictures, he said that the first represented Witham's house, the path in front of it and some lumber and stuff lying by the path; the next, the road to Hoskins' in front of his house; the next, the road to Hoskins' house; and the next, the road at Hoskins' house.

The evidence adduced on behalf of appellant is, in substance, as follows: There had been no family quarrel in the afternoon before the killing, nor any difference

between the accused and the deceased prior thereto, except in August, when the deceased came to the accused's home and charged Loy with abusing his wife. On that occasion deceased threatened to kill Loy and others if the abuse did not stop, if he had to get them from the bushes. Grace and Julia had not thrown at the signboard, nor abused Mrs. Pritchard in the presence of the accused, his wife and Mrs. Hoskins. Deceased, his wife and son had come to Mrs. Hoskins' home about 8 o'clock on the night of the killing, and accused the girls of these things. Mrs. Hoskins resented the charge; whereupon Mrs. Pritchard attacked her, and, during the fight, both deceased and his son struck Mrs. Hoskins. Mrs. Hoskins ordered them away. Julia Hoskins ran up the road and called for the accused. Mrs. Pritchard and her son left. Deceased remained and told them to call the accused, for he came to have it out with him, and that he intended to kill him if he came. Deceased tied his horses to the fence near the Hoskins home; then opened and put his knife in his pocket. Loy and Grace came before accused and his wife. Deceased ordered them to stop, and struck at Grace. When accused and his wife arrived, deceased jumped from behind his horse and told accused he had said if they called him down there he would kill him, and with that, grabbed accused. The accused jerked loose and said, "Stop." Deceased grabbed him again, and as he backed off again, cut at him. When deceased had backed him for a way up the embankment and against the fence, accused jerked loose and shot him. Accused raised the gun in both hands and fired one shot, the muzzle being within two feet of deceased's breast. Accused turned and ran before deceased fell. Accused did not return, or send any one, to see about the deceased. When he got home, he removed his sweater, which had been cut in the affray, and, after putting on other clothes, went to Louis Tudor's, in company with his son, where he remained for the night. Mrs. Hoskins and her children went to accused's home a short time after the killing and remained there. They did not go to the body or see it, but went

around another way. Loy went home by the road, and observed the body of the deceased lying in the road, and passed on.

Appellant first insists that the court committed reversible error in giving instructions 1 and 2, because it is said they are abstract. Instuction No. 1 defined murder in the first degree; and No. 2, in the second degree. We do not think either instruction was abstract. There was evidence tending to show that the deceased, while standing in the road below the embankment, was shot by appellant while standing on the level ground above the embankment; that considerable distance intervened between them when the fatal shot was fired. There was no evidence of a struggle between them—the shotgun used being raised and held in both hands by appellant when fired. The range of the charge was downward at an angle of forty degrees. The evidence of the State tended to show that bad blood existed between them. So, it can not be said that evidence is wanting to show a motive for the killing. These stubborn facts, in connection with the subsequent conduct of appellant in abandoning the body of deceased and not returning to it, are inconsistent with a killing in necessary self-defense. If it could be said the instructions were abstract, no prejudice resulted to appellant on account of the court having given them, because he was acquitted of murder in the first and second degrees. This court said, in the case of *Easley* v. *State,* 109 Ark. 134, "As the defendant was only convicted of murder in the second degree, it is plain, whether the instruction on murder in the first degree was erroneous or not, it did him no harm." Again, in the case of *Rogers* v. *State,* 60 Ark. 76, it was said by the court that "where under an indictment for murder, defendant is convicted of manslaughter, error in defining the higher degrees of homicide is not prejudicial to defendant."

Appellant next insists that the court erred in defining malice. It is unnecessary to analyze the instruction, because malice was not an ingredient of the crime of manslaughter, for which appellant was convicted. Mal-

ice was an essential ingredient of the higher degrees of homicide of which appellant was acquitted. Therefore, no prejudice resulted to him on account of the instruction defining malice.

Appellant next insists that the court erred in submitting to the jury the question of whether there was either deliberation or premeditation existing in the mind of appellant at the time of the killing, for the reason, it is said, that no evidence whatever was adduced to show either deliberation or premeditation on his part. Deliberation and premeditation are not elements of the crime of manslaughter for which appellant was convicted, and no prejudice could have resulted to him on account of the instructions submitting those questions.

Appellant next insists that the court committed reversible error in instructing upon the various degrees of homicide, by saying, in effect, that, if they found appellant was not guilty of murder in the first degree, they might find him guilty of murder in the second degree, or lesser degrees, if convinced beyond a reasonable doubt of the guilt of any one of the degrees of murder. It is said that this manner of instructing the jury impressed upon their mind that the court wanted the defendant convicted of something. We think this position is untenable, for the court distinctly told the jury that, unless they were convinced beyond a reasonable doubt of the guilt of the accused, then it was their duty to acquit appellant. Certainly, reasonable men could not have concluded that the court wanted appellant convicted of some degree of homicide, when pointedly instructed to acquit him unless they believed, beyond a reasonable doubt, that he was guilty of some degree of homicide.

Appellant next insists that the court erred in giving instruction No. 7, requested by the State, which is as follows: "You are further instructed that in order to justify the defendant in killing the said W. L. Pritchard in self-defense that it was the duty of defendant to employ all means within his power and consistent with his safety to avoid the danger and avert the necessity of

taking the life of the deceased, and that the circumstances were sufficient to excite the fears of a reasonably prudent person that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily injury, the killing of the deceased was necessary, and that the deceased was the assailant." Appellant contends that the undisputed evidence showed that he did all within his power, consistent with his safety, to avoid the danger, and that the danger was so urgent and pressing it was necessary to kill deceased in order to save his own life. It is true appellant testified that he did all within his power, consistent with his safety, to avoid taking deceased's life, and that, at the time he fired the fatal shot, the danger to him was urgent and pressing. Other evidence, however, tended to show that, at the time the fatal shot was fired, quite a little distance intervened between the accused and the deceased; that the accused was standing on level ground above an embankment, and the deceased in the road below the embankment at the time the shot was fired; that deceased had not advanced on appellant up the bank and crowded him backward to the fence before he fired the shot; that, on the contrary, deceased was shot and fell in the road, by appellant, who was standing on the level ground above the embankment. The evidence being in dispute as to whether appellant employed all the means within his power, consistent with his safety, to avoid the danger, and as to whether the danger was so urgent and pressing that it was necessary to kill deceased in order to save appellant's life, it was proper to submit that question to the jury.

It is next insisted that the court erred in admitting evidence relating to the family quarrel at 3 o'clock in the afternoon before the killing. According to the State's witnesses, this quarrel occurred in the presence and hearing of appellant. The evidence, in its nature, tended to establish a motive for the killing, as well as tended to show who was the probable aggressor in the subsequent affray. In the first place, appellant stood charged with

all the degrees of homicide, and evidence tending to establish a motive for the killing was admissible on the charge, and, even if appellant had stood charged with manslaughter, the evidence would have been admissible under appellant's plea of self-defense, as tending to show which was the probable aggressor.

Appellant next insists that it was error to admit the evidence of George Aiken and his wife to the effect that they were on a trade for mules and that he had made arrangements to come to their house on Wednesday to see George Aiken about purchasing them. We think this evidence admissible, as tending to corroborate the evidence of other State witnesses to the effect that the deceased stopped at the Hoskins home on his way to the home of Aiken, and had not gone to the Hoskins home for the purpose of killing or doing bodily harm to appellant.

Appellant insists that the court erred in permitting the introduction of four photographs purporting to represent the place of killing, the road between the Witham and Hoskins places and the two residences, for the alleged reason that the photographs were not properly verified. The rule announced in the case of *Sellers* v. *State*, 91 Ark. 175, is relied upon to support the contention. The case cited is not parallel to the instant case, for in that case the photographs were intended to show the situation of the parties and the place and condition connected with the final rencounter. In the instant case, the photographs were introduced for the purpose of aiding in the description of the place where the rencounter occurred, and the relative position of the two residences referred to in the testimony. The photographs in the instant case could have little bearing upon the issues involved, for they in no way attempt to locate the persons engaged in or witnessing the affray during any period from its inception to its ending. They only evidence the place where the affray occurred, and so it was not as necessary to have the photographs as accurately verified as if they attempted to place the persons and their respective posi-

tions, from time to time, in the scene. But if the rigidity of the rule should be applied, we think it was substantially complied with in the instant case. Sam Newcomb was present when the photographs were taken and verified them all. It is true he said, concerning one of them, "Here is one that I don't understand some way or other." He followed up his testimony, however, by saying: "It represent's Witham's house. In front it shows the path, some lumber and stuff. It is 62 feet from Witham's house to the road in front of his house." It will be seen that, while he had some difficulty in understanding it, he did understand it sufficiently to explain it. No claim is made that the physical conditions had been changed after the killing and before the photographs were taken. We think he sufficiently identified each photograph.

Appellant next insists that the court erred in permitting Mart Kelt to testify, in substance, that, some six years before the killing, he heard accused say he grudged deceased the ownership of the land, and that some day, in some way, he would acquire it himself. This evidence only tended to establish a motive for the killing. Any prejudice resulting from the admission of this evidence was eliminated by appellant's acquittal of murder in either the first or second degree, because motive was not an ingredient of the crime of manslaughter, for which he was convicted, and was a necessary ingredient of the crimes of which he was acquitted.

The next and last insistence of appellant is that the court erred in refusing to allow Matt Witham, who was present at the scene of the killing, to testify on behalf of her husband. This court ruled in the case of *Padgett* v. *State,* 125 Ark. 471, that act 159 of the Acts of the General Assembly of 1915, extending the rights of married women, did not relate to the rules for the production of evidence; and hence did not change the rule to the effect that the wife is incompetent to testify for or against her husband in criminal cases. It is insisted, however, that act 66 of 1919 of the General Assembly so enlarged

the rights of married women as to relate to and change the rules for the production of evidence. We are unable to discover anything in act 66 of 1919 of the General Assembly which authorized a married woman to testify for or against her husband in criminal cases. It was ruled in the case of *Comstock* v. *Comstock,* 146 Ark. 266, that act 159 of 1915 and act 66 of 1919, changed the status of married women so as to render husband and wife competent as witnesses for or against each other in suits between themselves. There is nothing, however, in the opinion in the case of *Comstock* v. *Comstock, supra,* nor in either statute, changing or modifying the rule for the production of evidence in suits between third parties and either one of them.

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

CUNNINGHAM v. STATE.

Opinion delivered June 27, 1921.

1. HOMICIDE—INSTRUCTIONS—ASSUMPTION OF FACT OF KILLING.—In a prosecution for murder, where defendant denied that he killed deceased and offered no proof on self-defense, instructions upon self-defense and deliberation and premeditation were not abstract and did not constitute an assumption by the court that the killing was done by defendant.

2. HOMICIDE—INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE.—An instruction that circumstantial evidence is legal and competent, and that "if it is of such a character as to exclude every reasonable hypothesis, other than that the defendant is guilty, it must be received, just as direct evidence is received," *held* not objectionable where considered in connection with other instructions on the subject of reasonable doubt.

3. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—It was not error to refuse to give instructions fully covered by other instructions given.

4. CRIMINAL LAW — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE.—A motion for new trial on the ground of newly-discovered evidence relating to defendant's mental condition at the time of the al-

leged commission of the crime was properly refused where there was no showing of diligence in discovery and production of such evidence.

Appeal from Columbia Circuit Court; *C. W. Smith,* Judge; affirmed.

Henry Stevens, for appellant.

1. The court erred in its instructions given for the State. They are abstract, misleading and prejudicial; also arbitrary, and assume the facts not proved and tell the jury what inference may be drawn from the facts. Hughes on Instructions, §§ 505-6, 309; *Ib.*, § 8; 59 Ark. 422.

2. It was error to refuse the instructions asked by defendant and in amending them and in their modification. The circumstances show a conflict in the evidence and a reasonable doubt of defendant's guilt, and the court should have instructed the jury that the doubt should be resolved in favor of defendant. Hughes on Instructions, § 312.

3. It was error to refuse a new trial for newly-discovered evidence. When one is accused of crime, the question of his sanity or insanity is one for the jury. 133 Ark. 39.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. There was no error in the court's instructions on self-defense. The instructions were properly given, as testimony was introduced tending to show self-defense. A defendant accused of homicide who pleads self-defense must show that he used all means consistent with his safety to avert the danger and avoid the necessity of killing, and if he could avoid the necessity of killing by retreating it was his duty to retreat. 73 Ark. 568.

The admissibility of circumstantial evidence in criminal cases is well settled. 8 R. C. L., § 172, pp. 179-180.

2. The court properly modified appellant's requests. 109 Ark. 383.

3. There was no error in refusing a new trial for newly-discovered evidence. Due diligence was not shown, and the question as to whether or not appellant used due diligence was a question of fact for the jury to determine. 135 Ark. 435. The motion was addressed to the sound discretion of the court, and no abuse of discretion is shown. 41 Ark. 229; 54 *Id.* 364.

McCULLOCH, C. J. Appellant was charged in the indictment with murder in the first degree, but was convicted of voluntary manslaughter. The charge is that he shot and killed Walter Allen. According to the testimony adduced at the trial appellant and Allen were living together in the same house on a farm which Allen had rented from the owner. Appellant was working on shares with Allen. Appellant had a family consisting of a wife and children, but it does not appear from the evidence that Allen had any family, at least none of them lived with him. The house in which they lived was a small one, and was divided by an open hall through the center, and was situated from one hundred to two hundred yards from a public road.

There was no eye-witness to the killing, at least none was introduced as a witness. Allen's body was found lying in the open hall and a double-barrel shotgun which he owned was found in the grasp of his right hand. Two witnesses, Gore and Watkins, testified that on the morning of the day during which the dead body of Allen was found in the hall, they were passing along the road near the house where appellant and Allen lived and saw two men going toward the house talking to each other and one of them was rather excitedly gesturing; that the two men passed behind the house from them and immediately thereafter they heard a gunshot; that after the men passed out of their view they (witnesses) passed along about fifty yards up the road and then saw a man lying in the hall and saw a boy walking across the hall. The boy appeared to be about eight or ten years old, and then witnesses also stated that the boy passed in front of the house after they heard the gunshot. One of the

witnesses testified that he recognized appellant as one of the two men who were walking toward the house shortly before they heard the gunshot. Another witness, Miss Snyder, who lived but a short distance from the house where appellant and Allen lived, testified that on the morning of the day on which the body was found she was out in front of her father's house and saw appellant and Allen just before she heard the gun; that she saw the two men going toward the house talking to each other and gesticulating, and after about the length of time had elapsed for them to get into the house she heard the gunshot; that she saw appellant come out of the house and walk toward a tree in the back yard and then go back to the house, and that he then went down to the field where a Mr. Daniels and appellant's daughter were at work. This witness also testified that she saw a boy go toward the house just before the gun fired, but she did not know whether he entered the house; that the boy was appellant's son and was about nine or ten years old. She recognized appellant and Allen as being the two men whom she saw going toward the house just before the gun was fired.

Appellant testified as a witness and denied that he shot Allen. He testified concerning the trouble which had arisen between him and Allen; that Allen had abused and mistreated him and had also abused his daughter and offered her certain indignities. He testified that on the morning in question he was working in the field when Allen came out and gave him directions about the things to be done on the farm, and that Allen struck him and knocked him down; that the last time he saw Allen the latter directed him to go and get a trespassing animal out of the field. Appellant stated that after looking for the animal, and, failing to find it, he went back through the corn to see if he could find Allen and went to the house after water and saw the body of Allen lying in the hall with the shotgun grasped in his hand. There was other testimony in the case with reference to Allen's conduct toward appellant and toward appellant's daugh-

ter. There are other circumstances detailed in the evidence which are unnecessary to mention.

The court submitted the issues to the jury upon instructions covering all the phrases of the law of homicide, and the instructions were all in the forms which have received the approval of this court. It is not contended that there were errors in any of the instructions, but it is insisted that the court erred in giving an instruction on the law of self-defense and also erred in giving one on the subject of deliberation and premeditation as elements of murder. The argument is that, since appellant denied that he killed the deceased and did not offer any proof on self-defense, these instructions were abstract and were calculated to mislead the jury to appellant's prejudice. The contention is that the giving of these instructions constituted an assumption by the court that the killing was done by appellant. It is unnecessary for us to determine whether or not there was any proof which would have justified a finding by the jury that the killing was done in self-defense. But we do not think that the giving of either of the instructions referred to constituted any assumption of fact by the court. It is not contended that any particular language of either of the instructions assumed the existence of any fact, but the argument is that the mere giving of the instructions on those subjects presupposed that the killing was done by appellant, and constituted an assumption of that fact. It is true that appellant made no claim of self-defense, but, on the contrary, asserted in his testimony that he did not commit the homicide and was not present when it was committed. That issue was properly submitted to the jury, and the instructions on self-defense and on the subject of premeditation and deliberation, as essential elements of the crime of murder in the first degree, were given for the benefit of the accused. Even conceding that there was no evidence to justify a finding that the killing was done in self-defense, we can not say that any prejudice could possibly have resulted from the giving of these instructions. It was tantamount to

saying to the jury that if they found that the accused did the killing they should consider the law of self-defense as declared by the court. We think there was no prejudice resulting from the giving of these instructions.

Objection was made to instruction number 13, which reads as follows:

"The court further instructs the jury that circumstantial evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis, other than that the defendant is guilty, it must be received just as direct evidence is received."

We see no objection to the substance of this instruction, whatever criticism may be made to the form. The proposition of law stated therein is correct when considered in connection with other instructions given to the jury on the subject of reasonable doubt. *Jones* v. *State,* 61 Ark. 88; *Bost* v. *State,* 140 Ark. 254.

The next assignment relates to the ruling of the court in modifying appellant's instruction number 1 by striking out the last sentence, as follows:

"You are instructed, the law presumes the defendant to be innocent of the crime charged, and this presumption continues in his favor throughout the trial, step by step; and you can not find the accused guilty of any of the crimes charged in the indictment until the evidence in the case satisfies you beyond a reasonable doubt of his guilt. *And, as long as you have a reasonable doubt as to the existence of any one of the several elements necessary to constitute the offense or offenses charged, the accused can not be convicted.*"

The instruction was complete without the last sentence, and in this connection with other instructions completely declared the law as to the burden of proof and reasonable doubt. Indeed the language stricken out, when considered as an independent declaration of law, is erroneous. *Carr* v. *State,* 81 Ark. 589.

Instruction number 8 given on the court's own motion and instruction number 7 given at appellant's request stated to the jury, in substance, that it devolved upon the State to prove beyond a reasonable doubt each of the material allegations in the indictment.

The court also modified instruction number 3, requested by appellant, but the language stricken out was also covered by another instruction given on the court's own motion.

Finally it is insisted that the court erred in refusing to grant a new trial on the ground of newly discovered evidence. In the motion for a new trial appellant alleged the discovery, subsequent to the trial, of evidence which tended to prove that appellant at the time of the killing of Allen was insane "or was under such a defective reason as not to have known the nature of the act of killing." It is further alleged in the motion that the fact of appellant's insanity was unknown to appellant's counsel until after the trial and verdict. Affidavits were filed in support of these allegations. It appears from the record that appellant had been living in Columbia County for a number of years, and that his counsel had been personally acquainted with him to some extent for a long time. Appellant was introduced as a witness at the trial in his own behalf, and testified concerning his relations with Allen and all of the things that transpired between them on the day of the killing. There is no diligence shown in the discovery and production at the trial of evidence of appellant's alleged mental incapacity. The fact that the newly discovered evidence related to appellant's mental condition at the time of the alleged commission of the crime does not alter the rules and practices with reference to requiring diligence in testing the sufficiency of a motion for new trial grounded on newly discovered evidence. Diligence must be shown on a motion based on that ground as well as on the ground of newly discovered evidence in regard to other defenses. There are other available remedies for establishing,

either before or after the verdict, the fact of the insanity of the accused at the time of the trial. The accused may, before the trial, cause an inquiry to be made as to his sanity for the purpose of postponing the trial; or after trial when the accused appears for judgment he may show that he is insane. *Duncan* v. *State,* 110 Ark. 523. After the expiration of the term the trial court, upon proper showing of insanity of the accused at the time of the trial, may, when it appears that the question of insanity was not suggested at the trial, issue the writ of error *coram nobis* for the purpose of inquiring into that question, and empaneling a jury for that purpose. *Hydrick* v. *State,* 104 Ark. 43; *Hodges* v. *State,* 111 Ark. 22. It is not alleged in the motion in this case that appellant was insane at the time of the trial, and therefore the court did not treat it as a motion to inquire into the question of the insanity of the accused for the purpose of suspending judgment. *Duncan* v. *State, supra.* The alleged discovery of evidence can not, therefore, afford grounds for a new trial, without the proper showing of diligence.

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

CRAWFORD *v.* HARMON.

Opinion delivered June 27, 1921.

1. ELECTIONS—RIGHT TO VOTE IN PRIMARY ELECTION.—In a primary election those persons were not entitled to vote who were members of another political organization or who were not eligible under the established rules of the political party under whose auspices the primary election was held.

2. ELECTIONS—PRIMARY CONTESTS—UNSIGNED VOTES.—Allegations in a complaint seeking to contest a primary election that the ballots of many persons who voted in certain townships were not signed by the voters, without alleging their names or how they voted, or that their failure to sign their ballots was done fraudulently, or that the election officials failed to keep a register showing the names and number of ballot of each voter, *held* not to state grounds either for disregarding the unsigned ballots or

for discarding the returns in the townships in which such ballots were alleged to have been cast.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran,* Judge; affirmed.

J. D. Benson, J. P. Clayton, T. A. Pettigrew and *Evans & Evans,* for appellant.

This was a Democratic primary election, and it was error to allow Republicans to vote and count their votes. If the illegal votes had been thrown out, appellant clearly received a majority of the votes cast legally. 20 C. J., par. 158, p. 137; 109 Ark. 250; 43 Ark. 62.

The requirement that ballots shall be endorsed is mandatory. 69 Ark. 501; 79 *Id.* 236; 98 *Id.* 505; 108 *Id.* 515. To justify the annulment of an election, it is not necessary to show that a majority of the electors were actually prevented from voting or voted against their wishes; it is sufficient to show that wrongs against the freedom of elections prevailed generally and to the extent of rendering the result doubtful. 53 Ark. 161. See, also, 86 Ark. 259, where the fraudulent conduct of election judges discredited the returns.

G. C. Carter, David Partain and *G. L. Grant,* for appellee.

1. The abstract of appellant is insufficient and discloses no errors.

2. The testimony sustains the findings and judgment below.

3. The court properly sustained the demurrer to the third paragraph. The court did not throw out enough votes to change the result of the election. 85 S. W. 1183; 154 Pac. 2; 44 N. E. 803. Under the evidence and proof the judgment should be sustained.

There was no error in sustaining the demurrer to the complaint. The complaint did not allege that the parties named were known to have voted against the Democratic nominees or any of them, nor was their right to vote questioned by any well known Democrat or election official The judges are the proper triers of the issues

raised at the election, and their decision is final, as the presumption is that officers have acted properly and honestly.

McCULLOCH, C. J. At the general primary election held on August 10, 1920, for the purpose of nominating candidates of the Democratic party, appellant and appellee were opposing candidates for the office of sheriff of Franklin County, and upon the canvass of the votes appellee was returned as the successful candidate by a majority of 43 votes, having received 941 votes and appellant having received 898 votes.

Appellant instituted a contest in the circuit court pursuant to the statute (Crawford & Moses' Digest, § 3772), and in his complaint containing numerous paragraphs he set forth his grounds for the contest. He alleged, in substance, that certain members of the Republican party in Franklin County were allowed to vote and voted for appellee; that certain other persons who had not been affiliated with the Democratic party and who were ineligible to vote under the rules of the party were permitted to vote in said election and cast their ballot for appellee; that certain persons who were not qualified electors because of the fact that they had not paid their poll tax, were permitted to vote at the election and voted for appellee; that in certain townships the ballots cast by the voters were in many instances unsigned and that the judges of the election in some of the precincts were guilty of electioneering in violation of the statute and permitted ballots to be cast where the voters were not in fact present. The court sustained a demurrer to three of the paragraphs of the complaint, and after an answer was filed by appellee the cause proceeded to a trial on the pleadings and the evidence adduced. The trial resulted in a finding by the court in favor of appellee. The court found that appellee received 884 legal votes at the election and that appellant received 800 legal votes, a majority of 84 votes in favor of appellee.

It is thus seen that, according to the findings of the court, appellee received a greater majority of legal votes than had been given him in the certificate of the canvassing board.

In one of the paragraphs of the complaint to which the court sustained a demurrer it was alleged that the judges of the election in certain townships had allowed to vote 23 persons affiliated with the Republican party and two persons affiliated with the Socialist party. In another paragraph of the complaint to which the court sustained a demurrer it was alleged that the judges of the election in certain townships had permitted 45 persons to vote who were not, under the established rules of the Democratic party, entitled to vote, for the reason that said persons had not supported the nominees at the last preceeding general election, and that said persons had cast their ballots for appellee. Under the law as declared by this court in the recent case of *Ferguson* v. *Montgomery,* 148 Ark. 83, the court erred in sustaining the demurrer to these two paragraphs. We held, in that case, that persons were ineligible to vote in a primary election who were members of another political organization or who were not eligible under the established rules of the political party under whose auspices the primary election was held. In other words, we held that the rules of the political organization not in conflict with the statutes would be controlling in determining the qualifications of the voters. It does not follow, however, that this error of the court would result in a reversal of the cause, for, if it be conceded that the ballots of all the persons named in these two paragraphs were illegal and should be subtracted from the count, it is insufficient to change the result, for these paragraphs only mention 70 illegal votes, and the court found that appellee had received the nomination by a majority of 84 votes. After deducting the alleged illegal votes mentioned in these two paragraphs, it still leaves appellee, under the finding of the court, with a majority of 14 votes. It appears that, notwithstanding the sustaining of the demurrer, the court

permitted the parties to introduce proof concerning the allegations as to Republicans being allowed to vote, and there is proof tending to show that some of the persons mentioned in the paragraphs of the complaint were in fact eligible. But, even disregarding this proof, the allegations of the excluded paragraphs are not sufficient to show that there were enough illegal votes cast for appellee to change the result as found by the court.

In the other paragraph of the complaint to which the court sustained the demurrer, it was alleged, in substance, that the ballots of many persons who voted in certain townships were not signed by the voter, as required by law; that appellant had no means of ascertaining and stating the names of said voters who failed to sign their ballots, and that those facts could only be ascertained by an inspection of the ballots themselves. The paragraph contained no allegations with respect to the names of any of the persons who are alleged to have cast the unsigned ballots. Nor is there any allegation with respect to how those persons voted. It is not alleged that the election officials failed to keep and return a register showing the names of each person who voted and the number of the ballot of each person. Nor is it alleged that the ballots were left unsigned with any fraudulent intent on the part of the voter or any of the election judges. This being true, the allegations of the complaint were insufficient to afford grounds either for disregarding the unsigned ballots or for discarding the returns in the townships in which such ballots were alleged to have been cast. *Ferguson* v. *Montgomery, supra.* It was held in that case that the statute affords two methods of identification of the ballots—one by the signatures of the voters and the other by the register kept by and returned by the election officials—and that the failure to observe one of those methods, unless done with fraudulent purposes, would not afford grounds for disregarding the vote of the precinct.

In the present instance there is no allegation even that the unsigned votes were cast for appellee, and for

this reason also the paragraph failed to state a cause of action. It is not shown that the court erred in its findings as to the majority of 84 votes received by appellee. We find no error of the court in the proceedings. There was proof adduced in one instance that the judges of the election of a certain township accepted the ballot of an elector who was not actually present at the polls. The facts were that J. P. Locke, a qualified elector, was sick at his home a short distance from the polling place, and one of the election judges went to Mr. Locke's home and received the ballot and took it back to the voting place and deposited it in the box. It does not appear that this was done with any fraudulent design, but with an honest purpose on the part of the judges to permit the sick man to cast his ballot. The court properly threw out this ballot as having been illegally cast, but it afforded no ground for discarding the whole vote of the precinct.

It is argued in the brief that the court improperly threw out the votes of 98 qualified electors who had paid their poll taxes because their names did not appear on the official poll list. This assignment is not, however, sustained by the record, at least, we fail to find it in the record, and the abstract does not call attention to any page of the record which sustains this contention.

There are other errors which are unnecessary to discuss for the reason that the abstract is not sufficient to show that the assignments are well founded.

Judgment affirmed.

SIMMONS v. STATE.

Opinion delivered June 27, 1921.

1. DRUNKENNESS ON PUBLIC HIGHWAY—EVIDENCE.—A conviction of appearing in a drunken or intoxicated condition on a public highway, under Crawford & Moses' Digest, § 2626, is sustained by proof tending to show that defendant was in an intoxicated condition on a certain road leading from a church which was being traveled by the public, and also on a street in a certain town.

2. DRUNKENNESS—INSTRUCTION DEFINING.—It was not error to instruct the jury, in a prosecution for appearing in an intoxicated condition on a public highway, that "one does not have to be under the influence of whiskey to such an extent as to become boisterous, or stagger, or be, as is sometimes called, 'down drunk'; that whenever the whiskey causes a man to be out of the ordinary in his general demeanor, it is sufficient under what the law terms in this case as intoxicated."

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

W. T. Kidd and *Pinnix & Pinnix,* for appellant.

1. There was a total lack of evidence tending to prove that appellant was drunk or intoxicated on a public highway. C. & M. Digest, §§ 2626, 3028. One can not be charged with the commission of a crime in a particular way or place and convicted by showing that the crime was committed in a different way or place. 64 Ark. 188; *Ib.* 23; 23 *Id.* 550. The crime must be proved as alleged. 31 Ark. 49; 62 *Id.* 459; 84 *Id.* 285; 71 *Id.* 415; 64 *Id.* 188; 37 *Id.* 408; 36 *Id.* 178; 16 *Id.* 499; 114 *Id.* 312; 129 *Id.* 364.

2. The court erred in its instruction to the jury that if they believed beyond a reasonable doubt that defendant at the time and place mentioned in the indictment or any other time or place within twelve months was drunk or intoxicated on a public highway or street, he was guilty. This was error, as the indictment did not charge defendant with being drunk on a street or alley or at a public gathering. Evidence of other crimes is not admissible on the trial for another crime than the one charged. 20 Kan. 311-19.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. Appellant was guilty under C. & M. Digest, § 2626. This section does not mean a highway established by proper orders of the county court, necessarily; it simply means *any* highway that the public may use.

2. Appellant made no objections to the testimony offered below, and can not raise the question for the first time on appeal. 130 Ark. 11; 110 Ar. 117.

3. A general objection *in gross* to several instructions will not be considered if any one of them is good. 105 Ark. 157.

4. Evidence of other sales of liquor is admissible to show a plan or system on part of the accused to engage unlawfully in the liquor business. 131 Ark. 450; 18 A. & E. Ann. Cases 850-1; 97 S. W. 92; 45 Md. 33; 108 N. W. 6; 135 Ark. 163. See, also, 86 Ark. 364.

WOOD, J. The appellant was tried on an indictment charging that on the 15th day of February, 1921, in the county of Pike, State of Arkansas, he "did unlawfully appear on the public highway in a drunken and intoxicated condition." One of the witnesses introduced by the State testified, without objection, that he saw the appellant at Mt. Maria in Pike County at a picnic in January, 1921; that *he came up the road* to Mt. Maria; that he didn't seem to walk exactly straight and talked more than usual. Witness smelled whiskey on appellant's breath, and from his actions and conduct witness considered him intoxicated. Part of the time they were at the churchhouse, and part of the time on the road going from the churchhouse. Witness overtook appellant *on the road* a quarter or half mile from the church and smelled whiskey on his breath. Appellant was *going along the road* with a girl.

Another witness testified that she went with the appellant to the school house, and she thought he was intoxicated, and she didn't go home with him because she thought he was drinking. She smelled whiskey. She was asked if she noticed anything out of the ordinary about appellant's actions and conduct and answered, "*Well, he was rather funny that day.*" Witness smelled the whiskey at Luther Alford's.

Another witness, the deputy sheriff of the county, testified that he attended the singing at Mt. Maria on the occasion mentioned, and saw appellant, and thought he was drinking, but didn't smell any whiskey on him. Witness had seen appellant "lots of times, and anybody acquainted with him can tell it when he is drinking."

It is easy to detect. Witness and appellant used to drink together—"had drunk together many times." He wasn't out of the way, was laughing, funny and jovial. Witness was asked the following question: "Q. Was he attending to his own business and conducting himself in an orderly way?" "A. He was while I was with him, but after I went back to the house he started on toward my father's and met my sister in the road, and I thought he was trying to shake hands with her. I don't know whether that was what he was trying to do or not." Witness saw appellant intoxicated or drunk one night at the Forty-ninth Show on the street. *He was then acting out of the ordinary,* but not disturbing anybody, was attending to his own business and conducting himself in an orderly way. Witness watched him for an hour or more on account of his condition.

Appellant himself testified that he was not drunk or drinking on the occasion mentioned; that he had no liquor and didn't see any, and several witnesses testified in his behalf, corroborating the testimony of appellant to the effect that he was not drunk.

The court instructed the jury as follows: "If you believe beyond a reasonable doubt that the defendant at the time and place mentioned in the indictment, or any other time within twelve months before the finding of the indictment in this case, was in a drunk or intoxicated condition on a public highway or on a street or alley of the town, or any public gathering, you will find him guilty. I want to state, gentlemen, in a case like this, you don't have to be under the influence of whiskey to such an extent that you become boisterous, stagger, or be, as we sometimes call, down drunk. Whenever the whiskey causes a man to be out of the ordinary in his general demeanor, it is sufficient under what the law terms in this case as intoxicated." The appellant objected to the giving of the instruction. The court overruled the objection, and the appellant duly excepted to the court's ruling.

The appellant presented the following prayer for instruction: "The court instructs the jury that, although you may find from the evidence in the case that the defendant had drunk intoxicating liquors, yet if you further find from the evidence that he was attending to his own business in an orderly way and in control of his faculties, then he would not be guilty of the offense charged against him, and it would be your duty to acquit him." The court overruled appellant's prayer for this instruction on the ground that he had already embodied the purport of that prayer in the instruction given the jury. The appellant duly excepted to the ruling of the court. The jury returned a verdict of guilty against the appellant and assessed his fine at the sum of $10. From the judgment rendered on that verdict is this appeal.

1. The appellant contends that there is a total lack of evidence tending to prove that appellant was in a drunken and intoxicated condition on the public highway. Section 2626 of Crawford & Moses' Digest reads as follows: "Any person or persons who shall appear at any public gathering of any kind or upon any public highway, street, park or thoroughfare, or on any train in this State, in a drunken or intoxicated condition shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten dollars, nor more than twenty-five dollars." The terms, "highway," "street," and "thoroughfare," are used in the statute synonymously. The words "road" and "highway" are used indiscriminately throughout our statute and mean the same. Chapter 81, Crawford & Moses' Digest, "Highways."

The word "highway," is used in this statute, was intended to embrace any road or thoroughfare used and traveled by the public, even though the same was not laid out by the county court and technically designated as a public road or highway. "Highway" is used in its popular rather than its technical sense, and is synonymous with "road," which is "an open way of public passage

for vehicles, persons and animals." Webster's New International and Funk & Wagnall's dictionaries.

There was testimony in the record tending to show that the appellant was in an intoxicated condition on a *road* leading from the churchhouse at Mt. Maria, which was being traveled by the public, and also on the street in Murfreesboro. This testimony was sufficient to sustain the charge as far as the word "highway" is concerned, for a "street" is "a public highway." Webster's New International Dict. The *road* was being used by the public.

2. The appellant next contends that the court erred in telling the jury that "one does not have to be under the influence of whiskey to such an extent as to become boisterous or stagger or be, as sometimes called, down drunk; that whenever the whiskey causes a man to be out of the ordinary in his general demeanor, it is sufficient under what the law terms in this case as intoxicated" and erred in refusing to instruct the jury that "if appellant was attending to his own business in an orderly way and in coutrol of his faculties, then he would not be guilty of the offense charged against him." There was no error in these rulings of the court.

In *Brooks* v. *State,* 86 Ark. 364, the court had under review an ordinance of the city of Morrilton which made it a misdemeanor "for any person to appear in any public street in a drunken or intoxicated condition." In that case the evidence showed that the defendant was drinking, and he showed some signs of the effect of strong drink, but he was attending to his own business in an orderly manner and had not lost control of his faculties. The court held that the evidence was not sufficient to sustain the charge, and we approved the following definition of "drunk" taken from the Standard Dictionary: "Under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and, commonly, to evince a disposition to violence, quarrelsomeness and bestiality." Some of the common effects of being under the influence

of intoxicating liquor, or drunk, are there given, towit: "A disposition to violence, quarrelsomeness and bestiality." But these are by no means the only results or exhibitions that may be included in the definition.

"Drunk and speak parrot? and squabble? swagger? swear? and discourse fustian with one's own shadow? O thou invisible spirit of wine, if thou hast no name to be known by, let us call thee devil!" Othello, Act I, Scene 3.

The statute was broad enough to include, and does include, the manifold manifestations of the influence of intoxicating liquors, upon varying temperaments, when such influence becomes so pronounced over one's bodily or mental faculties as to put them beyond normal control, so that in acts or words one is liable to become a nuisance to fellow travelers upon the public highway, or to those with whom he comes in contact at the other places designated in the statute. See *Sepp* v. *State,* 116 Ga. 182, and cases there cited.

In *Midland Valley Railroad Co.* v. *Hamilton,* 84 Ark. 81, speaking of the terms "drunkenness" and "soberness," we said: "It may well be doubted whether these terms are susceptible to any accurate definition for practical purposes. They sufficiently define themselves, and it would have been better to leave it to the jury, without attempt at definition, to determine what the condition of the plaintiff was in this respect."

In *Brooks* v. *State, supra,* we held that "it was not error, in a prosecution for appearing in a public street in a drunken condition, to leave to the jury to determine the condition of the defendant as to drunkenness or sobriety, without defining these terms."

Under the above authorities the trial court might, very properly, have refrained from defining the words "drunken" and "intoxicated" used in the statute; but, since the trial court did not take that course, it can not be said that the definition embodied in the instruction was erroneous. On the contrary, the court apprehended and declared the meaning of these words as they were

intended by our lawmakers. The prayer of appellant was correct, but the court did not err in refusing it because it was sufficiently covered by the court's charge.

The record shows no error, and the judgment is therefore affirmed.

ROBINSON *v.* FLORENCE SANITARIUM.

Opinion delivered June 27, 1921.

1. SPECIFIC PERFORMANCE—FRAUD—WEIGHT OF EVIDENCE.—In a suit by a vendor for the specific performance of a contract for the purchase of real estate, a finding of the chancellor that the officers of the vendor who negotiated the sale were not guilty of misrepresentation *held* to be supported by preponderance of the evidence.
2. FRAUDS, STATUTE OF—COMPLETED CONTRACT.—In a suit by a vendor to enforce specific performance of a contract of sale of real estate, where the statute of frauds was not pleaded, it must be taken as conceded that the written bid of the vendee for the property, accompanied by his check, and its acceptance by the officers and stockholders of the vendor, constituted a completed executory contract for the sale of the property.
3. SPECIFIC PERFORMANCE—TO WHOM GRANTED.—The remedy of specific performance may be granted to a vendor, as well as to a vendee, of real property.
4. SPECIFIC PERFORMANCE—WHEN CONTRACT ENFORCED.—A contract for the sale of real estate will not be specifically enforced unless it is free from fraud, misrepresentation, mistake, or illegality, and is fair and just in its terms.
5. SPECIFIC PERFORMANCE—MISREPRESENTATION.—An untrue statement of a material fact will prevent specific performance, irrespective of the party's intent to deceive, where the other party relied upon such misrepresentation.

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

Bridges & Wooldridge, for appellant.

Appellee does not come into court with clean hands, but comes trying to enforce a contract that was obtained by unfair methods. Fairness and honesty in business

dealings is demanded, especially in chancery courts. Specific performance is within the sound discretion of the court, and if the contract is inequitable it will not be enforced. One seeking equity must come into court with clean hands. The contract must be free from fraud, mistake, misrepresentation, or illegality. 25 R. C. L., p. 223, § 21; Pomeroy's Eq. Jur. (3 ed.), vol. 4, § 1405; 86 Ark. 600; 125 *Id.* 572; 75 *Id.* 46. Misrepresentation is material. 100 *Id.* 144; 82 *Id.* 20. Deceit is fatal, as is misrepresentation. 30 Ark. 535; 109 *Id.* 297; 115 *Id.* 297; 43 *Id.* 464; 115 *Id.* 304. An executory contract will not be specifically enforced where the vendor has made farudulent material misrepresentations. 175 N. W. 329; 53 S. E. 593; 12 R. C. L. 283-4; 35 L. R. A. (N. S.), p. 185 and notes, and p. 189. The decree is against the clear preponderance of the testimony and should be reversed. 143 Ark. 307.

Coleman & Gantt, for appellee.

The appeal presents only a question of fact and the finding is amply supported by the evidence. The alleged misrepresentations had nothing to do with the contract itself but only with the amount bid, so any possible injury done appellant was removed by reducing the bid. 2 Pom., Eq., §§ 889, 899. But under the testimony appellant voluntarily offered to pay $30,000 for the property and he should be required to pay it.

A statement, to make it a misrepresentation, must be a positive affirmation of a fact and not a mere expression of opinion. 36 Cyc. 600. Niven's statement was a mere expression of opinion. The mere fact that Niven was president of appellee did not authorize him to sell its property or make admissions binding it. 14 C. J. 444, 476.

When all the testimony is considered, the contract was fairly entered into and should be specifically enforced. 224 S. W. 984; 140 Ark. 384; 137 *Id.* 414. So far as the terms of payment are concerned, the decree conforms *verbatim* to appellant's proposal; the deed tendered is also in accordance with the contract, but, if

not, appellee stood ready to correct it and had the right to do so. 73 Ark. 491; 83 *Id.* 340. The decree is right, and no error is shown.

WOOD, J. The appellee instituted this action against the appellant in the Jefferson Chancery Court, alleging that it was owner of a certain half block of land with the improvements thereon in the city of Pine Bluff, Arkansas; that it agreed to sell the land to appellant for the sum of thirty thousand dollars, as evidenced by a written bid or offer from the appellant to the appellee of that sum for the purchase of the property. With the offer was a certified check for $4,500 cash, and the balance to be paid in three years at eight per cent. per annum, payable semi-annually, with the privilege of paying the sum of $500 or any multiple therof at any interest-paying period. Appellee alleged that it accepted the proposition, and on August 26, 1920, it executed and delivered to the appellant its warranty deed conveying the property to him in accordance with the agreement; that appellant had stopped the payment of the check given to the appellee as earnest money and had refused to accept the deed which appellee tendered, and prayed that the appellant be required to specifically perform the contract.

The appellant answered, and, after denying all the material allegations of the complaint, set up that, if the offer alleged was made, it was made because of the representation of the president of the appellee, who assumed to represent it in conducting the negotiations for the sale of the property; that he represented that the proposed sale embraced everything in the building execept groceries, one chair, and a few surgical instruments; that the appellee discovered, before concluding the purchase, that there were many other valuable furnishings of the building which did not belong to the appellee, and which appellee could or would not include in the conveyance; that these furnishings which did not belong to appellee were worth two or three thousand dollars or more; that, after making this discovery, appellant notified the appellee that he would not purchase the property. Appellant further alleged that on or about the 7th of August, 1920, he did

offer to the president of the company the sum of $29,000 for the property, including all the furnishings and contents; that the president on the same day informed the appellant that another person had offered $30,000, and that it would require $30,000 to purchase it; that it was upon this representation that appellant delivered to the president of the appellee an offer to purchase the building and its contents for the sum of $30,000, but appellant learned that the appellee had not had an offer for $30,000 for the property, and he thereupon notified the appellee that he would not purchase. The appellant also alleged that he gave the appellee a check for the sum of $4,500, which had not been paid by the drawee bank, but was withheld from the appellant. He prayed that the appellee be required to surrender the check.

The appellee also instituted an action against the drawee bank to recover judgment for the amount of the check which the bank had refused to pay. The bank answered and alleged that, before the check was presented, the drawer of the check had notified it not to pay the same. It asked that Robinson, the drawer of the check, be made a party, and that, in order to avoid a multiplicity of suits the cause be transferred to the chancery court and consolidated with the suit of appellee against the appellant pending therein. The transfer and consolidation were made.

The appellee is a domestic corporation and owns the property in controversy on which it maintains and conducts, as its name indicates, a hospital or sanitarium. D. B. Niven testified that he was the president of the appellee; that the appellant delivered to him a written proposal to purchase the hospital, which he identified, and the same was introduced in evidence and is substantially as set forth in the complaint. He further testified substantially to the facts as they are alleged in appellee's complaint. He testified that he told appellant that certain doctors had some surgical instruments in the hospital that were not the property of the appellee; that witness did not know anything about these instruments, but

that the only personal property that the appellee could sell to the appellant was contained in an invoice that the appellee had obtained from Doctor Jordan, from whom it had purchased the property. Witness called appellant's attention to this invoice. Witness told appellant that the appellee paid for the stuff on the inventory the sum of $10,000. Witness did not know anything about the surgical instruments, but did undertake to tell the appellant about the furniture. He told appellant that the furniture was worth $2,500; that he could realize as much out of the furniture as it would cost him to change the sanitarium into an apartment house as appellant contemplated doing. It had been furnished and was being operated as a hospital. The witness stated that the appellant, the day before the board of directors were to receive bids, came into witness' office, and, after they had gone over the value of each department in detail, appellant made a bid of $29,000. The next morning one of the directors, Doctor Jordan, asked witness if anybody had sent in any bids, and witness informed him that there had been a bid of $29,000; whereupon Doctor Jordan said that it was no good—that he had a better one. Witness felt interested in appellant, inasmuch as he had discussed the proposition in a confidential way with witness, and witness thought that he wanted to purchase the property. It wasn't time for the board meeting. Witness went over to appellant's office and told him that witness understood there would be a better bid than his and asked appellant to come to the meeting as he was a stockholder any way; that witness would be glad for him to come and protect his bid. Appellant asked witness to take care of his bid, and witness replied that he did not want to do that, and asked appellant to bid whatever he wanted to give. Appellant then asked witness for his bid and changed it from $29,000 to $30,000. When the board met witness presented appellant's bid, and it was accepted. Witness notified appellant, and he did not make any objection to it at the time, and never had made any objection to witness. Witness did not know what the amount of the

other bid was, and did not tell appellant that there would be a bid of $30,000. He told him that he had been informed that there was a better bid, and that appellant would have to raise his bid. The furniture had cost the appellee six or seven thousand dollars. Witness was sure that appellant was misled probably by the fact that witness told him that it had cost $10,000. He may have thought that witness told him it was worth that; witness knew that appellant could not get $10,000 for it because appellee had sold it to Howard for $7,000 and afterward bought it back. Witness had told the appellant that he thought $29,000 would buy the property, and, after Doctor Jordan told witness that he had a better bid, witness then informed the appellant of this fact and as already stated asked him to go to the board meeting. Witness told the directors he wished they would make the price $29,000 to the appellant because witness was the cause of appellant's raising his bid. Witness told them that he felt a little guilty, but he was entirely innocent in it. It was witness' unintentional misrepresentation that caused appellant to bid $30,000 for the property. Witness was sure that appellant would have got it for $29,000 and went to the board two or three times and tried to get them to take off the $1,000, but they wouldn't do it. Witness felt bad over it, and thought appellant ought to have it for $29,000 and wanted him to have it for that price as far as witness was individually concerned. Appellant afterward told witness that he did not want the property. Witness was only a small stockholder, and did not care personally whether appellant took it or not. In the conversations witness had with appellant he had acted as president of the appellee. In the conversation with reference to the personal property appellant did not seem to lay any stress on the furniture and stuff at all. He said that it was the kind of stuff that could not be used. Witness did not represent to the appellant that Doctor Jordan's surgical instruments in the hospital were contained in one case. Witness never discussed the title with appellant at all. Witness did not expect appellant

to take it unless the title was good. The board had their attorney to prepare the deed and tendered it to the appellant. The deed was introduced in evidence.

The attorney who prepared the deed testified that when he tendered the deed to appellant, appellant said that he did not know whether he wanted to take it or not because he was not getting all the personal property he expected to get, and that he had been caused to bid more for the property than he thought was necessary. Witness saw appellant again in a few days, and he still had not made up his mind, but after several weeks appellant finally told witness that he would not accept the deed. The deed was a warranty deed conveying the land with all improvements thereon and all furniture and furnishings belonging to the grantor and now in the building on said land, and contained recitals showing the terms of the purchase money in accord with the appellant's bid.

Mrs. Harris testified that she was a tenant in one of the houses on the sanitarium property at the time she heard that appellant had bought the same. It was reported in the paper. After that appellant came out and was looking around at the property, and witness asked him if he was the man who had bought the same, and he replied that he was. He told witness that he was about to tear the house down that she was living in, and said he would be glad if witness would look around for a new house. Appellant and Doctor Jordan had been out before that day.

Another witness, a Mrs. Reynolds, testified that she was also a tenant in one of the houses on the property and stated that, after she saw in the paper the statement to the effect that the appellant had purchased the property, the appellant was out looking at the house, and she asked him if he was the man who had purchased the property, and he said yes. He discussed with witness certain improvements that he contemplated making on the house in which she lived and discussed the amount of rent that witness was paying and asked witness what amount she could afford to pay. Afterward two of appellant's

plumbers came out and did certain work that was necessary to be done. Appellant went through the house in which witness lived and discussed with her the changes he was willing to make.

Doctor Jordan, one of the stockholders and a vice president and director of the appellee, testified that on Friday preceding the stockholders' meeting on the next day, appellant came to his office and asked if the sanitarium was for sale. Witness informed him that it was, and told him that the board wanted $35,000 for it; that for a speedy sale it might be had for thirty thousand, and witness and appellant began to figure it on that basis. Witness wrote out a proposition which he laid before the appellant as a tentative offer for the property at $30,000 with the terms specified. Appellant said that it was all right except for the cash payment of $5,000. Appellant stated that if the cash payment could be made $4,500, it was all right. Witness told him that could be arranged. Appellant stated that he would see his attorney and have him prepare the proposition in legal form, and appellant would bring it around in the morning with his check for $4,500. Appellee did not own any surgical instruments. The doctors furnished their own instruments, although they sometimes kept them at the hospital. On Tuesday following the Saturday on which the sale was made appellant and witness went all over the building together, and witness showed appellant all of its contents except the boiler room and showed him what witness claimed as his own property. The appellant then said, "I don't know what I am going to do with this doctor's junk." Witness replied, "Give me ten per cent. and I will sell it for you." Appellant replied, "The job is yours." Appellant meant by doctor's junk the tables, sterilizing plant and things of that kind which were considered hospital furniture proper. There were two cases containing surgical instruments worth several thousand dollars. Besides these, two or three doctors had small packages left on the operating tables. There were two of these

tables. The appellant did not give the witness a written bid of $30,000. Witness was requested by Harry Hanf to let him bid on the property, and the stockholders' meeting was called for the purpose of negotiating with him. He had bid $27,500. Another man, Mr. Leo Andrews, one of the directors, said he would not let the property go for that. He was at the meeting but made no offer. Niven, the president of the appellee, had stated to witness that he had a proposition form appellant of $29,00, and witness told Niven that appellant had agreed with witness on $30,000; that he and appellant had talked it over, and that appellant said that $30,000 was all right.

The appellant testified that, in company with Doctor Jordan, he looked at the property in controversy on the afternoon of Friday, the 5th of August; that Doctor Jordan showed him all the rooms and their contents and told him that it had cost between eleven and twelve thousand dollars to furnish the building. While they were looking at it, Jordan asked witness, who was in the plumbing business, to send a man out to fix a certain defect in the sewer connecting one of the cottages. Witness talked with Niven in regard to the purchase and consulted with him about converting the building into an apartment house. Witness asked Niven if he had a list of the contents of the building, and Niven told witness that he thought there was one. Niven told witness that there were some groceries and a chair and some surgical instruments that Doctor Jordan had in one of the cases; that this was all that would not be included in the sale. After receiving this information from Niven and talking again with Doctor Jordan, witness went back to see Niven and asked him what he thought about an offer of $28,000. Niven informed witness that he could not get the building for that, but he could get it for $29,000. Niven told witness that he could get six or seven thousand dollars out of the contents. Niven assured witness that he could get $2,500 or $3,000 out of the furniture. Witness stated that on Saturday morning, August 6, Doctor Jordan had left a memorandum of figures on witness' desk showing

the amount and terms that witness could buy the property for by assuming a building and loan mortgage of $13,000. The total amount as shown by the memorandum was $17,000, and by including the mortgage this made $30,000. On the morning of August 7, upon receiving positive assurance from Niven that he could obtain the property for $29,000, appellant made the written bid for that amount. This amount was raised to $30,000 in the afternoon. In a conversation with Niven that afternoon, Niven told appellant that the other parties had bid the sum of $30,000, and he wanted witness to raise this. Witness told him that he had already raised his bid $1,000 more than he thought the property was worth, and then Niven told him that the stockholders were his friends, and that if he would make his bid $30,000 he would see that the building was knocked down to him at that price. After discussing it for some time and Niven assuring him that he could get seven or eight thousand dollars for the contents, appellant, being ignorant of the cost of the doctor's stuff, thought maybe Niven was right, and then changed his bid from $29,000 to $30,000. Appellant then detailed a conversation which he had with Doctor Jordan on Tuesday evening thereafter when he went with Doctor Jordan to look over the building and other houses on the lot. He stated that Doctor Jordan claimed so much of the stuff that Niven hadn't told appellant about that he (appellant) "felt kind of sore," but didn't say anything. On the next day appellant was informed that there were only two bids for the property; one, his bid of $30,000, and the other a bid for $27,500. Appellant took the advice of his lawyer, found that the check he had given had not yet been paid, and he then arranged to stop the payment. Appellant then instructed his lawyer to inform the attorney and agents of the appellee that he would not take the property. Appellant also informed the appellee's attorney that he would not take the property and gave his reasons. About six or seven weeks thereafter the appellee's attorney came with some papers and asked appellant if he was ready to close up the

deal. Appellant informed him that he thought the deal was over. The attorney requested appellant to see Niven again. Appellant saw Niven, and he said that he was very sorry that he had raised appellant $1,000 on the bid and felt mighty mean about it. He told appellant that he had done everything he could with the board of directors to get them to take the $29,000, but could not succeed. Witness further stated that on his first trip with Doctor Jordan to examine the building and its contents, Doctor Jordan made no reservations, and that witness understood that all of the things that Doctor Jordan was pointing out went with the sanitarium, the surgical instruments, hospital equipment and other things; that he would not have made the proposition to purchase the building at $30,000 if he had known or had been told that Doctor Jordan claimed all the things which he afterward claimed, as they were the best and most valuable of the contents that Niven had represented that he would get seven or eight thousand dollars for. Appellant was influenced to raise his bid to $30,000 because of the statement of Niven that other persons had offered that sum for the property. Appellant denied that he had told Doctor Jordan that he would give $30,000 for the property, and he had not said anything which would lead Jordan to believe that he would make an offer of that amount. The greatest amount appellant had offered was $28,000. Appellant had known and done business with Niven a long time, and had confidence in his judgment and reputation. When Niven told him he had been offered $30,000 by other persons, he believed him. Appellee had never given him any notice of the acceptance of his offer except the verbal statement of Doctor Jordan and Mr. Niven. Witness further testified on cross-examination that he did not know why Niven wanted him to raise his bid to $30,000 when he had already made a bid for that amount, but supposed that Niven was doing him a favor. When appellant went through the building with Doctor Jordan on Tuesday after appellant had been informed that his bid had been accepted, when Doctor Jordan pointed out

the things that he claimed, appellant did not challenge the claim of Doctor Jordan because he thought perhaps Doctor Jordan was right and owned all he claimed. Appellant also stated that his plumbing records showed that he had repaired a sewer on the property before purchasing the same.

The above are substantially the facts upon which the chancellor rendered a decree in favor of the appellee against the appellant for specific performance of the contract according to the prayer of appellee's complaint, and against the bank for the payment of the check given by the appellant to the appellee as a cash payment on the purchase. From that decree is this appeal.

The chancellor found the facts to be as they were set forth in the apellee's complaint. There is a sharp conflict in the testimony upon some of the material issues of fact, and we are convinced that the preponderance of the evidence shows that the chancery court was correct in its findings.

The statute of frauds was not pleaded, and it must therefore be taken as conceded that the written bid of the appellant for the property, accompanied by his check and its acceptance by the board of directors and stockholders of the appellee in a meeting duly called for that purpose, constituted a completed executory contract for the sale of the property in controversy. "The remedy of specific performance may be granted to a vendor of real estate." *Wilkins* v. *Eames,* 126 Ark. 339-340-342. The appellee therefore had the right to call upon the appellant to specifically perform this contract unless the appellee, through its duly authorized agents who were conducting the negotiations in its behalf, made fraudulent representations concerning the property, or such representations as, even though not fraudulent in fact, were nevertheless of such character as to deceive and mislead the appellant, and such as would constitute a fraud in law against the rights of appellant and render it inequitable to compel him to perform his contract. "The contract must be free from fraud, misrepresentation,

mistake, or illegality. It must be perfectly fair, equal and just in its terms and in its circumstances." 4 Pomeroy's Equity Jur. 1405; *Cleavenger* v. *Stearnes,* 53 S. E. 593.

An untrue statement of a material fact will prevent specific performance, irrespective of party's intent to deceive, where the party relied upon such misrepresentation. *Taliaferro* v. *Boyd,* 115 Ark. 297; *Grant* v. *Ledwidge,* 109 Ark. 297.

Applying the above well-established principles to the facts of this record, we are convinced that the appellant had no right to refuse to perform his contract. Neither Doctor Jordan nor Mr. Niven, who conducted the negotiations on the part of the appellee with the appellant leading to the latter's bid and acceptance thereof, by appellee, occupied any legal relation of confidence and trust to the appellant. He was dealing with them at arm's length. True, appellant and Niven testified that appellant had consulted Niven as a trusted friend and in a confidential way, but that did not create any legal relation of trust and confidence between them. Appellant knew that Niven was the president of the appellee. Niven and Jordan were representing the appellee, and, according to their testimony, which we are unwilling to discredit, they made no representation to the appellant which was false in fact, and it is clear to us that they did not intend to mislead or deceive him. We do not discover any collusion between them to have the appellant increase his bid from $29,000 to $30,000. It appears that Niven had told appellant that he thought $29,000 would buy the property, and upon that suggestion appellant lodged a bid with him for that amount. It appears also that appellant had told Jordan that he was willing to pay $30,000 for the property. Jordan asked Niven on the morning of the day of the sale if he had received any bids and Niven replied in the affirmative and told him that he had received a bid for $29,000. Whereupon Jordan stated that he had a better bid, but, according to Niven, Jordan

did not inform him who had made the bid for the amount thereof. Upon receiving such information from Jordan, Niven went back to the appellant, thinking that he wanted the property, and in good faith believing that some one else had bid more than appellant, informed the latter that there was a better bid. Appellant then requested Niven to act for him, which Niven refused to do, and asked appellant (himself a member of the board) to attend the meeting and take care of his own bid. Thereupon, the appellant increased his bid to $30,000.

It is true that Jordan testified that Niven told him on Saturday morning that appellant had offered $29,000, and that he thereupon informed Niven that appellant had offered him $30,000. It is quite immaterial as to which of these witnesses was correct, but it occurs to us that the testimony of Niven was more reasonable; that is, that he was not informed that appellant was the man who had offered Jordan the $30,000. For immediately after he was informed that there was a bid of $30,000, Niven went back to the appellant and informed him of that fact in order that appellant might increase his bid, if he wanted the property. It was the duty of Niven and of Jordan, representing the appellee, to get the best price possible for the property, and if, without taking any undue or unfair advantage of the appellant, he was induced to bid $30,000 for the property, he should not be allowed to repudiate his contract to purchase for that sum simply because he ascertained afterward that he might have obtained the property for $29,000, if Niven had not understood from Jordan that there was a better bid and so informed appellant. Niven states that he was perfectly innocent in this transaction, and we are disposed to believe him. Since he thought he was the innocent cause of appellant's raising his bid, we can readily understand how he was anxious for the board to accept appellant's bid of $29,000. But the board was not willing to do this, and it was justified in not doing it, because, according to the testimony of Jordan, appellant had before expressed a willingness to buy the property for $30,000.

Such being the case, Niven, not knowing that it was the bid of appellant himself and honestly believing that it was the bid of some one else, did not misrepresent a fact when he informed appellant that there had been a better bid. Appellant himself, according to the testimony of Jordan, had made a better bid. We do not see that the board was at fault in this transaction or that the appellant has the right to complain of it for the reason that he was invited by Niven who gave him the information to be present at the meeting and take care of his own bid, which he failed to do. It occurs to us, under the circumstances, that when appellant increased his bid from $29,000 to $30,000 he was willing to pay that price for the property, and that no imposition whatever was practiced upon him. It is clear that the property was worth around that figure, and the price he agreed to pay therefor was not excessive or oppressive. So far as any misrepresentation concerning the personal property is concerned, the decided preponderance of the evidence shows that nothing was said by Niven or Jordan that was untrue in fact, and nothing concerning the occurred that was calculated to deceive or mislead appellant.

We conclude, therefore, that, upon the making and tendering by appellee to appellant of a warranty deed conveying perfect title to appellant, he should be required to fulfill his contract.

The decree of the chancery court so holding is correct, and it is therefore in all things affirmed.

ESTES v. LAMB & COMPANY.

Opinion delivered June 27, 1921.

1. SALES—PAROL RESERVATION OF TITLE.—A parol reservation of title in personal property, made at the time of its sale, is valid, and is effectual as against a *bona fide* purchaser for value, to the same extent as such a reservation in a written contract.

2. SALES—CONDITIONAL SALE—EFFECT OF EXECUTING NOTE.—The giving of a note to represent the purchase price, with sureties, does

not change a verbal contract which would otherwise be one for a conditional sale with reservation of title to one of absolute sale.

3. SALES—CONDITIONAL SALE.—While the buyer in a conditional sale acquires an interest in the property which he may sell or mortgage, without the seller's consent, the latter's right to recover the property if the purchase money was not paid could not be prejudiced by such sale or mortgage.

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

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellants to obtain judgment for an account due them and for the foreclosure of a chattel mortgage given to secure the same.

In their complaint they alleged that Albert Estes executed a chattel mortgage on two mules to secure an account for merchandise and supplies to be furnished him in 1919; that subsequently Estes sold the mules to J. A. Coward; that J. A. Coward sold the mules to J. H. Coward, and that said mules are now in the possession of J. H. Coward.

Appellants defended the suit on the ground that, prior to the execution of the mortgage by Estes to appellees, J. A. Coward had sold the mules to Estes and had reserved title in them until they were paid for.

According to the testimony of appellees, they constitute a mercantile firm at Bono, Ark., and on March 11, 1919, Albert Estes executed a mortgage on the mules in controversy to them for supplies to be furnished him in making a crop. Estes did not inform them that Coward had sold him the mules and had reserved title in himself until they were paid for. On the other hand, Albert Estes testified that, at the time he executed the mortgage, he told appellees that he had purchased the mules from Coward, and that Coward had retained title in them until they were paid for, and that he had paid nothing toward the purchase price thereof.

Both Albert Estes and J. A. Coward testified in regard to the execution of the contract, and their testimony is in all essential respects the same. According to their

testimony, J. A. Coward sold to Albert Estes the mules in controversy, a wagon, harness and tools for $730 and retained title in the property until the purchase price was paid. It was a part of the agreement that Estes should execute a note for the purchase price to be signed by Arthur Smith and Joe Smith.

Pursuant to the agreement, in a few days Estes brought back and delivered to Coward his note for the purchase price of the property signed by Joe and Arthur Smith. The note is as follows:

"$730.00 1-22-1919.

"Ten months after date, we promise to pay to the order of

J. A. Coward,

seven hundred and thirty dollars, for value received, negotiable and payable without defalcation or discount and with interest from date at the rate of ten per cent. per annum, and if the interest be not paid annually to become as principal and bear the same rate of interest.

"Albert Estes, A. D. Smith, Joe Smith."

Arthur Smith was present when the contract was made and corroborated the testimony of Coward and Estes. He stated that he and his brother would not have signed the note if Coward had not retained title in the property until the purchase price was paid. Estes was unable to pay the note when it became due, and by agreement with Coward, turned over to him the mules in question. J. A. Coward then sold the mules to his brother, J. H. Coward, who had possession of them at the time appellees sought to foreclose their mortgage and recover possession of them for that purpose.

On April 25, 1919, J. A. Coward transferred the note copied above as collateral security to the Jonesboro Trust Company.

The chancellor found the issues in favor of appellees, and a decree was entered in their favor for the amount sued for and for a foreclosure of their mortgage on the mules.

The case is here on appeal.

H. W. Applegate, for appellants.

1. The right of a vendor to retain title by verbal contract, and if he so desires to take additional security, has long been well established. 47 Ark. 365; 68 *Id.* 230 (234); 48 *Id.* 160; 108 *Id.* 442 (446); 123 *Id.* 132.

2. The proof is conclusive that J. B. Lamb & Company took their mortgage with notice that J. A. Coward had retained and still owned the title to the mules and eliminates any doubt of the fact. Lamb & Company knew of the mortgage and took with notice of it and subject to it. 11 C. J. 522; 5 A. L. R. 391; 20 R. C. L. 346. Lamb & Company had plenty of time to make inquiry, because the note and mortgage which they took from Albert Edwards was not for value immediately paid but was for supplies to be furnished from time to time in the future.

It is true that where one purchases personal property and the vendor retains the title until the purchase money is paid, the vendee has the right to sell or mortgage his equity, but here the vendee, Estes, never had any equity, as he never paid anything upon the purchase price of the mules. But it is also true that vendor's right to recover the property, if the purchase money is not paid, is not prejudiced by sale or mortgage. 108 Ark. 442. The assignment as collateral security of a note given as additional security for the purchase price of property conditionally sold does not affect the right of a seller to take possession of his property in case of default or failure of the payment of the purchase price. 38 Ark. 285; 50 *Id.* 256; 29 A. & E. Ann. Cases (1916 A) 265; 70 Miss. 649; 12 So. Rep. 857; 48 Ark. 160. The law of this case is plain and well established and the court erred in its declarations of law.

Sloan & Sloan, for appellees.

1. Since a note was given for the purchase money, a contract for the retention of title by parol can not be established. An oral conditional sale is valid in Arkansas, but it is only when the entire transaction was oral.

If the transaction be reduced to writing, other conditions can not be shown by parol evidence. 6 Ind. 300; 29 Ark. 438.

2. After having indorsed and transferred the purchase money note as collateral security to the bank, Coward had no authority to either accept payment or to discharge it by retaking the property. Jones on Coll. Sec. (3 ed.), § 89; 41 Ark. 419; 94 *Id.* 387; 136 Ark. 215; 127 *Id.* 545; 120 *Id.* 616; 111 *Id.* 263; 105 *Id.* 152; 118 *Id.* 316; 113 *Id.* 585; 72 Miss. 608; 18 So. Rep. 364; 38 Ark. 285.

3. Estes, after having executed the mortgage to Lamb & Company, did not have the right to contract with Coward for a discharge of the purchase money note by return of the property and the payment of one hundred dollars. The vendee in a conditional sale contract acquires an interest in the property sold that he may either sell or mortgage subject to the prior interests of the conditional vendor. 108 Ark. 442; 163 S. W. Rep. 157; 97 *Id.* 432. See, also, 117 Ga. 919; 43 S. E. Rep. 982.

4. The transfer of the note as collateral security by Coward to the bank constituted an election on his part to affirm the sale and treat the debt as absolute. 66 Ark. 240; 65 Wash. 650; 118 Pac. 817; 37 L. R. A. (N. S.) 71.

5. Coward is estopped, after having indorsed the note to the bank as collateral security, to assert any alleged rights under an alleged oral retention of title, and this was a fraud on the bank. 177 Pac. 340; 3 A. L. Rep. 235, 239; 37 L. R. A. (N. S.) 71; 118 Pac. 817.

The lower court was unquestionably right in holding that Estes and Coward, who had parted with their interest in the subject-matter, could not enter into an agreement destructive of the rights of their transferees.

HART, J. (after stating the facts). Following the rule of the common law, this court has held that a parol reservation of title in personal property made at the time of the sale is valid, and that such oral reservation of title is effectual as against a *bona fide* purchaser for value

to the same extent as such a reservation in a written contract. *Jones* v. *Bank of Commerce,* 131 Ark. 362. To the same effect see *Segrist* v. *Crabtree,* 131 U. S. 287.

Counsel for appellees recognize this to be the rule, but claim that the rule is not applicable in the present case because, at the time the agreement for the oral reservation of title was made, it was also agreed that the purchaser should execute his note for the purchase price, and that the note executed pursuant to the agreement is a plain note of hand signed by the purchaser with two sureties.

It is generally held that the giving of a note to represent the purchase price does not change a contract which would otherwise be one for a conditional sale to one of absolute sale. *International Harvester Co.* v. *Pott,* 32 S. D. 82, Ann. Cas. 1916 A, p. 327 and note at p. 331.

In *Bierce* v. *Hutchins,* 205 U. S. 340, it was expressly held that the taking of notes for the purchase price and the taking of collateral security did not in any way qualify the conditional sale features of such contracts. In that case the court said: "Parties can agree to pay the value of goods upon what consideration they please, * * * and when a purchaser has possession and the right to gain the title by payment he can not complain of a bargain by which he binds himself to pay and is not to get the title until he does."

The giving of a promissory note for debt is no payment unless by agreement of the parties the notes are taken in payment of the debt. *Triplett* v. *Mansur-Tebbetts Implement Co.,* 68 Ark. 230. In that case the court held that where goods were sold on condition that the title shall remain in the vendor until the purchase notes are paid, the execution of renewal notes for the debt is not a payment unless by agreement of the parties the notes are taken as such.

It is true that in all the cases above cited the contracts of conditional sale were in writing, but the courts do not seem to have made any point of that fact. The

cases all turn on the rule that the giving of the promissory note does not discharge the debt for which it was given unless such be the express agreement of the parties. It only operates to extend the time of payment until the note is due. Our own court has not recognized any difference in this respect between oral and written contracts for the reservation of title for the conditional sale of personal property.

In *Rex Buggy Co.* v. *Ross,* 80 Ark. 388, Ross bought a carload of buggies from the Rex Buggy Company with the understanding that the title to the property should remain in the vendor until the purchase price was paid. Ross agreed to execute his promissory note for the price of the buggies upon receipt thereof payable in four months after date. The court held that, upon executing the notes, he was entitled to the possession of the buggies and to retail them in due course of trade until he failed to comply with the conditions of the sale to him. The statement of facts does not show whether the contract for the conditional sale of the buggies was a written or oral one.

The undisputed evidence establishes the oral contract of sale in the instant case with the reservation of title in Coward until the property was paid for. The undisputed evidence also shows that Estes did not pay for the mules and by agreement turned them back to Coward. The evidence also shows that the agreement to execute the note was made at the same time the oral contract for the conditional sale was made.

The mortgage to appellee was executed subsequent to the contract of conditional sale between Coward and Estes. Estes acquired an interest in the property which he could sell or mortgage to appellees without the consent of Coward, but Coward's right to recover the property if the purchase price was not paid could not be prejudiced by such sale or mortgage. *Clinton* v. *Ross.* 108 Ark. 442. Neither was the right of Coward affected by the fact that he transferred to the bank as collateral

security the note given by Estes for the purchase price of the property. The reservation of title in the instant case appears from the oral contract for the conditional sale, but not in the purchase money notes. In such cases the seller may transfer the notes as collateral security and on default of the buyer retake the property. The reason is, he is interested in the payment of the notes so as to relieve him from liability as indorser and he therefore has the right to retake possession of the property. 35 Cyc. 702; *McDonald Automobile Co.* v. *Bicknell* (Tenn.), Ann. Cas. 1916 A, 265, and *McPhearson* v. *Acme Lumber Co.*, 70 Miss. 649, 12 So. R. 857.

No complaint is made that a judgment is rendered in favor of appellees against Estes for the amount he owes them.

From the views we have expressed, it follows that the chancellor erred in rendering a decree for appellees, and for that error the decree must be reversed and the cause will be remanded with directions to enter a decree in favor of J. H. Coward for the possession of the property and for further proceedings not inconsistent with this opinion.

FERRELL *v.* WOOD.

Opinion delivered June 27, 1921.

VENDOR AND PURCHASER—BREACH OF CONTRACT TO CONVEY HOMESTEAD.—One is not liable in damages for breach of his contract to convey his homestead, where the wife refuses to join in the conveyance.

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

Mann & Mann, for appellant.

Crawford & Moses' Digest, § 5542, does not apply to an executory contract for a future sale of a homestead, but only to formal instruments which pass some title to the homestead at the time of execution. Conveyances and mortgages are specifically set out, and the general

words, "or other instruments," calls for the application of the doctrine of "*ejusdem generis.*" It is an old and settled rule of statutory construction which confines the meaning of additional and general descriptive words to the class to which the preceding specific words belong. It can not be said that an executory contract is of the same class as instruments which by their very nature affect the title to the property described in them. Conveyances and mortgages are evidences of consummated and executed contracts which pass title, or least place liens on property, while contracts such as the one in question only contain promises to perform certain acts in the future and do not in any way affect the actual title to the property which is the subject of the contract. This court has accepted the doctrine of "*ejusdem generis*" in a number of cases, and it is the settled rule of law in this State. 95 Ark. 114; 74 *Id.* 510; 114 *Id.* 47. The rule is especially applicable to the statute in question, as the Legislature especially limited "other instruments" to those affecting the homestead.

Had the husband abandoned his homestead before the date set for the consummation of this contract and the deeding of the property, there can be no question but that the contract could be enforced. This he could do without his wife's concurrence, and she need not join in the conveyance of an abandoned homestead. 101 Ark. 101; 68 *Id.* 76; 104 *Id.* 313; 137 *Id.* 309. The evident intention of the statute quoted is to protect the wife in the homestead right, so that the title to the same could not be affected by any instrument executed by her husband in which she did not join. This purpose is not defeated by this suit, as a judgment obtained against the husband could not affect the homestead and would not be a lien on it.

At common law a husband could convey the homestead without the concurrence of the wife, and the fact that she did not join in the alienation of the homestead did not affect the validity of the sale. The statute does

not apply to executory contracts, and the old rule still holds good. 37 Ark. 298. Such a contract is not void and has been sustained by this court. 224 S. W. Rep. 484. The Alabama statute is similar to ours and the courts of that State hold that the statute only applies to instruments which are perfected by delivery and operate as conveyances. 66 Ala. 345; 158 Ala.; 132 Am. St. R. 25. See, also, 168 N. W. 1101; Stet.; 185 Mo. App. 45; 171 S. W. 983. Other courts follow the rule and require the husband to answer for damages for breach of contract. 234 Ill. 276; 84 N. E. Rep. 906; 28 Tex. 523; 94 S. W. 115. The case should be reversed.

C. W. Norton, for appellee.

A majority of courts hold contracts like this are void and the case is settled by 4 A. L. R. 1272.

HART, J. H. A. Ferrell made a contract in writing with Fletcher Wood to purchase the homestead of the latter. Wood's wife did not sign the contract. Upon the refusal of Wood to carry out the contract, Ferrell instituted this suit in the circuit court against him to recover damages.

The judgment of the circuit court was in favor of Wood, and Ferrell has appealed.

A majority of the court is of the opinion that the judgment of the circuit court was correct. This court has uniformly held that, under our statute, a deed or mortgage purporting to convey the homestead by a married man is void unless his wife joins in the execution of the conveyance. *Pipkin* v. *Williams,* 57 Ark. 242, and *Oliver* v. *Routh,* 123 Ark. 189, and cases cited.

This court has never decided the precise question raised by the appeal. The courts are divided on the question of whether an action for damages may be maintained against a husband for a breach of contract to convey his homestead where his wife did not sign the contract. The authorities on both sides of the question are cited and to some extent reviewed in a case note to 4 A. L. R. at page 1272. Courts favoring liability for a breach of such a contract say that it is not unlawful for

a person to contract to sell and convey something he does not own but expects to acquire, and that, if he unqualifiedly undertakes to do that which later he finds he can not perform, he must respond in damages. There is a difference between such a contract and a contract to convey the homestead.

In the first instance, if the contracting party should acquire the land which he had agreed to convey to another, he could carry out the contract, and therefore should respond in damages for a failure to do so. A contract by a husband to convey his homestead is a mere nullity unless the wife signs the contract. This court expressly held in the case of *Waters* v. *Hanley,* 120 Ark. 465, that the husband can not make a contract to convey the homestead which will be binding unless his wife signs it. The court pointed out that if such a contract would be obligatory upon the wife the statute prohibiting the sale of the homestead without the consent of the wife could be easily evaded and would be of no force.

Again, it is urged that to hold that the husband can not be made to respond in damages for the breach of a contract to convey his homestead unless signed by his wife would have the effect to embarrass him in the sale thereof. We can not see how the failure to make him respond in damages would embarrass him any more than to hold that his contract to convey the homestead is not valid unless his wife signs the same. If any embarrassment is caused in either event, it is caused by the passage of the statute, and not by placing a construction on it which its language clearly imports. If a man can not make a contract agreeing to convey his homestead that will be valid or binding without his wife's concurrence, it is difficult to see upon what reason he should be made liable to respond in damages for a breach thereof.

As said by Judge Carland in *Mundy* v. *Shellaberger,* 161 Fed. 503, the reason for holding that a contract to convey the homestead without the concurrence of the wife is null and void and can not be used as a basis for the recovery of damages, is clearly and forcibly stated

by Judge Mitchell in *Weitzner* v. *Thingstad,* 55 Minn. 244, 56 N. W. 817. We quote from his opinion as follows:

"But, notwithstanding some respectable authority to the contrary, it seems to us that to hold that a person is liable in damages for the nonperformance of a contract which he is under no legal obligation to perform would be illogical, and without analogy or precedent in the law. The very proposition involves a legal inconsistency. We think that on legal principles such a contract must be held void for all purposes, and not to constitute the basis of any action against the obligor. There are also strong practical considerations in favor of this view. While it is true, as counsel suggests, that to hold the husband liable for damages would not deprive him or his family of their homestead, yet to force him to the alternative of securing his wife's signature to the conveyance, or of being mulcted in damages for not doing so, and to place the wife in the dilemma of either having to sign the deed or see her husband thus mulcted in damages might, and naturally would, often indirectly defeat the very object of the statute. There is nothing unjust to the obligee in holding such a contract absolutely void for all purposes. He is bound to know the law, and he always has actual notice, or the means of obtaining actual notice, of the fact that the land with which he is about to deal is a homestead."

But it is insisted that this rule is contrary to the principles announced in *Branch* v. *Moore,* 84 Ark. 462. That was a case where a broker sued the owner of a homestead to recover commissions for effecting a sale thereof, and the court held that it was no defense to the action that the land constituted the defendant's homestead. Upon this branch of the case we quote from the opinion as follows:

"Appellant contends that the land constituted his homestead, and he could not lawfully authorize the appellee to sell it without his wife joining him in executing an instrument for that purpose, but this contention is not

tenable. Appellee is not seeking to enforce any contract to sell or convey the land, or any lien thereon. The land has been sold. No party is seeking to avoid the sale. Appellee is asking only for compensation for services rendered."

There the broker was suing for services he had performed in effecting a sale of the homestead, and his contract was collateral to the contract of the husband to convey the homestead without the concurrence of the wife. Here the breach of the contract of the husband to convey the homestead is made the basis of the suit. As above stated, if the contract is a complete nullity, it was void from its inception and can not be made the basis of the cause of action.

It follows that the judgment will be affirmed.

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

McCULLOCH, C. J. (dissenting). The authorities on the question involved in this case are nearly equally divided, which leaves us free to follow our own views, uninfluenced by the precedents established by other courts. Two cases which may be selected as leading ones on this subject are *Weitzner* v. *Thingstad,* 55 Minn. 244, supporting the conclusion now reached by the majority of this court, and *White* v. *Bates*, 234 Ill. 276, announcing the contrary conclusion. I think the reasoning of the Illinois court is sound.

The statute (C. & M. Digest, § 5542) does not declare that an executory contract for the sale of a homestead is void. It merely declares that a "conveyance, mortgage or other instrument affecting the homestead of any married man" shall not be valid "unless his wife joins in the execution of such instrument and acknowledges the same." Such a contract does not involve moral turpitude in its performance, nor does it offend against any public declared policy, though the statute fixes a limitation on the husband's right to convey the homestead. He can do so only with the consent of the wife. A conveyance of the homestead without her consent is void, but, since the statute itself does not declare invalid

the husband's executory contract to sell the homestead, I fail to see the force of the contention that the contract is void because a conveyance in performance of a contract is invalid unless the wife joins in it. It would be different, of course, if the contract was one involving moral turpitude, for no rights can accrue under a contract to do an unlawful or immoral act. Such is not the effect of a contract to sell and convey the homestead. The obligor merely undertakes in such a contract to sell and convey certain property in a manner prescribed by law; and if he fails to comply, he should be held liable for all damages resulting from his breach of the contract. The effect is the same as if the contract were one to sell and convey property to which the obligor had no title at the time. Though beyond his power to perform the contract, he is liable in damages for its breach. The fact that such a contract would embarrass the wife and cause her unwillingly to join in the conveyance of the homestead, rather than to see her husband mulcted in damages, affords no sound reason for the court to declare the contract void, though it might appeal strongly to the Legislature on a proposal to enact such a law.

This court has heretofore decided that a contract to pay an agent's commission under a contract for sale of the homestead is valid. *Branch* v. *Moore,* 84 Ark. 469; *Chandler* v. *Gaines-Ferguson Realty Co.,* 145 Ark. 262.

The conclusion now announced by the majority is, I think, in conflict with those cases, for, if a contract for the sale of the homestead is void, then a contract for payment of a commission on such sale is likewise void. Both contracts should be controlled by the same principles.

I do not think it is important whether or not the wife joins in the contract to sell the homestead. She is not required to join in such a contract to make it valid. She must, in order to make such a contract effective, join in the execution of the conveyance and acknowledge the same.

MARTIN v. HARGROVE.

Opinion delivered June 27, 1921.

1. EQUITY—APPOINTMENT OF RECEIVER OF ROAD DISTRICT.—On a complaint by landowners in a road improvement district against the commissioners of such district, alleging that the commissioners had suspended work on the road improvement, an order of the chancery court substituting receivers for the commissioners and directing such receivers to take charge of the affairs and funds of the district and to complete the road is void on its face for want of jurisdiction.

2. CERTIORARI — REVIEW OF VOID JUDGMENT.—Where the chancery court exceeded its jurisdiction in substituting its own receivers for the commissioners of a road improvement district, certiorari is an appropriate remedy to bring such order before the Supreme Court for review.

Certiorari to Franklin Chancery Court; *J. V. Bourland,* Chancellor; orders quashed.

Dave Partain, G. C. Carter and *G. L. Grant,* for petitioners and appellants.

The law as announced by this court in 142 Ark. 21-28 settles this case, and the chancellor was without power to oust the commissioners and turn the district and its affairs over to receivers. The general rule is that the appointment of receivers must be ancillary to the main cause. 23 R. C. L. 16; 178 Pac. 438. The commissioners are the duly and legally constituted officers of the district, and should have charge of its affairs, and are the only ones authorized to act for the district, create debts, execute obligations and manage its affairs. Act No. 588, Acts 1919, vol. 2, p. 2157. No fraud or misconduct is charged or shown, and the law is settled in 142 Ark., pp. 21-28; 166 Pac. 770. This court is authorized to grant certiorari and quash vacation orders and decrees of the chancellor, and its orders are final and can not be appealed from, and certiorari is the only remedy. 146 Ark. 314; 139 *Id.* 402-3; 103 *Id.* 571.

J. D. Benson, J. P. Clayton and *Evans & Evans,* for respondents and appellees.

The chancellor had jurisdiction, and 142 Ark. 21-28 is not in point. The cases cited by petitioners (116 Ark. 314; 139 *Id.* 402 and 103 *Id.* 571) do not aid petitioners in this case.

Courts of chancery have inherent power over trustees and the administation of trusts, and may make the necessary orders in vacation. The court had jurisdiction. C. & M. Digest, § 8600. This has been the law for sixty years and can not be questioned. See, also, C. & M. Digest, § 8606; 23 R. C. L., p. 32; Whitehouse, Eq. Practice, vol. 1, § 479; Clark on Receivers, vol. 1, p. 119. The appeal should be dismissed, and the petition for certiorari denied.

SMITH, J. This is a petition for certiorari by the commissioners of Road Improvement District No. 1 of Franklin County, Arkansas, to bring up the proceedings in a certain cause now pending in the chancery court of Franklin County. The suit in chancery was commenced by certain landowners in Road Improvement District No. 1 of Franklin County, and the complaint contained substantially the following allegations: Road Improvement District No. 1 was created by special act No. 588 of the Acts of the General Assembly of 1919. The commissioners of the district let a contract for the construction of the improvement within 240 working days from the 1st day of July, 1919. The commissioners had issued and sold $210,000 in bonds, and had expended the proceeds of the sale thereof without completing the road in the western end of the district after having fully completed the roads in the eastern end thereof. Enough work had been done on the road in the western end of the district to make the existing road impassable. The commissioners had promised to repair the road and make it passable, and had promised to complete the road within a specified time, but neither promise had been redeemed, and the commissioners had failed to institute suit against the sureties on the bond of the contractor for the breach of his contract to complete the road. There

was a prayer that receivers be appointed to take over the affairs of the district and complete the road.

The commissioners filed a demurrer and an answer. In the answer they denied they had been guilty of any fraud, mismanagement, or improper conduct, and denied that they had abandoned the construction of the road. They admitted work had been suspended, but alleged that this was temporary, and was due to the failure to receive promised State and Federal aid, and that the improvement would be completed when this aid was received. Attached to this answer was a detailed statement of the district's finances and a tender, for examination, of all its books, papers and vouchers.

On March 21, 1921, the chancellor, sitting in chambers in the city of Fort Smith, heard the application for the appointment of receivers for the district and granted it. This application was heard on the pleadings and exhibits and on oral evidence. After appointing the receivers, the court made an elaborate order for their direction. This order directed the receivers to proceed as a board and for a majority to act, and to receive from the commissioners all papers and records of every kind, and to have an audit thereof made, and to issue and sell receiver's certificates bearing interest at a rate not to exceed 7½ per cent., and to create indebtedness and make contracts of not more than $250 without applying to the court for authority so to do. The receivers were further ordered to locate the contractor and to notify him by registered mail to complete the road, to make immediate arrangements to carry on the work independent of the contractor if the contractor did not resume work under his contract. As a means to this end, the receivers were especially directed to assume control of the road machinery and other equipment of the contractor until the further orders of the court. The contractor was not made a party to this proceeding. The receivers were directed to apply for, to receive and to expend the State and Federal aid apportioned to this road district. In

fine, the receivers were substituted for the commissioners, with general directions to complete the improvement as authorized by special act 588 under the directions and supervision of the chancery court.

After the institution of this proceeding to cancel the above order of the court, which, as has been stated, was made on March 21, 1921, the court made a supplemental order amending the order of March 21. This last order was made on June 2, and it has been brought up by certiorari. This last order elaborates, to some extent, the directions of the first, but is important chiefly because of its recital that the court's orders in the premises were made with the consent of the commissioners. The commissioners seek, by affidavit, to show that this last order was made without notice to them, and that all the orders which have been made by the court were made without their consent and over their protest.

These questions of fact can not be considered by us in this proceeding as we look only to the face of the orders which the proceeding seeks to quash. The orders themselves are void on their face. The question presented is conclusively decided by the case of *Paving District No.* 5 v. *Fernandez,* 142 Ark. 21.

In that case the chancery court made an order directing its receiver to take charge of the affairs and funds of Paving District No. 5 of the city of Fort Smith. We reversed that decree, and in doing so held that the chancery court was without authority to remove these commissioners by appointing a receiver. The reasoning of that case applies with full force here and need not be repeated.

Inasmuch as the orders of the court exceed its jurisdiction, certiorari is an appropriate way to bring them before this court for review. *Monette Road Imp. Dist.* v. *Dudley,* 144 Ark. 184; *Reed* v. *Bradford,* 141 Ark. 201; *Budd* v. *Burnett,* 138 Ark. 80; *Hilger* v. *Watkins Medical Co.,* 139 Ark. 400.

The orders and decrees of the court below are therefore quashed.

COX *v.* STATE.

Opinion delivered June 27, 1921.

1. INDICTMENT AND INFORMATION—CHARGING SEVERAL ACTS AS ONE OFFENSE.—Where the statute makes indictable two or more distinct acts connected with the same transaction, each of which may be considered as representing a phase of the same transaction, they may be charged conjunctively in a single count, as constituting but a single offense.

2. INTOXICATING LIQUORS—INDICTMENT.—Under Crawford & Moses' Digest, § 660, the manufacturing and the being interested in the manufacture of intoxicating liquors constitute different phases of the same transaction, and may be charged conjunctively in the same indictment.

3. INTOXICATING LIQUORS—AIDING AND ASSISTING IN MANUFACTURE.—On a trial for manufacturing or being interested in the manufacture of intoxicating liquors, an instruction that accused was guilty if he was assisting in the manufacture of such liquors, or if he was not assisting in the manufacture, but was present and ready and consenting to aid and abet the manufacture, was proper, under Crawford & Moses' Digest, § 2311, as the offense charged is a felony under § 6160, *Id.*

4. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY.—Argument of the prosecuting attorney that it was inferable from defendant's failure to impeach a State's witness that defendant was unable to impeach him was not prejudicial error, as the inference might be drawn, although an extravagant one.

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

W. T. Kidd, for appellant.

1. The indictment charges more than one offense, and it was error to refuse the motion to require the State to elect. 84 Ark. 136; 201 S. W. 845; 135 Ark. 245; 37 *Id.* 408. An indictment must charge but one offense. C. & M. Digest, § 3016; 118 Ark. 35. The State should have been required to elect which charge she will proceed under to prosecute. 33 Ark. 180; 32 *Id.* 203; 36 *Id.* 55; 58 *Id.* ..... (*Ry. Co.* v. *State*).

The indictment was defective under section 3028, C. & M. Digest; 5 Words and Phrases, p. 4344.

2. Instruction No. 1 for the State was error, as it submitted two issues, one of making and manufacturing liquor, and another of being interested in the making and manufacturing of liquor. 112 S. W. 956.

3. Instruction No. 2 for the State was unfair and prejudicial, as there was no evidence to sustain it. It is argumentative. Defendant was indicted as a principal, and not as an aider and abettor, and could not be convicted as a principal. 37 Ark. 274; 96 *Id.* 62; 22 Cyc. 455; 41 Ark. 173; 55 *Id.* 593.

4. There is no testimony showing defendant's guilt; that he was ever at the still, or even had knowledge that a still was in the vicinity, and he could not be indicted as a principal, and it was error to give the instruction asked by the State. 37 Ark. 274; 109 *Id.* 389; *Ib.* 498.

5. There were errors in the other instructions given for the State.

6. The prosecuting attorney's argument was improper, and was prejudicial. 101 Ark. 147.

7. There is no evidence to sustain the verdict. Giving the evidence its strongest probative force, it is not sufficient.

J. S. Utley, Attorney General,, *Elbert Godwin* and *W. T. Hammock*, Assistants, for appellee.

1. The indictment charges only one offense. 135 Ark. 245. The proper motion to require the State to elect was not made. 37 Ark. 408; 84 *Id.* 136; 201 S. W. 845; 37 Ark. 410.

2. There was no error in the instructions given for the State. They state the law. All persons aiding or abetting the crime are guilty as principals. C. & M. Digest, § 2311; 104 Ark. 245.

3. There is no error in the other instructions given for the State.

4. The verdict is sustained by the evidence. All the facts and circumstances show that appellant was at least guilty of being interested in the manufacture of intoxicating liquor. C. & M. Dig., § 2311; 104 Ark. 245.

HART, J. Horace Cox prosecutes this appeal to reverse a judgment and sentence of conviction against him for a violation of our liquor laws.

The indictment charges that Horace Cox on the 15th day of January, 1921, "did unlawfully and feloniously make and manufacture, and was unlawfully and feloniously interested in the making and manufacture of ardent, vinous, malt, spirituous, intoxicating and alcoholic liquors," etc.

The defendant filed a motion to require the State to elect upon which count it would proceed, and assigned as error the refusal of the court to require the State to make such election.

Counsel for the defendant relies upon the case of *Gramlich* v. *State,* 135 Ark. 243. That case is not authority for the defendant, because the court reserved a ruling on the point now under consideration.

Again counsel rely upon the case of *Chronister* v. *State,* 140 Ark. 39. In that case the court held that the manufacture of wine is a separate and distinct offense from the sale thereof. It is true that the prohibition against manufacturing, selling and giving away intoxicating liquors, or being interested in the manufacture, sale or giving away thereof, is contained in the same section of the statute. Crawford & Moses' Digest, § 6160. But it does not follow that the holding in the Chronister case just cited controls here. It is manifest that the manufacture of intoxicating liquors is a separate and distinct offense from the sale thereof, and they do not necessarily constitute parts of the same transaction. For instance, it would be unlawful to manufacture intoxicating liquors, regardless of the fact of whether the maker intended to sell them, or to use the liquors himself. Again a person might be guilty of selling intoxicating liquors and have nothing to do with the manufacture thereof. On the other hand, while the offense of manufacturing intoxicating liquors consists of a series of acts, and the same person might be guilty of being interested in the manufacture thereof and yet not be guilty of man-

ufacturing them, the different acts, where they are all parts of the same transaction, may be charged conjunctively in the same indictment. Where the statute makes indictable two or more distinct acts connected with the same transaction, each of which may be considered as representing a phase of the same transaction, they may be charged conjunctively in a single count as constituting but a single offense. *Davis* v. *State*, 50 Ark. 17. In that case the court held that an indictment under our statute which alleges that the defendant "unlawfully did sell and was unlawfully interested in the sale of one pint of alcoholic, ardent, and vinous liquors and intoxicating spirits, without having first procured a license," is sufficient and charges but one offense. The rule applies here, and we hold that an indictment alleging the unlawful making and being interested in the manufacture of intoxicating liquors charges but one offense.

It is earnestly insisted that the evidence is not legally sufficient to support the verdict.

The defendant was a witness for himself. He denied having manufactured any intoxicating liquors, or being interested in the manufacture thereof. His testimony was corroborated by that of other witnesses. The legal sufficiency of the evidence to support the verdict must be tested by the evidence for the State.

According to the evidence for the State, the sheriff found a still about 250 yards from the house of the defendant. There were barrels there, but the still did not appear to have been operated recently. There had been a fire under it, and other evidences that it had once been operated. The sheriff watched this still at intervals for a week, and it was moved during his absence. The sheriff then found another still about a quarter of a mile from the defendant's residence. After the defendant had been arrested, he admitted to the sheriff that he had hauled the still away, but denied having operated it.

A coca-cola dealer testified that the defendant had bought a coca-cola barrel from him along about this time,

One of the barrels found at the still was a coca-cola barrel.

Another witness testified that he rode out of town with defendant along about this time, and that he had four sacks of sugar and some shorts. When they got a few miles out of town, the defenadnt got out of his wagon and went out to the side of the road and brought in some whiskey in a fruit jar which he had hidden there.

Another witness testified that he had seen the defendant with some whiskey about this time. It was also shown that the sugar and shorts were ingredients used in the manufacture of whiskey.

Still another witness testified that on one occasion he started in the direction of where the still was found, and the defendant warned him away.

This evidence was legally sufficient to establish the guilt of the defendant. It shows that there was a still near his residence which he admits that he hauled away. He had in his possession a large amount of sugar and some shorts, and these ingredients were generally used in the manufacture of whiskey. It was fairly inferable that the still was operated and the ingredients purchased for the purpose of making whiskey. The defendant on one occasion warned persons from approaching the place where the still was located. After the sheriff commenced watching the still, he hauled it away during the absence of the sheriff. This at least tended to prove that the defendant did not wish the location of the still to be discovered, or the sheriff to find any one working at it. This testimony also tended to make him an interested party if the evidence showed that whiskey was manufactured. The fact that whiskey was found in his possession on two occasions about this time tends to show that whiskey was manufactured by some one, and the series of acts were so connected in point of time as to make it fairly inferable that whiskey was manufactured by some one in that locality at about that time, and that the defendant at least was interested in the transaction.

At the request of the State, the court instructed the jury that it might find the defendant guilty if he was at the still at the time the intoxicating liquor was being manufactured and was assisting in its manufacture, or, if he was not assisting, that he was present and ready and consenting to aid and abet in the manufacture of the liquor.

There was no error in giving this instruction. The manufacure, or being interested in the manufacture, of intoxicating liquors is now a felony in this State. Crawford & Moses' Digest, § 6160. All persons being present aiding and abetting, or ready and consenting to aid and abet, in any felony shall be deemed principal offenders and indicted and punished as such. Crawford & Moses' Digest, § 2311.

But it is insisted that the evidence does not show that the defendant was present when the liquor was made. The still was situated near his house. On one occasion he warned away some persons who were about to approach it. He bought sugar and shorts in sufficient quantities to be used in making liquor. He admitted that he found the tracks of the sheriff leading to the still on one occasion. The sheriff was watching the still to see if any one made liquor there. The defendant after his arrest admitted that he hauled the still away. Liquor was found in his possession about that time. As above stated, all these acts connected together make it legally inferable that some one made liquor in that locality, and that the defendant was present aiding and abetting the act.

Objection is also made by the defendant to the court's modifying certain instructions asked by him. We do not deem it necessary to set out the instructions. In the form asked by the defendant, they were argumentative, and the court properly modified them so as to eliminate this feature.

Error calling for a reversal of the judgment is also assigned to certain remarks made by the prosecuting attorney in his argument to the jury. The remarks excepted to are as follows: "As stated to you in the open-

ing statement of this case, I understand the defendant would undertake to impeach the witness, Welch Kelley, and you gentlemen noticed the host of witnesses that were sworn in this case, and realizing the diligence with which the attorneys for the defendant have presented his defense, it is only fair for me to argue and for you to infer that, if there was any witness in that territory who would testify that this witness was not worthy of belief, they would have produced him, and, since they have not done so, it is then fair for me to argue and you to infer that they could not do so."

We do not think the remarks were prejudicial. The evidence shows that several witnesses were introduced in behalf of the defendant. The prosecuting attorney did not argue that the only inference that could be drawn from this fact was that if the defendant could have impeached the testimony of one of the State's witnesses he would have done so. He only stated that it was fair to argue that the defendant could not do so because he had not done so. This was an inference to be drawn, extravagant though it might be. It is one thing to say that a legal inference may be drawn from a certain state of facts, and quite a different thing to say that such inference must necessarily be drawn from the given state of facts. The jury must be accredited with common sense, and it is not to be supposed that they were swept off of their feet by the extravagant inference sought to be drawn by the prosecuting attorney.

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

O'LEARY v. LANE.

Opinion delivered June 27, 1921.

1. WILLS—CONTEST OF PROBATE.—The question whether a will was properly probated can be raised only on an appeal from the judgment of the probate court admitting it to probate, and such question can not be raised in a collateral proceeding.
2. WILLS—INCORPORATION OF INDEPENDENT INSTRUMENTS BY REFER-

ENCE.—Independent instruments, though testamentary in character, can not be incorporated in wills as a part thereof by reference only, as the statutes require that the entire will shall be authenticated as specified; but if the language of the will itself is insufficient to effect a conveyance of the lands, reference to an extraneous instrument for the description is sufficient where the will sufficiently designates the extraneous instrument so as to identify it with certainty.

3. WILLS—IDENTIFICATION OF DEEDS.—A will which merely refers to deeds theretofore executed to certain heirs as being in a safety box in a certain bank does not sufficiently describe the deeds so as to effect a testamentary disposition of the lands.

Appeal from Prairie Circuit Court, Northern District; *George W. Clark,* Judge; reversed.

Emmet Vaughan, for appellants.

1. The will is void for uncertainty, (1) because it does not designate specific existing deeds with sufficient definiteness as to admit of the incorporation of said deeds in the will; (2) because the will is indefinite and uncertain as to whom the testator desired to leave his property to, or as to whether the deeds probated with the will were all the deeds that were in the lockbox. Uncertainty in a will as to either the subject or object of a devise is fatal to its validity. 116 Ark. 328.

2. The deeds being absolute upon their face, not testamentary in character, and not attached to the will or identified by it, can not be made effective as part of the will.

3. The will is inoperative as a conveyance, because the deeds mentioned are without sufficient identification to become part thereof. Borland on Wills, 51; 58 A. 748; 77 Conn. 240; L. R. A. 335; 107 Am. St. Rep. 24. A letter testamentary in character and not being executed as a will is ineffective as part of a will. 60 A. 266; 77 Con. 604; 107 Am. St. Rep. 64. Where a will is properly executed and proved, it must be admitted to probate, though it contain not a single provision capable of execution, or valid under the law. 101 Mo. 168; 77 Pac. 825; 144 Cal. 121; 141 *Id.* 121. See, also, 163 Atl. Rep. 754. The court erred in overrul-

ing the motion to require cross-complainant to complete exhibit "A" by attaching the testimony upon which the will was admitted to probate, and also in overruling appellants' demurrer to the cross-complaint.

F. E. Brown, for appellee.

There was no error in overruling the motion to require appellee to complete exhibit "A" to the answer and cross-complaint, nor in overruling the demurrer to that part of the corss-complaint which relies upon the will of W. H. Brock as a conveyance of real estate. As to the motion, at law an exhibit is not part of a complaint unless the action is founded upon the written instrument exhibited. 32 Ark. 131; 85 *Id.* 223.

The evidence upon which the will of Brock was admitted is no part of the will, and attaching it to the will served no useful purpose. C. & M. Digest, § 10537. The demurrer was a collateral attack on the final judgment of a court of record, which is not allowed. There was a final judgment, and no appeal was taken, and it is final on appeal. 40 Ark. 91; 31 Ark. 175; 64 *Id.* 350; 66 *Id.* 623; 75 *Id.* 146; 109 *Id.* 119. No error is pointed out in the court's judgment.

HUMPHREYS, J. Appellants and appellee are the sole heirs of W. H. Brock, deceased. Appellants instituted suit against appellee in the Prairie Chancery Court, Northern District, for partition of the lands in said county, owned by the said W. H. Brock at the time of his death, alleging that W. H. Brock, deceased, died intestate and that they were the owners, as tenants in common, of said lands by inheritance from him.

Appellee filed an answer, denying that W. H. Brock, deceased, died intestate, and that appellants and appellee inherited said lands, as tenants in common, under the law of descent and distribution, from W. H. Brock, deceased; but, on the contrary, alleged that W. H. Brock, deceased, died testate, devising a part of the lands, sought to be partitioned, to appellee, another part thereof to Ellen O'Leary, another part thereof to Willie Riddle, and another part thereof to Clarice Reid, by reference

for the particular description of the lands devised to warranty deeds theretofore executed to each, and referred to in the will as being in deceased's safety deposit box in the Farmers' & Merchants' Bank of Des Arc, Arkansas, and that each acquired and owned in severalty the particular tracts thus devised to each. Appellee attached to her answer, as a part thereof, Exhibit "A" which embodied the last will and testament of W. H. Brock, deceased, and four warranty deeds from him to the heirs aforesaid, conveying to each a part of the lands sought to be partitioned.

Appellee also filed a cross-bill, requesting the court to construe certain clauses of the will of W. H. Brock, deceased, and made Exhibit A to her answer an exhibit to her cross-bill.

The chancery court, upon its own motion and over the objections of both appellants and appellee, transferred the cause to the circuit court.

Appellants filed a motion in the circuit court to require appellee to attach to exhibit "A" to the answer and cross-bill the proof adduced in admitting the will to probate. The motion was overruled, to which ruling of the court appellants objected and excepted.

Appellants then demurred to appellee's cross-complaint, upon the ground, among others, that the will and deeds, attached as Exhibit A to the answer and cross-complaint, did not operate as a devise of the real estate of W. H. Brock, deceased. The demurrer was overruled, to which ruling appellants objected and excepted.

Later, the cause was submitted to the court, sitting as a jury, upon the complaint, the answer and cross-complaint, evidence of witnesses, a certified copy of the will of W. H. Brock, deceased, and the order of the probate court admitting the will to probate, which resulted in a finding and judgment that the will was legally probated, and that it operated as an effective conveyance of the entire estate, both real and personal, of W. H. Brock, deceased, from which judgment is this appeal.

No assignments of error were brought into the record by bill of exception, so that the only questions presented to the court on this appeal are the rulings of the trial court upon the motion to complete Exhibit A by adding thereto the proofs adduced for the probate thereof, and the demurrer to the cross-complaint in alleging the will and deeds to be a testamentary disposition of the real estate described in said deeds.

The question as to whether the court erred in overruling the motion to complete Exhibit A is immaterial and eliminated, as the record made in this case upon its face shows a judgment in the probate court probating the will. The question as to whether properly probated was one for determination on appeal from that judgment. The only material issue joined on the answer, cross-bill and demurrer thereto, appearing on the face of the record for determination on this appeal, is whether the will and deeds are effective as a testamentary disposition of the property described in the deeds to the grantees therein. The will and deeds probated as the last will and testament of W. H. Brock, deceased, are as follows:

"W. H. Brock, Last Will and Testament:

"In the name of God. Amen.

"I, W. H. Brock, of the town of Des Arc, in the county of Prairie, and State of Arkansas, being of sound and disposing mind and memory and over the age of twenty-one years, knowing the certainty of death, and the uncertainty of the hour thereof, and being desirous of having my estate managed, controlled, used and disposed of at my death in accordance with my wishes, I do hereby make, publish and declare this my last will and testament, hereby revoking all former wills and codicils, by me heretofore made; also revoking any and all contracts or instruments of writing designating heretofore any one as executor, administrator, agent or attorney or representative in any manner in winding up the affairs of my estate after my death.

"*First.* It is my will and desire that all of my just debts and funeral expenses be paid as soon as same can be conveniently done out of any money I may have on hand or on deposit at my death.

"*Second.* It is my will and desire that the deeds heretofore by me executed to the heirs of my estate, deeding to them real property that I desire each to have at my death, which are now in my safety deposit box in the Farmers' & Merchants' Bank of Des Arc, Arkansas, be by my executor and executrix, hereinafter named, delivered to said heirs mentioned in said deeds, which property I give and bequeath to each of said heirs as conveyed in said deeds.

"*Third.* After paying my just debts and funeral expenses and the delivery of deeds hereinabove mentioned, by my executor and executrix, hereinafter named, to my heirs, vesting in them title to the property as conveyed in said deeds, the remainder of my estate, real, personal or mixed property, I give, devise, and bequeath to my heirs, as their interest appears in my estate, said heirs being Emmet Vaughan, Percy Vaughan, Clarice Reid, who are the heirs of my sister, Mrs. Martha Vaughan, deceased; Alora Lane, heir of my brother, James Thomas Brock, deceased; Ellen O'Leary, heir of my sister, Mrs. Caroline Bledsoe; and Mrs. Willie Riddle, heir of my sister, Mrs. Emily Francis Porter, they being my sole and only heirs.

"*Fourth.* I hereby name and nominate and appoint, as the executor of this, my last will and testament, my friend, R. A. Richmond, and as executrix of same my niece, Mrs. Willie Riddle, and it is my will and desire that no bond be required of them, and that they carry out my wishes as herein made.

"In witness whereof, I, W. H. Brock, have to this, my last will and testament, subscribed my name, on this the 17th day of August, in the year of our Lord, one thousand nine hundred and fourteen.

"W. H. Brock (Seal).

"Signed, sealed, declared and published by the said W. H. Brock, as and for his last will and testament, in the presence of us, who at his request and in his presence and in the presence of each other, have subscribed our names as witnesses hereto.

"A. V. Harris,
"Erwin Bethell."

"Exhibit A to Will."

"Warranty deed from W. H. Brock to Alora Lane conveying lot 11 in block 22 and lot 11, and 10 feet of west side of lot 12 in block 15, Watkins' survey of Des Arc. Deed acknowledged on the 29th day of July, 1914.

"Warranty deed, W. H. Brock to Ellen O'Leary, lots 1, 2, 10, 11, in block 16, lot 7 in block 15, lots 7, 8, 9 and west half lot 10, in block 27, in Watkins' survey of the town of Des Arc. Deed acknowledged 29th day of July, 1914.

"Warranty deed, W. H. Brock to Willie Riddle, east half lot 5 in block 26, Watkins' survey of Des Arc. Acknowledged 29th day of July, 1914.

"Warranty deed, W. H. Brock to Clarice Reid, lot 9 in block 16 in Watkins' survey of Des Arc. * * * Deed acknowledged 29th day of July, 1914."

W. H. Brock died on the 21st day of March, 1916, and the will was probated on the 26th day of October, 1917.

Independent instruments, though testamentary in character, can not be incorporated in wills as a part thereof by reference only in this State, for the statutes here require that the entire will shall be authenticated in the manner specified in the statutes. In the case of *Bryan* v. *Bigelow,* 77 Conn. 604 (107 Am. St. Rep. 64), a sealed letter, testamentary in character, found in the same receptacle with the will, referred to in the will and otherwise identified, was treated as ineffective as a part of the will, not being executed in the manner required for the execution of wills. Under the rule thus announced, the separate deeds referred to in the will now under con-

struction are ineffective as testamentary dispositions of the lands described therein—not being testamentary in character and authenticated as required by the laws of this State. Under the rule thus announced there could be no objection, however, in devises of real estate, if the language of the will itself is sufficient to effect a conveyance of the lands, to refer to an extraneous instrument for the description merely, if the will sufficiently designates the extraneous instrument so as to certainly identify it. By reference to the latter part of section 2 of the will before us for construction, this language appears: "Which property I give and bequeath to each of said heirs as conveyed in said deeds." This language refers to deeds in the testator's safety deposit box in the Farmers & Merchants Bank of Des Arc, Arkansas, at the time the will was executed, and, if the instrument referred to is sufficiently identified, the language quoted was sufficient to effect a conveyance of the real estate. The will was executed on the 17th day of August, 1914. The deeds exhibited as a part of the answer and cross-complaint in the instant case were acknowledged on the 29th day of July, 1914. They purport on their face to be warranty deeds conveying lands described in each to a part of the heirs mentioned in the third paragraph of the will. There is nothing in the will to definitely identify these deeds as the deeds which were in the safety vault at the time the will was executed. The will does not identify the deeds by their dates or in any other manner. The reference in the will is to deeds theretofore executed to a part of the heirs mentioned in section 3, and therefore does not identify those deeds any more definitely than other deeds he may have theretofore executed to different lands to the same parties, or deeds executed to other heirs mentioned in the third paragraph of said will. We do not think that the deeds probated as a part of the will are sufficiently identified in the will to effect a testamentary disposition or conveyance of the lands in question as specific devises to the grantees in the deeds. It

follows that the lots described in the deeds are a part of the residue of the estate and pass to the heirs under the residuary clause of the will. The court should have sustained the demurrer to that part of the cross-complaint which relies upon the will of W. H. Brock as a conveyance of said real estate.

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

DEASON & KEITH v. ROCK.

Opinion delivered June 27, 1921.

APPEAL AND ERROR—REVERSAL OF CHANCERY CASE—NEW TRIAL.—Unless a direction for a new trial is specifically made upon a part or all of the issues involved, a direction for further proceedings according to law and not inconsistent with the opinion means nothing more than to render a decree in accordance with the record made.

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

Sullins & Ivie, for appellants.

The mandate in this case was filed in the Benton Chancery Court, and appellees filed motion for judgment *upon the mandate alone* in the sum of $283.50 with interest, to which motion appellants filed a response asking for further hearing and such proceedings as might be necessary in determining the rights of the parties which were not inconsistent with the mandate of this court, and the court sustained a demurrer of appellees to said response and rendered judgment for $283.50 with interest. There is only one question at issue on this appeal, and that is, whether or not, under the opinion and mandate in the former appeal, the appellee was entitled to judgment for the amount sued for, or whether the cause was remanded for further proceedings, in order for the chancery court to ascertain what the loss or damage the appellee had sustained. The latter was the clear

intention of this court in remanding the cause. 225 S. W. 317.

Under the order and opinion in the former case the difference in the contract price and the resale of the 105 barrels of flour and feed sued for was only *a part of the car of flour* ordered or contracted for, and this fact should be taken into consideration in ascertaining the loss suffered by appellees, if any, by the breach of the contract by appellants.

Where a cause is reversed and remanded for further proceedings, the lower court can only carry into effect the mandate of this court, so far as its directions extend, but the chancery court is left free to make any orders or directions in the progress of the case, not inconsistent with the decision of this court, as to any question not presented or settled by such decision. 16 Ark. 181. Where the remanding of a cause for further proceedings is general and no specific directions are made by this court to the lower court in the mandate, the lower court may proceed further with any matter in the cause which was not inconsistent with the opinion of the court on appeal. 54 Ark. 278. Where the record shows that the court below did not dispose of an issue raised by the complaint, and there is no showing that it was abandoned by plaintiff, who on other issues obtained judgment which was not sustained on appeal, the cause will be reversed, not with directions to dismiss the complaint, but to proceed, if plaintiff so desires, to pass upon the undetermined issues. 76 Ark. 162. A chancery case will not be affirmed on appeal for insufficiency of the evidence if it appears that the case was not fully developed on account of an error of the court or mistake of the party when the interest of justice requires that the whole case be more fully developed. 75 Ark. 415; 77 *Id.* 156; 82 *Id.* 51; 102; *Id.* 542; 88 *Id.* 318. Where, on account of the court's misconception of the law, a chancery case is not fully developed, on reversing it this court will remand with directions to reopen the case and hear testimony. 88 Ark. 318.

While, ordinarily, chancery cases are tried *de novo,* yet, where the chancellor has decided a case upon a question of law, upon which he is bound to be in error and leaves undecided questions of fact, this court should remand the case upon such issues of facts. 99 Ark. 500; 110 *Id.* 39. Nothing in our Code prohibits this court from directing a new trial in a chancery case as well as in a court of law. 135 Ark. 201. It is not the practice of this court to pass upon the questions of damages, where the lower court made no finding on the question. 136 Ark. 63. When a cause is reversed and remanded "for further proceedings," this is a remand for further proceedings or a new trial on the issues presented. 122 Ark. 500. The mandate here was general, without any specific directions to the lower court. The opinion of this court upon the facts is not binding or final where the case is remanded for further proceedings. 52 Ark. 473; 124 *Id.* 545; 188 S. W. Rep. 310.

The learned chancellor misinterpreted the former opinion and erred in refusing to proceed further with the case and in rendering judgment for the amount sued for upon the mandate of the Supreme Cuort. 52 Ark. 473; 124 *Id.* 545; 188 S. W. 310.

McGill & McGill, for appellee.

It was the duty of the defendants to make all the defenses they had, and his denials should be specific, and where a sentence or paragraph in a complaint contains several facts alleged conjunctively, it is not sufficient to make a denial following the language of the complaint, as it can not be determined which specific allegation is intended to be put in issue, and such denial will put in issue only those allegations that are necessary to sustain the cause of action and those that may be covered by the proof. 31 Cyc. 205; 72 Ark. 62; 84 *Id.* 409; 120 *Id.* 603-4.

This court in its opinion has settled all questions raised, and if, through negligence, ignorance or carelessness, one seeking affirmative relief, one has neglected to set up his defenses or introduce evidence to support them,

the question can not be raised here again. 16 Ark. 168; *Ib.* 181; 45 *Id.* 177; 54 *Id.* 273; 76 *Id.* 162; 77 *Id.* 156; 88 *Id.* 318; 94 *Id.* 329; 98 *Id.* 595; 110 *Id.* 39; 122 *Id.* 491; 135 *Id.* 201; 142 *Id.* 339; 75 *Id.* 415; 102 *Id.* 543.

The cases in 80 Ark. 563 and 136 *Id.* 63 are not in point.

HUMPHREYS, J. This is the second appeal in this case. On the first appeal, the decree, dismissing the bill of appellees against appellants, was reversed and the cause remanded for further proceedings, according to law and not inconsistent with the opinion. That case was styled "*Rock et al.* v. *Deason & Keith,*" and is reported in 146 Ark. 124. Upon remand of the cause to the Benton Chancery Court, appellants on former appeal, who are appellees herein, moved for a judgment of $283.50. A response to the motion for judgment was filed by appellees on former appeal, who are appellants herein, denying that appellants herein were entitled to a judgment under the mandate of the Supreme Court on former appeal, but, on the contrary, alleging that the mandate, in substance, directed a new trial of the cause. A demurrer was filed to the response, and, upon the issue joined, the chancery court held that the direction was for a judgment of $283.50, upon the mandate, as a loss sustained by breach of the contract which formed the basis of the original suit. In accordance with this interpretation of the mandate, the chancery court rendered a decree against appellants herein for said sum, together with interest and costs. From that decree an appeal has been duly prosecuted to this court. New trials are seldom directed by this court upon a reversal of chancery decrees; and, when new trials upon the whole case, or any part thereof, are intended, it has become the established practice of this court, in equity cases, to give special directions to that effect. On the first appeal in the case of *Rushing* v. *Horner,* 130 Ark. 21, the case was reversed with directions "for a new trial with the privilege to either party to make further proof." In discuss-

ing what was meant by that direction on the second appeal to the Supreme Court, this court said, in the case of *Rushing* v. *Horner,* 130 Ark. 201, that "when a cause is remanded broadly for a new trial, all the issues in the case are open for trial anew the same as if there had been no trial. On a reversal of a cause by this court, it seldom occurs that the same is remanded for a new trial; but when such is the direction by this court, then the case stands for trial precisely the same as if there had never been any trial." It follows, therefore, from this expression of the court that, unless the direction for a new trial is specifically made upon a part or all of the issues involved, a direction for further proceedings according to law and not inconsistent with the opinion can mean nothing more than to render a decree in accordance with the record made. It was said in the case of *Gaither* v. *Campbell,* 94 Ark. 329, that, upon a reversal of a chancery decree with special directions, which was followed by the words: "And for further proceedings to be therein had according to the principles of equity and not inconsistent with the opinion herein delivered," these words added nothing in the way of directions to the special directions given.

We think a direction to a trial court, upon reversal and remand of a chancery decree for further proceedings according to law and not inconsistent with the opinion means nothing more than to render a decree in accordance with the record made. In the instant case, upon motion, a decree was rendered upon the remand without reference to the record made, but no prejudice resulted to appellant on this account, for, under the issues and evidence in the case, the only evidence adduced showed a breach of the contract for the sale and purchase of 105 barrels of flour and a resultant damage to appellee in the sum of $283.50.

The decree rendered is responsive to the record made, and is therefore affirmed.

WEBB v. SHEA.

Opinion delivered July 4, 1921.

1. TRUSTS—GOOD FAITH REQUIRED OF TRUSTEES.—Where defendant was not only one of the promoters of an unincorporated association, but also was a trustee or the shareholders and was designated in their advertising matter as president of the company, he thereby assumed a relation of trust and confidence toward those who were invited to join in the enterprise by purchasing stock, and that relation required good faith on his part in making full disclosure of all matters that might affect the interests which they were purchasing.

2. TRUSTS—SALE BY TRUSTEE.—The existence of a trust relation does not preclude the trustee from selling property to others with whom he is interested, but such relation does call for the utmost good faith, and the sale is voidable where any advantage is taken or there is a failure to disclose the fact that the person so making the sale is interested in the transaction.

3. TRUSTS—SALE BY TRUSTEE—RIGHT OF CESTUI QUE TRUST TO RESCIND.—Where a sale of an oil lease by trustees of an unincorporated association is void because of their failure to disclose to the other members of the association the fact that they were financially interested in such sale, the contract being voidable at the election of the stockholders, they could elect to keep the property and sue for the excessive profits derived by such trustees in the transfer of the lease, or they could rescind the contract for fraud and recover the price paid for the stock.

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

S. S. Hargraves, for appellant.

1. The contention of plaintiffs that defendants concealed form them the fact that Webb was interested in the oil lease as owner and that he sold same to the Rainbow Division Oil Company at a profit is not sustained by the proof. The transfer and assignment of the lease was placed in escrow in a bank at Little Rock, and any prospective shareholder might have examined it. The declaration of trust showed that Webb was one of the lessors. There was nothing concealed. See 1 Thompson, Corporations, §§ 459, 460.

2. Where a secret profit is wrongfully obtained from a corporation by one sustaining a fiduciary relation to it, the measure of recovery is the amount of money he made as a profit in the transaction. 71 Ark. 283. The chancellor erred in requiring appellant to repay to the company all of the purchase price paid by the company for the lease.

Cul L. Pearce, Brundidge & Neelly; Mann, Bussey & Mann, and *Coleman, Robinson & House,* for appellees.

1. Promoters are required to make a full disclosure of all material facts, and are not permitted to make a secret profit. 71 Ark. 281; 131 Ark. 386; 176 U. S. 204; 188 Mass. 315; 149 Pac. 595; 16 S. W. 390; 35 Pac. 444; 18 L. R. A. (N. S.) 1106; 32 Pac. 600; 72 N. W. 745; 35 Pac. 444.

It is not true that the trustees, directors and officers of the company were apprised of the facts and dealt with a full knowledge of them. Defendants fraudulently misrepresented facts to them.

2. When promoters organize a company or corporation for the express purpose of taking over property owned by the promoters, the law requires them to make a full disclosure of material facts, and to create an independent board that will be in a position to deal with the promoters at arms' length. 1 Fletcher, Cyc. Corp., p. 283; 7 R. C. L. 70; Thompson on Corp., § 457; 3 App. Cas. H. L. 1218.

McCULLOCH, C. J. This is an action instituted by appellee against appellant D. C. Webb and certain parties to cancel the transfer of an oil lease and to recover the amount paid by appellees for shares in an unincorporated association organized for the purpose of producing and selling oil. Eugene Williams and R. E. Priddy were made defendants, but they were nonresidents of the State, and there was no service on them, so the cause proceeded against appellant D. C. Webb alone. Appellant resides in St. Francis County, Arkansas, and Priddy and Williams live in Memphis, Tennessee, where they

were copartners in the business of buying and selling bonds, and they had a branch office in Little Rock.

Appellant and Priddy and Williams purchased an oil lease on ten acres of land in what is known as the Burk-Burnett oil fields in the State of Texas, paying therefor the sum of $20,000 in cash, each of the parties contributing one-third. They conceived the plan of organizing an association of some kind and selling the lease to such association and then selling sufficient stock therein to raise funds to pay for the lease. Pursuant to this plan, the above, named parties interested R. R. Kelly and W. S. Madden in the plan which was carried out by a written contract creating a common-law trust whereby appellant, Kelly and Madden, were made trustees for all persons who should acquire shares in the association. The association was given the name of Rainbow Division Oil Company, but it was never incorporated. It was agreed that appellant, Priddy and Williams should sell the lease to the association for the price of $95,000, of which $20,000 was to be paid in shares in the association and the remainder in cash. It was further agreed that the transfer of the lease would be placed in escrow in one of the banks of Little Rock for delivery upon the completion of the payment of the price. Pursuant to this plan, the lease propery assigned was so deposited, and the trustees proceeded to sell stock in the association, employing for that purpose certain agents and solicitors, and they paid a commission of fifteen per centum on the sales. The trustees adopted a rule or resolution, which was pursuant to the agreement with the holders of the lease, that 80 per cent. of the proceeds of the sale of stock should be paid over to the bank on the price of the lease and that 15 per cent. should be paid to the agents and solicitors as commissions on sales of stock and the other 5 per cent. should be used in paying overhead expenses, such as office rent and other like expenses. Stock was sold aggregating $89,000, and these sales were made by various solicitors and the parties interested, including appellant himself, and also one of the appellees. A little

later appellees T. A. Shea and B. W. Moore were elected trustees by the other three, but the testimony shows that they did not taken any action in the management of the concern except that they sold some of the stock to other persons. Out of the proceeds of the sale of stock $70,400 was paid to appellant and Priddy and Williams on the price of the lease and commissions in the sum of about $13,000 were paid. Appellees are all shareholders in the association and joined in this suit as such, and appellees, Shea and Moore also sue as trustees of the association.

The charge in the complaint is that appellant concealed from the shareholders the fact that he was interested in the sale of the lease to the association; that the lease was practically worthless, and that the value thereof was grossly misrepresented by the trustees, including appellant, in selling stock in the association and advertising the stock for sale, and that the sale of the stock under those circumstances constituted a fraud, for which a court of equity should grant relief by canceling the transfer of the lease and by restoring the consideration paid for the stock. We are of the opinion that the charge in complaint is established by the evidence and that appellees are entitled to the relief which the court granted. The testimony warrants the finding that, at the time of the purchase of the lease by appellant and Priddy and Williams in May, 1919, and the resale thereof shortly thereafter to the association, the lease was not worth more than the amount appellant and his associates paid for it, which was $20,000, and that the price at which it was resold to the association was grossly exaggerated, and that at the time of the institution of this action the lease was practically worthless. The testimony warrants the conclusion that these parties, *i. e.,* appellant and his associates, Priddy and Williams, conceived the plan of unloading this lease upon the association for the purpose of obtaining a grossly exaggerated price, and that appellant failed to disclose the fact to the public that he was interested in the sale of the lease. They adopted a very pretentious name, and advertised it extensively in the

newspapers as being a good investment, and represented the fact to be that the lease was worth a great deal more than the association had agreed to pay for it. We think that the testimony was, as before stated, sufficient to warrant a finding that the conduct of appellant and his associates was fraudulent, and that it was calculated to deceive and did deceive the persons who purchased shares in the association. Appellant was not only one of the promoters of the association, but he became a trustee for all the shareholders and was designated on the literature published at large as president of the company. He thereby assumed a relation of trust and confidence toward those who were invited to join in the enterprise by purchasing stock, and that relation required good faith on his part in making full disclosure to the shareholders of all matters that might affect their several interests which they were purchasing. *Tegarden* v. *Big Star Zinc Co.*, 71 Ark. 281; *Porter* v. *Morris*, 131 Ark. 386; *Old Dominion Co.* v. *Bigelow*, 188 Mass. 315; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 204; *Erlander* v. *New Sombrero Phosphate Co.*, 3 App. Cas. H. L. 1218, 36 Law Times Rep. 222. Such a relation does not absolutely preclude a person who occupies it from selling property to others with whom he is interested, but his relation does call for the utmost good faith, and the sale is voidable where any advantage is taken or where there is a failure to disclose the fact that the person so making the sale is interested in the transaction. The same rule applies as in the case of a corporation. 1 Thompson on Corporations, § 457; 7 Ruling Case Law, 70.

It is also contended that the relief granted by the chancery court was erroneous in its extent, for at most it should only have been granted against appellant for the amount of profit which he is alleged to have secretly obtained. The contract being voidable at the election of the shareholders, they might have elected to keep the property and sue for the recovery of the excessive profits derived by appellant and his associates in the transfer of the lease, but they had a right to rescind the contract

for fraud and recover the price paid for the stock. In other words, they had a right to set aside the transfer of the lease, being appellant and his associates to whom in the purchase of stock.

There was an expense of about $900 for erecting a derrick on the land, and it is also argued that this amount should have been deducted from the amount recovered. Since the lease was cancelled, the benefit, if any, from the erection of the derrick on the land will inure to the holder of the lease, being appellant and his associates to whom the lease reverts upon the cancellation of the transfer to the association. Our conclusion is, therefore, that the chancellor was correct in his decree, and the same is affirmed.

FLANAGAN v. RAY.

Opinion delivered July 4, 1921.

1. PLEADING—SUFFICIENCY OF COMPLAINT—DESCRIPTION OF LAND.—A complaint seeking the recovery of land which describes it as the west part of the northwest fractional quarter of a certain section is not sufficient to identify the land.

2. LIMITATION OF ACTIONS—DEMURRER RAISING DEFENSE AT LAW.—As a rule, the statute of limitations can not be taken advantage of by a demurrer to the complaint in an action at law, unless the complaint shows that a sufficient time had elapsed to bar the action and the nonexistence of any ground of avoidance.

3. LIMITATION OF ACTIONS—DEMURRER RAISING DEFENSE IN EQUITY.—A defense of the statute of limitations may be interposed in equity by demurrer where the cause of action appears upon the face of the complaint to be barred and does not disclose facts sufficient to remove such bar.

4. JUDGMENT—DESCRIPTION OF LAND.—Where a decree contained an incorrect general description of certain land, followed by a correct, specific description, the particular description restrains and limits the general description.

Appeal from Sebastian Chancery Court, Greenwood District; *J. V. Bourland,* Chancellor; affirmed.

J. E. London, for appellant.

1. It was error to transfer the cause to chancery. Plaintiff (appellant) set up a title in ejectment. No equitable defense was set up.

2. It was error to refuse to make McFarlane a party to the action. Defendant made the issue turn upon transactions with McFarlane, who was an indispensable party. See 49 Ark. 87; Kirby's Dig., § 600; 74 Ark. 414; 86 Ark. 304.

3. The judgment relied on is invalid for failure to show that defendant therein (appellant) was summoned or was present.

4. The judgment relied on was satisfied. The court erred in holding that the matter was *res judicata.*

5. We ask that defendant be required to pay $500 with interest, and restored to his home, or that the cause be transferred to a master with instructions to state an account, making McFarlane a party, and to treat the defendants as mortgagees in possession.

Appellee, *pro se.*

1. Appellant waived objection to the transfer to equity. 83 Ark. 1; 80 Ark. 65. An action at law may be transferred to equity because of the equitable nature of the defense. 91 Ark. 464; *Ward* v. *Blythe,* 92 Ark. 208. No exception was saved to the order of transfer.

2. The demurrer to the complaint should have been sustained, as the description of the land was insufficient. 80 Ark. 458. Also because the complaint shows defendant's adverse possession for the past eight years. 46 Ark. 438; 39 Ark. 158. Under Crawford & Moses' Digest, § 6946, the action to set aside a judicial sale should be brought within five years.

3. The plea of *res judicata* was properly sustained. 79 Ark. 210.

WOOD, J. This action was instituted by the appellant against the appellee in the Sebastian Circuit Court. The appellant alleged that he was the owner and entitled to the possession of the west part of section 30, township 8 north, range 30 west, in Sebastian County, Arkansas,

containing 37 2/3 acres. Appellant deraigned title through Abram Smith and his wife, who acquired title through Albert Schular. The deed, which was exhibited with his complaint, described the land as follows: West part of the northwest fractional quarter of section 30, township 8 north, range 30 west, containing 37.94 acres, more or less. Appellant alleged that the appellee was in the wrongful possession of the land, and had been for more than four years, to appellant's damage in the sum of $500.00. The prayer was for possession and damages in that sum.

The appellee moved to transfer the cause to the chancery court. He alleged in his motion that the present suit was the third for the determination of the title, and the right to possession of the land described in appellant's complaint; that the two former suits were between the appellant and R. W. McFarlane; that the appellee deraigned title through McFarlane, who acquired title through a decree and sale of the land by the chancery court.

The appellant replied to the motion to transfer and alleged that this was an action in ejectment, and that the appellant must recover upon the strength of his own title, and that the motion to transfer does not set out any equitable defense; that the allegation that the suit had been before determined in the chancery court, if true, would not entitle the appellee to attack a decree or judgment of the chancery court in this action; that the issue here raised by the plaintiff's complaint was purely one at law, which, on the issues of fact, called for the intervention of a jury. There is no record entry showing that the cause was formally transferred to the chancery court; but there is an entry showing that a "reply and cross complaint" was filed in the chancery court, and the cause proceeded to a decree in that court, from which comes this appeal.

We must presume, therefore, that the cause was duly transferred to the chancery court, and, in the absence of any showing in this record that the appellant

excepted to the ruling of the court in transferring the cause, we must assume that he waived any objections that he might have to such transfer. The so-called "reply and cross complaint," which in reality is but an amended complaint, alleged in substance that the appellant executed a note to John H. Holland for the sum of $500; that a mortgage on the land was prepared and given appellant to execute, but it is not true that the mortgage executed by appellant was on the land involved in this suit, as the record will show; that of the proceedings had in the chancery court appellant's information is of the most meager kind, but he is informed that a judgment was entered against him in favor of R. W. McFarlane; that an execution was issued and levied on the lands described in the decree, which was the east part of the northwest fractional quarter of section 30, township 8 north, range 30 west, in Sebastian County; that these lands were sold; that a writ of possession was issued by the clerk without notice to the appellant and without an order of the court, and that under this writ of possession McFarlane wrongfully took possession, not of the land above described in the decree, but of the west part of the northwest fractional quarter of section 30, township 8 north, range 30 west, in Sebastian County, and also of the southeast quarter of northwest quarter of section 29, township 8 north, range 30 west, in Sebastian County; that McFarlane took possession of the lands and sold them to one Pittman and Pittman sold them to the appellee, Ray. Appellant reiterated his source of title to the first-named tract, and also deraigned title to the last-named tract through a deed from F. E. Pence and wife. Appellant alleged that the decree and conveyance thereunder did not have the effect of divesting appellant of title to the lands. The appellant then alleged that the land had been in the wrongful possession of the appellee and those under whom he claimed for the past eight years; that the rental value on the land in section 30 was $150 per year, or a total of $1,200 for the eight years, and the rental value of the land in section 29 was

$100 per year, or $800 for the eight years. The appellant concluded his "reply and cross complaint" with a prayer for an accounting, and that the appellee be treated as a mortgagee in possession; that appellant have judgment for possession, for damages, and that the commissioner's deed be cancelled as a cloud on his title. The appellant then asked that R. W. McFarlane be made a party defendant.

The appellee filed a general demurrer to the effect that the complaint did not state facts sufficient to constitute a cause of action, and also an answer. In his answer he admitted that McFarlane was in possession of the land in controversy, and had sold the same to Pittman, and that Pittman sold the same to the appellee. He alleged that he had been in peaceable, notorious, continuous and adverse possession of the land described in the appellant's complaint for more than eight years, and had paid the taxes thereon. He denied all the other allegations of the complaint and set up that he was a *bona fide* purchaser of the lands under the decree of the chancery court of Sebastian County, which had never been appealed from; that the appellee filed a bill of review seeking to set aside the decree and the issue was decided against the appellant. Appellee filed as an exhibit to his answer the decree of the chancery court, entered on the first day of July, 1910, which showed a decree in favor of R. W. McFarlane against the appellant, awarding him the possession of the land described therein as follows: "* * * Also the fractional east part of the northwest quarter of section 30, township 8 north, range 30 west, containing 37.67 acres, and more particularly described as follows: Beginning in section thirty, township eight north, range thirty west, at a corner 23 chains west of center of section thirty * * *, thence running west * * * 2.00 chains to the east bank of Vache Grasse Creek, thence north 47¾ degrees west 6.00 chains; thence north 48 degrees west 7.00 chains; thence north 77¾ degrees west 11.10 chains; thence north 3 degrees west 6.00 chains; thence north 59 degrees east 5.00 chains; thence

north 68½ degrees east 6.50 chains; thence north 77 degrees east 2.50 chains; thence north 57½ degrees east 10.00 chains; thence north 63 degrees east 5.18¾ chains * * * thence running south 27.78 chains to the point of beginning, being all the land owned by R. T. Flanagan in said quarter section."

The appellant moved to strike the answer from the files because it was not filed in the time allowed by law and because it did not state a defense to the allegations of the appellant's cross-complaint and set up new matter. The court overruled this motion, to which the appellant excepted. Appellant offered to testify that property of the aggregate value of $1,240, according to an itemized list, was taken from him by the sheriff under a process at the instance of McFarlane; that certain parties had paid McFarlane the sum of $500 for the appellant; that the rents on the lands taken from him under the decree of the chancery court were worth $2,000, and that a certain tenant had paid McFarlane the sum of $125 rent. He offered to introduce two executions in favor of McFarlane showing that a large amount of property had been taken from appellant. The court refused to permit this testimony to be introduced, to all of which the appellant excepted. The appellant introduced the deed from Smith and wife in which the land was described as in his original complaint, and also introduced a mortgage from appellant to Holland conveying real and personal property and, among other lands, the following: "* * * Also the fractional east part of the northwest quarter of section 30, township 8 north, range 30 west, containing 37.67 acres, being all of said quarter section owned by me."

The court found that the title to the land had been previously litigated in a decree, and also in a proceeding to review a former decree of the court. The court, thereupon entered a decree dismissing the appellant's complaint for want of equity, from which is this appeal.

There are at least three reasons why the judgment of the court must be affirmed. In the first place, the de-

scription of the land in the complaint is not sufficient to identify the land. The complaint therefore does not state a cause of action. *Evans* v. *Russ,* 131 Ark. 335-341; *Smith* v. *Smith,* 80 Ark. 458-461. See, also, *Peters* v. *Priest,* 134 Ark. 161-165.

In the second place, the complaint, on its face, shows that the appellee had acquired title through the statute of limitations, for it is alleged "that said lands have been in the possession of the defendant for the past eight years;" that the defendant wrongfully took possession of the lands under a decree which did not describe the lands in controversy, but described the east part of the northwest fractional quarter of section 30, township 8 north, range 30 west, in Sebastian County, etc." Other facts alleged in the pleadings show that the appellee and those under whom he claimed had been holding the lands in controversy continuously, openly and notoriously claiming to own the same for eight years. In *Dowell* v. *Tucker,* 46 Ark. 438-452, we said: "As a rule the statute of limitations cannot be taken advantage of by a demurrer to the complaint in an action at law, unless the complaint shows that a sufficient time had elapsed to bar the action and the nonexistence of any ground of avoidance. That is done by the complaint in this case." So here. *Rogers* v. *Ogburn,* 116 Ark. 233. See also, *Earnest* v. *St. Louis, Memphis & S. E. Ry. Co.,* 87 Ark. 65.

Furthermore, although this action was begun at law, it was transferred to chancery, and must be treated as a cause of action in equity. "A defense of the statute of limitation may be interposed by demurrer in equity where the cause of action appears upon the face of the complaint to be barred and does not disclose facts sufficient to remove such bar." *Mueller* v. *Light,* 92 Ark. 522; *Evans* v. *Pettus,* 112 Ark. 572-580. See, also, *Riley* v. *Norman,* 39 Ark. 158. The court, therefore, might have sustained the demurrer to the complaint which fails to state a cause of action.

In the third place, the court was correct in finding on the trial from the pleadings, exhibits, and testimony in the case that the title to the tract of land in controversy had been previously adjudicated. The erroneous description of the land contained in the decree under which the appellee claims title, which described the land as the east part of the northwest fractional quarter of section 30, township 8 north, range 30 west, is followed by a specific description. This particular description, which embraces the land in controversy, restrains and limits the general description. *Doe* v. *Porter,* 3 Ark. 18.

The decree is therefore in all things correct, and it is affirmed.

JOHNSON *v.* MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered July 4, 1921.

1. ATTORNEY AND CLIENT — RIGHT TO DISCHARGE ATTORNEY.—A client has an unqualified right to control her litigation and to discharge her attorney, but she could not discharge his lien by his wrongful discharge after the action was instituted to recover on the claim.
2. ATTORNEY AND CLIENT — COMMENCEMENT OF LIEN.—An attorney's lien on his client's cause of action, under Crawford and Moses' Dig. § 629, begins only from the institution of the action; and, unless there is an action instituted by authority of the client or upon ratification by the client, there is no lien.
3. TRIAL—DISCRETION TO REFUSE ADDITIONAL INSTRUCTION.—In the absence of any showing of its abuse, the trial court had a discretion to refuse to give an additional instruction after the argument of the case had begun.
4. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.—Instructions requested by the plaintiff which imposed upon the defendant the burden of establishing her defense by a "fair" preponderance of the evidence were properly modified by striking out the word "fair"
5. ATTORNEY AND CLIENT — DEGREE OF DILIGENCE.—Failure of an attorney to exercise reasonable diligence in prosecuting his client's cause will justify the client in discharging him, and an instruction which based the client's right to discharge on the exercise of gross negligence on the attorney's part was properly refused.
6. TRIAL — SPECIAL VERDICT.—Refusal of the trial court to require a special verdict in a case will not be ground for reversal unless there has been a clear abuse of the court's discretion.

Appeal from Baxter Circuit Court; *John B. Baker*, Judge; affirmed.

Allyn Smith, for appellant.

(1) Intervener, as attorney for Mrs. King, had a right to control the course of action, and, in absence of direction to the contrary, may take a nonsuit. 11 Ark. 232.

(2) It was error to refuse to instruct that intervener's negligence in the prosecution of the claim in controversy must be established by the "fair" preponderance of the evidence or beyond a reasonable doubt. 11 Ark. 228.

(3) It was abuse of discretion to refuse to submit requests for a special verdict.

Thomas B. Pryor and *Samp Jennings*, for appellee.

A client is justified in dissolving the relation with his attorney whenever he ceases to have confidence in his integrity or judgment. 136 Cal. 170; 155 Iowa 312; 219 N. Y. 170; 205 N. Y. 398. Mrs. King had control and disposition of this lawsuit. 66 Ark. 197; 117 Ark. 104; 120 Ark. 389.

McCULLOCH, C. J. James E. King, a locomotive engineer employed by appellee, was killed while serving in the line of his duty as such engineer for appellee, and his widow was appointed administratrix of the estate and instituted suit to recover damages for the benefit of herself, as widow, on account of the alleged negligence which caused the death of said decedent; and she entered into a written contract with appellant as her attorney to prosecute the litigation and agreed in the contract to pay him as compensation for his services one-half of the amount recovered after deducting expenses incident to the prosecution of the litigation.

Appellant instituted an action for his client, Mrs. King, as administratrix, first in Lawrence County, on October 31, 1917, and dismissed it on March 13, 1918, and brought a second action in the circuit court of Independence County on the same day or the day thereafter.

This action was dismissed by the Independence Circuit Court for want of prosecution, and appellant on April 23, 1918, brought a new action for Mrs. King in the circuit court of Marion County. This action was also dismissed, and appellant on June 3, 1918, instituted a new action for Mrs. King in the circuit court of Baxter County. Mrs. King subsequently dismissed this action, claiming that she had previously discharged appellant from her employment and employed other attorneys through whom a settlement was negotiated and consummated whereby appellee paid to Mrs. King as such administratrix the sum of $8,500 as a compromise of her claim. Appellant filed his intervention at the next term of the Baxter Circuit Court in which he set forth his claim for one-half of the amount of the compromised settlement between appellee and his *quondam* client and prayed that the dismissed action be reinstated, and that he have judgment against appellee under the statute which gives a lien to attorneys. Crawford & Moses' Digest, § 628. Appellee filed a demurrer to the intervention, which was sustained by the trial court, but on appeal to this court it was held that the demurrer was improperly sustained, and the cause was remanded for further proceedings. *Johnson* v. *Missouri Pacific Railroad Company,* 144 Ark. 469. On the remand of the cause appellee answered setting forth, in substance, that appellant had been discharged by Mrs. King on account of negligence in failing to prosecute her claim with diligence, and that the action instituted by appellant for Mrs. King in the Baxter Circuit Court was without authority from her, and that therefore the court had no jurisdiction to entertain appellant's claim. Appellant filed a demurrer to the answer and also a motion to make more definite and certain and to strike out certain portions of the answer, all of which were overruled by the court, and the cause proceeded to a trial before a jury, which resulted in a verdict in favor of appellee.

The case was tried below on the theory that appel-

lant was entitled to recover one-half of the amount of the compromise settlement between appellee and Mrs. King according to the terms of the contract, unless he was rightfully discharged by Mrs. King on account of negligence in failing to prosecute her claim with diligence, or unless the action in the Baxter Circuit Court was unauthorized.

Appellant requested certain peremptory instructions on the ground that the evidence was insufficient to justify a submission of the issues to the jury, and, after those instructions were refused, he requested the following instructions, which the court gave:

"1. Gentlemen of the jury, this is an action by the plaintiff, Kathern King, as administratrix of the estate of James E. King, deceased, against the defendant, Missouri Pacific Railroad Company and Jo Johnson as intervener, in which the intervener, Jo Johnson, alleges that the plaintiff, Kathern King, employed him to represent her as her attorney in the collection of her claim for damages against the defendant railroad company for the death of her husband, James E. King, agreeing to pay him for his services as such attorney one-half of the amount recovered after deducting the expenses incurred in the collection of said damages; to these allegations the defendant's answer and its response admits that the plaintiff employed the intervener as alleged and as set forth in the contract attached to his petition as exhibit 'A', but deny that intervener performed his duty as such attorney in the settlement of such claim, as a diligent, prudent and careful attorney should; and that, by reason of his carelessness and neglect in the diligent prosecution of said claim to final settlement, plaintiff discharged said intervener as her said attorney and employed other attorneys. These allegations and denials raise the issues to be determined by you."

"2. You are instructed that it is admitted that the intervener was employed as such attorney by the plaintiff, Mrs. Kathern King, that he was later discharged by

such plaintiff, and that thereafter the cause of action was settled through other attorneys, and upon these admissions your verdict should be for the intervener unless you further find that the discharge of the intervener was justified as hereinafter set out."

"4. You are further instructed that, unless you believe from a fair preponderance of the evidence that the intervener was negligent and careless in the prosecution of the claim in controversy to settlement as alleged in defendant's response, and that he failed to prosecute the same as a prudent, careful attorney should, then your verdict should be for the intervener. However, the burden in the whole case is upon the intervener."

"5. You are further instructed that under the law when an attorney accepts a contract of employment from a client, he impliedly agrees to prosecute the cause with due and reasonable diligence; and if you believe from a fair preponderance of the evidence in this cause that the intervener, Jo Johnson, failed and neglected to diligently prosecute the claim in controversy to settlement, and that by reason of such neglect and failure the plaintiff discharged him as her attorney, or that at the time of the filing of the suit against the defendant railroad company in the Baxter Circuit Court by said intervener, that he was acting without authority of employment from plaintiff, then your verdict should be for the defendant."

The court modified instructions number 4 and 5 by striking out the word fair as it appears in each instruction preceding the words "preponderance of the evidence." Other instructions were given by the court of its own motion in harmony with those copied above.

The first contention is that the evidence was insufficient to sustain the verdict. Appellant and Mrs. King were each introduced as witnesses and testified concerning the transactions and correspondence between them. There was a conflict in their respective statements. Mrs. King testified that when she met appellant at Yellville

while the cause was pending in the circuit court of Marion County and the court was then in session, she discharged appellant from her service and also testified that the action in the Baxter Circuit Court was instituted by appellant without her knowledge or consent. Appellant testified that he had a conversation with Mrs. King at the railroad station at Yellville upon his arrival there to attend court, but he denied that she discharged him from her service. He testified that the action then pending in that court was dismissed by the court on motion of counsel for appellee on account of it being in violation of an order issued by the Director General of Railroads, and that, pursuant to agreement with Mrs. King and with her knowledge, he brought the action in the circuit court of Baxter County. He also testified to the receipt thereafter of letters from Mrs. King, which established the fact that she approved and ratified the institution of that action, even though she had no knowledge at the time of the institution of the action that it was to be begun. It is argued that these letters which were introduced in evidence show conclusively that Mrs. King ratified the institution of the action in the Baxter Circuit Court. Mrs. King at first denied that she wrote the letters, but later, when they were presented to her on cross-examination, she qualified this statement by saying that she did not remember whether she had written them or not. These letters tend to show that Mrs. King still regarded appellant as having authority to proceed with the collection of her claim against appellee, but nowhere in either of the letters is there any reference to the pendency of the suit in the Baxter Circuit Court or elsewhere, and Mrs. King testified positively that she had no knowledge of the institution of that action. Those letters were dated respectively June 18, 1918, and June 25, 1918. On July 15, 1918, and on a still later date Mrs. King wrote to appellant notifying him that he was not authorized to represent her in any litigation for the collection of the claim. We are of the opinion that it was a question for

the jury to decide whether or not Mrs. King knew of the institution of the action in the Baxter Circuit Court or whether she subsequently ratified the institution of the action. The testimony was sufficient to warrant a submission of the issue whether or not appellant's discharge by his client was rightful, and whether or not he was guilty of negligence in failing to prosecute her claim with proper diligence. Mrs. King had an unqualified right to control her own litigation and to discharge her attorney (*St. L., I. M. & S. Ry. Co.* v. *Blaylock,* 117 Ark. 504; *St. L., I. M. & S. Ry. Co. v. Hays & Ward,* 128 Ark. 471), but she could not displace the attorney's lien by his wrongful discharge after the action was instituted to recover on the claim. The statute provides that the compensation of an attorney shall be governed by agreement, and that the attorney who appears for a party has a lien on the cause of action from the commencement of the action "which attaches to a verdict, report, decision, judgment or final order in his client's favor and the proceeds thereof in whosesoever hands they may come; and the lien can not be affected by any settlement between the parties before or after judgment or final order." Crawford & Moses Digest, § 628. The statute also provides that the lien created by the act shall be determined and enforced by the court "before which said action was instituted, or in which said action may be pending at the time of settlement, compromise or verdict." Crawford & Moses' Digest, § 629.

It will be observed that the lien begins only from the institution of the action, and unless there is an action instituted by authority of the client or upon ratification by the client there is no lien. Thus the two issues were submitted to the jury in this case, whether appellant's discharge was rightful or wrongful, and whether or not he was authorized to institute the action in the Baxter Circuit Court. Appellant complains now that the court failed to submit to the jury the issue of ratification by his client of the institution of the action in the Baxter Cir-

cuit Court. He did not ask the court at the proper time to give such an instruction. Instruction number 5, quoted above, was given at the instance of appellant after the word "fair" was stricken out, and appellant has no right to complain of the failure of the court to incorporate in that instruction the issue of alleged ratification. It is true that the record shows that appellant during the argument of the case before the jury asked the court to give an instruction on that subject. The record recites that during the argument of the case appellant's attorney made the following request: "In view of the argument of counsel for defendant that Jo Johnson, intervener herein, was discharged at Yellville and that the court was without jurisdiction, we ask this court to instruct the jury that a client may approve and ratify the action of her attorney, even though such act is without the knowledge of the client; and such act of the attorney when approved and ratified has all the validity of an act, which, when performed, has the approval and direction of the client." There is nothing in the record to show what use was being made by counsel for appellee of the instructions of the court. According to the words of appellant's counsel, they were merely arguing that the court was without jurisdiction, which they clearly had a right to do under the issues presented to the jury, and this does not show abuse of discretion by the court in refusing to give new instructions at that stage of the trial. Statement of counsel, however, does not make a record of what actually was said by the opposing counsel. The court does not certify in the bill of exceptions what the argument of counsel was. That which is quoted above is merely the statement of attorneys for appellant, and if the opposing counsel were in fact making an illegitimate argument upon the instructions given by the court or were making an argument which was calculated to mislead the jury and cause it to ignore the question of ratification, they ought to have shown this by a proper recital in the bill of exceptions. We have nothing be-

fore us except the statement of counsel themselves. The court may have refused the instruction on the ground that no such argument had been made by counsel. At any rate it was a question of discretion with the court as to whether or not the additional instruction should be given in the midst of the argument, and we can not say there was any abuse of that discretion in this respect.

It is insisted that the court erred in striking out the word "fair" from the instructions requested by appellant in regard to the preponderance of the evidence, but we are of the opinion that there was no error in that regard.

It is also contended that the court erred in refusing to give an instruction which would have told the jury, in substance, that the neglect of duty or want of diligence which would justify an attorney's discharge was "that degree which the law designates as gross negligence, that is, such management on his part must show a reckless disregard of his duties as an attorney or a dense ignorance of the law governing the conduct of such litigation." Counsel for appellant claim that this requested instruction was given under the rule announced by this court in *Pennington* v. *Yell,* 11 Ark. 212. That was an action instituted against an attorney by his client to recover damages on account of alleged negligence in prosecuting the client's cause and the court laid down the following rule: "Reasonable diligence and skill constitute the measure of an attorney's engagement with his client. He is liable only for gross negligence or gross ignorance in the performance of his professional duties; and this is a question of fact to be determined by the jury * * *." In the present case the trial court followed this rule substantially in the statement to the jury that the client's right to discharge appellant as her attorney was dependent upon the question whether or not he was prosecuting her cause with diligence or was guilty of negligence in failing to do so. In the fifth instruction which the court gave at appellant's request the

law was stated to be that an attorney when he accepts employment from his client "impliedly agrees to prosecute the cause with due and reasonable diligence; and if you believe from fair preponderance of the evidence in this case that the intervener, Jo Johnson, failed and neglected to diligently prosecute the claim in controversy to settlement, and that by reason of such neglect and failure the plaintiff discharged him as her attorney, or that at the time of the filing of the suit against the defendant railroad company in the Baxter Circuit Court * * * that he was acting without authority of employment from plaintiff, then your verdict should be for defendant."

Whatever the degree of diligence may be found necessary to establish the liability of an attorney to his client for damages, there can be no doubt of the right of a client to discharge an attorney who fails to prosecute the cause with reasonable diligence, for that is clearly the measure of an attorney's duty to his client. Any other rule would require a client to retain an attorney who was neglecting the cause and failing to proceed with proper diligence. We think that there was no error of the court in refusing to apply the rule of gross negligence as a condition upon the right of Mrs. King to discharge her attorney.

Appellant requested the court to direct the jury to return a special verdict upon six separate interrogatories, some of which related to questions of law and the others related to matters of fact. The statute (Crawford & Moses' Digest, § 1303) provides that the court may require a jury to return a special verdict and to find specially upon particular questions of fact to be stated in writing. It is discretionary with the court whether or not such special verdict shall be required, and this court will not disturb the exercise of that discretion by the trial court unless there has been a clear abuse of it. *Little Rock & Fort Smith Ry. Co.* v. *Pankhurst,* 36 Ark. 371. Certainly it can not be said in this instance that there was an abuse of discretion where the request contained

interrogatories which related to matters which were not in any event proper to be submitted to the jury.

There are other assignments of error which we do not deem of sufficient importance to discuss. After careful consideration, we are of the opinion that there was no error committed in the course of the proceedings below, and that there was evidence legally sufficient to sustain the findings in the verdict. The judgment is, therefore, affirmed.

WOOD and HUMPHREYS, JJ., dissent.

NORTON v. HALL.

Opinion delivered July 4, 1921.

AUTOMOBILE—FAMILY CAR—SON'S NEGLIGENCE—A complaint which alleges that plaintiff, while walking along a street, was struck by an automobile belonging to defendant and driven by her son, who was a member of defendant's family, without alleging that the son was defendant's agent, fails to state a cause of action against defendant.

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

W. E. Beloate and *J. E. Anderson,* for appellant.

Smith & Gibson, for appellee.

MCCULLOCH, C. J. There are two consolidated cases involving the same question in this appeal. Each case was instituted to recover damages for personal injuries resulting from an automobile collision caused by the negligence of the driver of the car. A demurrer to the complaint was sustained in each case. It is alleged in the complaint in each case that the plaintiff, while walking along a street, was struck by an automobile "belonging to the defendant, Mrs. L. F. Hall, and driven by Bill Huddleston, or Clara Huddleston, wife of the said Bill Huddleston, the said Bill Huddleston being the son of the defendant, Mrs. L. F. Hall, and residing with and being a member of the family of the said defendant, Mrs. L. F. Hall, the said automobile being at the time under

the care and control of the said Bill Huddleston, defendant herein." There is a further allegation that the automobile "was the property of the said Mrs. L. F. Hall, and by her at that time furnished for the use and entertainment of the family," and after describing the injury of the plaintiff it was alleged that "said injuries were caused by the negligence of said defendants, their servants, and members of the family of said defendant, Mrs. L. F. Hall." The demurrer was filed by Mrs. Hall alone and not by the other defendants, so the appeal relates only to the question of Mrs. Hall's liability under the allegations of the complaint.

There is no charge of negligence on the part of Mrs. Hall herself in permitting the use of the automobile by her son or his wife. Nor is there any specific allegation that either Huddleston or his wife were the agents or were servants of Mrs. Hall in operating the automobile. Plaintiffs rely solely for recovery on the charge that the automobile was the property of Mrs. Hall which was provided for the use of her family, the members of which were permitted to use it, and that her son, Bill Huddleston, and his wife, Clara Huddleston, were members of the family, residing with her.

This involves the application of what has become to be termed the "family purpose" doctrine, which is of comparatively recent origin. The substance of the doctrine is that when the father or other head of a family supplies an automobile for the use and pleasure of the family, permitting the members thereof to use it at will, those members thus using the automobile become the agent of the head of the family, and that each one using it, even for his sole personal pleasure, is carrying out the purpose for which the automobile is furnished, and is the agent or servant of the head of the family, so that the latter is liable for injuries resulting from negligence, under the doctrine of *respondeat superior*. The cases which uphold and apply this doctrine do so apparently

in recognition of the principle that the parent is not, as such, liable for the torts of the child, nor liable merely because of permission to use the car, but they hold that liability rests upon the principle of master and servant, or principal and agent, and that the furnishing of the car for family use creates that relation between the head of the family and each member who operates the car by permission. There is great contrariety of judicial opinion upon this subject. The courts of last resort in New York, Missouri, North Carolina, Maine, Alabama, Utah, New Jersey, Massachusetts, Virginia, Kansas, California, Ohio, Illinois, New Hampshire, Mississippi, and Michigan, have refused to apply this doctrine in its broadest sense, so as to impose liability merely because the car is used by a member of the family. *Hays* v. *Hogan,* (Mo.) 200 S. W. 286; L. R. A. 1918 C. 715; *Van Blaricom* v. *Dodgson,* 200 N. Y. 11, L. R. A. 1917 F. 363; *Linville* v. *Nissen,* 162 N. C. 95; *Parker* v. *Wilson,* 179 Ala. 361; *Doran* v. *Thomsen,* 76 N. J. L. 756; *Missel* v. *Hayes,* 86 N. J. L. 348; *Smith* v. *Jordan,* 211 Mass. 269; *McFarlane* v. *Winters,* 75 Utah 598; *Blair* v. *Broadwater,* 121 Va. 301; *Watkins* v. *Clark,* 103 Kansas 629; *Spence* v. *Fisher* (Calif.), 193 Pac. 255; *Elms* v. *Flick* (Ohio St.), 126 N. E. 66; *Arkin* v. *Page,* 287 Ill 420; *Danforth* v. *Fisher,* 75 N. H. 111; *Woods* v. *Clements* (Miss.), 74 Sou. 420; *Loehr* v. *Abell,* 174 Mich. 590; *Pratt* v. *Clothier,* 110 Ala. 353, 10 A. L. R. 1434; *Farnum v. Clifford,* 118 Maine 145.

On the other hand the courts of last resort in Minnesota, Iowa, Georgia, Oklahoma, New Mexico, North Dakota, Wisconsin, Washington, Colorado, Montana, South Carolina and Tennessee have announced in more or less broad terms the application of this doctrine. *Dircks* v. *Tonne* (Iowa), 167 N. W. 103; *Plasch* v. *Fass,* 144 Minn. 44, 10 A. L. R. 1446; *Griffin* v. *Russell,* 144 Ga. 275; *Boes* v. *Howell,* 24 N. M. 142; L. R. A. 1918 F, 288; *McNeal* v. *McKain,* 33 Okla. 499; *Ullman* v. *Lindeman* (N. Dak.), 76 N. W. 25, 10 A. L. R. 1440; *Birch* v.

Abercrombie, 74 Wash. 486; *Hutchin* v. *Hafner,* 63 Col. 365; *Lewis* v. *Steele,* 52 Mont. 300; *Davis* v. *Littlefield,* 97 S. C. 171; *King* v. *Smythe* (Tenn.), 204 S. W. 296; *Denison* v. *McNorton,* 228 Fed. 401. The United States Circuit Court of Appeals for the Sixth Circuit, in the case of *Denison* v. *McNorton,* 228 Fed. 401 should also be classed in that list.

It will thus be seen that there is a sharp division in the authorities. By no means all of the cases cited above as applying the doctrine do so unqualifiedly in holding that any member of a family to which an automobile is furnished by the father becomes the agent of the latter so as to make him liable for injury done to strangers. A few of the cases hold that a member of the family using the automobile for his or her own personal pleasure or convenience makes the father liable for injuries to a stranger, but most of the cases are those where the injury to a stranger resulted while one of the members of the family was using the car for the pleasure of other members of the family, and it was held that this was sufficient to create an agency so as to make the head of the family liable. Those cases do not hold that liability exists because of the fact that the automobile was being operated by a member of the family, but they seem to hold that where one member of the family is operating the car for the benefit of the others an inference of fact may or may not be drawn from the circumstances that agency existed and that the person so using the automobile for the benefit of the other members of the family was acting pursuant to the purposes of the head of the family in furnishing the automobile for family use and therefore became the agent of the latter in using it for the benefit of the others. Such seems to be the effect of the decision of the United States Circuit Court of Appeals, *supra,* and also the Oklahoma court and the Iowa, Michigan, Minnesota and Massachusetts courts in the cases referred to.

We think the better reasoning lies with those courts which hold that there is no agency merely because of the

fact that the automobile was furnished for family use. In other words, we reject the so called "family purpose" doctrine as stated by some of the courts in its broadest sense, though we do not mean to hold that there may not be circumstances under which it would be a question of fact for the jury to determine whether the person so operating the car was the agent of the head of the family or was agent of the particular member or members of the family for whose pleasure and benefit the car was then used. This doctrine is clearly recognized by the Massachusetts court in the case of *Smith* v. *Jordan, supra,* and also in the New Jersey cases cited above. In those and some of the other cases it was held that where an automobile was furnished by the father for family use and the son was driving the car for the benefit of his mother, there was an inference that he was the agent of the father in operating the car.

In the complaint in this case, as before stated, there is no specific allegation of agency or of facts which would constitute an agency. The substance of the charge is that the car, though furnished by Mrs. Hall, was being used and operated by her son and his wife for their own pleasure, and this does not constitute an allegation that the relation of master and servant or principal and agent existed between Mrs. Hall and her son and daughter-in-law.

We are therefore of the opinion that the circuit court was correct in holding that there was no cause of action stated against Mrs. Hall in the complaint.

HART, J., concurs; SMITH, J., dissents.

STERNBERG *v.* CITY NATIONAL BANK OF FORT SMITH.

Opinion delivered July 4, 1921.

1. BANKRUPTCY ACT — POWERS OF TRUSTEE.—Prior to the amendment of § 47 a-2 of the Bankruptcy Act in 1910, a trustee in bankruptcy was vested with no better right or title to the property of the bank-

rupt than the latter had when the trustee's title accrued; but since that amendment the trustee is vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings as against an unrecorded transfer.

2. SALES—CONDITIONAL SALES.—A vendor of a chattel may deliver possession on condition that the title shall not pass to the vendee until the purchase price shall be paid in full, and a subsequent purchaser without notice acquires no title as against the original vendor.

3. SALES—CONDITIONAL SALES—ORAL SALES.—Contracts for the conditional sale of personal property with reservation of title in the seller are not required to be in writing.

4. SALES—CONDITIONAL SALES.—Where a bank, at the request of a local dealer, advanced to a manufacturer of automobiles the price of cars shipped to be sold, and took separate notes reciting that the cars were deposited as collateral security, but the evidence showed that the cars were delivered to the local dealer with the understanding that title was retained in the bank until the money advanced on it was paid, the transaction constituted a conditional sale with reservation of title.

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

STATEMENT OF FACTS.

On application of a creditor, the chancery court at Fort Smith, Arkansas, appointed a receiver to take charge of the property of the Adams-Cooper Sales Company as an insolvent corporation. The company was engaged in selling automobiles at retail in the city of Fort Smith at the time the receiver was appointed. The receiver took charge of certain automobiles owned by the company and sold them under direction of the court and held the money subject to the further orders of the court.

Subsequently the Adams-Cooper Sales Company was adjudged a bankrupt in the Federal court and M. Sternberg, trustee in bankruptcy, filed an intervention in the chancery court claiming the money derived from the sale of the automobiles by the receiver.

The City National Bank of Fort Smith, Ark., also filed an intervention claiming said money. The issue

raised by this appeal is as to which of said parties is entitled to the proceeds of the sale of the automobiles by the receiver.

I. H. Nakdimen, president of the City National Bank of Fort Smith, was a witness for the bank. According to his testimony, the Adams-Cooper Sales Company was engaged in selling automobiles by retail in the city of Fort Smith. The company bought its cars from the manufacturers. According to an agreement with the manufacturers, the sales company and the bank, whenever a car of automobiles was ordered, the bill of lading with the draft for the purchase money attached was sent to the bank. The sales company was notified when the car arrived. Before delivering the bill of lading to the sales company, the bank required the company to make a note for each car, giving the description of the car and everything. The bank did not let the sales company pay for the bill of lading, but the bank itself paid the cost of the automobiles to the manufacturer. The note given to the bank by the sales company specified the number of the car, the engine and so on, and when the car is sold the company brings the money to the bank and pays the note off.

One of the notes in question is as follows:

"Fort Smith, Ark., Oct. 2, 1918.
"No. 18941.

"Thirty days after date, without grace, we or either of us, promise to pay to the order of 'The City National Bank of Fort Smith, Fort Smith, Arkansas,' five hundred dollars, at the City National Bank of Fort Smith, with interest at ten per cent. per annum, payable annually, from maturity, until paid. Value received. Having deposited herewith, as collateral security for payment of this, or any other liabilities of ..... to said bank due, or to become due, or which may be hereafter contracted, the following property, viz:

"One Chevrolet touring car No. 43641, which I

hereby authorize the holder of this note to sell at public or private sale, without demanding payment of this note or debt due thereon and without further notice by advertising or otherwise, and apply proceeds, or as much thereof as may be necessary, to the payment of this note, and all expenses and charges, together with ten per cent. commission on all sales, holding myself responsible for any deficiency. Should there be any depreciation in value of said security prior to the maturity of this note, such an amount of additional security shall be furnished as will be satisfactory to said The City National Bank, and if the additional security is not furnished within two days after demand is made, either in person or by written notice put in postoffice, said bank may proceed at once to sell security as above specified.

"Demand, notice and protest waived.

"Adams-Cooper Sales Co. Inc.

"Troy Adams."

Every other note was like this except as to date, amount and description of the car. In other words, they were all written on the same form. The company had an agreement with the bank that when it ordered a car of automobiles the automobiles should be shipped with a draft and bill of lading attached for the purchase money to the bank.

The draft was drawn by the factory against the sales company and sent to the bank. The bank had an understanding that the title of the cars should be in it. Nakdimen said: "I want to explain the entire circumstance. Adams & Cooper has borrowed money from us. He had an understanding with us whenever he orders a carload of cars that we should loan him money when the carload of cars comes in. They generally come all alike, no exceptions, they come with a bill of lading attached to a draft for the amount of the cars.

"Q. Who was the draft on? A. The draft is drawn by the factory against the seller. Q. In this case? A. In this case Adams & Cooper. When the draft comes in,

it is sent to us, before we paid for it, we have an understanding that the title of these cars goes to us.

"*Mr. Dailey*: I object to him saying before he pays for it. *Mr. McDonough*: That is a matter of cross-examination. *The Court*: Be a little more specific in your statement.

"A. Well, when the bill of lading and draft comes, and when the car arrives, the understanding is that we loan him money to take that up, advance him money on it, and we take a lien on the cars until they are sold. We pay the draft to the company, and we take notes for those cars, and when he sells the car the understanding is, when he sells the cars, he takes up one of the notes.

"Q. How did you do that? *Mr. McDonough*: I object to the cross-examination pending the statement. I think it is proper to let him get through. Q. Did you do that in each instance, Mr. Nakdimen? A. Yes, sir."

Again we quote from the testimony of Nakdimen the following:

"Q. What did you do with the bill of lading when you marked the draft paid? A. Gave it to them. Q. To whom? A. Adams-Cooper Sales Company. Q. Then after you gave them the bill of lading they went down to the railroad company and took the cars out? A. Yes, sir. Q. They unloaded them and took them to their place of business? A. Yes, sir. Q. And sold them there in the ordinary course of trade? A. I suppose so; I couldn't keep them in the vault in the bank. Q. But they took them out and sold them in the ordinary course of trade? A. Yes, sir. Q. They were in the automobile business? A. Yes, sir. Q. They were selling Chevrolet and Chalmers cars? A. Yes, sir."

Redirect examination by Mr. McDonough:

"Q. In your testimony you referred to the title to the property being in the bank, and about a lien. I wish you would explain exactly the agreement between you and

the Adams-Cooper Sales Company in that matter? *Mr. Dailey*: I don't think he can explain an agreement. *The Court*: He can testify what he said and what they said was done. If you can't remember the exact language, give it as near as you can. Q. Just state what the facts are with reference to that agreement, the agreement relating to the method of handling cars? A. The agreement was just like the note says, and the only reason why the collateral in this case is not attached is because it is too bulky, and we have no room for it, and we give him the power to take it to his house and sell it, otherwise we would have had it attached to the note as collateral, because every car or cars we loaned money with the understanding we have got a lien on it until it is sold. The note shows for itself, and the only distinction is we can't take a car and keep it in the vault and put it in the note case."

Again we copy from the testimony of the witness the following:

"Q. Now did they make any contract with you with regard to helping them handle their business? If so, what was that contract? A. Well, they made a contract with us, whenever they buy a carload of cars, they are willing to give us a lien on it provided we pay for it, and when the car comes the contract was to make a note for each car. There was generally three or four cars in a car, and they make a note for it; and when they sell a car they come and pay the money, and in the meantime when the carload arrives they will come in the bank and make the notes and take credit for it, and then make a check for the draft, in order to have a record for all the transactions for their benefit, and as well for the bank. That was a standing contract. Q. Were they buying from the manufacturer of the cars? A. Yes, sir. Q. Who did the ordering, you or them? A. They ordered from them to be sent through us. Q. Was there anything in your contract, and if so state what it was, which induced the manufacturer to send the bill of lading and draft to your bank? Was there anything in the contract about that, that you know of? If so, state what it was? If there was anything in

the contract what was it? A. That we have a lien upon the cars. Q. If there was anything in your contract to induce the bill of lading to be sent to your bank, rather than somebody else's bank. A. The inducement is the factory knows that we take care of it. Q. How do they know it? A. Every time that an automobile agent, every time they order the car, the agent used to some down; the agent of the factory comes down frequently and visits them and visits the bank they do business with, so the factory is aware of the bank. Q. Did you have arrangements with this company whereby you or they one would notify the factory to send the bill of lading to your bank? A. Yes, sir. Q. Now when it came to your bank what was the contract with reference to how you dicharged the thing, how would you pay it? A. By making notes for the car and we pay the factory. Q. Who would do that? A. Take the note and specifying the car, off the bill of lading and off the invoice. Every time, Judge, the factory sent a bill of lading there was an invoice and there was a draft. The bill of lading has to be delivered to the railroad company in order for them to deliver the car of automobiles to Adams-Cooper. The invoice was to them, so we copy it from the invoice the number of the car and the cost of it. That is the only way we could ascertain the number of the car and what it cost."

The chancellor found the issues in favor of the bank and a decree was entered accordingly. To reverse that decree the trustee in bankruptcy has duly prosecuted an appeal to this court.

Dailey & Woods, for appellant.

(1) The only question here is as to which has priority, the unrecorded lien of the bank or the lien given to the trustee by § 47a (2) of Bankruptcy Act as amended in 1910.

(2) The bankrupt was a dealer in automobiles. Bills of lading for the cars came through the bank for collection. The bankrupt would borrow from the bank on each car. The lower court found that the bank retained a lien not a title. The notes recited the pledge of the cars for payment. The notes are what are called "collateral

pledge notes." These notes were not recorded. To make valid such pledges, possession of the cars should have been delivered. 98 Ark. 384. An unrecorded chattel mortgage is not good as against strangers. 9 Ark. 112; 41 Ark. 186; 54 Ark. 179; 130 Ark. 287; 240 U. S. 642; 41 Am. B. R. 698.

(3) The title of the trustee is fixed as of date of the petition in bankruptcy. 129 Ark. 364; 34 Am. B. R. 80.

(4) The lien of the trustee in bankruptcy prevails over an unrecorded conditional sales contract. 34 Am. B. R. 75.

Fadjo Cravens & Ira D. Oglesby and *James B. McDonough,* for appellees.

The transaction either amounted to a pledge or a verbal mortgage with possession in pledge, or the bank is entitled to an equitable lien for the unpaid purchase money advanced by it. The cars never left the possession of the appellee. The lower court so found. It was the understanding that the title of the cars went to appellee. The transfer of the bill of landing to appellee transferred the possession. 117 Ark. 180. Payment of the purchase money and transfer of bill of lading gave the bank title. Crawford & Moses' Dig. § 792; 64 Ark. 244. There was a sufficient symbolical delivery. See 98 Ark. 379.

The trustee's lien cannot take away from the bank its vested rights in the property. 43 Ark. 236; 58 Ark. 289; 23 Law. Ed. U. S. S. C. 64.

When the bank paid the draft, it became the absolute owner and possessor of the property. 90 Ark. 439; 117 Ark. 180; 92 Ark. 472.

The title never passed to the bankrupt. The bankrupt could not sell the bank's interest. 47 Ark. 363; 48 Ark. 160; 82 Am. St. 284.

The transaction was a conditional sale, in which the title did not pass. 101 Ark. 469. A similar question was decided in 137 Ark. 40. Giving of the notes was not inconsistent with retention of the title. 205 U. S. 340.

The claim of the appellee is an equitable lien, superior to the claim of the trustee. 153 Fed. 503; 234 U. S. 399.

If the pledge contract was void, the bank was entitled to the proceeds because of its advances to pay the purchase money. 267 Fed. 606; 263 Fed. 254; 262 Fed. 111; 260 Fed. 321; 256 Fed. 871; 105 Atl. 328; 174 N. Y. S. 375; 169 Pac. 964; 207 Fed. 535.

HART, J., (after stating the facts). It may be stated at the outset that, prior to the amendment of the bankruptcy act in 1910, the trustee in bankruptcy was vested with no better right or title to the property of the bankrupt than the latter had when the trustee's title accrued. *York Mfg. Co.* v. *Cassell,* 201 U. S. 344.

Section 47a-2 of the bankruptcy act, as amended in 1910, gives to a trustee in bankruptcy "the rights, remedies and powers to a creditor holding a lien by legal or equitable proceedings thereon." See, also, *Fairbanks Shovel Company* v. *Wills,* 240 U. S. 642. In that case the court said:

"Since the amendment of section 47a-2 of the bankruptcy act by the act of June 25, 1910 (ch. 412, § 8; 36 Stat. 838, 840), trustees have the rights and remedies of a lien creditor or a judgment creditor as against an unrecorded transfer."

If the transaction between the bank and the sales company constituted a conditional sale, it is manifest that under our decisions the bank is entitled to the proceeds arising from the sale of the automobiles by the receiver.

In *Starnes* v. *Boyd,* 101 Ark. 469, it was said that this court has uniformly adhered to the rule that the vendor of a chattel may deliver possession on condition that the title shall not pass to the vendee until the purchase price shall be paid in full, and that a subsequent purchaser without notice acquires no title as against the original vendor. In that case under a contract for the sale of tim-

ber whereby it was agreed that the seller's brother "is to receive all the lumber and funds for the same" until the seller is paid in full for all his logs delivered at the price stipulated, it was held that the contract constituted a conditional sale with the reservation of title, and not an absolute sale with the reservation of a lien.

In *Bryant* v. *Swofford Bros.,* 214 U. S. 279, it was held that the validity of conditional sales depends upon the law of the State where made, and in bankruptcy proceedings the construction and validity of such a contract must be determined by the local law of the State. Following the decisions of the State of Arkansas, the court held that the sale of a stock of dry goods under a contract by which the articles sold were to remain the property of the seller until paid for, with provision for substitution of other goods and that the proceeds of the goods sold should also belong to the seller, constituted a conditional sale.

It is true that the contracts of sale in those cases were written ones, but this court has held that contracts for the conditional sale of personal property with the reservation of title in the seller are not required to be in writing. *Jones* v. *Bank of Commerce,* 131 Ark. 362, and *Estes* v. *Lamb & Co.,* 149 Ark. 369.

This brings us to a consideration of the question of whether under the facts as disclosed by the record, the transaction under investigation was a conditional sale or a contract for an equitable mortgage. It is often difficult to decide whether in a given case the contracting parties intended to make an absolute sale and to give the seller a lien on the property for the purchase money, or whether the transaction was intended as a conditional sale.

It is certain that when the property arrived at Fort Smith the title and possession were in the bank. A draft for the purchase money with a bill of lading attached was sent by the manufacturer and seller of the automo-

biles to the bank. In each instance the bank took the note of the sales company for the price of the automobile before it was turned over to the sales company. The bank itself transmitted the purchase money directly to the manufacturer of the automobiles. It is true that the note given by the sales company to the bank recites that the automobile is deposited as collateral security, and that Nakdimen in his testimony speaks of having a lien on the automobiles for the purchase money, yet, when the whole substance of the transaction is considered, we think it was a conditional sale. We attach no importance to the recitation in the note of the automobile being deposited as collateral security.

The record shows that the note was written on the printed form of the bank, and the form was the one generally used when notes were deposited with the note filled out as collateral security. It is plain that the automobile could not be deposited with the note as collateral security. There is much circumlocution in the testimony of Nakdimen due in part to the way he was examined and cross-examined. While he speaks in one place of having taken a lien on the automobiles for the purchase price thereof, in another portion of his testimony he speaks of retaining title in them until the purchase price was paid. This view of the transaction is borne out when we consider that a separate note was given for each automobile, and that it was considered a separate transaction. The bank became responsible to the manufacturer and seller of the automobiles at the time it permitted the sales company to take them from the possession of the railroad company. The acts and conduct of the parties indicate that it was the intention of the bank to retain the control of each automobile until it was sold and the proceeds applied to the payment of the purchase price. The fact that the sales company was allowed to have the possession of the automobiles and dispose of them does not under the authorities cited above prevent the transaction from being a conditional sale.

We think that when the testimony of Nakdimen, which is all the testimony there is on the question, is read and considered in connection with the note given by the sales company to the bank for the purchase money, the substance of the transaction is a conditional sale.

It follows that the decree of the chancellor was correct and must be affirmed.

FORD v. MILLER.

Opinion delivered July 4, 1921.

FRAUDS, STATUTE OF—PAROL SURRENDER OF LEASE FOR YEARS.—While, under the statute of frauds, a written lease for a term of years cannot be cancelled or surrendered by a parol agreement alone or by destruction of the writing witnessing the lease, such a parol agreement becomes effective when performed by the parties, in which case the conduct of the parties operates by way of estoppel.

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

STATEMENT OF FACTS.

John E. Miller brought this suit in equity against T. J. Ford to cancel an oil and gas lease executed by his grantor, E. J. Nalley, to Ford. The lease was sought to be canceled on the ground that the parties to it had by parol agreement surrendered it, and that their agreement in this regard had been executed.

T. J. Ford defended on the ground that there had been no surrender of the lease, and that it was still in force.

According to the evidence adduced for the plaintiff, E. J. Nalley and F. B. Nalley, his wife, conveyed the land, which is the subject-matter of this lawsuit, to John E. Miller by warranty deed for the sum of $2,500 in hand paid and the assumption by said Miller of a mortgage on the land amounting to $1,100. On the 3d day of May,

1919, E. J. Nalley and F. B. Nalley, his wife, executed an oil and gas lease to T. J. Ford for the period of ten years under certain conditions set out in the lease contract. On the 14th day of June, 1919, T. J. Ford, J. E. Miller and T. J. Bowers entered into a written contract whereby Miller became interested in certain oil and gas leases owned by T. J. Bowers and T. J. Ford. Among the leases was the one referred to above from E. J. Nalley and wife to T. J. Ford.

According to the testimony of E. J. Nalley, T. J. Ford and T. J. Bowers had made an oral agreement with him to purchase the land set out in the lease contract under consideration. Nalley had previously leased the land to Bowers and Ford, and they had verbally agreed with him to cancel the lease at any time that he wished to sell the land. Pursuant to this oral agreement, they delivered the lease to Nalley, and the understanding was that the lease was canceled. The lease had been filed for record, but the lessees had never gone into possession of the land. Nalley held possession of it all the time.

According to the testimony of John E. Miller, Bowers and Ford first intended to purchase the land from Nalley. They applied to him for assistance in making the purchase, and he agreed with them to advance one-third or even one-half of the purchase money and take a corresponding interest in the land. When the time to complete the contract arrived, Ford and Bowers could not raise the money, and they agreed that Miller might purchase the land from Nalley and further agreed that they would surrender the oil and gas lease on the land which they held. They did actually surrender to Nalley the lease contract and told Miller that they had done so. The plaintiff then purchased the land from Nalley and paid him the purchase price thereof. Nalley corroborated the testimony of Miller to the effect that the lease contract had been surrendered to him at the time he completed his contract with Miller and executed to him a warranty deed to the land.

According to the testimony of T. J. Ford, Bowers and himself were interested in buying oil and gas leases. Subsequently they took Miller in with them. Ford surrendered the lease in question to Nalley because he thought Nalley was about to sell the land to a man at Helena, Arkansas, and he had verbally agreed with Nalley at the time the lease contract was executed to surrender the lease contract to Nalley at any time Nalley had a chance to sell the land. Nalley agreed to return the lease to Ford if he did not make the sale to the Helena man. Before Ford surrendered the lease to Nalley, he asked Miller about it, and Miller told him that it was all right to surrender the lease in the manner indicated because it was on record.

Bowers corroborated the testimony of Ford. Bowers acted as agent for Nalley in the sale of the land to Miller.

According to the testimony of Nalley and Miller, they understood that there was an absolute surrender of the lease contract by Ford and Bowers to Nalley before Miller completed his contract for the purchase of the land from Nalley and paid the purchase money and received a deed therefor.

The chancellor found that there had been an executed oral contract for the surrender of the lease between Ford and Nalley, and that Miller purchased the land upon the faith of it, and that Ford was therefore estopped from claiming that there was no valid cancellation of the lease.

From a decree entered in favor of the plaintiff Miller, the defendant, Ford, has duly prosecuted an appeal to this court.

Brundidge & Neely, for appellant.

(1) It was error to admit parol testimony to show that no consideration was paid and to show agreement between Nalley and Bowers. Parol evidence is inadmis-

sible to vary written contract. 113 Ark. 517; 95 Ark. 135; 7 A. L. R. 836; 22 C. J. 1129; 145 Ark. 310. The lease was good between Ford and Nalley's successor. A partner cannot derive benefit from the relation against his copartners. 20 R. C. L. 880; 53 Ark. 154.

(2) The lease was not void for want of mutuality. 145 Ark. 310. As to when misrepresentations affect the validity of contracts, see 143 Ark. 592.

HART, J. (after stating the facts). The lease contract between Ford and Nalley covered a period of ten years under the conditions and terms recited in the contract.

Section 4866 of Crawford & Moses' Digest provides, in effect, that no lease for a term of years except a lease for a term not exceeding one year shall be assigned, granted or surrendered unless it be by deed or notice in writing signed by the party so assigning, granting or surrendering the same, or by his agent lawfully authorized by writing or by operation of law.

There was no written surrender or assignment of the lease in question. On that account counsel for the defendant claims that the attempted cancellation or surrender of the lease is void under the section of our statute of frauds just referred to.

Under the statute of frauds it is settled that a written lease can not be canceled or surrendered by parol agreement alone, but it is equally well settled that an executed parol agreement for the surrender of a lease will effect such cancellation. The rule of law invoked does not prohibit parol proof of a verbal agreement to surrender, which is effective when executed; but only goes to the extent of holding that such parol agreement does not of itself constitute a surrender and cancellation of the lease. 24 Cyc. 1327; Taylor's Landlord and Tenant, (9 ed.), vol. 2, par. 511-516. Because the written contract for the lease is not the essence of the contract, but only the evidence of it, the destruction of the writ-

ten instrument does not of itself effect the surrender or the cancellation of the contract.

In addition to the text writers cited above, it is well settled that a written contract for the lease of land may be canceled or surrendered by a subsequent, distinct and independent parol agreement between the parties performed by them. In such cases the conduct of the parties operates by way of estoppel. *Phelps* v. *Seely,* 22 Gratt. (Va.) 573; *Jordan* v. *Katz,* 89 Va. 628; *Goldsmith* v. *Darling,* 92 Wis. 363; *Brewer* v. *National Union Building Association.* (Ill.), 46 N. E. 752; *Auer* v. *Penn.,* 92 Penn. St. Repts. 444; *Stotesbury* v. *Vail,* 13 N. J. Eq. 390; *Williams & Davis* v. *Jones* (Ky.), 1 Bush 621, and *Coe* v. *Cassidy,* 72 N. Y. 133. This rule has been recognized and applied by this court in *Hayes* v. *Goldman,* 71 Ark. 251, and *Williamson* v. *Crossett,* 62 Ark. 393.

In the instant case, according to the testimony of Nalley, there was an absolute surrender of the lease by the delivery of it by Ford to Nalley for the purpose of cancellation. Nalley was at that time in possession of the premises and continued in the possession thereof. According to the testimony of Nalley and Miller, Miller paid the purchase price of the land and received a warranty deed therefor from Nalley upon the faith of the surrender of the lease. Upon the completion of the sale Nalley turned over the possession of the property to Miller.

Thus it will be seen that the verbal contract for the surrender of the lease was fully performed, and the court was right in holding that this operated as a matter of fact to cancel the lease. It is true that the testimony of Miller and Nalley was disputed by the testimony of Ford and Bowers, but the chancellor found the facts for the plaintiff.

There is nothing in the record tending to show that the finding of the court was against the preponderance

of the evidence. Under the settled rules of this court the finding of fact made by a chancellor will not be disturbed on appeal unless it is against the preponderance of the evidence. We do not find that to be the case here, and the decree will be affirmed.

NAKDIMEN v. ATKINSON IMPROVEMENT COMPANY.

Opinion delivered July 4, 1921.

1. LANDLORD AND TENANT—COVENANT TO RENEW LEASE.—While covenants for continued renewals of leases are not favored because they tend to create a perpetuity, they are valid when there is an express covenant to that effect.

2. LANDLORD AND TENANT—COVENANT TO RENEW LEASE—CONSTRUCTION. — The general rule is that where a provision for renewal of a lease is in general terms, the lessee is entitled to only a single renewal for the same term and at the same rent.

3. LANDLORD AND TENANT—RIGHT TO RENEWAL OF LEASE.—Under a lease for a ten-year period stipulating that, at the expiration of a period of ten years, the rental should be fixed by arbitration, it was intended that there should be a renewal of the lease for the further period of ten years at a rental to be fixed by arbitration.

4. SPECIFIC PERFORMANCE—CONTRACTS INVOLVING SKILL OR JUDGMENT.—Under the rule that chancery courts will not decree specific performance of contracts requiring continuous acts involving mechanical skill and judgment or technical knowledge, or acts requiring special skill, judgment and discretion, equity will not enforce specifically a contract requiring the continuous operation of an elevator.

5. ARBITRATION AND AWARD—ENFORCEMENT BY COURT OF CONTRACT TO ARBITRATE.—Where the essence of a contract was the renewal of a lease for another term, the fixing of the rental for that period by arbitration being merely auxiliary to the main contract, the party refusing to name an arbitrator cannot be heard to complain where the court performs or provides for the performance of such service.

6. LANDLORD AND TENANT—RENEWAL OF LEASE—VALIDITY OF CONTRACT.—A clause in a contract of lease providing for renewal of the lease at the end of the term at a rental to be fixed by arbitration is not void as being too indefinite to be enforceable.

7. REFORMATION OF INSTRUMENTS—BURDEN OF PROOF.—While parol evidence is admissible in an action to reform an instrument on the ground of fraud or mistake, the evidence to warrant reformation must be clear and convincing.

8. EQUITY—ADMINISTERING COMPLETE RELIEF.—Where equity takes jurisdiction for one purpose, it takes it for all purposes, and will grant complete relief.

9. LANDLORD AND TENANT—EVICTION—DAMAGES.—Where a tenant is unlawfully evicted from the premises by the landlord, he may recover as damages whatever loss results to him as a direct and natural consequence of the wrongful act of the landlord.

10. APPEAL AND ERROR—REVERSAL—REOPENING CHANCERY CASE—Where a decree in a chancery case is reversed and remanded for further proceedings, and it appears to the Supreme Court that the testimony upon any branch of the case has not been fully developed, or that the court in making a finding on a particular branch of the case has proceeded upon an erroneous theory, it is within the province of the Supreme Court to allow the case to be reopened and further testimony taken on that point.

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

STATEMENT OF FACTS.

This is a suit in equity by appellee against appellants to enforce the specific performance of a renewal covenant in a lease, and also to compel the defendants to submit to an arbitration to fix the rent as provided in the covenant of renewal.

The lease is in writing and is as follows:

"State of Arkansas,
County of Sebastian, ss.

"This instrument witnesseth a contract this day entered into by and between I. H. Nakdimen, hereinafter called the party of the first part, and Atkinson Improvement Company, hereinafter called the party of the second part, which is in the words and figures following, towit:

"The party of the first part contemplates the erection of a six-story building upon his lot lying immediately

west of and adjacent to the Merchants National Bank building, owned by the party of the second part, on Garrison Avenue, Fort Smith, Arkansas; and, for the mutual benefit of said parties of the first and second parts, they have entered into the following agreement and contract:

"For and in consideration of the sum of one dollar each to the other in hand paid, receipt of which is hereby acknowledged, and the mutual concessions, covenants and agreements hereinafter set out; the party of the first part is hereby granted the privilege and permission to use, for the period of ten years from the completion of his said building, the lobby and stairway of the Merchants National Bank Building, paying as rent and compensation for said privilege and use, to the party of the second part, the sum of twenty-five dollars per month, the said sum to be paid in advance, on the first day of each month during the said ten years; and in order to have such use and privilege said party of the first part is hereby authorized and permitted to cut through the wall of said Merchants National Bank Building, on the first floor, for the purpose of access to his elevator, which is to be so located in his own building as to be accessible from the lobby of the Merchants National Bank Building, and on the second, third, fourth, fifth and sixth floors, he is to cut archways, so as to give direct communication from his building to the said Merchants National Bank Building at the elevators in each, so that the said elevators shall be common to both buildings.

"This work of cutting through said wall shall be done in a skillful and workmanlike manner, so as not to injure or impair said wall or said building, and said openings shall be finished in the same style and material as that used in said Merchants National Bank Building; and all this work shall be done at the expense of the party of the first part.

"It is mutually agreed that at the expiration of said period of ten years, the rental to be paid by the party of

the first part to the party of the second part for the concession and privilege herein granted, as herein set out, shall be fixed by a board of arbitrators, three in number, one to be named by each of the parties hereto, and the third to be selected by the two so named by the parties hereto, and that the award of any two of said arbitrators shall be final and conclusive upon the parties hereto.

"And it is further mutually agreed that in cutting through the said wall and making said openings and using the same, party of the first part must do the work and use said opening so as not to increase the rate of fire insurance upon said Merchants National Bank Building, and that if such work and use can not be accomplished without increasing the present rate of fire insurance upon said building then the party of the first part is to pay to the party of the second part said increased rate of insurance; and he hereby obligates himself to pay the same.

"And said party of the first part hereby obligates and binds himself to do, keep and perform all the acts and things herein undertaken by him, and especially to pay the rent herein reserved at the time herein indicated, and the rents named by said board of arbitrators; and to keep said openings so made in the wall of the Merchants National Bank Building in repair during the life of this agreement; and the party of the second part binds and obligates itself to put no hindrance in the way of the exercise of the use of the privilege herein granted to the party of the first part, so long as he, and his heirs and assigns, keep and perform the obligations and agreements herein assumed by him.

"It is further agreed that the party of the first part is permitted to remove that part of the east party wall, now used exclusively for his present building, without recompense to the party of the second part, and by setting his new wall back two feet on his own property from the line between his lot and the lot of the party of the

second part, he is by this concession, to enjoy the use of the areaway (for light and ventilation), now in use, and the additional two feet of areaway produced by setting his new wall back two feet, and the party of the second part is to also enjoy the privilege of the additional areaway so created.

"It is further agreed that the area walls of both parties to this agreement are to be painted white and enameled.

"In testimony whereof, the parties hereto have set their hands in duplicate; and party of the second part being thereunto authorized by resolution of its board of directors, empowering the president to execute this contract in its name, upon this 10th day of July, 1909.

"I. H. Nakdimen,
"Atkinson Improvement Company
"By W. J. Echols, President."

The lease was duly acknowledged and recorded. Subsequent to the execution of the contract, Nakdimen conveyed a part of his property to the other appellants, and for this reason they were, also, made defendants in the chancery court.

Under the terms of the lease, it extended over a period of ten years from the completion of the building by Nakdimen. Appellee claims that the lease contained a covenant for its perpetual renewal on a rental to be fixed by a board of arbitrators as provided in the lease.

A short time prior to the expiration of the first term for ten years, appellee made demand upon appellants to fix the rental for the next term by a board of arbitrators, as provided in the lease contract. Appellants refused to comply with this clause of the contract and claimed that the lease expired by its own terms at the end of the ten years, which was on the 10th of September, 1920.

Other facts will be stated under appropriate headings in the opinion.

The chancellor found that the lease copied above was a continuous contract and remained in force during the life of the buildings specified in it; that appellee was entitled to compensation from appellants in the nature of an annuity; that the lease calls for the rental value for the use of the elevator, stairway, and lobby to be fixed by a board of arbitrators; that appellants, upon being notified of appellee's desire to arbitrate under the contract, refused to appoint an appraiser or arbitrator; that the reasonable rental value for a period of five years is $300 per year, payable in monthly installments of $25; that the rental value at $25 may be increased on application of appellee for any month during said five-year period by showing more than a designated number of persons occupying the Nakdimen building going in and out of the building; that, owing to the fact that the Nakdimen building had become vacant for a period of three months next ensuing, appellants may abate the monthly payment of $25 as rent, by showing the actual number of persons going in or out of the building are less than a designated number; that the court retained jurisdiction of the cause in regard to the rent in order to carry out its decree by appropriate supplemental orders; that the rent fixed by the court for the use of the stairway and lobby expired five years from September 10, 1920; that at the expiration of that period the arbitration clause of the contract will again be in force and then on the failure of either party to select an arbitrator the other may apply to the court to fix the rental.

A decree was entered of record in accordance with the finding of the chancellor. Appellants, who were defendant in the chancery court, have duly prosecuted an appeal from that part of the decree holding that the lease did not expire at the end of ten years. Appellee has been granted a cross-appeal from that part of the decree fixing the rental value of the premises.

Warner, Hardin & Warner, and *James B. McDonough,* for appellants.

(1) The lease or contract terminated at the end of ten years. In construing a contract the court should construe it according to the spirit and intention of the parties. 1 Ark. 325. Where ambiguous, it should be construed against the grantor. 1 Ark. 325; 2 Ark. 491. The law looks to the substance and not to the form of the transaction. 52 Ark. 30. The contract must be construed as a whole. 94 Ark. 461; 53 Ark. 58. In construing a contract the court should ascertain the intention of the parties. 106 Ark. 400; 113 Ark. 174. The situation and relation of the parties will be considered. 105 Ark. 421. The lease might have been extended by the conduct of the parties. 61 Ark. 377; 71 Ark. 251. If the meaning of the contract is doubtful, the circumstances and surroundings and transactions become admissible. 52 Ark. 95; 46 Ark. 122; 55 Ark. 18; 90 Ark. 272; 97 Ark. 522; 90 Ark. 504.

(2) Courts will not construe a contract as perpetual unless they are compelled to do so. Where a contract provides its duration, that clause will prevail. 101 Ark. 22. The court will construe a contract to impose an obligation in perpetuity only when the language of the agreement compels that construction. 130 S. W. 836; 120 Mo. 447; 28 Mo. 420.

(3) Courts will not, by inference or implication, extend the duration of leases or contracts. 2 Addison Contracts, §683.

(4) Courts will construe a contract most strictly against the party who prepared it. 84 Ark. 431; 97 Ark. 522; 105 Ark. 518; 112 Ark. 1; 115 Ark. 166.

(5) Courts construe contracts most strictly against the party seeking to enforce it. 2 Page, Contr. §1120; 130 S. W. 836.

(6) The contract has not the legal requirements necessary to convey an interest in real estate. Crawford & Moses' Dig., §1495; 109 Ark. 223.

(7) The defendants were entitled to a decree modifying and rescinding the language of the contract, so as

to make it a contract for ten years only. 24 Am. and Eng. Enc. of Law 647-9; 66 Ark. 155; 32 Ark. 346; 28 L. R. A. (N. S.) 785. Grant of a privilege to use a stairway and lobby carries the meaning of an easement, and not any right or title or interest in the land. 10 Atl. 526. Such privilege is not the grant of a perpetual right. 77 Pac. 388.

(8) A vague, uncertain and indefinite contract will not be enforced in equity. 223 S. W. 393.

(9) The contract is not one which can be specifically performed. It calls for a succession of acts which cannot be consummated by one decree. 194 Pac. 945; 36 Cyc. 584; 68 Am. St. 749; 126 Cal. 657. A court will not enforce a contract to operate a mine. 39 Ill. App. 630; 82 S. W. 932; 462; 93 Pa. St. 434; 8 S. E. 664; 10 Wall. 339; 193 Pac. 210. The operation of an elevator is a mechanical service, and is not enforceable. 140 Am. St. 52. Contracts containing clauses for arbitration will not be specifically enforced. 36 Cyc. 577. The parties do not agree that the court may fix the rental. 123 Ia. 344; 6 Gill and J. 424; 6 Harr. and J. 485; 168 Mass. 339; 70 Mo. 69; 44 N. J. Eq. 349; 17 N. Y. 491; 7 N. C. 189; 1 Ohio St. 166; 3 Humph. 644.

(10) There is no ambiguity in the contract as to the right to use the stairway and lobby for a period of ten years only. In the construction of contracts containing conflicting clauses control is given to that contract which is plain, certain and specific. 72 Ark. 630; 97 Ark. 322; 116 Ark. 212. A specific limitation of time in a contract controls inferences which might be drawn from other clauses. 101 Ark. 22; 124 Ark. 90.

(11) Even if the contract is continuous during the life thereof, that does not make it a perpetual contract. Every part of the contract must be considered. 124 Ark. 90. The courts abhor perpetuities.

(12) Mutual concessions do not make the contract perpetual.

Hill & Fitzhugh, for appellee.

HART, J. (after stating the facts). It is the contention of counsel for appellants that under the terms of the lease contract which is copied in our statement of facts thelease expired ten years after the completion of the Nakdimen building, which was on the 10th day of September, 1920, and that the lease contained no covenant for renewal.

On the other hand, it is the contention of counsel for appellee that the lease contained a covenant for renewal which might be exercised at the end of each succeeding ten-year period.

Covenants for renewal are frequently inserted in leases for terms of years, and they add much to the stability of the lessee's interest, and afford inducement to make permanent improvements. The landlord is not bound to renew without a covenant for the purpose. Covenants for continued renewals are not favored because they tend to create a perpetuity. They are valid, however, when there is an express covenant to that effect. The general rule is that where the provision is in general terms for a renewal, the lessee is only entitled to a single renewal. A single covenant to renew a lease implies a renewal for the same term and at the same rent. 4 Kent's Commentaries; *Winslow* v. *Baltimore & Ohio Rd.,* 188 U. S. 646; Taylor's Landlord and Tenant, 9 ed., vol. 1, sec. 334; *Thaw* v. *Gaffney* (W. Va.), 3 A. L. R. 495; *Hoff* v. *Royal Metal Furniture Co.,* 103 N. Y. Supp. 371; *Tracy* v. *Albany Exchange Co.* (N. Y.), 57 Am. Dec. 538; *Western Transp. Co. of Buffalo* v. *Lansing,* 49 N. Y. 499, and *Cunningham* v. *Pattee,* 99 Mass. 252.

The lease contract under consideration does not contain any express covenant for continued renewals, and the chancellor erred in holding that the lease continued during the life of the buildings specified in the contract.

On the other hand, when the lease is read from its four corners in the light of the situation and condition existing at the time of its execution, it is fairly inferable

that the parties contemplated a renewal of the lease at the expiration of the period of ten years from the completion of the Nakdimen building. This is shown by the fact that the parties provided for a board of arbitrators to fix the rental value after that period of time expired. This indicates that they intended for the lease to be extended for another term. If they had intended that the lease should expire after the ten-year period, it would have been a vain and idle thing to have provided a board of arbitrators to fix the rent thereafter. This view is strengthened when we consider that the lease provides for the erection and operation of an elevator for the common use of both buildings. Therefore, we hold that, when the language of the lease is considered in its entirety, it was intended by the parties that there should be a renewal of the lease for the period of ten years upon a rental to be fixed by a board of arbitrators as provided in the lease.

Appellants declared that the lease was terminated by its own terms at the expiration of ten years and refused to comply with its provisions any longer.

The court rendered a supplemental decree in which it ordered appellants to restore the operation of the elevator service in the Nakdimen building. The appeal also challenges the correctness of this holding.

We think the court erred in directing appellants to continue the elevator service. Chancery courts will not decree the specific performance of contracts requiring continuous acts involving mechanical skill, and judgment or technical knowledge or acts requiring special skill, judgment and discretion. 25 R. C. L., sec. 117, p. 303, case note to 140 Am. St. Repts., p. 62; case note to 68 Am. St. Repts. 760-761.

The courts generally recognize that to enforce the specific performance of such contracts would unreasonably tax the superintendence of the court. In recognition of the principle, this court has held that equity will not

decree the specific performance of a contract to build a levee for the reason that there is no reasonable method by which such a decree can be enforced. *Leonard* v. *Bd. Dir. Plum Bayou Levee Dist.*, 79 Ark. 42.

Again in the case of *Warmack* v. *Major Stave Company,* 132 Ark. 173, the court refused to direct the specific performance of a contract with an electric light company to supply current for light between itself and a manufacturing company.

The running of an elevator requires both mechanical skill and judgment, and we are of the opinion that the contract in question comes within that class of cases which courts of equity will not specifically enforce. If the court should undertake to enforce the contract in the present case, it might involve the frequent necessity of hearing complaints from the appellee, charging the appellants with a breach of duty, or similar complaints from the appellants for a breach of duty on the part of appellee. There would be no limit to the number of times the court might be called on during the life of the lease to say whether the appellants have performed their duties faithfully or efficiently. For the same reason a court of equity in the present case would not seek to enforce the contract by a mandatory injunction. The performance of the contract would require continuous duties on the part of the appellants involving mechanical skill and care of such a character that the court could not superintend it.

Again it is contended by counsel for appellants that the contract is void because it provides for the rent to be fixed by a board of arbitrators, and they invoke the general rule that an agreement to enforce a contract by arbitration will not be carried out by a court of equity. The presence of an arbitration clause in a contract does not necessarily prevent the court from acting. It is only where the act to be performed by the board of arbitrators is of the essence of the contract that the court will refuse to act.

In the present case the essence of the contract was the renewal of the lease for another term of ten years, and the fixing of the rental for that period was merely ancillary to the main contract. Where the provision for an appraisal is incidental and subsidiary to the substantive part of the agreement, the party refusing to name an appraiser or arbitrator can not be heard to complain where the court performs or provides for the performance of such service. The court in fixing the reasonable rental value treats the method as a matter of form rather than substance. So it may be said in the present case that the clause of the contract providing for a board of arbitrators to fix the rental value of the premises does not render the contract void as being too indefinite to be enforceable. *Mutual Life Ins. Co. of New York* v. *Stephens* (N. Y.), L. R. A. 1917 C, p. 809; *Grosvenor* v. *Flint,* (R. I.), 37 Atl. 304; *Kaufman* v. *Liggett* (Penn.), 67 L. R. A. 353. In each of the two cases last cited the court held that the fixing of the rental is not of the essence of a contract to renew a lease upon receipt of notice of that effect upon a rental to be fixed by arbitrators to be appointed by the parties. See, also, *Castle Creek Water Co.* v. *Aspen* (U. S. Ct. Ct. of Appeals), 8 A. & E. Ann. Cas., p. 660.

On the question of the reformation of the lease contract, but little need be said. In *Welch* v. *Welch,* 132 Ark. 227, we reviewed the authorities on this question, and held that, while parol evidence is admissible in an action to reform an instrument on the ground of fraud and mistake, the evidence must be clear and convincing to warrant a reformation of the instrument. No useful purpose can be served by stating or discussing the evidence on this branch of the case. We need only say that it clearly falls short of the requirement of our decisions on the subject, and appellants are not entitled to reformation.

The court fixed the rental value of the premises for a period of five years, and then provided that the matter

might again be taken up by it if the parties refused to arbitrate.

There is some confusion in the testimony as to what the rental value of the elevator service should be, and for this reason and the further reason that the decree must be reversed and the cause remanded, the court will be directed to make a further finding on this branch of the case, and each party will be allowed to take additional proof therefor.

The result of our views is that there could have been only one renewal of the contract for the period of ten years from the 10th of September, 1920, and no specific performance of that contract could be enforced. The record shows that appellee applied to appellants for a renewal of the lease and for the appointment of a board of arbitrators under the contract to fix the rent. Appellants declined to appoint an arbitrator and to further perform the contract. This constituted a breach of the contract on the part of appellants. Having denied appellee the specific performance of the contract, it was entitled to recover from appellants for the damages suffered on account of the breach of the contract by appellants. The rule is that, chancery having properly assumed jurisdiction of an action, it will determine all issues presented by the pleading and evidence. In other words, when equity takes jurisdiction for one purpose, it takes it for all purposes and will grant complete relief.

Upon the remand of the case for the error in granting specific performance of the contract, it will be the duty of the court to settle the damages which resulted to appellee from a breach of the contract by appellants. Where a tenant is unlawfully evicted from the premises by the landlord, he may recover as damages whatever loss results to him as a direct and natural consequence of the wrongful act of the landlord. *Byers* v. *Moore*, 110 Ark. 540.

In fixing the damages to be allowed to the appellee

for the breach of the contract by appellants, it will be necessary for the court to consider and fix the rental value of the premises. Therefore, for the reasons above stated, the rental value of the premises, fixed by the court, will not be considered as the correct rental value of the premises under the contract, and the court will be directed to make a new finding on that issue, and each party will be allowed to take additional proof thereon and as well on the question of the amount of damages suffered by the breach of the contract.

While chancery cases are tried *de novo* in this court, they are tried on the record made in the court below. Where a decree is reversed and a cause is remanded for further proceedings, and it appears to this court that the testimony upon any branch of the case has not been fully developed, or that the court in making a finding on a particular branch of the case has proceeded upon an erroneous theory, it is within the province of this court to allow the case to be reopened and further testimony to be taken on that point. It will be the duty of the court upon the remand of the present case to fix the amount of damages suffered by appellee by the breach of the contract upon the part of appellants, and, inasmuch as it will be necessary for the court to know the rental value of the premises for the renewal period of ten years in fixing the damages, it will be necessary for the court to fix the rental value for the elevator service for the reason that appellants refused to proceed under the arbitration clause looking to that end, as above stated. The court will allow both sides to take additional testimony on these points if they are so advised.

For the errors pointed out in the opinion the decree will be reversed and the cause remanded for further proceedings as indicated in the opinion, and not inconsistent therewith.

TERRY v. STATE.

Opinion delivered July 4, 1921.

1. HOMICIDE—INDICTMENT OF ACCESSORY—SUFFICIENCY.—An indictment of one as accessory after the fact to murder in the first degree which alleges the commission of the crime by the principal, and that the defendant, with full knowledge that the principal had committed such crime, "did then and there wilfully, unlawfully and feloniously harbor, protect and conceal said crime" *held* to charge defendant with concealing the principal's crime after full knowledge of its commission.

2. HOMICIDE—TRIAL OF ACCESSORY—EVIDENCE OF PRINCIPAL'S CONVICTION.—On the trial of an accessory to the crime of murder, the judgment of conviction of the principal is admissible as *prima facie* evidence of the principal's guilt, so long as it remained in force, though the time for filing a motion for new trial had not then expired.

3. HOMICIDE—CONCEALMENT OF CRIME—QUESTION FOR JURY.—Testimony held to warrant the jury in finding that it was the purpose of defendants to shield the principal from detection and arrest.

4. CRIMINAL LAW—TRIAL BY JURY OF COUNTY HAVING TWO DISTRICTS.—Under Const. 1874, art. 2, § 10, providing that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed, a provision in an act relating to a county having two judicial districts that in selecting jurors in either of said districts the circuit judge may direct that the venire be selected from either or both districts is constitutional.

5. CRIMINAL LAW—WAIVER OF OBJECTION.—Objection that act No. 282 of 1921 required that the presiding judge should first make an order for a special venire from a judicial district other than the one in which the trial was had before such venire can be summoned was waived where the only objection in the trial court was that the act above mentioned was unconstitutional.

6. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.—Where the defendant's testimony showed that he killed an officer while resisting arrest for the commission of a felony, the mere fact that at the time he shot the officer, the latter was bringing his gun to his shoulder did not make out a case calling for an instruction defining the law of self-defense.

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

Brundidge & Neelly, for appellant.

(1) The demurrer to the indictment should have been sustained. The statute defines an accessory after the fact to be a person who, after full knowledge that a crime has been committed, conceals it from the magistrate or harbors and protects the person charged with or found guilty of the crime. The indictment charges defendants with concealing the crime. Nothing can be taken by intendment. 94 Ark. 242; 93 Ark. 81; 67 Ark. 308; 43 Ark. 93; 95 Ark. 48; 91 Ark. 5. The indictment is not sufficient. 88 Pac. 819; 104 Atl. 525. It does not attempt to follow the language of the statute.

(2) It is not shown that either of the defendants has knowledge of the commission of the crime by Long.

(3) Defendants were not guilty if they concealed the crime because of anxiety for their own safety. 43 Ark. 366; 51 Ark. 189; 66 Ark. 16; 51 Ark. 115.

(4) Defendants were entitled to a trial before a jury of the Northern District of Prairie County. Art. 2, §10, Const.

(5) The court erred in giving instruction No. 1.

J. S. Utley, Attorney General, *Elbert Godwin,* Assistant Attorney General, and *W. T. Hammock,* Assistant Attorney General, for appellee.

(1) The demurrer to indictment was propertly overruled. In 91 Ark. 9, the court declined to follow the construction of the statute given by the California Court.

(2) The proof was sufficient to sustain a finding that defendants had knowledge of the crime.

(3) Defendants' contention that they concealed this crime through fear was submitted to the jury. The verdict is supported by the evidence.

(4) Defendants were tried by a jury from the county in which the crime was committed.

(5) Instruction No. 1 is the law. The conviction of the principal is *prima facie* evidence of his guilt. 1 R. C. L. §§ 153-4.

SMITH, J. Appellants were separately indicted and

tried. The indictments are identical, and charge each appellant with the crime of being an accessory after the fact to the crime of murder in the first degree. They were convicted, and the punishment of each fixed at ten years in the penitentiary. The proceedings at the trial below are so nearly identical that the appeals have been briefed together as a single case.

The indictment against the appellant Terry reads as follows: "The grand jury of Northern District of Prairie County, in the name and by authority of the State of Arkansas, accuse S. A. Terry of the crime of accessory after the fact to murder in the first degree committed as follows, towit: The said Robert Long in the county, district and State aforesaid, on the 14th day of February, A. D. 1921, unlawfully, feloniously and with malice aforethought, with deliberation and premeditation did kill and murder one Alfred Oliver, by shooting him, the said Alfred Oliver, with a gun then and there loaded with gunpowder and leaden bullets, and had and held in the hands of him, the said Robert Long; and that the said S. A. Terry, after said crime of murder had been committed, and with full knowledge that the said Robert Long, had committed said crime of first degree murder as aforesaid, did then and there wilfully, unlawfully and feloniously, harbor, protect and conceal said crime as aforesaid, against the peace and dignity of the State of Arkansas."

The sufficiency of this indictment is questioned both on demurrer and by a motion in arrest of judgment.

The indictment against appellant Cornall is identical except the use of his name instead of that of appellant Terry.

At each trial the record of the conviction of Long was read in evidence. The trial of the appellant Terry was had the day after that of Long. Objection was made to the introduction of the judgment of conviction against Long for the reason that Long had three days within

which to file a motion for a new trial and sixty days within which to appeal, and that the judgment could not become final until the expiration of that time. Objection was also made and exceptions saved to the action of the court in permitting the attorney who defended Long to testify that there would be no appeal in Long's case. Long was convicted of murder in the first degree and given a life sentence in the penitentiary.

The trial occurred in the Northern District of Prairie County, and in making up the jury jurors residing in the Southern District of the county were accepted. Exceptions were saved to the action of the court in holding these jurors competent.

After the introduction of the record of Long's conviction, the first witness to testify was Long himself. Long was asked if he knew what had become of Alfred Oliver, the person alleged to have been killed by him. Objection was made to this question "because the same is a matter of record evidence, and the record is the best evidence of that fact." In passing upon this objection the court said: "I am going to instruct the jury, gentlemen, when we reach that, that the introduction of that record constitutes a *prima facie* case of murder in the first degree as against Robert Long, and unless there be testimony contradictory of that record that that is sufficient to establish that allegation in the indictment of the murder of Oliver by Long, the witness now on the witness stand. What else do you want now at this time?"

The State asked witness Long nothing about the circumstances of the killing, but had him relate what had happened after the killing occurred, and a most gruesome story was told. Long was engaged in the illicit manufacture of moonshine whiskey, and after killing Oliver—to whom he referred as the "detective"—he loaded the corpse into a wagon, covered it with quilts and bales of hay, and left his home, where the killing occurred, about dark. He drove to the home of Terry, a distance of about seventeen miles, where he arrived about eleven

p. m. He awakened Terry, and as soon as Terry came out where the wagon was advised him that "We have got a detective out here, and I want you to help me secrete him." Appellant Cornall was called on by Terry to assist, and the corpse was loaded into a boat and carried out into a creek and thrown into the water after a large rock had been fastened to the body. Other details were related by Long which, if true, fully warranted the jury in finding that both Terry and Cornall had consciously assisted in the attempt to cover up the evidence of Long's crime. They admit this to be true, but attempt to excuse their conduct by stating that they were coerced and intimidated by Long. That they were asked by members of searching parties if they knew anything about the disappearance of Oliver, and denied that they did. This they also admit, but explain that conduct by saying that they kept silent and denied their knowledge of the crime because Long had stated he would kill them both if they told what they knew, and that his partner, Bridges, would kill them if he failed to do so. They stated that, as soon as Bridges and Long were taken into custody and they no longer feared for their safety, they told what they knew and carried the searching party to the creek where the body of Oliver was found. Bridges himself testified. He was present at the killing, and stated that, after the corpse was put into the wagon, Long got a tow sack, into which he put the blood and brains of the deceased which had been scattered over the floor. This sack and the bloody blankets were burned at Terry's home.

Just before the conclusion of the cross-examination of the witness Long, counsel for appellant Terry asked the witness if he killed Oliver in self-defense. The court sustained an objection to this question, holding that the witness could not express his opinion as to what constituted self-defense, but that he might tell what was done. Thereupon counsel asked the witness, "What was Oliver doing when you shot him?" The following questions and answers then appear in the bill of exceptions: "A. Rais-

ing his gun. (The witness then made a motion with both of his hands showing Oliver bringing his shotgun up to his shoulder or bringing it up in a shooting position). Q. Who? A. Alfred Oliver. Q. Who on? A. Me."

This concluded the cross-examination of the witness, and there was no other effort made to show that the killing of Oliver was justifiable.

Exceptions were saved to the action of the court in giving and in refusing to give a number of instructions.

The objections to the indictment are that it does not charge the appellants with concealing the commission of the offense of murder from a magistrate, nor does it allege that appellants harbored and protected Long, the person charged with its commission, and, further, that the indictment is indefinite in its allegations as to the acts of appellants which constituted the concealment of the crime.

The statute under which the prosecutions were conducted reads as follows: "An accessory after the fact is a person who, after a full knowledge that a crime has been committed, conceals it from a magistrate, or harbors and protects the person charged with or found guilty of the crime." Section 2310, C. & M. Digest.

This court has had frequent occasion to consider this statute, and a number of the cases are cited in the briefs of respective counsel. In the case of *Stevens* v. *State,* 111 Ark. 299, we considered what affirmative action would be required to constitute one an accessory after the fact. We there quoted from the case of *Davis* v. *State,* 96 Ark. 7, the following statement of the law: "The mere passive failure to disclose the commission of the crime would not make one an accessory under our statute. There must be some affirmative act tending toward the concealment of its commission, or a refusal to give knowledge of the commission of the crime, when same is sought for by the officials of the person having such knowledge. It has been held by this court that the fact that the person knowing of a crime conceals his knowledge of its

commission, for his own safety does not raise a presumption that he is an accomplice."

We think the indictments under review meet the requirements of the case cited. The indictments allege that, with full knowledge that Long had committed the crime of murder in the first degree, the appellants "did then and there wilfully, unlawfully and feloniously, harbor, protect and conceal said crime as aforesaid."

The indictments do not allege that the crime was concealed from a magistrate. Its allegations are broader, the fair and reasonable interpretation thereof being that the crime was concealed from all persons. As has been said, we have held that mere silence in the presence of crime, or the mere failure to inform the officers of the law when one has learned of the commission of a crime, does not make one an accomplice. *Stevens* v. *State, supra,* and cases there cited. But appellants are charged with the affirmative act of harboring, protecting and concealing said crime, and when this language is read in connection with that which immediately precedes it in the indictment, as it should be, we think it fairly charges appellants with concealing the crime of Long after full knowledge of its commission.

Cases are cited from the courts of other States which hold the pleader to greater strictness and require the recital of the facts which constitute the concealment of the crime. We do not follow these cases, as they they do not comport with our statute, which provides that an indictment is sufficient if it can be understood therefrom (a) that it was found by a grand jury impaneled in a court having authority to receive it; (b) that the offense was committed within the jurisdiction of the court, and at some time prior to the finding of the indictment; and (c) that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case. Section 3013, C. & M. Digest.

No error was committed in permitting the judgment

in Long's trial to be admitted. It is true the time for filing a motion for a new trial had not then expired, and, of course, the time for appeal had not expired; but the judgment showed the disposition of the charge against Long. He had been convicted of murder in the first degree, and the judgment recited that fact. It was not conclusive of Long's guilt, so far as Terry and Cornall were concerned, nor would it have been had the time for appeal, or for filing a motion for a new trial, expired, as the court properly held; but that judgment was *prima facie* evidence of the truth of its recital against Long, so long as it remained in force and effect. 1 R. C. L., p. 154, section 35, of the article on "Accessories."

It is insisted that the proof conclusively shows that appellants acted under the coercion of the threats of Long. But at appellant's request the court charged the jury, if the failure of appellants to disclose the information possessed by them was not for the purpose of shielding Long, to find them not guilty. An instruction more favorable could not have been asked, and we think the testimony warranted the jury in finding that it was the purpose of appellants to shield Long from detection and arrest.

The court committed no error in permitting jurors to serve who resided in the Southern District of the county. The insistence of appellants in this respect is that by act 133 (p. 217) of the Acts of the General Assembly of 1885, Prairie County was divided into the Northern and Southern Districts. By section 6 of this act it is provided "That the circuit courts, hereby established in the respective districts of Paririe County shall be as distinct from each other and have the same relation to each other as if they were circuit courts of different counties, and may change the venue of any case from one district to another, or to any other county in the judicial circuit, in like manner as changes of venue are granted in this State." By section 10, of article 2, of the Constitution it is provided that in all criminal prosecutions the accused shall enjoy the right to a speedy and public

trial by an impartial jury of the county in which the crime shall have been committed. Counsel say that when section 6 of the act of 1885 is read in connection with section 10, of article 2, of the Constitution, the right existed to demand a jury coming from the body of the Northern District of the county, where the crime was committed and where the trial occurred.

It appears, however, that by act 282 of the Acts of the General Assembly of 1921, section 6 of the act of 1885 has been amended by the addition of the following proviso: "Provided, however, that, in selecting juries in special venire in said circuit courts in either of said districts of said county, the circuit judge presiding may direct that said venire be selected from the district in which the court is sitting, or from either or both of said districts of said county."

We see no constitutional objection to this amendment. The General Assembly of 1921 had the right to amend the act of 1885. It had the authority to prescribe the practice of the courts of that county, and the authority of the General Assembly was limited only by the restrictions of the Constitution. The guaranty of the Constitution is that the accused shall enjoy the right to a trial before a jury of the county in which the crime was committed—unless the venue is changed. The Northern District of Prairie County and the Southern District of Prairie County are alike parts of that county, and the guaranty of the Constitution is met when jurors are selected from either division of the county.

It is now objected that the act of 1921 requires that the presiding judge shall first make an order for a special venire from the district other than the one in which the trial is had before such venire can be summoned. This, however, was not the ground of the objection in the court below. Counsel expressly stated that it was his purpose to raise the question of the constitutionality of the act of 1921, and if he had also then raised the question now raised it might have been made to satisfactorily appear

that the court had ordered a special venire from the other district of the county.

The court gave an instruction numbered 1 reading as follows: "You are instructed that the record read to you by the clerk of this court makes a *prima facie* proof of the charge contained in the indictment that Robert Long killed Alfred Oliver in the form and manner charged in the indictment and in the killing thereof it is *prima facie* proof by such record that he was guilty of murder in the first degree and that the State is not required, unless such record be contradicted, to produce additional proof upon this issue."

As we have said, this is a correct statement of the law. But after giving this instruction the court refused instructions requested by appellants defining the law of self-defense. It is very earnestly insisted that the refusal to give these instructions constituted reversible error, as the cross-examination of Long, set out above, tended to show that Long had killed Oliver in self-defense. We do not think the testimony presents that issue. The court gave appellants permission to show that the killing of Oliver by Long was justifiable; but no other effort was made to show that such was the case. Long was not asked to detail the circumstances leading up to the killing. It is fairly inferable—and the jury no doubt found—that, while resisting arrest for the commission of a felony, Long killed an officer of the law who was in the discharge of his duties in making an arrest. *Coats* v. *State,* 101 Ark. 51. The statement that Oliver was bringing his gun to his shoulder does not, under the circumstances detailed by the witness, make a case of self-defense, and the court did not err in refusing to submit that question to the jury.

Numerous errors are assigned in giving and in refusing to give instructions. We do not discuss these instructions in detail, as the questions raised have been many times considered by this court, and a discus-

sion of these assignments of error would unduly protract this opinion.

The court gave a very elaborate charge, included in which were a number of instructions requested by appellants which submitted their theory of the case to the jury. These instructions, as a whole, fairly and fully submitted the case; the evidence is legally sufficient to support the verdict; and, as no error of law appears, the judgment in each case is affirmed.

BANKERS' TRUST COMPANY v. HUDSON.

Opinion delivered July 4, 1921.

1. MORTGAGES—CHATTEL MORTGAGE NOT PROPERLY FILED—VALIDITY.—A chattel mortgage of cattle, which was filed but not recorded without the indorsement required by Crawford and Moses' Dig., § 7384, is not binding on one who subsequently leased the cattle from the mortgagor under an agreement that he should be repaid for expenditures for feed, salt and dipping and should receive one-half of the increase in value of the cattle as remuneration for his care of them.
2. LANDLORD AND TENANT—TERM OF LEASE.—A contract of lease whereby the tenant was to rent a farm and certain cattle thereon for a stipulated rent and for one-half of the increase in value of the stock, no time limit being expressed, is a contract good for one year.
3. DAMAGES—BREACH OF LEASE.—Under a contract of lease of land and cattle, no time limit being expressed, the tenant's right to recover for taking the cattle from his possession would be limited to such damages as would have accrued within one year from the date of the contract.

Appeal from Perry Circuit Court; *Guy Fulk,* Judge; reversed.

W. B. Rutherford and *Owens & Ehrman,* for appellant.

(1) The mortgage, although not properly indorsed, was valid and binding between the parties to the suit. The rent and lease contract between Dale and appellee was nothing more than an agreement on appellee's part to cultivate the land and care for the cattle, and a promise on the part of Dale to pay for any expense incurred in

the care of the cattle other than for feed on the farm. The unrecorded mortgage is binding between the parties. 112 Ark. 187; 123 Ark. 28; 49 Ark. 279. The case of 79 Pac. 749 is almost identical with this.

(2) If the mortgage was invalid, appellee was not entitled to $550.00. If entitled to judgment at all, he was entitled to $195.00.

J. H. Bowen, for appellee.

Appellee was a stranger to the mortgage, and as to him it was void, and replevin could not be maintained against him under the same. If appellee was a bailee, he had an interest in the property, and replevin could not be maintained against him. 52 Ark. 164; 83 Ark. 109; 121 Ark. 346; 16 Ark. 90; 21 Ark. 559; 126 Ark. 462.

The value of the cattle was the correct measure of damages. 50 Ark. 169.

HUMPHREYS, J. This suit in replevin, for the possession of nineteen head of cattle, was filed by appellant against appellee in the Perry Circuit Court. It was alleged, in substance, that appellant was entitled to the possession of the cattle under a chattel mortgage executed by J. L. Dale to J. T. Chafin, February 17, 1920, to secure a promissory note in the sum of $500; that appellant, in due course of business, had acquired the note and mortgage; that, under the terms of the mortgage, appellant was entitled to the immediate possession of the property for the purpose of selling it under the power of sale contained in the mortgage. Appellee interposed the defense that he was entitled to retain the possession of the cattle under a contract with J. L. Dale, which invested him with an interest in said cattle; that the mortgage did not constitute a lien upon the property as against appellee, because he was a stranger thereto, and, when filed with the clerk, was filed without instructions to the clerk to file but not record, as required by section 7384 of Crawford & Moses' Digest. Appellee alleged damages in the maximum sum of $495 on account of the breach of contract in taking the cattle before the

expiration of the contract. The contract between J. L. Dale, the mortgagor, and the appellee, under which he held possession of the cattle, is as follows:

"Perry, Arkansas, April 10, 1920.

"RENT AND LEASE CONTRACT.

"This contract and agreement, made this the 10th day of April, 1920, between J. L. Dale, as party of the first part, and C. W. Hudson, party of the second part, witnesseth and voids all previous contracts between parties hereto or their agents.

"Party of the first part, being the owner of 120 acres of farm and twenty head of cattle, calves, and twenty-four head of sheep, does this day rent and lease unto the party of the second part on following terms and conditions: Party of second part is to care for all stock, furnish all feed and give them all necessary attention; cultivate and care for farm, and pay to party of first part one-third of all marketed crops, except cotton, on which he is to pay one-fourth.

"Party of first part agrees to pay to party of second part at rate of two and fifty hundredths dollars per day for any work done on farm in the way of permanent improvements, and to furnish all materials for repair.

"It is mutually agreed that party of second part is to have one-half of wool clipped from sheep and one-half the increase in value of all stock, based on following agreed valuation:

"One male (no value given).

"Fourteen (14) cows over two years old, at $50 per head.

"Six (6) yearlings and calves at $5 per head.

"The offspring from sheep to be equally divided between parties hereto.

"Party of the first part agrees to pay to party of the second part twenty cents per head for each head each

time dipped. Party of second part to pay vat charges out of same.

"Party of first part agrees to pay all expenses necessary for any and all skilled attention to stock, all medicine, salt and feed necessary for maintenance of stock not produced on farm.

"J. L. Dale,
Party of the first part.

.....
Party of the second part.

"Witness: R. M. Barrington."

The appellant offered the mortgage in evidence, which was excluded over appellant's objection and exception on the ground that it was not properly indorsed for record.

Appellee, the only witness in the case, testified that the sheriff took nineteen head of cattle from him under the writ of replevin, worth, on the Kansas City market, $550; that he expended about $137.50 for feed, and $11 for salt in the care of the cattle; that he dipped them, which was reasonably worth twenty cents a head. The contract was identified by him and introduced in evidence.

At the conclusion of the evidence, the court, at the request of appellee, over the objection and exception of appellant, peremptorily instructed the jury to return a verdict in favor of appellee for $550, which the jury did. A judgment was rendered in accordance with the verdict, from which an appeal has been duly prosecuted to this court.

Appellant first insists that the court erred in excluding the mortgage, although improperly indorsed for record, because, under the terms of the rent and lease contract, appellee was a mere bailee of the mortgagor, and, in that capacity, in effect, a party to the mortgage. The doctrine is invoked that, as between the parties, as well as their privies, an unrecorded mortgage is valid. The contract not only provides that appellee should be repaid

for expenditures for feed, salt and dipping, but for one-half the increase in value of the cattle as remuneration for his attention and for feed raised on the farm by him and fed to them. This working interest in the cattle, coupled with possession, rendered appellee a stranger to the mortgage, and not a privy merely to the mortgagor. The court therefore properly excluded the mortgage when offered as evidence.

Appellant next insists that the court erred in instructing $550 damages for appellee. The mortgage being valid between appellant and J. L. Dale, the mortgagor, appellant is in the same position in relation to damages that the mortgagor would have been had he breached the contract by taking possession of the cattle. No time limit appears in the contract, so, as between them, the contract was good for one year. By analogy, a written contract without a time limit is valid for the same length of time an oral contract would be. Under the statute of frauds, an oral contract of this kind would be good for only one year. Appellee then must be limited to a recovery of damages accruing within one year from the date of the contract. Had the mortgagor been plaintiff in the action, appellee was privileged to treat the contract as rescinded when the cattle were taken from him and to ask for all damages sustained to the date of the breach. This he did in his answer, alleging his damages at $495. It was error to instruct damages in the sum of $550, the value of the cattle on the Kansas City market.

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

GOULD v. TOLAND.

Opinion delivered July 4, 1921.

1. HIGHWAYS—AUTHORITY OF BOARD OF COMMISSIONERS TO ADJUDICATE CLAIMS.—Acts of Special Session of 1920, No. 114, unpublished, in directing the commissioners of Howard County Road

Improvement District No. 2 to ascertain the preliminary expenses of said district, including damages for failure of the district to carry out it contracts, did not constitute the board a judicial tribunal to adjudicate finally such preliminary expenses and damages; while much weight should be given to settlements by the board under the act, they cannot be regarded as final, but the burden is on the complaining taxpayers of showing that the allowances were inequitable and unjust.

2 HIGHWAYS—ABANDONMENT OF ROAD PROJECT—CLAIMS ALLOWABLE. —Where there was no assessment of benefits in a road improvement district, and therefore no ascertainment that the cost of the improvement would come within the assessed benefits to the lands in the district, a contract with a bond dealer for the sale of the district's bond is unenforceable, except as to advances made for preliminary expenses, which, with interest, may be recovered.

3. HIGHWAYS—ABANDONMENT OF ROAD PROJECT—ENGINEER'S FEE.—Where, upon the abandonment of a road improvement, the Legislature directed the commissioners to ascertain the preliminary expenses of the district and to levy a tax to pay the same, an engineer who did preliminary work under a contract which stipulated that the compensation of the engineer should be five per cent. of the cost of construction, of which one per cent. should be paid when plans, specifications and estimates of cost were completed, was entitled to recover only upon a *quantum meruit* basis; and if the per cent. for the entire work provided under the contract was reasonable, it should be accepted as a basis, and a proportionate amount thereof should be allowed for preliminary services.

4. HIGHWAYS—EXPENSES OF COMMISSIONERS.—Under Acts 1920 No. 114, § 5, allowing to highway commissioners of a certain district $5 for each day devoted to his duties," and § 7, providing that the board may incur other necessary expenditures, *held*, that the commissioners could not charge the district for their personal expenses while attending board meetings, but that if any commissioner should be called upon to transact business for the district not included in his personal duties in attending meetings of the board and should incur expenses in performing such duty, he would be entitled to recover therefor.

7. HIGHWAYS—ABANDONMENT OF ROAD IMPROVEMENT—ATTORNEY'S FEE.—Where a road improvement district employed an attorney for a lump sum for all services to be rendered in relation to preliminary as well as permanent work of the district, upon the abandonment of the work, the contract can be regarded only as evidentiary of the value of his preliminary services, and not effective for any other purpose.

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

Coleman, Robinson & House, for appellants.

The commissioners were justified in charging their expenses for railroad fare, auto hire and hotel bills to the district. Acts 1919, No. 243, §§ 5-7. The expenses were incurred in good faith. The allowance to James Gould, under § 2 of the act, was final and binding. No right of appeal was given. 1 L. R. A. (N. S.) 438; 50 do. 233; 127 N. W. 226. The act of 1920 providing for the payment of damages, in addition to preliminary expenses, on dissolution of the district, was valid. The engineer's fee should be estimated by the proportion of the work done as compared with the contract. 115 Ark. 445; 127 Ark. 14. Under the testimony the engineer was entitled to judgment for 2 1-2 per cent of the total fee, which was the amount allowed by the board of commissioners.

W. P. Feazel and *W. C. Rodgers,* for appellees.

The statute (§5) fixed a *per diem* for the commissioners. No provision is made for their "expenses." The expenses of the district are rigidly circumscribed and strictly limited to matters and things specifically and expressly mentioned in the act.

Any contract which Judge Gould made with reference to a sale of bonds for the district was made before there was an assessment of benefits, and was void. The allowance to Judge Gould for $35,000, to the extent of the excess of the preliminary expenses of the district, was *ultra vires.*

The contract of the engineer with the board provided that he should receive one per cent. of the estimated cost when the plans, specifications and estimates are complete. The engineer is bound by the contract.

Allowance to Mr. House of $1000 as attorney's fee was improper. $250 for the nominal services shown would be an outside figure.

HUMPHREYS, J. This suit was instituted in the How-

ard Chancery Court by appellees against appellants, to set aside settlements made by the Board of Commissioners of Howard County Road Improvement District No. 2 with certain of the appellants, for services rendered by them to the district, expense allowance to said commissioners, and to prevent the collection of taxes from the landowners in said district to pay same. The district was created by Special Act No. 243, General Assembly of 1919. The act permitted an abandonment of the district at any time. On account of local opposition, the commissioners suspended work before it was ascertained that the benefits to the property in the district were equal to, or exceeded, the cost of the improvements, whereupon the Legislature passed act No. 114 at its special session in 1920, directing the commissioners to ascertain the preliminary expenses of said district, including damages for the failure of the district to carry out its contracts and to levy a tax against the real estate in the district, in accordance with section 12 of the act creating the district, to pay same.

Subsequent to the organization of the district, and before any assessment of benefits was laid on the land in the district, the commissioners entered into a contract for the sale of bonds with James Gould, and employed an engineer and attorney. The contract with James Gould for the sale of the bonds contained the following clauses:

"First party hereby sells and agrees to deliver to the party of the second part serial bonds of said improvement district in an amount as is authorized under the special act creating said district, minimum of four hundred thousand dollars and a maximum of seven hundred thousand dollars, at a price of $1.02, said bonds to mature within a period of twenty-five years and to be dated the first day of May, 1919, and shall bear interest at the rate of six per cent. per annum semi-annually, New York City payment.

* * * * * *

"That as soon as the board of commissioners has delivered to said James Gould, party of the second part, a written opinion of.....or Geo. B. Rose, attorneys, with the board of commissioners, for a right to borrow funds to be expended upon the preliminary work of said road district and upon the execution of a note signed by members of the board of commissioners as commissioners of said district and delivered to the said James Gould, party of the second part, he contracts and agrees to advance to the said board of commissioners the sum of $20,000 in cash, and said commissioners shall execute a note payable to James Gould, party of the second part, to bear interest at the rate of six per cent."

The contract with the engineer contained the following clause:

"The compensation of the party of the second part shall be an amount equal to 5 per cent. of the actual construction cost of all improvements made by the party of the first part, not exceeding in cost $1,000,000, to be paid as follows: One per cent. of the estimated cost when plans, specifications and estimates of costs are completed, 1½ per cent. of the construction costs when the contract is let, and the balance to be paid in installments."

The contract with the attorney was, in substance, for him to render all necessary legal services to the district during the construction of the work for a stipulated amount of $1,000.

Before the work was suspended, James Gould had advanced $20,000 in cash to the board, under his contract, on a note executed to him, bearing interest at the rate of six per cent. All this money, except $7,000, was used in the payment of preliminary expenses. The work progressed to the point where contractors made bids for constructing the improvement. The lowest bid, however, was for $1,260,859.60, considerably in excess of the estimate according to the preliminary survey and estimate, which was for $922,154.14. The contract for the construction of the improvement was not let.

Pursuant to the provisions of the act authorizing the commissioners to settle all preliminary expenses and damages growing out of its contracts, the commissioners settled with James Gould, including damages growing out of his contract, upon the basis of $4,000 for his profits on a tentative sale of the minimum amount of bonds, $18,000 as interest thereof from the date of his contract until the date of settlement, and $13,000 at that time unpaid upon the advance of $20,000 in cash, making a total balance allowance to him of $35,000, for which they issued the district's notes in denominations of $500 each, bearing interest at the rate of six per cent. per annum from date until paid; also settled with the engineer, H. R. Carter, upon the basis of two and one-half per cent. of the estimate of the cost of the improvement, and, on that basis, allowed him a balance of $14,000, for which amount they executed notes of the district of the denomination of $500 each, bearing interest at the rate of six per cent. per annum from date until paid; also settled with the attorney by allowing him $1,000, the total amount of his contract, for which they issued the notes of the district, bearing the same rate of interest.

In addition to the settlements and allowances aforesaid, the commissioners allowed themselves expenses covering the items of railroad fare, auto hire and hotel bills incurred while attending meetings of the board and performing other services for the district.

Upon a hearing of the cause in the chancery court, the allowance to James Gould was reduced to the actual amount of money advanced by him, with interest thereon, the allowance to the engineer to one per cent. on the estimated cost of the improvement, approved the allowance to the attorney and disapproved the allowance to the commissioners for expenses. Appellants have prosecuted an appeal from the decree of the court, in so far as it was adverse to them, and appellees have prosecuted a cross appeal from the allowance of the attorney's fee.

The first insistence of appellants is that act No. 114,

Acts of the General Assembly of 1920, constituted the commissioners of said district a judicial tribunal without right of appeal, to finally adjudicate the preliminary expenses and all damages resulting on account of contracts entered into by the district, which it failed to carry out. We find no language in the act susceptible of this construction. The act simply directs the board to ascertain the amount due by the district for preliminary expenses and damages growing out of any of the contracts entered into by the board, to collect the amount from the landowners in the district and to pay said claims. The act does not pretend to authorize the board to sit as a court in making the ascertainment and settlement.

While much weight must be given to settlements made by the board under the act, they can not be regarded as final. The effect of the ascertainment and settlement necessarily casts upon the landowners in the district the burden of showing that the allowances were inequitable and unjust.

The next insistence of appellants is that the court erred in reducing the allowance of James Gould to the actual amount advanced, with interest thereon, for the purpose of paying preliminary expenses. This must depend upon the construction given the contract for the sale of the bonds. There is no express provision in the statute prohibiting the making of such a contract before the benefits to the lands in the district have been assessed, but, under the authority of *Cherry* v. *Bowman*, 106 Ark. 39, and the later cases of *Thibault* v. *McHaney*, 119 Ark. 188, and *Thibault* v. *McHaney*, 127 Ark. 1. contracts for permanent construction remain in abeyance and do not become effective until an assessment of benefits has been made for the purpose of ascertaining whether the cost of the improvement will exceed in value the assessment of benefits against the lands. The contract for the bond issue in the instant case related to the procurement of money for the permanent construction, save and except the amount of $20,000 agreed to be ad-

vanced for preliminary work. Save for the money actually advanced to pay for preliminary work, the contract must be characterized as an unenforceable contract until the contingency upon which it was based happened—that contingency being that, before becoming a binding and effective contract, it must be ascertained by an assessment of benefits that the cost of the improvement does not exceed the benefits to the lands in the district.

In the instant case, there has never been an assessment of benefits, and therefore no ascertainment that the cost of the improvement would come within the assessed benefits to the lands in the district. It follows from this construction of the contract, as related to the facts in the case, that the court was correct in reducing the allowance by the commissioners to the amount of money actually advanced for preliminary costs, together with interest thereon, for damages are not recoverable growing out of an ineffective, unenforceable contract.

The next insistence of appellants is that the court erred in reducing the allowance of the engineer to one per cent. of the estimated cost of the preliminary work. This reduction was made by the court under the construction given to the contract to the effect that one per cent. on the estimated cost of the improvement was the contract price between the parties for all necessary preliminary engineering work of the district. This was an incorrect interpretation of the contract. The one per cent. clause in the contract related to the time such installment should be paid, and not in full payment for the services rendered to that date. Such construction was placed upon a contract of the same tenor and effect in the case of *Morgan Engineering Co.* v. *Cache River Drainage District,* 115 Ark. 437. A majority of the court are of the opinion that a contract for engineering and attorney's services, entered into before an assessment of benefits has been made, providing a total per cent. of the assessed cost of the improvement, or for a total amount for all services relating to preliminary as well as per-

manent work of the district, can not be regarded as effective in arriving at the value of the preliminary services, except as evidentiary. The Chief Justice and the writer are of the opinion that the same effect should be given to this contract as was given to the contract in *Morgan Engineering Co.* v. *Cache River Drainage District, supra,* —that is to say, if the contract provided for a total per cent. of the estimated cost of the construction as remuneration and the per cent. provided was reasonable for the whole work, it should be accepted as a basis and a proportionate amount thereof should be allowed the engineer or attorney for preliminary services rendered by him. The majority view results in the application of the *quantum meruit* rule in arriving at the value of the preliminary services of the engineer in this case. The chancellor tried the case upon the theory that the one per cent. provided in the contract covered the value of all preliminary services rendered by the engineer. This constitutes reversible error. In the application of this rule, it would be proper to consider, along with all the other evidence in the case, the actual cost of the preliminary services rendered. The evidence was not fully developed in that respect. It is unnecessary to reiterate the rule and character of evidence admissible in the proper ascertainment of the value of the engineer's fees, as both were fully discussed in the case of *Thibault* v. *McHaney, supra.*

The next insistence of appellants is that the court erred in disallowing the allowance made by the board for the expenses incurred by the members thereof. Section 5 of the act creating the district provides that "each of the commissioners shall receive as their compensation the sum of $5 for each day devoted to his duties." As the section makes no provision for personal expenses while discharging his duties in attending board meetings, any member of the board must necessarily bear his own expenses when thus engaged. Section 7, however, of the act provides that the board may incur other necessary

expenditures which shall be treated as a part of the cost of the improvement. Should any member of the board, however, be called upon to transact business for the district, not included in his personal duties in attending meetings of the board, and, in performance of the duty, incurred necessary expenses, such expenses should be treated as a part of the cost of the improvement and be governed by the authority vested in the board to incur other necessary expenditures. Nothing in the views now expressed on the subject conflicts with the decision of this court in *Tallman* v. *Lewis*, 124 Ark. 6, where we held that a contract between an improvement district and one of its commissioners for the performance of services by the latter outside of his duties as such commissioner, was void, and that he was not entitled to compensation for such services nor for his expenses in performing them. We adhere strictly to the rule there announced in that case, but we hold that there is a distinction between expenses incurred by a commissioner under a void contract and expenses incurred at the instance of the board of commissioners by one or more of its members in the performance of the duties of the board. This rule was not applied by the chancery court, nor was evidence adduced with this rule in view. It will perhaps be necessary to more fully develop the evidence in this regard.

On direct appeal, the decree will be affirmed as to the allowance made to James Gould, and reversed as to the allowance to the engineer and disallowance of expenses to the commissioners, with leave to all parties to introduce additional evidence upon these issues.

Appellants, in the cross-appeal, insist that the court erred in allowing the attorney a fee of $1,000. The court based the allowance upon the contract. The contract for attorney's fees is upon like basis of the contract for engineering fees. The contract was for a total sum of $1,000 for services to be rendered in relation to preliminary as well as permanent work of the district. The contract can only be regarded as evidentiary and

not effective for any other purpose for the reason that the work was suspended in the preliminary stage. The *quantum meruit* rule is applicable to the services of an attorney. The chancellor erred in enforcing the contract as a whole, and, for that reason, the decree must be reversed and remanded with directions to allow both parties to introduce further evidence under the *quantum meruit* rule.

Justices WOOD and HART dissent in part.

HOUSTON v. HANBY.

Opinion delivered July 11, 1921.

1. HIGHWAYS—ESTABLISHMENT OF PRIVATE ROAD—DAMAGES.—Under Crawford and Moses' Dig. §§ 5250–1, authorizing the county court to establish a private road across another's land, evidence *held* to justify a finding that the damage to the owner's land did not exceed $25.
2. HIGHWAYS—ESTABLISHMENT OF PRIVATE ROAD.—Crawford and Moses' Dig., §§ 5250, 5251, providing that when it is necessary for the owner of lands, dwelling house or plantation to have a private road across another's land to a public road or watercourse, the county court may order such road to be laid off at the petitioner's expense, *held* to authorize the establishment of a private road for the benefit of the owner of lands, whether occupied or unoccupied, and the road established thereunder becomes a public road, in the sense that it is open to the use of all who see fit to use it.
3. HIGHWAYS—PRIVATE ROAD—NECESSITY.—In determining whether a private road is necessary, under Crawford and Moses' Dig., §§5250–1, it is not required that the petitioner show an absolute necessity for such road by showing that he had no other means of reaching the public highway or watercourse.
4. HIGHWAYS—PRIVATE ROAD—NECESSITY.—In determining whether a road is necessary, under Crawford and Moses' Dig. §§ 5250–1, the county court should take into consideration not only the convenience and benefit it will be to the limited number of people it serves, but also the injury and inconvenience it will occasion to the owner of the land through which it is proposed to extend the road.
5. HIGHWAYS—PRIVATE ROAD—NECESSITY.—The trial court's finding that a proposed private road was necessary to enable petitioner to haul logs to a public road was sustained by evidence that the proposed road runs about 125 or 150 yards through appellant's cleared

land, to his damage in the sum of $25; that another route suggested by appellant was along a steep grade with sharp angles which rendered it impossible to haul logs, and would cost petitioner from $500 to $1000 for bridges; and that petitioner could reach a public road by travelling two and a half miles by a route by which it was impracticable to get out the logs.

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

Oscar H. Winn and *H. R. Whyte,* for appellant.

Combs & Combs, for appellee.

McCULLOCH, C. J. This is a proceeding originating in the county court of Madison County on the part of appellee to establish a road from certain lands of appellee across lands of appellant to a public road. The proceeding is based on the statute which provides that if "the lands, dwelling house or plantation of any person is so situated as to render it necessary for the owner thereof to have a private road from such lands, dwelling house or plantation to any public road or navigable water course over the lands of any other person, and such person shall refuse to allow such owner such private road, it shall be the duty of the county court, on the petition of such owner, * * * to appoint the viewers to lay off said road," and that upon the report of the viewers if "the court shall be of the opinion that it is necessary for the petitioner to have said road from his said lands, dwelling house or plantation to said public road or navigable water course, and said petitioner shall pay all costs and expenses accruing on account of said petition for such private road, * * * an order shall be made establishing the same as a private road, not exceeding fifteen feet wide, and the person applying for such road may proceed to open the same." Crawford & Moses' Digest, §§ 5250, 5251.

The county court granted the petition of appellee, and upon the report of the viewers made an order authorizing the opening of the road across appellant's land. The viewers awarded damages to appellant in the sum of $25, which said award of damages the county court

approved. Appellant prosecuted an appeal from this order to the circuit court. There was a trial of the issues as to the right of appellee to have the road established and as to the amount of damages to be awarded, and the trial resulted in a judgment of the circuit court establishing the road in accordance with the order of the county court and awarding to appellant the same amount of damages as was awarded by the viewers in their report and by the county court in its judgment. An appeal has been duly prosecuted to this court.

The only question presented for our consideration is whether or not there was evidence sufficient to sustain the findings of the court upon the issues involved. The land of appellant over which the road is sought to be established is a small farm in Madison County, occupied by appellant as his homestead. Only a small portion of the land is in cultivation, as we understand the testimony, though the amount is not shown. Appellee owns an adjoining tract containing 160 acres of unenclosed timber lands. He owns and operates a sawmill a few miles distant from this land, and at the time the present proceeding was instituted he was engaged in cutting the timber from his own lands and hauling it to his mill. He claimed that it was necessary to have a road across appellant's land in order to haul the timber away from his own land. It appears from the testimony that there was an old road across appellant's land along the route now sought to be established—not a public road, nor a private way acquired by prescription, but there had been a country road used to some extent by appellee and others —and appellant stopped up this road by cutting timber across it and refused to permit appellee to use it in hauling his logs. Appellant offered to open up another road around the edge of his place and permit appellee to use it, but the contention of appellee is that that road was an impractical one by reason of the fact that the grade was too steep, the angles too sharp and that it was too expensive to build bridges across the gulches.

There is a conflict in the testimony as to the amount of damage to appellant in opening up the proposed road, but in testing the legal sufficiency of the evidence we must view it in the light most favorable to appellee's cause. The road viewers were introduced as witnesses by appellee and there were certain other witnesses and each of the parties testified themselves. According to the evidence adduced by appellee, the proposed road runs about 125 or 150 yards through appellant's cleared land, *i. e.,* a small field enclosed by a two-wire fence. At the time the road was laid out appellant had planted sugar cane. The viewers testified that the laying out of the road that way cut off a small patch of about three-fourths of an acre from the remainder of the field and that the total damage, including the value of the land taken and the inconvenience in using the remainder of the land and loss of the crop, did not exceed $25. There was, we think, sufficient evidence to justify the finding that the award of $25 was proper compensation to appellant for his injury.

It will be observed that the language of the statute is broad enough to include all lands whether occupied or unoccupied, and, as said by this court in construing the statute, a road established thereunder becomes a public road in the sense that it is open to the use of all who see fit to use it. *Roberts* v. *Williams,* 15 Ark. 43; *Pippin* v. *May,* 78 Ark. 18; *Carter v. Bates,* 142 Ark. 417.

In *Pippin* v. *May, supra,* Judge RIDDICK, speaking for the court, said:

"It being a public road, it was not, we think, required that plaintiff should establish an absolute necessity for such road by showing that he had no other means of reaching the public highway. The fact that there is already a road leading from his place to the public highway does not conclusively show that the road that he petitioned for is not necessary. * * * In determining whether such a road is necessary, the court must, of course, take into consideration, not only the convenience

and benefit it will be to the limited number of people it serves, but the injury and inconvenience it will occasion the defendant through whose place it is proposed to extend it. After considering all these matters, it is for the court to determine whether the road is, within the meaning of the law, necessary or not."

In that case the facts were that the petitioner sought to establish a road over adjoining lands for a distance of about a quarter of a mile when he had the use of another road about three-quarters of a mile long, which, at certain seasons of the year, was boggy and difficult to travel. The judgment of the circuit court was reversed on account of a declaration made by the court stating the law to be that "one person is not entitled to a private road through the land of another except in case of absolute necessity and where he had no other way of ingress and egress."

In the recent case of *Carter* v. *Bates, supra,* the facts were, according to the undisputed evidence, that the land over which the road was sought to be established was a valuable farm which was tile-drained and that the establishment of the road and traveling over it would cause ruts to be formed and the tiling broken and that injurious consequences would inevitably result to the owner by establishing the road out of proportion to the expense and inconvenience of adopting another route.

In the present case there is testimony to the effect that appellant was injured only to the extent of $25 by establishing the road along the proposed route, and that he sustained less injury to his farm than by adopting the other road which he was willing to give around the edge of his place. It is also shown that the road which appellant proposed to give around his place was along a very steep grade, and that there were sharp angles which rendered it impossible to haul logs that way. It was also shown that it would cost from $500 to $1,000 to build bridges across the gulches. There was testimony also that appellee could get out to a public road by traveling

about two and a half miles, but appellee and some of his witnesses testified that it was impracticable to get the timber out by hauling it along that route. Appellee, after stating the facts with reference to the location of the proposed road and of the other road named, gave his positive opinion that the use of this road was a necessity in affording ingress and egress to and from his land.

We think the evidence is legally sufficient to sustain the findings.

Judgment affirmed.

PAYNE v. ROAD IMPROVEMENT DISTRICT NO. 1 OF HOWARD COUNTY.

Opinion delivered July 11, 1921.

1. APPEAL AND ERROR—CONCLUSIVENESS OF FINDINGS OF TRIAL COURT.—Findings of fact of a trial court on conflicting testimony will not be disturbed.

2. HIGHWAYS—ROAD IMPROVEMENT DISTRICTS—LEGISLATIVE DETERMINATION OF BENEFIT.—The fact that the county court found that certain lands would receive no benefit from a road improvement did not preclude the Legislature from determining to the contrary, and such legislative determination will not be disturbed by the court except for demonstrable mistakes.

3. HIGHWAYS—ROAD IMPROVEMENT DISTRICT—ZONAL ASSESSMENT—REVIEW.—Though a board of assessors adopted the zonal system of assessment, and the court found that such system was fair and just as a proportionate assessment of benefits, this did not deprive the court of the power to examine individual assessments to determine whether they should be assessed in the same proportion as other lands in the same zone.

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

W. C. Rodgers, for appellant.

By the judgment of the county court it was adjudged that none of the lands described in certain sections would be benefited. This order was entered by consent. This judgment is conclusive of the matters there settled.

107 Ark. 41; 76 Ark. 423. The Legislature could not validate the acts of a board of assessors fixing assessments where there are no benefits. 119 Ark. 198.

The special finding that these lands are not benefited is in an irreconcilable conflict with the finding that they are liable. The special finding of fact should prevail. 40 Ark. 298, 327; 50 Ark. 91; Kirby's Digest § 6209. The statute also applies to the findings of a judge. 84 Ark. 362.

J. M. Jackson and *H. P. Epperson,* for appellees.

The county court had no legal authority to exempt a part of the lands included in the district from taxation. It might have eliminated such lands from the district if they were not benefited. Crawford & Moses' Digest §5401. The court at the time it made the order exempting these lands had no question before it except the matters set forth in §5401, *Id.* The act of 1919, No. 105, cured all defects, and failed to provide that these lands should not be assessed. The entire benefits as reassessed are not before the court, but only the benefits as reassessed against the lands of these plaintiffs. The question here is whether the burden is equitably distributed, rather than whether each tract is benefited. No fairer scheme of assessment could have been devised than the one followed by the assessors in making this reassessment. The tracts involved herein are benefited, and the benefits as reassessed should be permitted to stand.

McCULLOCH, C. J. Appellants are owners of separate tracts of land within the boundaries of Road Improvement District No. 1 of Howard County, and they appeared in the county court and made objections to the assessment of benefits on said lands. There are two of the cases in which a protest was filed, and in each case the county court found that none of the lands of appellants would be benefited by the construction of the improvement and annulled the assessment of benefits thereon. The commissioners of the district prosecuted an appeal to the circuit court in each case, and in that

court the two cases were consolidated and tried as one. The consolidated cases were heard on the pleadings and oral testimony, and a judgment was rendered, from which each side has prosecuted an appeal to this court.

It is contended in the first place that the appeal to this court prosecuted by the commissioners of the district is unavailing for the reason that no motion for a new trial was presented to the court in apt time and overruled. Since the transcript was lodged here by the appellants, there has been an additional record brought here of proceedings of the trial court on an adjourned day of the same term at which the original judgment was entered, amending the record so as to show that a motion for a new trial was filed and overruled and time given for filing a bill of exceptions. Appellants invoke an application of the rule established by the authorities that after an appeal has been granted a trial court has no jurisdiction to take further proceedings in a cause. This rule can not be applied so as to deny the trial court's jurisdiction to consider the application for a new trial of a party other than the appellant. The statute fixes the time within which motions for new trial may be presented and considered by trial courts, and it is within the discretion of trial courts to extend the time to a date within that term of court. Where both parties to litigation are aggrieved by the judgment, each has a right to prosecute an appeal and take necessary steps leading up to it within the time prescribed by the statute and the order of the court, and one party can not deprive the other of any of his rights by a hasty appeal.

The motion for new trial in this case was filed by permission of the trial court during the term at which judgment was rendered, and therefore, on the overruling of the motion, the commissioners of the district had the right to prosecute an appeal to this court, notwithstanding the fact that appellants had theretofore completed their appeal by lodging a transcript in this court. We are of the opinion, therefore, that both appeals are prop-

erly before this court with bills of exceptions which constitute a complete history of the trial below.

This improvement district was originally created by an order of the county court of Howard County, entered on October 7, 1918, pursuant to the general statutes of the State authorizing the creation of road improvement districts. Crawford & Moses' Digest, § 5399 *et seq.* The lands within the district were properly described in the order of the county court and in the petition therefor, but the order contained the following recital in regard to certain lands described in the petition:

"It being hereby agreed by the parties owning lands hereafter described, their attorneys and the attorneys for said road improvement district, because of the topographical location of the said lands, no benefits are to be assessed against the said property for the road improvement district, towit: The south half of sections 8, 9, and 10, and all of sections 14, 15, 16, 17 and 18, all in township 8 south, range 28 west."

The General Assembly at the regular session of 1919 enacted a statute, approved February 22, 1919 (Vol. 1, Road Acts, page 201), curing all irregularities and errors in the organization of Road Improvement District No. 1 of Howard County, and re-establishing the district, describing the lands therein, including the lands specially referred to in the order of the county court quoted above. This statute provides that the district is established as a road improvement district under the general statutes "with all the powers granted and all the limitations imposed by the terms of said act, except as herein otherwise provided." Section 3 of the special statute expressly confirms the assessment of benefits theretofore made by the assessors. Section 4 provides how the assessments shall be paid in installments, with interest on the deferred payments.

At the extraordinary session of the General Assembly in February, 1920, a special statute was enacted ap-

plicable to this district (Act No. 285) expressly declaring that the assessment of benefits heretofore made by the board of assessors is equitably distributed in said district, "but inadequate in amount, and that all lands within said district will be benefited by the improvement now under way to the extent of double the amount of the present assessments." This statute declares that the county clerk of Howard County shall be authorized to double the assessments "now standing against said lands", and that the assessments thus doubled shall "be made and authorized according to the provisions of" the general statutes of the State. The assessments thus doubled by the special statute referred to were, on a hearing by the county court, disapproved, and no appeal was taken from that order. Notwithstanding this order of the county court, the clerk extended the taxes on the books, pursuant to act No. 285, but the collection was restrained by a decree of the chancery court rendered in a suit instituted for that purpose by owners of property attacking the validity of the assessments. There was no appeal from that decree, and thereafter the commissioners ordered a new assessment, which was duly made by the board of assessors and reported to the county court. This is the assessment against which the protests of appellants were filed in the county court when the assessments came up for that court's approval or disapproval.

The board of assessors adopted what is known as the zone system by dividing the district into zones according to the distance of the lands from the road to be constructed and levying the assessments proportionately according to zones. All of the lands of appellants are in the fourth zone, and the assessors appraised the benefits at ten per centum of the assessed value of the lands. There were protests made by the owners of property in other zones, but there has been no appeal prosecuted from the order with respect to those lands.

On the hearing of the cases in the circuit court, that court decided that the lands excluded from the assess-

ments by the original order of the county court creating the district can not be assessed now for the reason that the order of the county court was conclusive, and that the Legislature could not thereafter authorize the taxation of those lands for the construction of the improvement. The court made a finding that the lands of appellants situated in the fourth zone "should be assessed five per cent. of their assessed value, instead of ten per cent. as fixed by the assessors," and that "the assessment of benefits against the other lands mentioned in the complaint should not be disturbed because the district has already incurred large liabilities, and for this reason alone." There is no appeal by the parties interested in the last finding, and so we have no concern with that. This is the substance of the judgment as recited by the court in the corrected entry made on May 17, 1921. The judgment as originally entered contained a general finding by the court that there were no benefits to the lands in the fourth zone, but the judgment entry subsequently entered corrected the judgment so as to strike out the recital of such finding.

Appellants complain of that part of the judgment which appraises the benefits at five per cent. of the assessed value of their lands; and, on the other hand, the commissioners appeal from that part of the judgment which exempts from taxation the lands referred to in the original order of the county court, and from that part of the judgment which reduces the assessment on appellants' lands from ten per cent. of the assessed valuation to five per cent. of the assessed valuation.

The court heard the issues, as before stated, on oral testimony, and there was a conflict in the testimony. Each of the appellants testified concerning his own tract of land in the fourth zone, and the testimony tended to show that there was no benefit to be derived from the road, or a smaller amount of benefits than those assessed by the board. The assessors and commissioners were introduced as witnesses, and their testimony tended to

show that the adoption of the zone system was, under the circumstances, a fair and proportionate assessment of benefits. There was, in other words, a conflict in the testimony, and there was sufficient testimony to justify the finding of the court that the lands of appellants were benefited to the extent of the amount found by the board of assessors. We have adopted and adhere to the rule in proceedings of this character that the findings of a trial court on conflicting testimony will not be disturbed. *St. Louis & S. F. Ry. Co.* v. *Fort Smith & Van Buren Bridge Dist.,* 113 Ark. 493. There was certainly enough testimony to warrant the finding of which the appellants complain, and under the settled practice in this court the finding will not be disturbed. It follows that the judgment on the appeal of the appellants will be affirmed.

The trial court apparently made no finding as to the benefits to the lands originally excluded by the order of the county court and held that under that order there was no power under legislative authority to assess them. In this the court erred, for, notwithstanding the original exemption of the lands from the district, it was within the power of the Legislature to include them in the district as re-established and authorize the assessment of benefits. The Legislature in the special statute did not undertake to determine the benefits, but left that to the findings of the board of assessors, subject to the approval or disapproval of the county court and the right to appeal as fixed by the general statutes with reference to road districts. The fact that the county court upon the facts presented to it at that time found that the lands would not be benefited did not deprive the Legislature of the power to subsequently reach a different conclusion upon the facts presented to it in re-establishing the district. The power of the Legislature over this subject is, as we have often said, supreme, and will not be disturbed by the court except for demonstrable mistakes in such determination. This part of the judgment will, there-

fore, be reversed for further proceedings in passing upon the protests of the owners of the property against the assessments made by the board of assessors.

The commissioners have also appealed from that part of the court's finding and judgment reducing the assessment on the lands of appellants from ten per cent. to five per cent. This proceeding merely challenges the correctness of individual assessments of the parties who are protesting, and the effect of the court's ruling is that these particular tracts of lands will not be benefited ten per centum of the assessed valuation as found by the board of assessors, but will only be benefited five per centum of that valuation. The evidence was, as before stated, abundantly sufficient to show that the zone system as adopted by the board of commissioners was fair and just as a proportionate assessment of benefits, but the fact that the court approved the adoption of the zone system by the board of assessors does not deprive it of the power to examine individual assessments to determine whether or not they should be assessed in the same proportion as other lands in the same zone, for it is entirely consistent to say that it is fair to assess the lands by zones in accordance with the distance from the road, yet under the peculiar circumstances a given tract of land in a zone would not be benefited in the same proportion as other lands in that zone. Notwithstanding the zone system, it is always a question for determination by the court on the hearing of assessments to determine whether or not individual assessments should be absolutely controlled by the zone system. After all it is a question of fact in each case for determination by the court what is the proper proportionate assessment on a given tract of land. We must assume that the court found in this case that these particular tracts owned by appellant would not be benefited to the extent of the percentage adopted by the board of assessors, but would be benefited to the extent of five per centum of the assessed valuation. In other words, we conclude that there

was sufficient testimony to warrant the finding of the court, and, there being no inconsistency in the court's finding, it should not be disturbed. This portion of the judgment on the appeal of the commissioners will therefore be affirmed, but, as before stated, that part of the judgment which relates to the lands wholly excluded from the assessment will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

HART, J. (dissenting). The Road Improvement District was first established by the county court, and that court held that the lands in question were not benefited by the improvement of the road on account of their topographical location. No appeal was taken from the decision of the county court, and its judgment became final. Subsequently the Legislature attempted to provide for a reassessment of the land and to validate such additional reassessment. The county court acted within its jurisdiction, and after its judgment became final the Legislature had no right or power to set aside or impair the final judgment of a court of competent jurisdiction. The Legislature could not validate the assessment of benefits held void by the county court or authorize a new assessment after the county court had held that the assessment on the lands in question was invalid and its judgment had become final. To so hold is to give the Legislature power to reverse a final judgment of a court of competent jurisdiction. The rule is based upon the principle that the co-ordinate departments of government are independent and should be kept separate and distinct from each other.

In *Moser* v. *White,* 29 Mich. 59, the court held that the Legislature could not, by legalizing an invalid tax roll, set aside or impair a judgment against the collectors for trespass in attempting to collect the tax. Judge Campbell, speaking for the court, said: "That act does, in terms, purport to heal all the defects which have been pointed out. But the plaintiff's judgment was obtained

before the justice before this act was passed. If regular when obtained, it could not be reversed. The Legislature has no authority to reverse judgments, directly or indirectly. The effect of the act must be so limited as not to interfere with an existing judgment, or it would be necessary to declare it void on principles too elementary to be discussed. The case had already been tried, and there was to be no further trial to determine the merits. The judgment had fixed the question of fact, and the only matter open in the circuit court was whether, in so doing, any legal error had been committed. To allow such a judgment vacated when there had been no error committed would be a plain invasion of a private right, and a usurpation of judicial powers which cannot be justified." After the judgment of the county court, holding in the first instance that the lands in question were not benefited by the improvement of the road, had become final, the fruits of the judgment became rights of property, and no longer in that same proceeding could the Legislature validate that which the court had held void or reassess lands, or provide for the reassessment of lands, which the court had held were not benefited by the improvement. The Legislature attempts to avoid the effect of the judgment of the county court, not by directly setting it aside, but by a direction to a board of assessors which, in its effect, must be of equivalent import. The line which separates judicial from legislative authority is clear and distinct, and the Legislature cannot set aside, directly or indirectly, a final judgment of a court of competent jurisdiction.

It is apparent that the zone system of assessing benefits in road improvement districts frequently leads to inequalities, and in the hill sections of the State, like the one in question, the zone system is for the most part arbitrary and discriminatory.

It is undoubtedly true that the assessment of benefits is a question of fact, and, like other questions of fact, the verdict of a jury or the finding of a circuit court

is binding on appeal where the conclusion is reached by giving credence to the witnesses on the one side or the other, however improbable or unreasonable we might believe the testimony to be. It is equally well settled, however, that this court will not allow the verdict or finding of the circuit court to stand where it is opposed to the physical facts, the well-known laws of nature or other matters of which the court takes judicial cognizance. Here the voice of nature speaks and will not be denied. The topography of the land may be learned from the maps. The hills and hollows, the ridges and ravines, the mountains and valleys, and the accompanying water courses do not vary or change except in rare instances, and for very unusual causes. In the hills, fertile fields and rocky and barren lands lie side by side. The heights of the ridges and mountains and the depths and width of the ravines and streams all constitute natural barriers which are not changed or overcome by the improvement of the roads. A farm which has an impassable ridge or ravine, or a stream difficult or impracticable to cross between it and a public road, is not rendered more accessible to the road by reason of the improvement of the road itself. We must not forget that the assessment of benefits proceeds upon peculiar benefits to the lands from the improvement, and not from the general good common to all the lands. The benefits must be peculiar to the lands assessed and must arise directly and immediately from the construction of the improvement, and must not proceed from some supposed or shadowy benefit to be derived in the dim and distant future.

It is true that the assessors in the case at bar testify that in their opinion the lands in question were benefited. But, when their testimony is weighed in the light of the uncontroverted evidence, showing the situation of the lands with respect to the road, and the natural barriers which render it impracticable for the lands to be served by the road, our common experience leads us to the con-

clusion that no special benefits will accrue to the lands in question from the improvement of the road.

JUDGE WOOD and myself therefore respectfully dissent.

HARRISON ELECTRIC COMPANY v. CITIZENS' ICE & STORAGE COMPANY.

Opinion delivered July 11, 1921.

1. PUBLIC SERVICE COMMISSION—NOTICE OF CHANGE OF RATES OF PUBLIC UTILITY.—Under Crawford and Moses' Dig. § 1612, providing that public utilities may not change their rates "except after 30 days' notice to the [Corporation] Commission and the public," *held* the filing of a schedule of changes in the rates of an electric light company was sufficient notice to the Commission and to the public.
2. PUBLIC SERVICE COMMISSION.—WHEN NEW RATES BECOME EFFECTIVE.—Where an electric light company filed a schedule of new rates with the Corporation Commission, such rates became effective upon the maturity of the period of thirty days specified in the statute, unless the Commission suspended the rates pending a hearing.
3. PUBLIC SERVICE COMMISSION—NEW RATES SUPERSEDING CONTRACTUAL RATES.—Where a public utility filed a schedule of increased rates with the Corporation Commission which became effective after 30 days, the new rates superseded contractual rates theretofore established, as there could be no valid contract against the power of public control by the Corporation Commission.

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

Claud A. Fuller, for appellant.

The court should have sustained demurrer to paragraph 3 of appellee's reply, alleging that the Corporation Commission had no authority to change rates in abrogation or impairment of an existing contract. Such contracts are subject to the power of the State to regulate public utilities. 145 Ark. 205.

The notice of the application for an increase in rates was published twice in 2 weekly newspapers as required by the Commission. The act provides for a contest of rates before the Commission and for an appeal.

The alleged contract was verbal, and was entered into without authority by appellant's secretary and manager. All rates were subject to change by the Commission. 110 Atl. 78.

Guy L. Trimble, for appellee.

1. Rates could not be changed except after 30 days' notice. Acts 1919, p. 417. See also Crawford & Moses' Dig. § 6809. This notice is mandatory. 104 Ark. 298; 131 Ark. 429; 67 Ark. 43. The cases in 110 Atl. 778 and 145 Ark. 205 do not deal with notice. When constructive notice is given, the statute must be strictly complied with. 30 Ark. 723. The record should show at least four weekly publications. 39 Ark. 61.

2. Affirmative action by the Commission was necessary before the rate could be in effect. 145 Ark. 205 and 110 Atl. 778 are not in point as this question. Sec. 7 of the act provides that no rates can be changed without authority of the Commission. No order was made in this case.

3. On the cross-appeal, the damages of $100 awarded to appellee was insufficient.

McCULLOCH, C. J. Appellant is a domestic corporation owning and operating the electric light plant at Harrison, Arkansas, and appellee, Citizens Ice & Storage Company, is an industrial consumer of electric current and a patron of appellant. Appellee claims the right under a contract with appellant's predecessor to obtain electric current for its manufacturing plant at the maximum rate of $400 per month. Appellant changed the rate on April 1, 1920, after having filed the same with the Corporation Commission, but appellee refused to pay the increased rate. Appellant then cut off the supply of electric current, and appellee instituted this action in the chancery court of Boone County to enjoin appellant from cutting off the current and to recover damages in the sum of $2,000 for the interference with its business in cutting off the current. Appellant answered, setting up its change of rates pursuant to the statutes and under au-

thority from the Corporation Commission. On the final hearing of the cause, the chancery court decided that the change of rates was void for the reason that proper notice had not been given by appellant in accordance with the statute and rendered a decree in favor of appellee enjoining appellant from maintaining the increased rates and for the recovery of damages in the sum of one hundred dollars.

The contention of appellee in support of the court's decree is that the statute creating the Corporation Commission and conferring jurisdiction over public utilities requires that before a rate can be changed there must be an affirmative order by the commission authorizing it, and that there must be a notice published weekly for thirty days, and that the statute was not complied with in either of these respects. We think that this is not the proper construction of the statute. Crawford & Moses' Digest, chapter 37; Acts 1919, page 411. The statute confers jurisdiction on the commission over all public utilities in the State with power to control and regulate rates of charges and other matters in connection with service to the public. Section 7 of the act of 1919, which is section 1612 of Crawford & Moses' Digest, reads as follows:

"No person, firm or corporation subject to the provisions of this act shall modify, change, cancel or annul any rate, joint rates, fares, classifications, charge or rental, except after thirty days' notice to the commission and the public, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges shall go into effect; provided, the commission may enter an order prohibiting such person, firm or corporation from putting such proposed new rates into effect pending hearing and final decision of the matter by the commission, and whenever there shall be filed with the commission any schedule proposing a change in any rates, charges or regulations, the commission shall have, and it is hereby given authority, either upon complaint or upon its own initia-

tive upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge or regulation; and, pending such hearing, and the decision thereon, the commission, upon filing with such schedule, and delivering to the carrier or carriers or public service corporation affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate or charge, but not for a longer period than six months beyond the time when such rate, fare or charge, or regulation would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge or regulation goes into effect, the commission may make such order in reference to such rate, fare, charge or regulation as shall be deemed proper and just. Provided, that if said commission shall suspend the operation of any such schedule, and defer the use of such new rate or charge, as herein described, then the person, firm or corporation making such new rate may file with the commission its bond, to be approved by the commission, conditioned that it will pay over in money to the commission for the use and benefit of the persons or patrons entitled thereto the difference between the sums it shall collect under such new rate and the sums which would have been collected under the rate finally adjudged reasonable and just, with interest upon such difference at the rate of eight per centum per annum. Upon the filing of said bond, the order of the commission suspending such new schedule or charge shall become inoperative until final adjudication of the matter."

It will be observed that, while the statute provides that no change in the rates shall be made "except after thirty days' notice to the commission and the public," there is no specification as to the method in which the notice is to be given. The contention of counsel for appellee is that the provision for notice in this statute is controlled by the provision of the statute with reference to the length of time for publishing legal notices (Craw-

ford & Moses' Digest, § 6809); but this contention is obviously unsound, for the reason that the section just cited only fixes the number of publications and does not supply any other defects in an imperfect provision for notice. The section we are now dealing with does not specify either the method or place of the publication. The only reasonable interpretation of the statute is that the framers meant that the filing of the schedule in the prescribed form with the commission was sufficient notice to the commission and to the public. This is in accord with our decisions to the effect that notice must be taken of all proceedings and regulations promulgated by public boards. *Kansas City Southern Ry. Co.* v. *State,* 90 Ark. 343; *Cazort* v. *State,* 130 Ark. 453. The statute is patterned, to a considerable extent, after the Federal statute creating the Interstate Commerce Commission and regulating its proceedings, and it has been decided, not only by the Interstate Commerce Commission, but also by the Supreme Court of the United States that the filing of a schedule of rates by a common carrier with the commission constitutes notice to the public and puts the new rates into operation. *Texas Railway Co.* v. *Cisco Oil Mill,* 204 U. S. 449; *Kansas City So. Ry. Co.* v. *Albers Comm. Co.,* 223 U. S. 573; *U. S.* v. *Miller,* 223 U. S. 579; *Berwind-White Coal Mining Co.* v. *Chicago & Erie Rd. Co.,* 235 U. S. 371. Nor does the statute require an affirmative order of the commission authorizing that the new rates be put into effect. The rates become effective upon the maturity of the period of thirty days specified in the schedule, unless there is an order of the commission suspending the rates pending a hearing. *Suburban Water Co.* v. *Borough of Oakmont* (Penn.), 110 Atl. 778.

Jurisdiction is conferred on the commission to institute an investigation on its own initiative or to grant a hearing on the protest of a patron. The fact that the changed schedule becomes effective does not deprive the patrons, however, of an opportunity to appear at any time to contest the rates fixed in the new schedule. The

rates thus established are not final, and it is the privilege of any patron or of the commission itself on its own initiative to contest the correctness of the rate. Considering the statute in this light, it is clear that the framers of the act did not intend to require the publication of a formal notice, nor that the commission should make an order before the rates became effective. It appears from the record in the present case that the commission made a ruling requiring that in cases of local public utilities there must be publication for two insertions in a weekly newspaper, and the proof shows that this rule of the commission was complied with.

We are of the opinion, therefore, that the schedule of increased rates promulgated by appellant was valid, and, the statute having been complied with, the new rates superseded any contractual rates theretofore established between the parties. There could be no valid contract as against the power of public control by the commission. It would not constitute an impairment of the obligation of the contract for the new rates to be put into effect under the control of the Commission. *Camden* v. *Arkansas Light & Power Co.*, 145 Ark. 205; *Clear Creek Oil & Gas Co.* v. *Fort Smith Spelter Co.*, 148 Ark. 260.

It follows that the decree of the chancery court is erroneous, and the same is reversed and the cause remanded with directions to enter a decree dismissing the complaint of appellee for want of equity, and for further proceedings not inconsistent with this opinion.

MARKHAM v. STATE.

Opinion delivered July 11, 1921.

1. CRIMINAL LAW—AUGUMENTATIVE INSTRUCTIONS.—It was not error to refuse instructions requested by appellant which were argumentative in form.

2. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—It was not error

to refuse instructions asked by appellant where instructions given by the court covered the same subject-matter.

3. INTOXICATING LIQUORS—MANUFACTURE—INSTRUCTION.—An instruction, in a prosecution for the crime of manufacturing, and being interested in the manufacture of, intoxicating liquors, that "the fact that the parties, if it is a fact, that they visited the still frequently or any at all, are only circumstances that the jury may consider in arriving at their guilt" was not open to a general objection as assuming the defendant's guilt.

4 CRIMINAL LAW—TRIAL—COMMENT ON DEFENDANT'S FAILURE TO TESTIFY.—In a prosecution for manufacturing intoxicating liquor a statement by the prosecuting attorney that none of the defendants "denied that they went to the still" was not objectionable as a comment upon the defendant's failure to testify, within the prohibition of Crawford and Moses' Dig., § 3125.

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

W. S. Coblentz, for appellant.

1. The court erred in refusing appellants' prayers for instructions. The court's instruction was equivalent to a direction of a verdict. It is error for a court in its charge to ignore the bearing which certain facts have on the issues involved. 14 R. C. L. 794. Accused is entitled to have his instructions given in his own language if they correctly propound the law applicable. 14 R. C. L. 806.

2. Argument of prosecuting attorney was a reference to this failure of the defendant to testify. 10 R. C. L. 888; 83 Miss. 488; 89 Ark. 391.

J. S. Utley, Attorney General, *Elbert Godwin,* assistant, and *W. T. Hammock,* Assistant, for appellee.

1. Appellants' refused instructions were covered by those given by the court.

2. The argument of the prosecuting attorney was not within the prohibition of the statute. 108 Ark. 191; 96 Ark. 177; 2 R. C. L. 429.

WOOD, J. The appellants were separately indicted at the March term of the Pike County Circuit Court for

the crime of manufacturing and being interested in the manufacture of intoxicating liquors. The cases were consolidated for trial.

J. E. Chaney testified that he was the sheriff of Pike County, and was acquainted with the appellants. Some time in February, 1921, he discovered a still near Franklin's sawmill, about three hundred and fifty yards from Perry Franklin's house. He saw five persons coming away from the still on Thursday, and on Friday he again saw five persons at the still, among whom were the appellants. "They were working around there—brought up a little turn of pine and were working around the furnace; filled up the boiler, put the cap on, wrapped a rag around it and walked away." When the parties who were at the still on Thursday went away, witness went down there and found a hog in the pen which seemed to be pretty helpless, intoxicated. Witness also found a lot of barrels, boxes and about two or three hundred gallons of beer. Later, on Friday night, witness saw some parties go past the still and saw them go back carrying some glass jugs. One of the persons was the size of Jewell Sparks, and the other was the size of Green.

Another witness testified that he saw Jewell Sparks at the still. He had a bucket. Witness heard him hit the bucket against the barrels there, and thought he was getting a bucket of water. When he got back up to Perry Franklin's house, he heard one fellow say, "If that is not enough, I will go back and get some more." The parties he saw going to the still that night were carrying jugs. One of the parties corresponded in size with Jewell Sparks and another with Green or Martin. It was shown that the appellants were arrested on Sunday, and that some bottles and glass jugs were found in a sack at Perry Franklin's house, and the beer when destroyed on Sunday was ready to run.

Perry Franklin testified for the appellants to the effect that he had been running the sawmill mentioned

about two months. He discovered a still near his home on Monday before he was arrested on Sunday. He went to the still on Tuesday and looked around a little and drank a little beer; went back on Thursday and got a sow out of the pen where the still was; that on Friday appellants and others working at the mill left the mill and went to witness' house. Witness was not at the still on Friday. Jewell Sparks did not bring a bucket of beer to his house. Witness didn't tell appellants about the still, and they were never at the still, so far as witness knew. Witness stated that on Friday evening he, Ben Davidson, and the appellants left the mill together. Some of them had been drinking at the mill that week. It was shown by other witnesses on behalf of the appellants that the mill closed down about five o'clock on Friday evening and that in about thirty minutes after closing time the appellants came back to the mill. In rebuttal, Matthew Cummins testified that he heard Jewell Sparks admit that he had frequented the still. Sparks said he went up there and carried a bucket of beer on Thursday evening to the mill; that when he got to court he was going to tell that he went up there twice after beer, and if they stuck him for it he would just have to go.

The appellants asked the court to grant the following prayers for instructions:

"The mere fact, if shown, that these boys went there and drank beer would not be sufficient to convict. You are instructed if you find from the evidence in this case beyond a reasonable doubt that the defendants frequently visited the still, drank beer there at it, are circumstances which the jury may consider with all the other facts and circumstances in determining whether or not they were interested in the manufacture of intoxicating liquors.

"You are further instructed, gentlemen of the jury, that, even though you should believe that these parties visited the still and drank beer, or carried beer away

from the still, from this fact alone you can not convict the defendants; but it would be a mere circumstance which you may consider, with all the other facts and circumstances in the case, and, unless you are convinced beyond a reasonable doubt, notwithstanding although you should believe they visited the still and drank beer, that they manufactured or were interested in the manufacture of intoxicating liquors, you will acquit the defendants."

Mr. Rountree, one of the attorneys for the appellants, thereupon remarked: "The fact alone that they were there and drank beer is not of itself sufficient to warrant the jury in finding appellants guilty." To which the court replied: "That is for the jury to say—that is a circumstance they may consider."

The court refused to grant the above prayers, saying: "I want to give one along that line." The appellants duly excepted to the ruling of the court. The court, among others, gave the following instruction:

"The fact that the parties, if it is a fact, that they visited the still frequently, or any at all, are only circumstances that the jury may consider in arriving at their guilt. You must believe, beyond a reasonable doubt, from all the facts and circumstances in evidence, that the defendants did manufacture the whiskey, or were interested, or aided or abetted as defined by the instructions I have read to you. The law presumes the defendants innocent until their guilt is proven beyond a reasonable doubt."

In the course of his argument the prosecuting attorney used the following language: "We find the five leaving the mill and going in the direction of the still. None of them denied that they went to the still but Perry Franklin." The appellants objected to the argument of the prosecuting attorney and asked that the jury be instructed not to consider it for the reason that "it was a direct reference to the failure of the defendants to testify." The court overruled the objection and appellants

duly excepted. The jury returned a verdict of guilty against the appellants and fixed their punishment at one year in the penitentiary. From the judgments of sentence based on these verdicts is this appeal.

1. The court did not err in refusing the appellants' prayers for instructions. These prayers were argumentative in form and calculated to mislead the jury. The phases of the case presented by the testimony which these prayers of the appellants were intended to submit were covered by the instruction which the court gave "along that line." The court told the jury that "the fact that the parties, if it is a fact, visited the still frequently, or any at all, are only circumstances that the jury may consider in arriving at their guilt." When this paragraph is read in connection with the succeeding paragraph, it is clear that the court told the jury in substance that they should take into consideration the testimony tending to show that the appellants visited the still frequently and all the facts and circumstances in evidence in determining whether or not the appellants were guilty of the crime charged.

Learned counsel for appellants contend that the court instructed the jury in the first paragraph of the instruction to find the defendant guilty. That paragraph might have been more happily phrased if the attention of the court had been drawn to the phraseology to which the appellants' counsel now for the first time urge a specific objection. The instruction was not inherently erroneous. It was correct to tell the jury that if the appellants frequently visited the still this was a circumstance which the jury might take into consideration in determining the issue as to whether or not the appellants were guilty of the crime charged. The language used by the court was tantamount to so instructing the jury, and, when the instruction is considered as a whole, and in connection with the remarks of the court, it is evident that such was the court's purpose. If the appellants believed that the in-

struction was susceptible of the construction which they now give it, it was their duty to call the attention of the court to such particular construction by specific objection. This they did not do, and the prayers they presented do not have that effect. *St. L., I. M & S. Ry. Co.* v. *Holmes,* 88 Ark. 181; *St. L., I. M. & S. Ry. Co.* v. *Dallas,* 93 Ark. 209; *St. L., I. M. & S. Ry. Co.* v. *Stacks,* 97 Ark. 405; *Thompson* v. *Southern Lumber Co.,* 104 Ark. 196, and other cases cited in 4 Crawford's Digest, § 110, p. 5027.

2. The remarks of the prosecuting attorney should not be construed as a comment upon the failure of the appellants to testify, and hence these remarks do not contravene the provisions of our statute to the effect that the failure of an accused to testify shall not create any presumption against him. Section 3123, Crawford & Moses' Digest.

In *Culbreath* v. *State,* 96 Ark. 180, the attorney representing the State, in his closing remarks, said: "Where was the defendant that day? He has never seen fit to say. He has not shown by any one where he was between the hours of 10 o'clock in the morning and 1:30 in the afternoon." Concerning these remarks we said: "Taking the whole statement together, we do not think it can fairly be construed as a comment or criticism upon the defendant's failure to testify in his own behalf, or as calling attention to that fact. It was merely an expression of the opinion of counsel that the defendant had not adduced evidence accounting for his whereabouts during the hours named."

In *Davidson* v. *State,* 108 Ark. 191, the appellant, Davidson, did not testify in his own behalf. The sister of the deceased testified to a certain conversation the appellant had with the deceased. The prosecuting attorney referred to this testimony in the following language: "You have a right to consider this conversation with Miss Barham in presence of her sister, gentlemen of the

jury, so unexplained by any one and unexplained and undenied by any one, and I call on them now to explain this conversation, if true." Concerning these remarks, we said: "It is not a comment or criticism on the defendant's failure to testify in his own behalf, but was the expression of the opinion of counsel that the testimony had not been rebutted, and it should be accepted as true."

Now, in the case at bar it was shown that there were two others besides the appellants that were seen leaving the mill and going in the direction of the still. Ben Davidson was one of the five. He was not on trial with the appellants, and was a competent witness in their behalf to prove that neither he nor the appellants were at the still on the occasion mentioned, if such were the facts. The appellants did call Perry Franklin, who was also designated as one of the five who were seen leaving the mill and going in the direction of the still, and he testified that he was not at the still on Friday. He was asked whether the appellants were at the still and answered, "Not that I know of."

In *Davis* v. *State,* 96 Ark. 7, the appellant was charged with the crime of abortion. Two witnesses had testified about the conversation appellant had with them concerning the alleged crime. The prosecuting attorney referred to this testimony in the following language: "He (the defendant) told Bently and Doctor Cunningham how he had administered the medicine to her to produce an abortion, and it is undisputed and undenied in this case, and he can not deny it." In that case the defendant did not testify. Concerning the above remarks, we said: "These remarks, we think, were but the expression of the opinion of the State's attorney as to the weight of the testimony of these two witnesses and could not fairly be construed to refer to the fact that the defendant had not testified in the case, and did not tend to create any presumption against him by reason of his failure to testify."

In the light of the above cases we are convinced that the remarks of the prosecuting attorney under review here should not be construed as a comment upon the failure of the appellants to testify, but rather as an expression of his opinion as to the weight of the evidence adduced on the part of the State to the effect that the appellants and two others left the mill and were seen at the still on a certain day mentioned by the witnesses. The purport of the argument couched in the remarks of the prosecuting attorney was that the testimony tending to show that these parties left the mill and were at the still on that day was undenied and uncontroverted. There were other parties besides the appellants said to be at the still on that day. One of these parties was called on by the appellants to testify, and he denied that he was there, but did not categorically deny that appellants were there. His testimony was to the effect that if the appellants were there he had no knowledge of the fact, and the other party said to be in the company of appellants on that occasion was not called on to testify. Hence the prosecuting attorney argued that the presence of the appellants at the still on that day, as proved by the State, neither the appellants nor any one else denied. If the appellants were not at the still as proved by the State, it was a fact which, as the circumstances disclosed, they might have adduced testimony tending to prove by other witnesses than themselves. In this respect the case differs from the cases of *Curtis* v. *State,* 89 Ark. 391, and *Hoff* v. *State,* 83 Miss. 488, upon which counsel for appellants relies.

In the first of those cases the appellant was charged with the crime of rape, and in the second case with the crime of seduction. The remarks of the prosecuting officer in those cases to the effect that the crimes charged were not denied were correctly held as referring to the failure of the defendants to testify because in cases of that character, aside from the general denial involved in a plea of not guilty, the only way that such offenses could

be denied would be by the defendants themselves denying the charges on the witness stand.

In the case of *Starnes* v. *State,* 128 Ark. 302, the appellant was charged with grand larceny. He did not testify at the trial, and in his concluding remarks the prosecuting officer said: "The defendant has not denied a single allegation of the indictment." In that case we held that any prejudice resulting from the remarks of the prosecuting attorney was removed by instructions to the jury, and we announced the general doctrine that it was improper and presumptively prejudicial for the prosecuting attorney to call the attention of the jury to the failure of the accused to testify. But because of the instructions of the trial judge removing any possible prejudice that might have resulted from these remarks we were not called upon to decide and did not decide in that case whether the remarks of the prosecuting attorney were in fact a comment upon the failure of the defendant to testify. The effect of the holding in that case is that if the remarks there objected to could be considered as obnoxious to the statute there was no prejudicial error in the ruling of the court in refusing to rebuke the prosecuting officer for having made them because the court eliminated all possible prejudice by explicit instructions in telling the jury that they could not infer guilt because of the defendant's failure to testify.

The case for decision on the record now before us is ruled by the cases of *Culbreath* v. *State, supra; Davis* v. *State, supra,* and *Davidson* v. *State, supra.* See, also, *Blackshare* v. *State,* 94 Ark. 548, 558.

We find no error. The judgments are therefore affirmed.

INTER-SOUTHERN LIFE INSURANCE COMPANY v. RANSOM.

Opinion delivered July 11, 1921.

1. TRIAL—EFFECT OF BOTH PARTIES REQUESTING PEREMPTORY INSTRUCTION.—Where both parties asked a peremptory instruction and did not request other instructions, the only question for us to determine is whether the evidence is legally sufficient to sustain the verdict directed by the trial court.

2. APPEAL AND ERROR—CONCLUSIVENESS OF COURT'S FINDING.—A finding of the trial court based upon conflicting evidence is conclusive on appeal, and the evidence must be given its strongest probative force in favor of the finding.

3. INSURANCE—MEETING OF MINDS.—Evidence *held* to sustain a finding either that the policy issued and delivered to insured was the kind of policy applied for or, if it was different, that it was accepted by insured.

4. INSURANCE—STIPULATION AS TO DELIVERY TO INSURED WHILE IN GOOD HEALTH—Where an application for life insurance provided that "no contract of insurance shall be deemed made, and no liability upon the part of the company shall arise, until a policy shall be issued and be delivered and be personally and manually received by me, and the first premium thereon actually paid, all during my lifetime and while I am in good health," such provision did not constitute a warranty, nor a condition precedent to a binding contract of insurance.

5. INSURANCE—COMPLETION OF CONTRACT.—Where, by the provisions of an insurance contract, certain conditions must exist and certain things be done for the benefit of the insurer before the policy can be delivered and the contract be consummated, the agent to whom is committed the duty of delivering the policy and thus completing the contract must see that the requirements of the policy in these particulars are complied with before the policy is delivered, and a delivery of the policy by such agent, in the absence of collusion with the insured to defraud the company, and with knowledge of the facts showing that the conditions did not exist, will constitute a waiver of these conditions and requirements.

6. INSURANCE—DELIVERY OF POLICY.—In the absence of limitations upon the authority of an agent whose duty it was to deliver a policy of life insurance, the agent had the right to select the place of delivery and the messenger to convey the policy to the insured.

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

Hartsill Ragon, for appellant.

The court erred in overruling plaintiff's motion to require the complaint to be made more definite in regard to delivery of the policy. Under the pleadings the issue hinged upon a manual delivery of the policy to insured. The evidence showed a delivery of the policy by a stranger to insured's wife. This occasioned a surprise to appellant. 71 Ark. 197; 55 Ark. 567.

There was never a contract between the parties. See 115 Fed. 81. The insured never accepted the policy. 27 S. E. 38. To be effective, an acceptance of an application must be in the very terms offered. 14 R. C. L. 895; 12 L. R. A. (N. S.) 421. It is the duty of insured to examine his policy within a reasonable time. 81 Ark. 269; 86 Ark. 283. There was no meeting of minds. 111 Ark. 342.

There was not such a waiver of its rights by the company as to bind it. The application was a part of the policy. The provision as to delivery and receipt of the policy while in good health was not a mere representation. 133 Ark. 348; 236 Ill. 444; 59 Ill. 123. It constituted a warranty. There was no waiver of such warranty. 3 Cooley, Brief on Laws of Ins., p. 2367. Delivery to the wife did not constitute delivery to insured. 187 Pac. 405. The agent was not authorized to waive a warranty as to delivery.

Webb Covington, for appellee.

There was a delivery and acceptance of the policy. The agent knew insured was sick when he delivered the policy. This was a waiver of the provision as to delivery to insured while in good health. 217 N. Y. 336; 190 Ill. App. 604; 111 Ark. 442; 129 Ark. 240; 162 S. W. 10; 129 Ark. 450. The agent of insurer had a right to select his own method of delivery.

WOOD, J. On the 13th day of July, 1920, Isaac H. Ransom made application to the appellant for a policy of life insurance in the sum of $1,000 in favor of his wife, the appellee. The policy was issued on August 20, 1920,

and was sent to appellant's agent, H. D. Coffee, at Clarksville, Arkansas, some time prior to the 25th day of August, 1920. Coffee delivered the policy to one Earle Mardis, who was the manager of a coal mine at which Ransom worked, and Mardis delivered the policy to the appellee. Ransom became ill on the 5th of August, 1920, with typhoid fever, and died on September 16, 1920. This action was instituted by the appellee against the appellant on the policy. The appellant answered denying all material allegations of the complaint and set up in defense, among other things, the following provision of the application:

"*Second.* That no contract of insurance shall be deemed made, and no liability on the part of said company shall arise, until a policy shall be issued and be delivered, and be personally and manually received by me, and the first premium thereon actually paid, all during my lifetime and while I am in good health, and that for the first full annual premium paid thereon, the protection thereunder shall cease and end one year and one month (not less than thirty days) from the date of the policy issued hereunder, at 12 o'clock noon, standard time, reckoned at my domicile at this time, whether a full year shall have expired from the date such protection began thereunder or not."

The appellant alleged that the policy of insurance was not issued and delivered, and "personally and manually received" by Isaac H. Ransom and the first premium paid during his life and while he was in good health; that at the time of the issuance of the policy and at the time of its alleged delivery, Isaac H. Ransom was in a poor state of health, confined to his bed, suffering from a critical illness from which he grew progressively worse until his death.

The appellee testified that she was the wife of the insured. She identified the policy which is the foundation of the action and stated that same had been deliv-

ered to her on the 25th or 26th of August, 1920. It was delivered through Mr. Coffee and was brought to her home by Earle Mardis. Her husband was taken sick on the 5th of August. She was asked, "Did you read him the policy?" and answered, "Yes, sir; I don't know that I read it word for word, but I went over it with him. He knew that I had it." She was further asked: "Q. He was in a condition of health at that time that you couldn't worry him with a policy?" "A. I didn't deem it necessary, and I didn't do it. I didn't know it was necessary, while he could have understood it, but I didn't deem it necessary." She further testified in answer to questions that her husband understood that she had the policy; that he was not unconscious until about twelve hours before his death. He would have understood the policy if she had gone into details with him, which she didn't do because she didn't deem it necessary. She didn't sign any receipt for the policy.

The attending physician testified that Ransom was afflicted with, and died of, typhoid fever and its complications.

H. D. Coffee testified that he was the agent of the appellant at Clarksville, Arkansas, and received through the mail from the appellant the policy for delivery to the insured. He didn't deliver it personally to the insured, but gave it to Earle Mardis to deliver. He didn't know the exact condition of the health of the insured at the time—knew that he was sick—had been told that he was—had never seen him and didn't know how serious his illness was. Witness was asked whether he discussed with Mardis the condition of Ransom's health at the time, and answered that he couldn't tell about that. He was asked whether he and Mardis arranged to deliver the policy so that the witness would not know about the condition of Ransom's health and answered, "There was no arrangement made any more than I handed the policy to him and asked him if he would take it up there. He said he was going to

see how he was getting along." Witness did not present the insured or his wife with the receipt for the policy. Witness stated that he wouldn't ask the appellee to forge her husband's name on a post card receipt in which it stated that he was in good health. Witness further testified that the kind of insurance Ransom applied for was known as "compound optional ordinary life with complete disability and double indemnity benefit." The premium for the policy he applied for was $34.45. He was asked if there was a little notice with the policy, and stated that he thought there was, and that he tore the same out because he didn't think it had any business in there.

The vice president of the appellant testified that the application was for the kind of policy as before stated; that the company was unable to deliver a policy of that kind for the reason that Ransom was a mine foreman. The appellant issued another policy, the kind it felt it could issue and deliver to one in that occupation. The premium on the policy applied for was $34.45 with an 80-cent war tax. The premium on the policy sent to Ransom was $32.22 per thousand with an 80-cent war tax. There was a difference in the two kinds of policies, consisting of the complete disability and double indemnity features, which the witness explained. The witness stated that the appellant always sent notices on all policies showing that its agents were required to receive the personal signature of the insured and return the same to the company; that the appellant did not receive the card from Ransom countersigned.

Another witness testified that he, in company with Coffee, solicited the application of Ransom for insurance at the latter's home on the 13th day of July, 1920; that Ransom said that he would not take the "compound optional ordinary life" policy. Witness explained to him and he finally applied for the policy with double indemnity and complete disability features, another policy from

that which was issued; that was the only one he would accept. The witness further stated that he delivered several policies in Clarksville with the green sheet on it. That receipt was to show that the insured received it during the time of his good health and that it was the same policy he had applied for. The instructions to the agent were to have the insured sign this receipt personally and mail it to the home office.

At the conclusion of the testimony the appellee asked the court to instruct a verdict in her favor, and the appellant likewise asked the court to instruct a verdict in its favor. The court directed the jury to return a verdict in favor of the appellee for the full sum as shown by the fact of the policy, and from a judgment in favor of the appellee for that sum is this appeal.

1. It is a close question of fact in this case to determine whether the minds of the parties met upon the contract of insurance as evidenced by the policy which is the basis of this action. As both parties asked a peremptory instruction in their favor and did not request other instructions, the only question for us to determine is whether the evidence is legally sufficient to sustain the verdict directed by the trial court. *St. L. S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71; *St. L., I. M. & Sou. Ry. Co.* v. *Ingram,* 118 Ark. 377; *Hall* v. *Harrell,* 136 Ark. 329; *Gibson* v. *Allen-West Commission Co.,* 138 Ark. 172; *Oil Trough Gin Co.* v. *Hines,* 141 Ark. 135.

Even if the finding of the court in directing the verdict on the facts be against the decided preponderance of the evidence, it is not our province on appeal to determine where the preponderance lies. The finding of the trial court based upon conflicting evidence is conclusive on appeal; and the evidence must be given its strongest probative force *in favor of* the finding. *International Harvester Co.* v. *Layton,* 148 Ark. 156; *Gossett* v. *Gossett,* 112 Ark. 47, and cases there cited.

Now, applying the above rules to the facts under review, we are convinced that there is substantial testimony

—legally sufficient evidence—to sustain the directed verdict. While both the agents who solicited the application of Ransom for insurance testified that he applied for a policy known as the "compound optional ordinary life" with "complete disability and double indemnity benefits," yet the application itself shows that the kind of policy applied for was C. O. O. L. A copy of the application was attached to the policy which bears the signatures of Coffee and Kavanaugh as witnesses. It was made an exhibit to the complaint, was identified by the appellee and introduced in evidence. The letters, C. O. O. L., as explained, were intended to denote that the kind of insurance to be issued to Ransom was the "compound optional ordinary life," and that was the kind of policy, as is shown by the policy itself, and the testimony of witnesses, that was issued and sent to the agent for delivery to Ransom. In the application attached to the policy that was delivered to Mrs. Ransom the letters C. D. and D. I., which were intended to denote "complete disability and double indemnity," were canceled or erased by the stroke of a pen. There is no explanation in the record as to when or why this was done. The witnesses who witnessed the application do not explain it, and the voice of the insured is hushed by death. In the absence of any explanation in the record as to why these letters were canceled, the presumption must be indulged that they were stricken from the application before it was signed by the applicant and presented to the company. It was admitted by counsel for appellant that the application attached to the policy was a photographic copy of the application made by Ransom to the appellant.

The issuance of the kind of policy called for by this application with the complete disability and double indemnity benefits omitted therefrom also tends to prove that the application was made for the kind of policy that was issued. See *Jenkins* v. *International Life Ins. Co.*, 149 Ark. 257. True, the vice president of the company also

testified that the complete disability double indemnity policy was applied for, and that the company did not issue this, but did issue the policy in suit instead, which was sent to be delivered to the applicant; that this was a proposal for that kind of insurance, instead of the kind applied for. But, as before stated, the application itself and the issuance of the policy were facts tending to prove that the applicant applied for the kind of policy that was issued and sent to their agent for delivery. If we are mistaken in this, even if the policy issued and sent to the agent for delivery to Ransom was not the policy applied for by him, and if this policy can be considered as but a proposal for a different kind of insurance than that applied for, still there was some substantial testimony tending to prove that, as such proposal, it was accepted by Ransom. He had applied for insurance and had paid a sufficient sum of money to cover the premium for the policy that was issued, as well as the other kind. The difference between the two according to the testimony had been fully explained to him before his illness.

Mrs. Ransom testified that the day or the day after the policy was received she went over it with her husband. She didn't read every word of it, but he knew that she had it. He was taken sick on the 5th of August, 1920, and was not unconscious until about twelve hours before his death, and during the fourth week of his illness, which would be about the time the policy was delivered to her, they thought he was going to recover. He could have understood the contents of the policy. While he could have understood it, she didn't think it necessary to read it word for word to him. He retained the policy and didn't ask that the check or money given in payment of the premium be returned to him. He lived for twenty-one days.

Now, if Ransom were alive and seeking to cancel this policy on the ground that same had not been accepted by him, would not the above testimony be some substantial evidence on such an issue to prove that he had ac-

cepted the policy? It occurs to us that, if such were the issue, the above testimony would be sufficient to at least sustain a finding by the trial court that Ransom had accepted the policy. If so, it is also sufficient to sustain the finding by the trial court on the issue here presented as to whether or not the policy had been accepted by Ransom. We conclude therefore that there was testimony tending to prove that the policy sued on was accepted by the insured and that the minds of the insured and the insurer for a valuable consideration had met upon all the terms of the contract evidenced by the policy.

2. There are provisions in the policy making the application a part of the policy, and declaring that the policy and application constitute a contract between the parties. The application contained the following provision: "No contract of insurance shall be deemed made and no liability upon the part of the company shall arise, until a policy shall be issued and be delivered, and be personally and manually received by me, and the first premium thereon actually paid, all during my lifetime and while I am in good health."

The appellant contends that the above provision, because of its peculiar language, constitutes a warranty and is in the nature of a condition precedent to any effective contract of insurance. We believe that such a construction is contrary to our own cases and the law generally upon the subject. To be sure, the application is signed by the applicant for insurance, and, in that sense, he adopts its contents or provisions as his own; but in reality the form of the application is prepared by the insurance company and its language, except the blanks to be filled out in response to questions, is the language of the company. Similar provisions are usually found in all standard applications for policies of insurance and are inserted for the benefit of the insurer. The provision above quoted was wholly for the benefit of the appellant. There is nothing in the language used to constitute a warranty on the part of the assured, or

a condition precedent to a binding contract of insurance.

In *American Life & Accident Association* v. *Walton,* 133 Ark. 348, we stated the law upon this subject as follows: "The doctrine of warranty in the law of insurance is one of great rigor and frequently operates very harshly upon the assured, and courts will never construe a statement as a warranty unless the language of the policy is so clear as to preclude any other construction."

We find nothing in the special language of the provision under review which should constrain us to hold that the requirements set forth could not be waived by appellant, nor do we find anything in the peculiar language of this provision that can distinguish this case in principle from former decisions of this court, some of them quite recent. The doctrine of our cases is that where, by the provision of an insurance contract, certain conditions must exist, and certain things be done for the benefit of the insurer before the policy can be delivered and the insurance contract thus consummated, the agent to whom is committed the duty of delivering the policy and thus completing the contract must see that the requirements of the policy in these particulars are complied with before the policy is delivered; that a delivery of the policy by such an agent in the absence of collusion with the insured to defraud the company, and with knowledge of the facts showing that the conditions did not exist and the things had not been done incident to delivery, as required by the policy, will constitute a waiver of those conditions and requirements. *Kansas City Life Ins. Co.* v. *Ridout,* 147 Ark. 563, and other cases there cited. See, also, *Jenkins* v. *Ins. Co.,* 149 Ark. 257.

In the case of *Illinois Bankers Life Assn.* v. *Rhodes,* 147 Ark., 191, the policy was sent to the agent of the company "with authority to make delivery," and we said: "This clothed him with all things necessary in connection with the delivery of the policy."

In the case at bar no collusion of the agent with the insured is alleged or shown. There is testimony tending to prove that the agent whose duty it was to deliver the policy had knowledge of the fact that the insured was ill at the time the policy was delivered to Mrs. Ransom. It was also proved that he failed to comply with the provision of the application requiring that the policy be "personally and manually received by the applicant" and disobeyed his instructions in having the policy delivered without having a receipt therefor signed by the insured. But this failure on the part of the agent to discharge his duty to the company did not avoid the policy, and, after its delivery, it will be conclusively presumed that such requirements were waived by the appellant. See *Jenkins* v. *Ins. Co., supra.*

3. There was no error in the ruling of the court in refusing to require the appellee to make her pleadings more definite and certain by stating the manner of the delivery of the policy, giving the name of the place where, and the person to whom the delivery was made. In the absence of limitations upon the agent's authority whose duty it was to deliver the policy, he had the right to select the place of delivery and his own messenger to convey the policy to the insured. See *Illinois Bankers Life Assn.* v. *Rhodes, supra; Jenkins* v. *Ins. Co., supra.*

The record presents no error in the rulings of the circuit court, and its judgment is therefore affirmed.

BOYD v. EPPERSON.

Opinion delivered July 11, 1921.

1. WILLS—PRETERMITTED CHILD.—Under Crawford and Moses' Dig., § 10507, if a testator omit the name of a child from his will, he will be deemed to have died intestate as to the omitted child, and such child will be entitled to recover the same portion of the father's estate as would have descended or been distributed to such child if the father had died intestate.

2. ADVERSE POSSESSION—POSSESSION OF WIDOW.—Where decedent's heirs permitted his widow to reside on his land from the date of his death until her death, it being their duty to assign dower to her, her occupancy pending the assignment of dower was not adverse to such heirs.

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

STATEMENT OF FACTS.

This was an action in ejectment brought by appellees against appellants in the circuit court to recover possession of a tract of land.

Appellants answered denying title in appellees and claiming title in themselves. They also pleaded the statute of limitations. On motion of appellants the case was transferred to the chancery court and heard there.

Both parties claim title from the same source. The land was originally owned by Mack Harmon, who died testate in 1911 in Grant County, Arkansas, where the land in question is situated. Appellees claimed title to the land as the heirs at law of said Mack Harmon, deceased. Appellants claim title as heirs at law of their mother, who was the second wife of Mack Harmon, and who they claim took the land under his will at his death.

All the parties interested are negroes. Mack Harmon and Miranda Harmon, his first wife, came to Grant County, Arkansas, from the State of South Carolina, and settled there. Mack Harmon brought to Arkansas with him his family, Miranda Harmon, his wife, and Rose Epperson, then Rose Harmon, a little girl about six years old. He first rented land in Grant County and subsequently acquired, by purchase, the land in controversy. In March, 1905, Miranda Harmon secured a divorce from Mack Harmon and forty acres of his land were decreed to her. Then Mack Harmon married the mother of appellants and lived with her until his death. He made a will and devised to Nora Sites twenty acres of land and the balance to his wife, Frances Harmon. Nora Sites is the daughter of Rose Epperson, and Frances Harmon is the

mother of appellants, they being her children by her first husband.

Miranda Harmon was a witness for appellees. According to her testimony, she was married to Mack Harmon in Lexington County, South Carolina, but does not remember the date of her marriage. Appellee, Rose Epperson, is her daughter by Mack Harmon, and she was born in South Carolina after the marriage. The witness does not remember how long, but it was something like a year or two after their marriage. The witness does not remember what year they came to Arkansas, but according to the white folks it was thirty-four or thirty-five years ago, and Rose was then four or five years old. Mack always treated Rose as his daughter and so spoke of her to other people. Rose called her "mama" and Mack "papa." Witness denied that she had told Joe Stoudamire, or any one else, that Rose Epperson was not the daughter of Mack Harmon, but was the daughter of Hillard Roseboro. She denied that she knew Joe Stoudamire in South Carolina.

According to the testimony of Rose Epperson, Miranda is her mother and Mack Harmon is her father. They told her that she was born in South Carolina, and she said that she was too small to remember coming to Arkansas. Mack Harmon always called her daughter and always spoke of her as his daughter to his friends and acquaintances. The witness took the side of her mother in the divorce proceedings and never visited her father after he married Frances Boyd. Mack Harmon lived on the land of Frances Boyd until his death.

Several white people, five or six in number, testified that Mack Harmon moved on a farm near them when he came to Arkansas in 1884 or 1885. He had with him, Miranda Harmon and Rose Epperson, then a little girl five or six years old, whom he represented to be his wife and daughter. He continued to treat and speak of them as his wife and daughter during all the time that he lived in that neighborhood.

Dr. J. M. Goodman testified that he had known Mack and Miranda Harmon and Rose Epperson for twenty-three years and had done their practice during that time; that he had frequently heard Mack talk about his family, and that he said that his family consisted of himself, Miranda, his wife, and his daughter Rose. Mack referred to Rose as his daughter nearly every time that he visited the house.

According to the testimony of Joe Stoudamire, he knew Mack Harmon and Miranda Harmon in Lexington County, South Carolina, and remembered that they were married there in 1883. Rose was living with her mother at the time her mother married Mack Harmon. Rose looked to be six or seven years of age when Mack and Miranda married. Witness came to Arkansas in 1888, and Mack Harmon and his family lived in South Carolina at that time. Witness did not know what time they came to Arkansas.

According to the testimony of David W. Mays, Miranda Harmon told him that Hillard Roseboro was the father of her daughter Rose. Mack Harmon also told him this.

Other negroes, who were well acquainted with Miranda Harmon, testified that she had told them that Hillard Roseboro was the father of Rose Epperson. Miranda Harmon denied this in every instance.

A brother of Joe Stoudamire testified for appellees that Joe Stoudamire did not know Mack Harmon and his family before they came to Arkansas.

Another witness testified that Rose Epperson told him that Hillard Roseboro was her father. Rose Epperson denied this.

The will of Mack Harmon failed to refer to or mention Rose Epperson or John Harmon.

Mack Harmon devised twenty acres of the land owned by him in Grant County to Nora Sites, who is the

daughter of Rose Epperson. The balance of the land he devised to his wife, Frances Harmon, the mother of appellants. After his death in 1911, Frances Harmon, his widow, moved on the land in controversy and lived there until her death in August, 1919.

E. H. Vance, Jr., D. E. Waddell and *A. W. Jernigan,* for appellants.

W. D. Brouse, for appellee.

HART, J. (after stating the facts). The chancellor found that Rose Epperson was the legitimate daughter of Mack Harmon, deceased, and that she and John Harmon, her older half-brother, were the sole heirs at law of said Mack Harmon, deceased.

We are of the opinion that the evidence sustained the finding of the chancellor. According to the testimoney of Miranda Harmon, Rose Harmon was born after her marriage to Mack Harmon in South Carolina. The witness did not remember the date of her marriage to Mack Harmon, nor the date on which Rose was born. She remembered distinctly, however, that Rose was born after their marriage in South Carolina, and was four or five years of age when they came to Grant County, Arkansas. They rented land when they first came to Arkansas, and the white people from whom they rented land and others who knew them said that Mack Harmon always spoke of Rose as his own daughter. The family physician who knew them for twenty-three years said that Mack always spoke of Rose as his own daughter. The evidence of these witnesses tends to corroborate the testimony of Miranda Harmon. The testimony shows more than occasional conduct and declarations by Mack Harmon that he was the father of Rose. He spoke of and treated Rose as his daughter during the whole period of his residence in Arkansas. He devised to her daughter a part of his land after he had become estranged from Rose on account of the divorce from her mother. The whole course of his conduct shows that he reconized Rose

as his daughter. The witnesses all said that Mack Harmon came to Arkansas in 1884 or 1885, and that Rose appeared to be five or six years of age at that time.

It is true that Joe Stoudamire and others testified that Miranda Harmon had admitted to them that Hillard Roseboro was the father of Rose, but we do not think their testimony is sufficient to overcome the testimony favoring the legitimacy of Rose. Joe Stoudamire testified that he knew Mack and Miranda Harmon and that they married in South Carolina in 1883. He said that Rose was six or seven years old when they married and that he came to Arkansas in 1888, leaving the Harmons still in South Carolina. His testimony is contradicted by all the witnesses for the appellees. They testified that Mack Harmon and his family came to Arkansas in 1884 or 1885, and that Rose then appeared to be only five or six years old. George Stoudamire, the brother of Joe, testified that Joe did not know the Harmons in South Carolina. The testimony is too long to be set out in its entirety, but a careful consideration of it leads us, as above stated, to the conclusion that the chancellor was right in finding that Rose Epperson was the daughter of Mack Harmon and was born after his marriage to Miranda.

The will of Mack Harmon is copied in the transcript. The name of Rose Epperson is not contained in it, and no reference whatever is made to her. Under section 10507 of Crawford & Moses' Digest, if a testator omits the name of a child from his will, he will be deemed to have died intestate as to the child omitted and such child shall be entitled to recover the same portion of her father's estate as would have descended or been distributed to such child if the father had died intestate.

It follows then that because Rose Epperson was not named in her father's will he died intestate as to her. The record is not very clear as to whether John Harmon was the son of Mack Harmon, but that does not make any difference. Rose Epperson conveyed a half interest in the land to him, and, as we have already seen,

the chancellor was right in holding her to be the legitimate child of Mack Harmon. She and John Harmon, then, were the only heirs at law of Mack Harmon, deceased, and inherited his property subject to the widow's right of dower. Mack Harmon died in 1911, and his widow, Frances, then went on the land and resided there until her death in August, 1919. It is claimed that she thus acquired title to the land by adverse possession, and that appellants inherited the land from her. The widow did not acquire any title to the land by adverse possession. Under our statute it was the duty of the heirs to lay off and assign dower to the window. Crawford & Moses' Digest, § 3544.

Appellees permitted the widow to reside on the land from the date of her husband's death until her death. It was their duty to assign dower to the widow, and the widow's occupancy pending the assignment of dower was not an adverse holding. *Brinkley* v. *Taylor,* 111 Ark. 305. Therefore the statute of limitations did not begin to run in favor of appellants until after the death of their mother who was the widow of Mack Harmon, deceased.

It follows that the decree must be affirmed.

CENTRAL COAL & COKE COMPANY *v.* BARNES.

Opinion delivered July 11, 1921.

1. MINES AND MINERALS—VENTILATION FROM GAS.—Under Crawford and Moses' Dig., § 7284, providing that there shall not be less than 200 cubic feet of air pass each working place per minute, non-compliance with the statute will not be excused upon the ground that it was not practical to comply with the statute.

2. MINES AND MINERALS—VENTILATION FROM GAS.—Where a shot-firer worked in a cross-cut in a mine, it was necessary for the mine operator to keep a current of air in circulation in such cross-cut, as required by Crawford and Moses' Dig., § 7284.

3. MASTER AND SERVANT—DUTY OF FIRE-BOSS TO MARK DANGEROUS PLACES.—Where there was a conflict in the evidence as to whether the fire-boss placed on the blackboard a warning of danger of gas in a

cross-cut, the court properly held that the question of negligence in failing to post the warning was for the jury.

4. MASTER AND SERVANT—ASSUMED RISK—QUESTION FOR JURY.—In the case of a shot-firer injured in firing a shot in a mine at a place where he had shortly before discovered gas and had fanned it away, it was not error to submit to the jury the question of assumption of risk where the place was not marked on the blackboard as dangerous, as required by Crawford and Moses' Dig., § 7279, and it did not appear that the danger of firing a shot was patent and obvious, and where the jury might find that he relied upon the master complying with the statute in regard to the circulation of air.

5. MASTER AND SERVANT—SAFE PLACE TO WORK—INSTRUCTION.—In an action by a shot-firer for injuries received in a mine, it was not error to instruct the jury as to the duty of the fire-boss to make the inspection required by § 7279, Crawford and Moses' Dig., and to notify the plaintiff by marking on the blackboard any danger in the mine where he was required to work.

6. MASTER AND SERVANT—SAFE PLACE TO WORK—AIR CURRENTS IN MINE.—It was not error, in an action by a shot-firer for injuries received in a gas explosion in a mine, to instruct the jury as to the master's duty in regard to furnishing air currents, as required by Crawford and Moses' Dig., § 7259, where the evidence tended to prove that the mine employed more than 10 men, and therefore came within the provisions of the act, as the jury might have found that if the air current had been provided plaintiff would not have been injured by the explosion of gas.

7. MASTER AND SERVANT—ASSUMED RISK—INSTRUCTION.—It was not error to instruct the jury that "while the plaintiff, by entering the services of the defendant as shot-firer in its mine, assumed all the risks ordinarily incident to that employment, he did not assume any risks arising from the negligence of the defendant or any one to whom it intrusted its superintending authority, unless it be further shown that the plaintiff was aware of such dangers and appreciated same."

8. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—An instruction to the effect that an employee's contributory negligence would not bar a recovery by him, but that the damages should be diminished by the jury in proportion to the negligence attributable to him, is in accord with the provisions of Crawford and Moses' Dig., § 7145, and is not erroneous.

9. DAMAGES—INSTRUCTION—REFERENCE TO AMOUNT SUED FOR.—While it is improper for the court, in instructing the jury in a personal injury suit, to make reference to the amount sued for, it was not prejudicial error to instruct the jury that if they found for the plain-

tiff they should assess his recovery at such sum as from the evidence, in their judgment, would fairly compensate him for the injuries which he had sustained, if any, not to exceed the sum claimed in the complaint.

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

James B. McDonough, for appellant.

(1) A directed verdict should have been given in favor of the defendant. A shot-firer is the absolute judge of the safety of every place that he goes into. He relies upon his own judgment. Plaintiff knew there was gas there. Where a servant is required to make his place of work safe and fails to do so, he assumes the risk of his failure. 93 Ark. 140; 44 Ark. 524; 88 Ark. 292; 122 Ark. 552; 108 Ark. 377. Where a servant has knowledge of the danger, no duty exists to give further information. 96 Ark. 500; 137 Ark. 615; 97 Ark. 486; 174 S. W. 150; 107 Ark. 341. The risk of being injured by gas was incident to plaintiff's employment. 41 Ark. 382; 88 Ark. 548; 135 Ark. 330. It was his duty to make his place of work safe. 100 Ark. 156. The presence of gas is an obvious danger. 98 Ark. 211. Plaintiff knew of the presence of gas and necessarily assumed the risk. 118 Ark. 304; 96 Ark. 387.

(2) The court erred in giving plaintiff's instruction No. 1. There was evidence of negligence in failing to make inspections. Plaintiff did not go into a place of danger relying upon inspection by the fire boss. He relied upon his own inspection. He had better knowledge of the presence of gas than any other employee.

(3) The court erred in giving an instruction (No. 2) on air currents. Plaintiff knew he was the judge of the danger. The fact that 200 cubic feet of air did not pass the face of the cross-cut per minute was not the proximate cause of the injury.

(4) The court erred in giving plaintiff's instruction No. 4. 135 Ark. 330. Plaintiff was aware of the danger.

(5) The court erred in giving plaintiff's instruction No. 5. This instruction does not correctly declare the law of comparative negligence.

(6) The court erred in giving plaintiff's instruction No. 6. 128 Ark. 479; 82 Ark. 61.

A. M. Dobbs, Norwood & Alley and *G. L. Grant,* for appellee.

(1) It was not error to refuse to direct a verdict for appellant.

(2) Upon the question of assumed risk, plaintiff was not, as a matter of law, precluded from recovery. 46 Ark. 396; 93 Ark. 140; 44 Ark. 529.

(3) It was not error to give plaintiff's instruction No. 1. 122 Ark. 401. No specific objection was made to objectionable allegations. 115 Ark. 120; 127 Ark. 183.

(4) The court properly gave plaintiff's instruction No. 2. 131 Ark. 562; 75 Ark. 86; Crawford & Moses' Dig. §§ 7145-6.

(5) It was not error to give plaintiff's instruction No. 4. 135 Ark. 330 is not a similar case.

(6) Instruction No. 5 is not erroneous. 124 Ark. 437.

(7) There was no error in giving plaintiff's request No. 6.

HART, J. The Central Coal & Coke Company prosecutes this appeal to reverse a judgment for damages for personal injuries in favor of Tom Barnes, who was injured by the explosion of gas while he was acting in the capacity of shot-firer in one of the company's coal mines.

Tom Barnes was a witness for himself. According to his testimony, he was thirty-seven years of age and had worked seventeen years at mining in the neighborhood of the mine where he was injured. He had had eleven years experience as a shot-firer and had been working in the mine where he was injured seventeen months as a shot-firer. He knew that gas feeders were in the mine. Gas

feeders are crevices in the coal where the gas escapes. The gas also sometimes comes out of the roof, or the bottom of the mine. You can only tell by testing it out with a safety lamp. An open lamp will explode the gas. The shot-firer goes into the mine after the miners have left it and fires the shots which the miners have fixed during the day. A shot-firer usually goes to work about 4:30 o'clock in the afternoon. On the day in question Barnes went to the blackboard on the surface and looked for warnings. Barnes found no warnings on the blackboard for the place where he was injured. When he entered the mine, he went to the fourth south entry and found three shots prepared for firing. He tamped the shots and then went back to the air course. He opened the cross cut and found gas in it. He brushed the gas out of the cross cut and then tamped a shot in it. By brushing gas out is meant that he took a rag curtain left there for that purpose and fanned the gas out of the cross cut. He then went back to the other side and fired a shot. Then he came back to the cross cut and fired the shot in it with his open lamp. The use of the open lamp caused the gas to explode and to severely injure him. He knew that gas was feeding in there, but he did not know that it was coming in so rapidly. Barnes made the first test for gas in the cross cut and also made a test for gas in the entry. There were shots to be fired on the air course side of the cross cut and also on the entry side of the cross cut. Barnes fired the shots on the entry side before the explosion. The safety lamp will indicate whether there is a great or small quantity of gas. When Barnes first went in there, he heard the gas bubbling in the water and made a test for it with his safety lamp. He knew that a good deal of gas had accumulated there, but he readily brushed it out and did not know that it was coming in so rapidly as to explode if he should return in so short a time and fire the shot with his lighted lamp. It was necessary to fire the shot with his lighted lamp, and Barnes was doing his work as shot-firer in the usual and customary

manner. It was his duty to make a test for gas before he fired the shot. The miner who prepared the shot in the cross cut where Barnes was burned worked in the cross cut all day, but used a safety lamp. The fire boss had told him that gas was there and to use a safety lamp. In the morning a dead line had been located between the first and second crosscuts, but it was moved later in the day.

Tom Shaw, State Mining Inspector, was a witness for the plaintiff. According to his testimony, he was familiar with the mine in question for the reason that he had inspected it. He explained how the air was made to circulate in the mine and said that, while gas can not be prevented from coming out of the feeders, the circulation of the air will carry the gas away. He explained how the air circulated through the fourth south entry and stated that, under the law, 200 cubic feet of air per minute is required to be circulated in all working places in the mine. He stated further that, if that much air had been kept circulating in the second cross-cut per minute, it would have kept the cross-cut free from gas. The reason is that the gas is so much lighter than air that the current of air sweeps it out of the mine.

R. E. Hinson, the gas man and fire boss, was a witness for the defendant. He went into the mine on the morning in question and examined the fourth south air course. The face of it was practically clear, but the cross cut had a feeder in it that morning which was making quite a lot of gas. Witness marked it out and put a dead line there. He then went to the top of the mine and put a notice on the blackboard. The marking on the board showed that the fourth south air course was cut off. The notice was put there for everybody to see. There was no duty on his part to notify Barnes personally. It was Barnes' duty to examine all places for gas where he was required to go before doing anything in those places. According to the testimony of the mine foreman, it was Barnes' duty, even after he had swept the gas out, to

examine it again with a safety lamp. According to the evidence adduced for the defendant, it was also shown that it was not practical to provide 200 cubic feet of air each minute in the cross cuts.

It is earnestly insisted that, under this evidence, the court should have directed a verdict for the defendant.

We are of the opinion that the court properly submitted the issue of negligence on the part of the defendant, and assumption of risk on the part of the plaintiff, to the jury.

Section 7279 of Crawford & Moses' Digest provides that in all mines where a fire boss is employed all working places shall be examined at least once a day by the fire boss, and that all dangerous places shall be marked on the blackboard before any other employees enter the mine.

Section 7284 provides that there shall not be less than 200 cubic feet of air pass each working place per minute, and that it shall be the duty of the State Mine Inspector to measure the air at all working places in making his inspection.

The testimony on the part of the defendant itself tended to show that the latter section of the statute had not been complied with. Counsel seek to justify the neglect on the ground that it was not practical to comply with the statute. This is a matter that addresses itself to the Legislature and does not furnish a defense to an action for negligence based on a noncompliance with the statute. Then, too, it is insisted by counsel for the defendant that it was not necessary to comply with the statute in the cross cut where the plaintiff was injured. This question has been decided adversely to his contention in *Western Coal & Mining Co.* v. *Jones,* 75 Ark. 76. It was there contended by the plaintiff that the company owed no duty to its servants to keep the room adjoining his working room free of gas. The court said that the statute meant that the air shall be carried to the

extremest point where the pick falls, and that the entire mine shall be free of gas. In the discharge of their duties the employee who mined the coal and the shot-firer both worked in the cross cut where the injury occurred. Therefore, it was necessary for the company to keep the current of air in circulation in the cross cut as required by the statute.

It was also the duty of the fire boss to have placed a warning of danger of gas in the cross cut on the blackboard. This he claimed he did. His testimony, however, is contradicted in this respect by that of the plaintiff, who testified that he examined the blackboard and found no marking there indicating danger in the cross cut. This made a question of fact for the jury, and the court properly held that the question of negligence was one of fact for the jury and not of law for the court.

Again it is insisted by counsel for the defendant that the court should have declared as a matter of law that the plaintiff assumed the risk and therefore should have instructed the jury to find for the defendant. Counsel points out the fact that it was the duty of the plaintiff to make a test for gas, that plaintiff discovered that gas was coming into the cross cut, and that he assumed the risk of firing the shot when he knew that the gas was escaping in such large quantities.

While it was the duty of the plaintiff to inspect for gas, he was not made the insurer of his own safety. Of course, if the gas was coming into the cross cut in such large quatities and so rapidly as to have been obvious to the plaintiff that it was dangerous to fire the shot, he would have assumed the risk of doing so. But we do not think that the undisputed evidence made the danger of firing the shot a patent and obvious one. The warnings, required by the statute, of dangerous places in the mine were placed there for the benefit of the plaintiff as well as the miners who worked the mine. The plaintiff says

that no marking with regard to the cross cut was placed on the blackboard.

The jury might have found that he relied on this fact in estimating the amount of gas that would come in the cross cut in a given time. Then, too, he readily brushed the gas out of the cross cut with the cloth left there for that purpose. The jury had a right also to assume that he might rely to some extent on the company complying with the statute in regard to the circulation of the air. The plaintiff was only gone a short time, and, when all these matters are considered, we are of the opinion that the court was right in submitting to the jury the question of assumption of risk.

Section 7145 of Crawford & Moses' Digest provides that contributory negligence shall not bar a recovery, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. The court gave an instruction to the jury in compliance with this section of the statute. Therefore there was no error in refusing to direct a verdict for the defendant.

It is next insisted that the court erred in giving instruction No. 1 for the plaintiff. The instruction is as follows: "You are instructed that it was the duty of the defendant to exercise ordinary care to furnish the plaintiff with a reasonably safe place in which to work, and not expose him to any unusual danger while in the discharge of his duty as an employee in the defendant's mine; and it was also the duty of the defendant in the exercise of ordinary care to make such reasonable inspections and examination in its said mine as would enable it in the exercise of ordinary care to know of any dangers or dangerous places in its mine that might imperil the safety of the plaintiff while in the discharge of his duty as a shot-firer, and to notify the plaintiff by marking on the blackboard of any danger or dangerous places existing in said mine where the plaintiff was required to work, if there were any such dangers or dan-

gerous places and the defendant knew of them or in the exercise of ordinary care might have known thereof.

"If you find by a preponderance of the evidence that the defendant negligently failed to perform all or either of said duties and that the plaintiff was injured by reason of such failure and negligence, that the plaintiff is entitled to recover, unless he is precluded from recovering under the other instructions given you in this case."

Counsel for the defendant claims that the instruction is too general and misleading because it does not specifically define the issues in the case. He also contends that the instruction is erroneous in that it points out to the jury the duty of the defendant to make an inspection, whereas the duty rested upon the plaintiff alone to make the inspection for gas at the place where he was injured. Counsel contend that the fact that the fire boss had made an inspection did not justify the plaintiff in firing the shot where he knew that there was gas. That is true, but the quantity of gas and the rapidity with which it was feeding in the cross cut were questions to be decided by the plaintiff in determining whether it was safe to fire the shot. As above stated, in arriving at the conclusion, he had a right to rely in part upon the fact that the fire boss had not marked any danger there and also upon the fact that the statute prescribed the amount of air to be circulated there. These were statutory requirements enacted for the purpose of providing him with a safe place in which to work, and the court did not err in defining the duty of the fire boss to make the examination and inspection required by the statute and of notifying the plaintiff by marking on the blackboard any danger in the mine where he was required to work. We are of the opinion that the court did not err in giving the instruction.

It is next insisted that the court erred in giving an instruction on air currents in compliance with the provisions of section 7284 of Crawford & Moses' Digest.

It is contended by counsel for the defendant that this section does not apply to coal mines where less than ten men are employed underground in twenty-four hours, and that there is no proof in the present case that the mine in question came within the provisions of the act. It is true that there is no specific evidence to this effect. But the evidence shows that there were at least four south air courses, and that the mine employed a general foreman, a fire boss, and a shotfirer. The whole tenor of the evidence shows that it was a large mine. The State Mine Inspector, without objection, testified that he had inspected the mine as by law he was required to do. The statute only requires him to inspect mines where more than ten men are employed. Crawford & Moses' Digest, § 7259.

It is claimed that the court erred in giving an instruction based upon the section of the statute above referred to because the plaintiff knew that gas was in the cross cut and because the failure to cause 200 cubic feet of air per minute to pass the cross cut where the plaintiff was at work had nothing to do with his injury. The jury might have found that, had the current of air been in operation there, as required by the statute, it would have driven the gas out of the cross cut and not allowed it to accumulate there in sufficient quantities to ignite and thereby injure the plaintiff. It will be remembered that the evidence shows that he had returned in a very short time after brushing the gas out when he first found it there.

It is next insisted that the court erred in giving instruction No. 4, which reads as follows: "You are instructed that while the plaintiff, by entering the services of the defendant as a shot-firer in its mine, assumed all the risks ordinarily incident to that employment, he did not assume any risks arising from the negligence of the defendant, or any one to whom it intrusted its superintending authority, unless it be further shown that the

plaintiff was aware of such dangers and appreciated the same."

It is contended that the instruction is erroneous upon the authority of *Athletic Mining & Smelting Co.* v. *Sharp,* 135 Ark. 330. In that case an instruction on assumed risk was held to be wrong because the court neglected to tell the jury that an assumption of risk includes the negligence of the defendant if the plaintiff knew of the negligence and appreciated the danger incident to the service. That defect is not in the instruction in question. The instruction in plain terms tells the jury that the plaintiff did not assume any risk arising from the negligence of the defendant unless it was shown that he was aware of the danger and appreciated the same. The instruction as given was correct. *Ark. Land & Lbr. Co.* v. *Fitzhugh,* 143 Ark. 122.

It is next insisted that the court erred in giving instruction No. 5. It is as follows: "Upon the question of contributory negligence, you are instructed that the burden is on the defendant to establish that the plaintiff was guilty of contributory negligence, and that the defendant must make proof thereof by a preponderance of the evidence, unless such proof appears from the evidence on the part of the plaintiff; but if you find that the plaintiff was guilty of contributory negligence, such contributory negligence will not bar a recovery, or preclude the plaintiff from recovering in this action, if he is otherwise entitled to recover, but the damages, if any, shall be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff."

The instruction tells the jury to take into account the negligence of the plaintiff and reduce his recovery in the proportion in which his negligence contributed to his injury. The instruction is in accord with the provision of section 7145 of Crawford & Moses' Digest and is not erroneous. The section, in substance, provides that the fact that the amployee may have been guilty of

contributory negligence shall not bar a recovery; but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. See, also, *Kansas City So. Ry. Co.* v. *Sparks*, 144 Ark. 227.

Finally it is insisted that the court erred in giving instruction No. 6, which is as follows: "If you find for the plaintiff, you will assess his recovery at such a sum as from the evidence, in your judgment, will fairly compensate him for the injuries which he has sustained, if any, not to exceed the sum of three thousand dollars. In arriving at the amount of plaintiff's recovery, if you find for him, you may take into consideration the plaintiff's pain and suffering, mental and physical, if any; his loss of time, if any; his diminished capacity to earn a livelihood, if any; the temporary or permanent character of his injury; the necessary expense incurred by him for medical and surgical attendance, if any; and upon consideration of all these elements of recovery, if proved, you will assess the damages in favor of the plaintiff. If you find for the defendant, you will simply so state in your verdict."

Counsel relies upon the case of *St. L. S. W. Ry. Co.* v. *Aydelott*, 128 Ark. 479. In that case the instruction did not restrict the jury to a consideration of the amount of damages as shown by the evidence and for that reason the instruction was held to be erroneous.

In the case at bar the rule announced in *St. L., I. M. & S. Ry. Co.* v. *Snell*, 82 Ark. 61, governs. There we held that it was improper for the trial court to make reference in an instruction to the amount sued for. The reason given was that the jury is presumed to know from having heard the complaint read that its verdict should not exceed the amount asked for. The court said, however, that where an instruction containing such reference is properly limited by a direction to find only such amount as the evidence warrants, the court will not hold it to be

prejudicial error. The rule there announced governs the present case.

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

FRANKLIN v. STATE.

Opinion delivered July 11, 1921.

1. CONTINUANCE—ABSENCE OF WITNESS—DILIGENCE.—Defendants on trial for manufacturing intoxicating liquors were not entitled to a continuance for the absence of a witness who was likewise under indictment for the same offense, but who had not been subpoenaed as a witness on behalf of defendants.

2. CRIMINAL LAW—FORMER JEOPARDY.—Where, after a jury was impaneled in a felony case, a member of the jury advised the court that he had formed and expressed an opinion of defendant's guilt, having concurred in a verdict against one associated with defendant in the alleged crime, and the court, without objection from defendant, excused such juror and ordered the clerk to call another juror, the defendant, by his silence, will be held to have assented to the juror's discharge, and cannot plead former jeopardy.

3. CRIMINAL LAW—CONFESSION.—Where defendant denies having made a confession to the sheriff, he will not be heard to contend that, if made, the confession was obtained from him by threats.

4. INTOXICATING LIQUORS—UNLAWFUL MANUFACTURE—EVIDENCE.—On a prosecution for manufacturing or being interested in the manufacture of intoxicating liquors, evidence that defendant had told a witness how to make intoxicating liquors was competent in connection with evidence of the witness that he had bought from defendant a still and three barrels containing the ingredients for making whiskey.

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

W. S. Coblentz, for appellant.

(1) The court erred in overruling defendant's motion for continuance. The trial court assigned as reason therefor that the absent witness was indicted by the same grand jury for manufacturing liquor. It was shown by affidavit that the defendants did not know that the evidence of this witness would be material until too late to

secure his attendance. It was set out in the motion that the court permitted the witness to go to a sick wife. Illness in family of a witness may be ground for continuance. 5 Enc. Pro. 462. The testimony of this witness was material.

(2) Plea of former jeopardy should have been sustained. After impaneling the jury, the court discharged one of the jurors over defendants' objection. Bishop, Cr. Law, p. 571; 112 Tenn. 596; 43 Ark. 271; 135 Ark. 166.

(3) Error in admission of Franklin's confession to the sheriff, obtained by threats. A confession obtained through threats is inadmissible. 47 Ark. 172; 14 Ark. 555; 11 Ark. 389; 50 Ark. 305; 66 Ark. 506.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellees.

HART, J. Perry Franklin, Ben Davidson, Eli Markham, Jewell Sparks and Ira Green, were separately indicted for the crime of manufacturing and being interested in the manufacture of intoxicating liquors. The defendants were charged with manufacturing and being interested in the manufacture of intoxicating liquors at the same place and at the same time. They were tried separately, and there is a separate transcript in each case, but the testimony in each is practically the same. There was a verdict of guilty in each case, and from the judgment of conviction each defendant has separately prosecuted an appeal to this court.

For the sake of convenience the cases have been briefed and heard together here. The evidence for the State is sufficient to warrant a conviction, and no assignment of error is urged here on that account.

The defendant in each case assigns as error the refusal of the court to grant him a continuance on account of the absence of Buck Nicholson. There was no error in the action of the court in refusing the continuance, because the defendants did not show due diligence in endeavoring to procure the attendance of the absent wit-

ness. *Osborne* v. *State,* 121 Ark. 160. The record shows that Buck Nicholson had also been indicted for the crime of making intoxicating liquors, and had been permitted to go home to visit a sick wife at the time these cases were tried. Nicholson had not been subpoenaed as a witness in either of the cases. He was not required to attend court except in his own case. The defendants had no right to rely upon his being present when their cases were called for trial. Having failed to have the witness subpoenaed in their cases, they are in no attitude to complain that he was not present in court when they wished to call him as a witness, and the court did not abuse its discretion in refusing to grant them a continuance.

In No. 2526 the defendant, Franklin, assigns as error the action of the court in refusing to sustain his plea of former jeopardy. Counsel rely upon the holding of the court in *State* v. *Brown,* 135 Ark. 166, and *Whitmore* v. *State,* 43 Ark. 271, to the effect that when a jury in a criminal case is impaneled and sworn in a court of competent jurisdiction under a valid indictment, the accused is in jeopardy and the discharge of the panel or any part thereof without his consent will bar a further prosecution for the same offense.

We think the record in the present case shows an implied consent on the part of the defendant to discharge one of the jurors. The record is as follows:

"Court: After the jury was sworn, and before anything else was done in the case, it was discovered that Theodore Mansfield, one of the jurors selected in the case, was disqualified for the reason he had sat upon the case of Ira Green, Eli Markham and Jewell Sparks, three defendants who were jointly charged with the defendant in the manufacture of liquor; that he claims he didn't think about it at the time he was impaneled, but after being impaneled he comes to the court and tells him he was on that case, and was disqualified in the case because he had formed and expressed an opinion by his

verdict, and he asked the court to excuse him because of his disqualifications as a juror, and for this cause, upon challenge of the State, the court discharges said juror, Theodore Mansfield, and ordered the clerk to call another name.

"Mr. Coblentz: The defendant now interposes a plea of former jeopardy, from the fact the jury had already been sworn. The defendant also excepts to the ruling of the court in discharging Mansfield on motion of the State. The court overrules the plea of former jeopardy, and the defendant now excepts."

In *Whitmore* v. *State, supra,* the court said that the general rule is, that the discharge of a jury, after the machinery of the court is fully organized for trial and judgment, without the consent of the defendant, express or implied, operates as an acquittal. In *Atkins* v. *State,* 16 Ark. 568, the court said: "Lord Coke seems to have been of the opinion that a jury charged in a capital case, could not be discharged without giving a verdict, even with the consent of the prisoner and the attorney general. 1 Inst. 227b; 3 Inst. 110. But the doctrine was fully discussed in the case of the Kinlocks, Foster 16, and the law settled to be that where the jury is discharged by the consent, and for the benefit of the prisoner, he can not avail himself of such discharge as ground to be released from further prosecution."

The record shows that the discharged juror had been on the panel which had convicted three other defendants charged with making intoxicating liquors at the precise time and place that the defendants were charged with making such liquors. In other words, five persons, including the defendants, were engaged in making intoxicating liquors at a certain time and place, as one transaction. Three of them were tried together and convicted before the defendants were put on trial. The juror in question was on the panel which had convicted these other three defendants. When the juror saw that the

defendants were being tried for the same transaction, he informed the court that he had an opinion of their guilt, and it is obvious that the court discharged the juror in the interest of the defendants. The defendants and their attorney must have known that this was the case, and yet they sat by until after the court had discharged the juror before they made any objection or entered their plea of former jeopardy. This is shown by the language of the attorney. After the court had discharged the juror and ordered the clerk to call another man, the attorney for the defendants said that "the defendant now interposes a plea of former jeopardy," and that the defendant also excepts to the ruling of the court in discharging the juror. His action in remaining silent during the colloquy between the court and the juror and in permitting the court to discharge the juror and summons another one, under circumstances so manifestly for the benefit of the defendant, constituted an implied consent on his part to the action of the court. He must have known as a man of reasonable intelligence that the court was acting for his best interest and, not having raised any objection, he will be deemed to have impliedly assented to the action of the court, and not merely to have acquiesced in the action of the court.

Moreover, there was a manifest necessity which warranted the court in discharging the juror, and no jeopardy attached to the accused. The question was fully discussed in *Thompson* v. *United States,* 155 U. S. 271. In that case, after the jury had been sworn and a witness examined, the fact that one of the jury was disqualified by having been a member of the grand jury that found the indictment became known to the court. Thereupon the court, without the consent of the defendant and under exception, discharged the jury and directed that another jury should be called. The defendant pleaded former jeopardy, but the court denied his plea. In discussing the question the court said: "As to the question raised by the plea of former jeopardy, it is sufficiently answered

by citing *United States* v. *Perez,* 9 Wheat. 579; *Simmons* v. *United States,* 142 U. S. 148, and *Logan* v. *United States,* 144 U. S. 263. Those cases clearly establish the law of this court, that courts of justice are invested with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and that the defendant is not thereby twice put in jeopardy within the meaning of the Fifth Amendment to the Constitution of the United States." The question was, also, thoroughly discussed by the Supreme Court of Maine in *State* v. *Slorah,* 4 A. L. R., p. 1256, and the authorities bearing on the question reviewed. The court said:

"The administration of justice requires that verdicts, criminal as well as civil, shall be found by impartial juries, and shall be the result of honest deliberations absolutely free from prejudice or bias. The public as well as the accused have rights which must be safeguarded. If during the progress of a trial it shall become known to the court that some of the jury do not stand indifferent, whether toward the State or the accused, it would be a travesty on the administration of justice if the trial must proceed, and, if acquitted by such a tribunal, the constitutional safeguard may be invoked against again placing him in jeopardy before an impartial jury. Such a trial obviously should not constitute jeopardy, whether the jury be prejudiced or influenced in behalf of the accused or the State. To prevent such a perversion of justice, it is now well recognized that, if it comes to the knowledge of the presiding justice that such conditions exist, it creates that imperious, manifest necessity that will warrant a discharge of the jury, and such discharge will constitute no bar to another trial on the same indictment."

In the case of *State* v. *Duval,* L. R. A. 1916 E, p. 1264, the Supreme Court of Louisiana held that the trial

court may discharge a juror in a capital case without the consent of the prisoner, whenever in its opinion there is a manifest necessity for such discharge. In that case, after the jury had been sworn and the indictment read, the court found one of the jurors to be legally incapable to sit on the jury because he had formed an expressed determination not to find the defendants guilty.

In the present case the juror had been on the jury which had tried and convicted three defendants who had been charged with making whiskey at the same time and place that the defendants were charged with making it. In other words, the five men were engaged in the same transaction, and, as soon as the juror discovered this to be the fact, he announced to the court that he had formed an opinion. Manifestly the action of the court in discharging the juror was in the interest of the accused and for the purpose of enabling him to obtain a fair and impartial trial.

Again it is insisted by counsel for Franklin that the court erred in permitting the sheriff to testify to an admission made by the defendant which was in the nature of a confession and which is claimed to have been obtained by threats.

In answer to a question propounded to the defendant as to what had been said to him by the sheriff about it being to his best interest to tell about his connection with making the liquor, the defendant answered that the sheriff had said there was a worm in the defendant's loft; that, if the defendant did not tell about it, the other boys were going to bring it up against him. The defendant then denied having made an admission to the sheriff at all. Having made this denial, he is in no attitude to claim that a confession was obtained from him by threats.

In No. 2527 counsel for Ben Davidson assigns as error the action of the court in permitting Jim Higgins to testify that Ben Davidson had told him how to make in-

toxicating liquors. Higgins had already testified, without objection, that he had bought a still and three barrels of beer from Ben Davidson. The witness was then permitted to testify that the defendant at the time said that he had put one and a half bushels of meal and sixty pounds of sugar in the three barrels of beer. There was other evidence tending to show that these ingredients were used in making whiskey. Therefore the testimony was competent as tending to connect the defendant with the making, or being interested in the manufacture, of intoxicating liquors on the occasion in question.

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

MAGNOLIA PETROLEUM COMPANY *v.* JOHNSON.

Opinion delivered July 11, 1921.

1. MASTER AND SERVANT—INDEPENDENT CONTRACTOR.—Evidence held to sustain a finding that one engaged in handling oils and gasoline for an oil company was its servant, and not an independent contractor.

2. MASTER AND SERVANT—INDEPENDENT CONTRACTOR—TEST.—The test as to whether an oil company was liable for negligence in the delivery of gasoline to a consumer, or was dealing through an independent contractor, is not whether the company actually directed the manner of its delivery, but whether it had a right to control the delivery.

3. NEGLIGENCE—SALE OF GASOLINE.—Evidence *held* to sustain a finding of negligence on part of defendant's servants in the mode of delivering gasoline to a purchaser, and that plaintiff was not guilty of negligence that contributed to the resulting injury.

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

Cockrill & Armistead and *John W. Newman,* for appellant.

Defendant was entitled to a peremptory instruction in its favor, (1) because the drivers were employees of an independent contractor, and (2) because the plaintiff was equally negligent as the drivers.

There was no evidence as to defendant retaining any control or direction over the work of the drivers making deliveries. 105 Ark. 477; 118 Ark. 561; 128 Minn. 508; 152 Mich. 613; 203 N. Y. 191.

Plaintiff was equally as negligent as the drivers. 96 Ark. 500.

John E. Miller and *C. E. Yingling,* for appellee.

(1) The drivers were employees of appellant. Independent contractor defined. 135 Ark. 117; 2 Words and Phrases p. 1034. See 144 Ark. 401; 132 U. S. 523; 14 R. C. L. p. 67; 38 A. S. R. 564.

(2) The question of contributory negligence was for the jury.

SMITH, J. Appellee recovered judgment against appellant company for the value of a barn and its contents alleged to have been negligently set on fire by the agents, servants and employees of appellant. Liability on the part of appellant is denied upon two grounds, first, that it was not responsible for the acts of the persons whose negligence caused the fire, and, second, that appellee was guilty of contributory negligence which defeats his right of recovery.

Appellant is engaged in producing and selling oils and gasoline, with its principal Arkansas office in the city of Little Rock. In order to supply the territory in and about Searcy appellant entered into a contract with one J. N. Smith, who was in the transfer business at Searcy. Under this contract the company shipped oil and gasoline to Searcy and stored it in their tanks there for sale, with Smith in charge.

Smith undertook to handle the property with proper care, and to make sales and deliveries of gasoline on a commission basis, graduated according to the expense of delivery. The commission on deliveries in the city was two cents per gallon and to country points was three cents.

The company supplied the containers for the oil and gasoline, while Smith, in consideration of the commissions paid, used the teams, wagons and drivers employed by him in his transfer business. The company was not consulted in the employment or discharge of these men, whose wages were fixed and paid by Smith.

The contract is a very elaborate one, and designates Smith throughout as the company's agent, and he signed it in that capacity.

The company furnished the gasoline and oil and specified the prices at which it should be sold. The company required the drivers of the wagons making deliveries in the country to use sales slips furnished by it. These slips were signed by the driver, and were so prepared that a carbon copy might be delivered to the purchaser. The originals were turned into the company, and in cases where accounts were run bills were sent out from the company's office in Little Rock. Any money collected by the drivers was turned in by them to Smith, and all checks given in payment for oil or gasoline were made payable to the order of the company. The company caused to be painted on the wagons and tanks used in making deliveries the words, "Magnolia Petroleum Company," this being the name of appellant company.

Section 21 of the contract between Smith and the company contains the following recitals: "It is expressly understood and agreed that the above rates of commission apply on sales made by agents, and the commissions to apply on sales made by salesmen, managers and others, and the commissions to apply on transfers between agencies, on home office contracts and on railroad contracts, are allowed as full compensation to agent for service to be rendered in connection with the proper handling of the company's business in the territory assigned to the agency. The duties of the agent in return for said compensation, includes the proper care of stock placed in his charge, storage tanks, warehouse and

other equipment, soliciting and carrying on business under the direction of the division manager, and other authorized representatives, and the making of deliveries, the collecting of accounts, the making of reports required, unloading cars, and such other services as may be required for the proper conduct of the business."

Section 22 of that contract provides that the company shall furnish, free of charge, all forms, stationery and postage for the proper conduct of the business, and that all other items of expense shall be assumed by the agent, Smith.

No complaint is made of the instructions given on this subject. The insistence is that the undisputed evidence shows that Smith was an independent contractor, and that the drivers of the wagons were the servants of Smith.

The majority of the court are of the opinion that the facts stated made a case for the jury, and that the contract between the company and Smith created the relation of principal and agent, and that the company had reserved the right to control and direct the manner of making deliveries of oil, and that, while no directions were given in the particular instance as to the manner of delivering the oil to appellee, which caused the fire that destroyed the barn, the company had reserved the right of direction; and, in the discharge of all duties, whether performed by Smith himself or by men employed by him, in selling and delivering the oil, the work done was that of the company.

We recognize, of course, that the designation of Smith as "agent" in the contract is not conclusive of the relation. *J. R. Watkins Medical Co.* v. *Williams,* 124 Ark. 545. The test is, not whether the company actually directed the manner of the delivery of the oil, but is whether the company had the right to control the delivery. 14 R. C. L., section 3, p. 67, of the article on Independent Contractors. And the majority are of the

opinion that the contract between the company and Smith, as interpreted by the conduct of the parties under it, shows that it was the purpose of the company to retain complete control of everything done in connection with the sale and delivery of the oil, and that the testimony, in its entirety, warranted the finding that the drivers of the wagon were themselves the servants of the company.

The majority are also of the opinion that the question of appellee's contributory negligence was properly a question for the jury. Instructions on the question of negligence of the drivers and the contributory negligence of appellee correctly declared the law. The insistence on this branch of the case is that under the undisputed evidence appellee was as negligent as were the drivers of the wagon, and that if it be said that the testimony supports the finding that the drivers were negligent it must also be said that appellee was guilty of contributory negligence.

The testimony on this branch of the case is as follows: The wagon used in delivering oil to country customers was driven by Ernest Neal and Jim Mann. They drove the wagon to the home of appellee, and arrived there about dark on March 5, 1920. When they arrived, they called and asked appellee if he had a gasoline tank and, if so, where it was. Appellee answered that he had a tank, and that the tank was in his barn. Johnson was told to light his lantern and bring it to the barn. This appellee did, and he relates what happened as follows: "They drove the wagon up in front of the door, and backed right in front of the car shed door. Jim Mann started to draw the gasoline. He started to unscrew these taps I call them, in the end of the steel barrel; I had seen it drawn that way before; I had seen them take the small tap out; and it seemed like it did better, and I mentioned it to him, and he said, no, he thought he could manage it all right that way, and he just took it out, the gasoline was flowing in the barrel back and forth. When he took the tap out, he said, 'hold your light up where I can see.' I was standing something like six or eight feet

from him with the lantern down by my side, and when he told me to hold the light up I held it up waist high, and just about that time he took the tap out and the gasoline flew all over him, all over his hands and in front of his clothes, and it caught him afire. I saw the blaze leave the lantern and go to him. The blaze went right up into the barn and ignited it. Before he threw the barrel down and took the big bung out I suggested that he first take the small tap out. They usually pour the gasoline out of the barrel into a ten-gallon can, and then pour it into the gasoline tank. All the time before that they poured the gasoline through a rubber hose."

We think this testimony legally sufficient to support the finding that Neal and Nann were guilty of negligence in the manner employed of transporting the gasoline from the barrel to the tank, in that they did not use the rubber hose; nor did they remove the tap before tilting the barrel; nor did they first pour the gasoline into the ten-gallon can. The jury might have found that if any one of these things had been done the gasoline would not have splashed out over Mann.

The majority are also of the opinion that the question of appellee's contributory negligence was properly a question for the jury. It is true he held the lantern which caused the explosion, but Mann and Neal were in charge of the barrel, and they ignored appellee's suggestion, which, if it had been accepted, might have prevented the explosion. Moreover, the jury might have found that Mann and Neal were more experienced in handling gasoline than appellee was, and that appellee had, to that extent, the right to rely upon this superior knowledge and experience, inasmuch as the act being done was not so obviously dangerous that it must be said as a matter of law that an ordinarily prudent man would not have participated in it to the extent that appellee did.

No error appearing, the judgment is affirmed.

FOSHEE v. STATE.

Opinion delivered July 11, 1921.

1. INTOXICATING LIQUORS—MANUFACTURE—INSTRUCTION.—In a prosecution for manufacturing liquor an instruction that if the defendant and others entered into a conspiracy to make some whiskey and built a still, prepared and boiled the mash and placed it in boxes to mature, and that this work was necessary in the manufacture of liquor, then the defendant would be guilty of manufacturing liquor, was erroneous; whether the liquid was intoxicating before it ran through the worm or coil was a question for the jury.

2. WITNESSES—SELF-CRIMINATION.—Where several persons were jointly concerned in the commission of a crime, and the State called each of them to testify against the others, admission of the testimony of such a witness against himself upon a subsequent trial did not constitute reversible error where no objection was made to its admission.

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

Pinnix & Pinnix, for appellant.

Since appellants are accused of making and manufacturing liquor, nothing short of proof that the crime was actually committed in the actual making and manufacturing liquor would be sufficient to justify a conviction. The words "make and manufacture" become descriptive of the offense, and must be proved as charged. 62 Ark. 459; 84 do. 286; 71 do. 415; 64 do. 188; 37 do. 408; 36 do. 178; 16 do. 499; 129 do. 362.

It was a question for the jury whether the words "make and manufacture intoxicating liquors" have a special meaning limiting them to the completed act, and including the preparation for the act. An intended unfinished act is not sufficient upon which to base a prosecution of this kind.

For definition of "manufacture," see, 41 Fed. 326. Nothing was done or occurred to the mash or malt which caused it to be other than a raw unmanufactured article. 141 Ark. 267. The State was bound to prove that the beer or mash had been run through the process of distillation. 60 N. C. 496.

It was error to compel appellants to be witnesses against themselves. 142 U. S. 562; 13 Ark. 307; 80 Fed. 374; 81 Fed. 803; 115 Ark. 390.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants.

HUMPHREYS, J. Appellants were separately indicted, tried and convicted at the March term, 1921, of the Pike Circuit Court, for the crime of making intoxicating liquors, and, as a punishment for the crime, each was adjudged to serve one year in the State penitentiary. From the respective judgments of conviction each has duly prosecuted an appeal to this court. While the facts are somewhat different, the vital question involved in the appeals is the same in all the cases, so the respective appeals will tbe treated in one opinion.

The evidence on the part of the State in the cases of the appellants John W. W. Foshee, in case No. 2518, and Ed Ray, in case No. 2520, tended to show that they manufactured intoxicating liquor at a still near to, and between, the homes of each.

The evidence on the part of each appellant tended to show that he was not interested and did not manufacture intoxicating liquors at said still.

The evidence on the part of the State tended to show that all of the appellants entered into a contract to manufacture whiskey at a still in said county, near the home of appellant George Meyers, on what was known as the "goat pasture;" and that, pursuant to the agreement, a still was set in the pasture, other necessary paraphernalia procured, ingredients obtained and converted into a liquid in the course of the process for making whiskey. At the time of the seizure of the still, paraphernalia and product by the officers, no cap and worm were discovered, and the liquid produced had not been run through the worm.

In all the cases, except No. 2522, in which C. C. Pounds is the appellant, the court, over the objection

and exception of the respective appellants, instructed the jury as follows:

"If you find from the testimony in this case, beyond a reasonable doubt, that the defendant and others entered into a conspiracy to make some whiskey and the defendant and his associates built a still and boxes, hauled them to the still, set and arranged the still, prepared and boiled the mash, then placed it in the boxes to mature, and that this work was necessary in the manufacture of liquor, then the defendant would be guilty of manufacturing liquor, and you will so find."

In the Pounds case, the following additional words were added to the instruction: "And that the malt or beer had become alcoholic or intoxicating to any extent." The effect of these additional words, however, was rendered of no value by the modification made by the court in instruction No. 3, requested by the appellant Pounds. As modified, the instruction conflicted with the instruction given by the court.

The instruction given by the court in each case and set out above was predicated upon the idea that, when the liquid, commonly called beer, is produced in the process of the distillation of whiskey, it will be judicially said that the liquid is an intoxicating liquor, even before the vapor or gas, produced therefrom by the use of heat, passes through a worm or coil. No such presumption can be indulged. In the case of *Lowery* v. *State,* 135 Ark. 159, this court declared as a matter of law that the running of the liquid through the worm or coil once had the effect of producing spirituous or fermented liquor within the meaning of the statute prohibiting the distillation of spirituous or fermented liquors. As to whether the liquid or beer, before such treatment, is intoxicating, within the meaning of the statute preventing the manufacture of spirituous or fermented liquor, was a question for the jury. The instruction given took that question from the jury and was erroneous.

It is contended, however, by the State that the evidence was sufficient to show that appellants John W. W. Foshee, in case No. 2518, and Ed Ray, in case No. 2520, manufactured intoxicating liquor at the still in said county, near to and between their homes. The evidence introduced in behalf of said appellants, in their respective cases, tended to show that they were not interested in and did not manufacture intoxicating liquors at said still. We are unable to say whether the jury convicted them on the evidence adduced by the State, tending to show they made liquor at that still. For aught that can be said, the jury may have acquitted them of that charge and convicted them of manufacturing intoxicating liquors at the still in the goat pasture, under the instruction which, in effect, told the jury that the beer, or liquor produced in the course of the distillation of whiskey before passing through the worm in the form of vapor or gas, was intoxicating liquor, within the meaning of the statute prohibiting the manufacture of spirituous or fermented liquor.

In the course of several of the trials, the State called the co-conspirators to testify against their co-conspirator then on trial, and the testimony given by each was afterward used in the criminal prosecution against him. This did not constitute reversible error in the cases now before us, because the evidence was admitted as against the particular appellant then on trial without objection or exception on his part. For that reason, the contention now made by the several appellants that the court committed reversible error in this regard is not tenable. Should such objection be made in the retrial of the cases, it would be improper to use the evidence given by one against others in a subsequent prosecution against the one testifying. Section 3122 of Crawford & Moses' Digest is applicable to this character of evidence, and is as follows:

"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."

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

BARNETT *v.* STATE.

Opinion delivered July 4, 1921.

1. JUSTICES OF THE PEACE—NUMBER TO BE ELECTED—Crawford & Moses' Dig., § 6389, prescribing that, in ascertaining the number of justices of the peace to be voted for and commissioned, the number of votes cast in the general election next preceding shall be taken as conclusive of the number of electors in such township, is constitutional.
2. OFFICES—VACANCY—RIGHT TO FILL.—Since, under Const. 1874, art. 19, § 5, officers continue in office until their successors are elected and qualified, if there is a failure to elect justices of the peace at a general election, those holding the office continue therein.

Appeal from Hot Spring Circuit Court; *W. H. Evans,* Judge; affirmed.

Oscar Barnett, for appellant.

J. S. Utley, Attorney General, *Elbert Godwin,* Assistant Attorney General, and *W. T. Hammock,* Assistant Attorney General, for appellee.

SMITH, J. This is a proceeding in the nature of a quo warranto proceeding to try the title of the appellant, Horatio Barnett, to the office of justice of the peace of Fenter Township, in Hot Spring County, this State.

The facts are undisputed and are as follows: At the general election in 1918, 245 votes were cast in Fen-

ter Township. At the 1920 election the ballot contained the direction to the electors to "vote for three" justices of the peace, instead of the proper direction to "vote for two" justices of the peace. At the time of the 1920 election four persons held commissions and were acting as justices of the peace for Fenter Township.

Appellant Barnett testified that he and other electors supposed four justices of the peace were to be elected, but that after the election had been held he discovered the fact to be that authority existed for the election of only two justices of the peace. He thereupon applied to and received from the Governor of the State a commission to fill a vacancy existing in the office of justice of the peace for Fenter Township. He testified that the showing was made to the Governor—and such is the undisputed fact—that 1180 electors had voted at the 1920 election, and that there were 1326 qualified electors in that township. The commission of the Governor recites that "it appears that a vacancy exists in the office of justice of the peace in Fenter Township, in the county of Hot Spring, State of Arkansas, caused by ————," and bears the date November 13, 1920. After receiving the commission, respondent took the oath of office November 15, 1920. The insistence of respondent is that, inasmuch as the electors undertook to elect three justices of the peace, when authority for the election of only two existed, no one was elected, and that there was, therefore, a vacancy for the Governor to fill, and the vacancy was filled by the appointment of respondent.

It is also insisted that, inasmuch as the record of poll taxes paid shows that there were 1326 qualified electors in Fenter Township, the electors of that township were entitled to the services of six justices of the peace, and, as that number was not elected, there was a vacancy in office, which was properly filled by the appointment of respondent.

Respondent's authority to serve as a justice of the peace cannot be sustained upon either theory. It is provided that the electors of every township shall elect one justice of the peace for every 200 electors, provided each township, however small, shall have two justices of the peace. Section 6388, Crawford & Moses' Digest.

It is provided in section 6389, Crawford & Moses' Digest that "in ascertaining the number of justices of the peace to be voted for and commissioned, the number of votes cast in the general election next preceding shall be taken as conclusive of the number of electors in such township." This act was held constitutional in the case of *Alford* v. *State,* 69 Ark. 436.

There was authority to elect two justices of the peace, and only two. Each elector had the right to vote for that number, and for no more. This election appears not to have been contested, and we cannot here decide what its result was. Persons were in office when it was held, and under the Constitution these officers continued in office until their successors were elected and qualified. Section 5, art. 19, of the Constitution. So that in no event was there a vacancy to be filled by the Governor's appointment.

The showing that 1180 electors voted at the 1920 election is unimportant, as is also the showing that there were 1326 electors who were qualified to vote. Neither of these facts can be considered in determining the number of justices of the peace to elect. The proper basis was the vote at the 1918 election. Section 6389, Crawford & Moses' Digest.

The court below found there was no vacancy in the office of justice of the peace, quashed respondent's commission and enjoined him from exercising the functions of justice of the peace. This judgment was correct, and is affirmed.

PARRETT TRACTOR COMPANY v. BROWNFIEL.

Opinion delivered July 11, 1921.

1. PRINCIPAL AND AGENT—IMPLIED AUTHORITY TO GIVE WARRANTY.—It was not error to refuse to tell the jury that it was no part of the implied warranty of a salesman to make a specific warranty, as that question depended upon the facts established by the evidence.

2. SALES—WAIVER OF WARRANTY.—It was not error to refuse an instruction in substance that an unconditional promise to pay the balance of the purchase price of goods with knowledge of a breach of warranty in the sale constitutes a waiver of the breach.

3. SALES—BREACH OF WARRANTY—MEASURE OF DAMAGES.—Where defects in a machine could be corrected by reasonable expenditure, the measure of damages for breach of a warranty in its sale is the expense of curing such defects.

4. EVIDENCE—PAROL EVIDENCE OF WARRANTY IN SALE. — Parol evidence is admissible to prove a warranty in an oral sale of goods.

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

Arthur L. Adams, for appellant.

In the absence of express authority, a general agent has no authority to warrant the machine sold. 24 R. C. L. 701, 702, 704.

It was error to refuse to give instruction No. 2. A waiver is implied by a great period of delay. 102 Ark. 442; 29 Am. & Eng. Enc. of Law 1105; 27 R. C. L. 911. Retaining machinery after knowledge of defects without objection constitutes a waiver. 106 Ia. 85, 90, 40 Cyc. 267-8. Subsequent payment, following a breach of condition of performance, is a waiver. 110 Wisc. 11; 55 N. Y. 280. A definite promise to pay following an alleged breach of performance is a waiver. 50 N. Y. App. Div. 38; 30 Am. & Eng. Enc. Law 183.

The court erred in giving instruction 6 of its own motion and in refusing plaintiff's No. 5. 83 Ark. 283; Sutherland, Dam. §672.

The verdict was not supported by evidence. 70 Ark. 385; 107 Ark. 158.

McCULLOCH, C. J. Appellant sold and delivered to appellees a tractor for the sum and price of $1675, of which $1,000 was paid in cash and a promissory note for $675, dated April 18, 1918, due December 1, 1918, was duly executed by appellees to appellant. This is an action instituted by appellant against appellees to recover the amount of the note. There was an answer and counterclaim filed by appellees in which they alleged that there had been an express warranty of the quality of the machine sold to them by appellant and a breach of the warranty, whereby appellees suffered damages in the sum of $1675.

On a trial of the issues before a jury, J. W. Brownfiel, one of the appellees, testified that he and his son purchased the tractor from appellant's agent, and that the latter, in an oral contract, warranted said tractor to be of sufficient quality and capacity to do ordinary farm work, such as is commonly done in the use of that kind of a machine on a farm. The evidence of that witness and others tended to show that the tractor was not of that quality or capacity, and that appellees spent large sums of money in putting the tractor in condition to do the work which it was warranted to do. Appellee J. W. Brownfiel testified that he spent $600 on the tractor in order to make it do the work, and that that was not sufficient to put it in good order. There was other testimony as to the defects of the tractor and the amount of work necessary to put it in order. The testimony also tended to show that appellant was notified of the defects and sent an inspector to look at the machine. On the cross-examination of J. W. Brownfiel, he stated that, after his trouble in trying to make the machine work and after appellant's agent and inspector had failed to make it work properly, he had written to appellant a letter in May, 1919, in which he promised to pay the note given for the balance of the purchase price. The let-

ter was exhibited in evidence and contained the statement that the writer would pay the note or most of it in the month of July. Brownfiel, in explanation of this letter, stated that he had intended to pay for the tractor if appellant would make it work properly. There was a verdict in favor of appellees for the recovery of damages in the precise amount of the note and interest, and the court rendered judgment off-setting the amount of damages found against the amount of the note sued on and adjudged that appellant recover nothing in the action.

The principal assignments of error relate to the rulings of the court in the giving and refusing of instructions. The first contention is that the court erred in refusing to give an instruction which would have told the jury that it was "not a part of the implied authority of the agent to make any specific warranty." The court was correct in refusing to give this instruction, for it should not have been said, as a matter of law, that there was no implied authority on the part of the agent to warrant the goods sold. That depended upon the facts established by the evidence.

It is next insisted that the court erred in refusing to give the following instruction: "2. Even though you may find that said tractor was unsatisfactory in that it would not do the work for which it was purchased, and though you further find that there was a specific warranty or guaranty that it would perform said work or that it would fulfill other conditions, which said warranty or guaranty was not met, if you further find that the defendants, or either of them, made a new and definite promise to pay the amount originally agreed upon, they thereby waived any and all defenses accruing prior to such subsequent promise and are liable in the amount sued for; unless you further find that the plaintiff, after such subsequent promise of defendants, if any, renewed the original guaranty or made some fur-

ther or other promise or agreement regarding said tractor with which they failed to comply."

The substance of the declaration contained in this instruction is that an unconditional promise to pay the balance of the purchase price with the knowledge of the breach of the warranty constitutes a waiver of the breach. This is but another way of saying that a reaffirmance of the sale after the breach of the warranty constitutes a waiver. Such is not the law. This court held in the case of *Plant* v. *Condit,* 22 Ark. 454, that where there is a breach of an express warranty, the vendee may rescind the contract, or he may affirm the contract, keep the property, and, when sued for the price, set up the false warranty by way of recoupment. This doctrine was again reiterated in the case of *Weed* v. *Dyer,* 53 Ark., 155, where the court said: "Acceptance of the goods, when the buyer knows that their quality is inferior to that warranted, implies an agreement to take them, notwithstanding the defect, and waives the right to reject them, but does not waive the right to a reduction when sued for the price." Again the court said: "In most cases, the buyer, when he discovers that the quality of the goods is inferior to that warranted, would feel impelled by a sense of right and fair dealing to notify the seller of the fact (1) that he might satisfy himself of its existence, (2) that he might cure it. But in many cases this course might be found impracticable or even impossible; and, while the failure might be a circumstance for the jury to consider in ascertaining if there was in fact a breach of warranty, it could not defeat the recoupment if the breach was proved. How far such failure would weigh with a jury would vary with the circumstances of each case, and in all cases, be a matter for their determination."

In the very recent case of *Courtesy Flour Company* v. *Westbrook,* 146 Ark. 17, we said: "The law on the subject is that, where chattels are purchased under express warranty as to quality, the purchaser may rescind

on discovering the inferior quality of the article sold, but is not bound to do so, and, on the contrary, may retain the articles purchased and sue on the warranty, or recoup the damages when sued for the price."

Now, if the retention of the article after discovery of the breach of the warranty does not operate as a waiver of the breach, it follows that the promise to pay the debt does not constitute a waiver. The purchaser having the right to elect either to rescind on account of the breach or to retain the articles and sue for damages resulting from the breach, he is liable for payment of the price upon his election to retain the articles, but is entitled to a reduction to the extent of the amount of damages resulting from the breach. So the purchaser, being liable for the price on his election to retain the property, does not waive the breach by promising unconditionally to pay it. It is, of course, as indicated by this court in *Weed* v. *Dyer, supra,* a circumstance for the jury to consider whether or not there has been a breach, but the promise does not, as a matter of law, operate as a waiver. The weight of this circumstance is, of course, affected by any explanation of the circumstance under which the promise is made, and it becomes a question of fact for the jury to determine whether there has been a breach of the warranty. We are of the opinion, therefore, that the court was correct in refusing to give this instruction. Another refused instruction stated, in substance, that if appellant was induced to defer action on the note by a promise of appellee's to pay the debt at a future date, such promise constituted a waiver of the alleged breach of warranty. The instruction is open to the same objection stated above in regard to the other instruction, and there was no error in refusing it.

The next two assignments relate to the rulings of the court in giving instruction number 6 of its own motion and refusing to give instruction number 5 requested by appellant, which would have told the jury that "the

measure of damages for such breach is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty, with interest upon such sum." Instruction number 6 given by the court reads as follows: "If you find there was a guaranty and a breach of it upon the part of the company, and the defendants were damaged, then you will reduce your finding in the amount you find they have been damaged."

The court had previously told the jury in another instruction that the execution of the note was undisputed, and that the jury should find for the appellant for the amount of the note and interest. The contention is that the court, in giving instruction number 6, failed to state the measure of damages, and that there was error in refusing to give instruction number 5. It is true that instruction number 6 given by the court did not undertake to declare the measure of damages. It merely told the jury that they should reduce the finding in favor of appellant to the extent of the damages suffered by appellees by reason of the breach of the contract of warranty. The court should, if asked, have given an instruction defining the measure of damages, but the instruction which appellant requested did not state the correct measure of damages, and therefore the court did not err in refusing to give it. The instruction stated the measure of damages to be the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty. The proof showed that the defects in the machine could be corrected by reasonable expenditure, and the correct measure of damages was the expense of curing the defects. *Western Cabinet & Fix. Mfg. Co.* v. *Davis,* 121 Ark. 370. The court was not bound to give an instruction unless a correct one was asked, and appellant is in no attitude to complain of the court's failure to define the measure of damages, in-

asmuch as it did not ask for a correct instruction on that subject.

It is also contended that the testimony tended to establish an oral warranty and was inadmissible. There was no written contract of sale. The note executed by appellees containing a reservation of title as security for the price did not constitute a contract evidencing the terms of sale. Appellant relies on the recent case of *Federal Truck & Motor Co.* v. *Tompkins,* 149 Ark. 664, but in that case there was a written contract of sale which we held could not be waived by parol proof of a warranty. It was therefore not improper to admit oral testimony as to the express warranty.

It is also contended that the evidence was not sufficient to sustain the verdict, but our conclusion is that there was sufficient evidence.

The judgment is therefore affirmed.

TAYLOR v. SPIVEY.

Opinion delivered July 11, 1921.

SCHOOLS AND SCHOOL DISTRICTS—VOLUNTARY CONTRIBUTION—LIABILITY OF COUNTY TREASURER.—Where A and B, interested in a school district, agree between themselves that if a certain sixteenth section of school land should sell for less than $6,400 at public sale, the difference between the sale price and that amount should be presented to the school district to be used as a building fund, and, pursuant to this agreement, A purchased the land for $3,400, and paid that amount to the State Treasurer for the benefit of the public school fund, and shortly thereafter A sold the land to B for $6,400, and deposited $3,000 with the county treasurer, who issued a receipt to A reciting the receipt of the money for the benefit of the building fund of the school district, the county treasurer is bailee of said fund for the benefit of the school district, and is accountable therefor in his official settlement with such district.

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

Mann & Mann, for appellant.

1. Has the county court the power under the facts in this case to require the treasurer to give School District No. 27 credit for this fund? Crawford & Moses' Digest, §9110, provides that the proceeds of sale of 16th section lands shall be paid into the State Treasury, and placed to the credit of the county 16th section school fund. An unlawful agreement was made that $3000 should be retained by the district for a building fund. The fund properly belonged to the State, and the treasurer will probably be called on to account for it. He was right in not crediting the amount to the district. 11 Cyc. 446.

2. Is the fund of such character as would render the treasurer and his sureties liable on his bond? The treasurer was not the lawful custodian. This fund was credited by methods not sanctioned by law. The treasurer and his sureties are liable to the rightful owner, but not to one not entitled thereto.

J. W. Morrow, for appellees.

Appellant contends that appellant need not account for the fund in question because it was a gift prompted by an invalid agreement between the giver and a third party. Under our theory it does not matter whether the sale was good or bad. The district had a right to receive the gift. It will not do for a bailee to hunt up a paramount claimant. 3 R. C. L. § 17. He cannot question the regularity of the proceedings by which money came into his hands. 29 Cyc. 1440, N. 76. The law is that an officer must account in his official settlement for all funds received by him for departments of which he is the official custodian, regardless of how or why the funds came into his hands. 109 Pac. 199.

HUMPHREYS, J. This is the second appeal in this case. On the first appeal, the judgment of the circuit court was reversed, dismissing appellant's appeal from the county court to the circuit court, with directions to the circuit court to hear the objections which appellants had filed to the report of the appellee, the county treasur-

er, on the ground that he had failed to account in his report to the county court for certain money which, it was alleged, belonged to common school district No. 27 in St. Francis County. Upon remand, the circuit court heard and sustained the objections to the report and rendered judgment against said county treasurer, George P. Taylor, and his bondsmen, for the sum of $3,000 and interest, alleged to have been received by said county treasurer for said school district, for which amount he failed to account in his report. From that judgment an appeal has been duly prosecuted to this court.

The facts developed upon the hearing are, in substance, as follows: State school lands lying within said district were advertised, according to law, and sold by the sheriff of the county at public sale to the highest bidder. J. S. R. Cowan and B. C. Friar, being interested in the land and school district, agreed between themselves that, if the land sold for less than $6,400 at the sale, the difference between the sale price and that amount should be presented to said district, to be used as a building fund. Pursuant to this agreement, J. S. R. Cowan purchased the land at the sale for $3,400, and that amount was paid in cash to the sheriff, who, in turn, paid it to the treasurer of the State for the benefit of the public school fund. Shortly thereafter, Cowan sold the land to B. C. Friar, and, in addition to the purchase price of $3,400, received an additional check for $3,000 as a donation or gift to said school district No. 27. Either the check or the money derived therefrom was deposited by Cowan in the Planters' Bank & Trust Company, at Forrest City, to the credit of George P. Taylor, as county treasurer. Thereupon, the treasurer issued the following receipt to Cowan:

"$3,000.00 Oct. 2nd, 1917.

Received of J. S. R. Cowan, three thousand dollars, deposited by J. S. R. Cowan to be placed to the credit

of the building fund for School District No. 27, St. Francis County, Ark. Ck. of B. C. Friar.

"George P. Taylor, County Treasurer."

The fund was checked out of the bank on checks signed by the county treasurer, but was used by the said George P. Taylor personally.

Appellant contends that the court erred in requiring him to account to said school district No. 27 for the sum of $3,000 deposited by J. S. R. Cowan at the Planters' Bank & Trust Company in Forrest City for him, and for which he receipted as county treasurer, because the fund was in fact a part of the general school fund of the State, and properly payable to the State Treasurer. The record of the sale of said school land does not so show. On the contrary, it shows that the land sold for $3,400, and that the amount of the bid was paid to the collector for the benefit of the general school fund of the State. It is true that an unlawful agreement was entered into by the purchasers to give $3,000 to the school district No. 27 in lieu of bidding the additional $3,000 at the sale. If the State was defeated by reason of the illegal combination from obtaining this additional sum for the general school fund, the remedy to the State is twofold: Either to sue the purchasers for the fair price of the property or to rescind the sale and recover the land. The record reflects that the said sum of $3,000 was in the nature of a gift to said school district No. 27 by the purchasers at the sale and was so received by the county treasurer, and that it was not received by him as a part of the State school fund. By the receipt of same as county treasurer for the use and benefit of school district No. 27, the county treasurer became a public bailee of said fund for said district. Appellant, by virtue of his office, was the official custodian of the funds of said school district No. 27, and, having received the funds in his official capacity, is accountable for them in his official settlement to said district, regardless of the means

through which the funds were acquired. *Skagit County* v. *American Bonding Co. of Baltimore,* 109 Pac. (Wash.) 199.

No error appearing, the judgment is affirmed.

CREAMERY PACKAGE MANUFACTURING COMPANY

v. WILHITE.

Opinion delivered July 11, 1921.

1. STATUTES—IMPLIED REPEAL.—Where the later of two statutes covers the whole subject-matter of the former, and it is evident that the Legislature intended it as a substitute, the prior act will be held to have been repealed thereby, although there may be no express words to that effect, and there be in the old act provisions not included in the new.
2. BANKS AND BANKING—LIABILITY OF BANK.—Crawford & Moses' Digest, § 683, providing that "any officer of a bank found by the (Bank) Commissioner to be dishonest, reckless or incompetent shall be reported in writing to the directors of the bank of which he is an officer; and if they neglect or refuse to remove such officer they shall be liable for any loss that may accrue to the bank bv reason of his dishonesty, recklessness or incompetency", did not intend to absolve directors from their liability for negligent management except as therein provided.
3. BANKS AND BANKING—INSOLVENT BANK—SUIT BY DEPOSITOR.—A complaint by some of the depositors of a bank against the directors and officers of the bank, alleging that their mismanagement had caused its insolvency, is defective in failing to allege that the Bank Commissioner had been requested to sue on behalf of the bank and had failed to do so.

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

J. T. Coston, for appellants.

Bank directors cannot divest themselves of the duty of general supervision and control. 92 Ark. 327. The banking law has not changed this law. Crawford & Moses' Digest, § 702; 141 U. S. 147. Sec. 129 Ark. 416. It is the function of the board of directors to declare dividends. They are presumed to know whether the

bank is solvent. 186 S. W. 1026. They are liable to the extent that dividends were improperly declared. 29 Atl. 207; 85 Atl. 448. They are liable for mismanagement of the bank or theft of its funds by the cashier. Crawford & Moses' Digest, § 683, instead of limiting their liability, enlarges it. See 162 S. W. 611. The cashier was required to give a bond. Crawford & Moses' Digest, §683.

Little, Buck & Lasley, for appellees.

The appeal should be dismissed for failure to copy the complaint in full. Directors of a bank are not liable to creditors because they have mismanaged or wasted assets of the bank. 7 R. C. L. 482, 3 L. R. A. (N. S.) 438; 76 Ia. 535; 45 L. R. A. (N. S.) 421; 123 S. W. 47; 71 Am. St. 615; 67 Mo. 256; 36 N. J. Eq. 313; 13 Mo. App. 108; 96 Tenn. 98. If a receiver has been appointed, creditors cannot sue to recover from corporation officers for an injury to the corporation unless the receiver refuses to sue or is one of the alleged wrongdoers. 4 Fletcher, Corp. 2570; 56 Am. Rep. 256; 45 Fed. 13; 63 Fed. 488. It was the duty of the Bank Commissioner to sue for mismanagement of the bank's affairs. No preference was to be secured. The complaint does not allege that a request was made upon the Bank Commissioner to bring this suit. Directors are not liable for dividends declared in good faith. 7 R. C. L. 502.

SMITH, J. The appellants, The Creamery Package Manufacturing Company, J. D. Johnson, and the Grassy Lake & Tyronza Drainage District No. 9, filed a complaint in the chancery court of the Chickasawba District of Mississippi County, which contained the following allegations:

That the Bank of Blytheville, a banking corporation, was on the 10th day of March, 1920, indebted to appellants for money on deposit aggregating over $23,000.

"II. That defendant, J. C. Blaine, was a director and defendant, J. S. Wilhite, a director and president,

and defendant, B. H. Wilhite, cashier, and defendant W. O. Anthony, assistant cashier, of said bank.

"III. That the defendants, B. H. Wilhite and W. O. Anthony, systematically overdrew and stole from said bank for a period of many years prior to March 10, 1920, in various sums, aggregating about $100,000, and they permitted J. H. Reese and others, known to be insolvent, to overdraw in sums aggregating half a million dollars.

"IV. That the defendants, J. C. Blaine and J. S. Wilhite, knew, or by the exercise of reasonable, ordinary care as officers in said bank, could have known of the reckless, careless and criminal manner in which the affairs of said bank were being handled by defendants, B. H. Wilhite and W. O. Anthony, and plaintiffs believe and allege that defendant, J. F. Wilhite, did know of the manner in which the affairs of said bank were managed, but defendant Blaine negligently and carelessly failed to give the affairs of said bank any attention whatever, as director.

"V. Plaintiffs charge said defendants with the following specific acts of negligence:

"1. That said directors failed and refused and neglected to exercise reasonable care in the management, supervision and control of the affairs of said bank.

"2. In failing to remove the cashier and assistant cashier after they knew, or by the exercise of reasonable care could have known that said cashier and assistant cashier were dishonest, reckless and incompetent.

"3. In failing to require sufficient bonds of said cashier and assistant cashier for the faithful performance of their duties.

"4. Declaring and paying dividends out of the capital of said bank when they knew, or by the exercise of reasonable care could have known, that said bank was insolvent.

"5. In declaring and paying dividends out of the

capital stock of said bank at times when there were no profits out of which to pay such dividends.

"6. In receiving dividends from said bank when they knew, or by the exercise of reasonable care could have known, that said bank was insolvent.

"7. In receiving dividends when they knew, or by the exercise of reasonable care could have known, that there were no profits out of which to pay same.

"8. In assenting to the reception of deposits and the creation of debts by said bank when they knew, or by the exercise of reasonable care could have known, that said bank was insolvent.

"9. In lending the funds of said bank to individuals and corporations in sums greatly in excess of thirty per cent. of the capital stock of said bank.

"10. In suffering and permitting the depositors of said bank to overdraw their accounts.

"11. In failing to exercise reasonable care and diligence in the collection of overdrafts and other debts due said bank.

"12. In permitting said cashier and assistant cashier to pay out the funds of said bank upon the checks and orders of individuals, firms and corporations which had no deposits with the said bank.

"13. In ratifying overdrafts.

"14. In neglecting to inquire into and ascertain the condition of said bank by periodical audits of the books and accounts of said bank.

"That by reason of the reckless, careless, and unlawful manner in which the affairs of said bank were managed, it became insolvent and was taken over by the State Banking Commissioner, March 10, 1920, and will pay only a small percentage of its indebtedness."

There were allegations that J. C. Blaine and J. F. Wilhite had fraudulently conveyed certain real estate

owned by them, and there was a prayer for judgment for the amount of the deposits and for a decree uncovering the property which had been conveyed in fraud of these creditors. Blaine is a nonresident and was not served. Wilhite is a resident and was served, and there was a prayer against him for a personal judgment.

A general demurrer to this complaint was filed, which alleged a failure to state facts sufficient to constitute a cause of action. This demurrer was sustained and the complaint dismissed, and this appeal is from that order.

The action of the court in sustaining the demurrer is defended upon two grounds. First, that under act 113 of the Acts of 1913 (p. 462) entitled, "An Act for the Organization and Control of Banks, Trust Companies and Savings Banks," commonly known as the banking act, directors and officers of banks have been absolved from the liability here sought to be enforced. Second, that appellants have not alleged sufficient facts to entitle them to maintain this suit.

Appellees concede that under the allegations of the complaint as to the mismanagement of the bank they would have been liable for the results thereof in a proper suit brought prior to the passage of the banking act of 1913. Of this there can be no question. This court, in the cases of *Bailey* v. *O'Neal,* 92 Ark. 327, and *Bank of Des Arc* v. *Moody,* 110 Ark. 39, had occasion to consider the liability of directors and officers of banks for negligent waste and mismanagement; and in the later case of *Bank of Commerce* v. *Goolsby,* 129 Ark. 416, these and many other authorities on the subject were reviewed and the law of the subject so fully stated that no useful purpose would now be served by restating it. The insistence is that the General Assembly, in the banking act of 1913, took up the general subject of banking and there differentiated banks from other corporations and prescribed the liability of the directors and officers of banks, thereby absolving them from any liability on account of the

neglect of duty except such liability as the banking act itself imposed.

This court has, in a number of cases, applied the canon of construction that "where the later of two statutes covers the whole subject-matter of the former, and it is evident that the Legislature intended it as a substitute, the prior act will be held to have been repealed thereby, although there may be no express words to that effect, and there be in the old act provisions not in the new." *Sanderson* v. *Williams,* 142 Ark. 95, and cases cited.

We think, however, this canon of interpretation has no application to the facts of this case. The particular section of the banking act which appellees insist makes the canon of interpretation above stated applicable to the facts of this case is section 19, which is section 683 of Crawford & Moses' Digest. This section provides that the affairs of incorporated banks shall be controlled by a board of directors of not less than three, who shall be selected from the stockholders; and that the board shall select from their number a president and such number of vice-presidents as shall be provided in the by-laws; and may elect a secretary and treasurer and a cashier, all of which may be one and the same person; and may elect assistant cashiers. It is further provided that these officers shall hold their offices for a term of one year and until their successors are elected and qualified unless sooner removed by the board; and that the board shall require of these officers such bonds as are deemed necessary to protect the funds of the bank. It is there further provided that "any officer of a bank found by the commissioner to be dishonest, reckless or incompetent shall be reported in writing to the directors of the bank of which he is an officer, and, if they neglect or refuse to remove such officer, they shall be liable for any loss that may accrue to the bank by reason of his dishonesty, recklessness or incompetency."

We think the language quoted does not place a limitation upon the liability of directors and officers of banks for negligent mismanagement. If such was the case, these officers would be liable only when the commissioner had reported in writing to the directors that an officer of the bank had been found by the commissioner to be dishonest, reckless or incompetent. We think it was not the legislative purpose to absolve directors from liability except in the isolated case mentioned in section 683 of Crawford & Moses' Digest. We think counsel for appellants correctly interprets the act in stating that the legislative purpose was to enlarge the liability of these officers and to impose a liability which did not previously exist.

Prior to the enactment of this act, directors were held only to the exercise of ordinary care and good faith in keeping themselves informed as to the management of the bank. The Legislature was evidently of the opinion that the practiced eye of the Bank Commissioner might be able to discover some significant irregularity which might escape the observation of the less highly trained director. In such case it is the duty of the commissioner to advise the directors that the bank has in its employment a dishonest, a reckless or an incompetent employee, and upon receipt of this official information it becomes the duty of the directors to remove such officer. Failing to do so, the directors are made liable for any loss that may accrue to the bank by reason of the dishonesty, recklessness or incompetency of the person reported upon. In imposing this additional duty on directors we are unwilling to say that the Legislature has absolved them from all other duties for the negligent nonperformance of which they were liable prior to the passage of the banking act.

If such was the purpose of the Legislature, then directors have, for all purposes except to remove an officer upon whom the commissioner has adversely reported, become mere figureheads.

In the case of *Bank of Commerce* v. *Goolsby, supra,*

upon a thorough consideration of the authorities, we accepted the dissenting views of Justice Harlan in the case of *Briggs* v. *Spaulding,* 141 U. S. 132, as correctly defining the duties of bank directors, expressed in the following language: "Again he says: 'When one deposits money in a savings bank, or takes stock in a corporation. thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trust committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such degree of care and prudence.' "

We do not think a fair interpretation of the banking act supports the conclusion that directors have been relieved of their pre-existing responsibility and liability for negligent mismanagement and left only with the responsibility and liability which follows from the failure to remove an officer adversely reported upon by the Bank Commissioner.

This question was not raised or decided in the case of *Bank of Commerce* v. *Goolsby, supra,* yet it was necessarily presented by the record in that case if the appellees are correct in their interpretation of the banking act. But the eminent counsel representing the directors in that case did not even raise the question. The banking act was approved March 3, 1913, and became effective January 1, 1914. *Davis* v. *Branch,* 133 Ark. 417. The opinion in the case of *Bank of Commerce* v. *Goolsby* was delivered May 28, 1917. The mismanagement in that case commenced in 1911 and extended throughout the year 1914. The directors were held liable, and no attempt was made to distinguish their liability subsequent to the act from their liability prior to the act.

We think, however, that appellees are correct in their second contention that appellants do not state facts in their complaint entitling them to maintain this suit. The allegations of the complaint are that appellants have lost the aggregate sum of $23,000. But they are not the only losers. The complaint further recites that insolvent persons were permitted to overdraw in sums aggregating $500,000, and that the cashier and assistant cashier were permitted to misappropriate $100,000, and that the bank has become insolvent, and was on March 10, 1920, taken over by the State Bank Commissioner, and will pay only a small percentage of its indebtedness.

It thus appears from the allegations of the complaint that the losses sustained by these appellants constitute a comparatively small part of the losses for which the directors are said to be liable; yet it appears that the purpose of this suit by the three depositors who have brought it is to apply to the discharge and satisfaction of the bank's indebtedness to them the liability of the directors for the negligent mismanagement of the bank's affairs; and this without any allegation that the commissioner had been requested to sue and had failed to do so. This they can not do. 4 Fletcher's Cyclopedia Corporations, section 2570, and authorities there cited.

The banking act requires the Bank Commissioner to take possession of all the property of an insolvent bank and "to collect money due it, and to do such other acts as are necessary to conserve its assets and business and shall proceed to liquidate the affairs thereof as hereinafter provided." The commissioner is further given authority to "collect all debts due and claims belonging to it," his proceedings being under the direction of the chancery court. Section 719, C. & M. Digest; *Aber* v. *Maxwell,* 140 Ark. 203; *Greer* v. *Merchants & Mechanics Bank,* 114 Ark. 212.

Appellants say, however, that this rule does not apply here, for the reason that a general demurrer was filed, and he cites section 1190, C. & M. Digest, which provides

that a demurrer shall distinctly specify the grounds of objection to the complaint, and that unless this is done the demurrer shall be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action, and the general demurrer does not therefore raise the question of defect of parties. But the trouble with that contention is that there is not a mere defect of parties within the meaning of the statute.

For the reasons stated appellants have failed to show any right on their part to maintain this suit, and for that reason the demurrer to the complaint was properly sustained. Decree affirmed.

McCULLOCH, C. J., concurs.

McCABE v. STATE.

Opinion delivered September 26, 1921.

1. HOMICIDE—KILLING IN ATTEMPT TO COMMIT FELONY.—Under an indictment alleging a killing by defendant and another "unlawfully, wilfully, feloniously and with malice aforethought and with deliberation and premeditation", there may be a conviction for murder committed in the perpetration of, or in the attempt to perpetrate, a felony, if the killing was done with malice aforethought.
2. CRIMINAL LAW—DECLARATIONS OF FELLOW CONSPIRATOR.— Where a person is charged as principal in the commission of a crime, the acts and declarations of a co-conspirator, done or made in defendant's absence and after the consummation of the offense, are inadmissible against defendant.

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

Jno. B. Hiner, for appellant.

J. S. Utley, Attorney General; *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. There was no error in the action of the trial court in permitting the State to make proof of the amount of money in the possession of deceased just prior to the commission of the offense.

The defendant was indicted under the provisions of the first part of § 2343 of Crawford & Moses' Digest. The indictment did not allege that the murder was committed in the perpetration of or in the attempt to perpetrate a robbery.

The defendant was convicted of murder in the second degree; therefore, there was no error committed by the trial court, and its reference to the charge of murder in the first degree was harmless. 60 Ark. 76; 73 Ark. 280; 113 Ark. 142; 129 Ark. 324; 132 Ark. 416.

2. The court did not err in permitting Ross to testify as to the conversation he had with Jones relative to the killing, in the absence of the defendant. Sec. 2311, Crawford & Moses' Digest; 104 Ark. 245; 16 Corpus Juris, p. 669; 130 Ark. 111; 129 Ark. 316.

3. The court did not err in refusing to give to the jury the defendant's requested instruction Number 1. It was not the law.

McCULLOCH, C. J. Appellant was jointly indicted with one Willard Jones for the crime of murder in the first degree, alleged to have been committed by killing Robert Couch. On a severance appellant was tried separately, and was convicted of murder in the second degree.

The evidence adduced by the State tended to show that, while appellant and Couch were walking through the railroad yards at Fort Smith one night about 9:30 o'clock in December, 1920, Couch was shot and killed by Willard Jones in an attempt to rob Couch. The theory of the State is that appellant and Jones had formed a conspiracy between them to kill Couch, and that appellant was present when Jones committed the homicide.

It is not charged in the indictment that the homicide was committed "in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary or larceny," but it is charged that the killing was done by Jones and appellant "unlawfully, wilfully, feloniously and with

malice aforethought and with deliberation and premeditation." The statute defines murder in the first degree to be homicides "which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or in the attempt to perpetrate arson, rape, burglary, robbery or larceny." Crawford & Moses' Digest, § 2343.

An indictment charging malicious and premeditated homicide does not include murder committed in the perpetration of or in the attempt to perpetrate one of the felonies mentioned in the statute, unless the element of malice aforethought is present in the commission of the crime; but under such an indictment there can be a conviction for homicide committed in the perpetration of or in the attempt to perpetrate a felony if the killing was done with malice aforethought. *Rayburn* v. *State,* 69 Ark. 177. Malice might exist in the commission of the homicide, even though the primary purpose of the offender was to commit another felony, and it is generally a question for the jury to determine whether or not the crime was committed with malice aforethought, even though it was done in the perpetration of or in the attempt to perpetrate another felony of the kind mentioned in the statute.

After appellant was arrested, he pointed out Jones to the officers as the man who had shot Couch, and the court permitted the officer to testify concerning statements made by Jones in appellant's absence and after Jones had been arrested. The statements of Jones to the officer, according to the latter's testimony, were very damaging to appellant, and, if the testimony was inadmissible, the ruling of the court in allowing it to be introduced necessarily calls for a reversal of the judgment. We are clearly of the opinion that the testimony is inadmissible, for at most it related only to the statements of a co-conspirator in the absence of appellant after the consummation of the act, and was mere hearsay.

Appellant was indicted as a principal and not as an accessory, and it was therefore not competent for the State to prove appellant's participation in the crime by Jones' admissions made in appellant's absence. Under our statutes persons who are present aiding and abetting in the commission of a crime are principal offenders and not accessories and must be indicted and convicted as principals. Crawford & Moses' Digest, § 2311. Under an indictment for being an accessory to a crime, any evidence admissible upon the trial of the principal, including confessions, is admissible against the accessory, for the purpose of establishing the commission of the crime by the principal. 16 Corpus Juris, 669. But where a person is charged as principal in the commission of a crime, the acts and declarations of a co-participant in his absence and after the consummation of the offense are not admissible. The distinction is pointed out in the decision under a similar statute in the case of *State* v. *Bogue*, 52 Kan. 79. It is a well-settled principle in the law of evidence that acts and declarations of a co-conspirator are inadmissible against another in the latter's absence and after the consummation of the conspiratorial act.

For the error of the court in improperly admitting the testimony of the witness concerning statements of Jones in the absence of appellant, the judgment is reversed and the cause remanded for a new trial.

BROWN v. STATE.

Opinion delivered September 26, 1921.

1. HOMICIDE—DEFENSE OF PROPERTY.—Under Crawford & Moses' Dig., § 2369, defining justifiable homicide to be the killing of a human being in necessary self defense, or in defense of habitation, person or property against one who manifestly intends or endeavors by violence or surprise to commit a known felony, a person has no right to slay another merely to protect his property unless he is in possession, and the killing is necessary in order to prevent the commission of a felony; the mere fact that property is being wrongfully taken or detained not being a justification of a homicide.

2. HOMICIDE—DEFENSE OF PROPERTY—INSTRUCTION.—Where the undisputed fact was that the hogs in controversy between the accused and the deceased were in the deceased's possession, and that they were not taken by violence or surprise, but under a claim of right, it was not error to refuse an instruction on the subject of the right to kill in order to protect one's property.

3. HOMICIDE—MANSLAUGHTER—SUDDEN HEAT OF PASSION.— An instruction that if "defendant shot and killed the deceased while they were engaged in an altercation over the ownership of the hogs, and while the defendant was excited by the trespass on his property and in the heat of passion caused by the attempt of the deceased and his confederates to carry off the hogs which the defendant believed to belong to him, then the defendant "could not be guilty of a higher grade of offense than manslaughter," was property modified in effect so as to state that to reduce the crime to voluntary manslaughter the killing must "be upon a sudden heat of passion caused by a provocation apparently sufficient to make this passion irresistible" (Crawford & Moses' Dig., § 2355).

4. CRIMINAL LAW—EVIDENCE OF OTHER CRIMES.—Where the defense sought to be established in a murder case was that the killing was done in defense of defendant's hogs running at large in the woods, it was not error to refuse to permit defendant to show that deceased and his brother had made efforts to take up hogs found running in the woods that belonged to other persons, except for the purpose of impeaching deceased's brother as a witness.

5. CRIMINAL LAW—REPUTATION OF DECEASED.—It was not error to refuse to permit defendant, in a murder case, to prove the general reputation of deceased and his brother, where the testimony was remote in time and place.

6. WITNESS—LIMITS OF CROSS-EXAMINATION.—Where the court permitted defendant to cross-examine deceased's brother concerning his efforts in connection with deceased to take up hogs belonging to other persons, and witness denied any such activity, it was not an abuse of discretion to limit the further cross-examination of the witness on that subject.

7. CRIMINAL LAW—RES GESTAE.—It was not error to permit a witness in a prosecution for murder growing out of a controversy over some hogs to testify that, just before the shooting occurred, defendant's brother in defendant's presence walked up to deceased, and patted him on the shoulder, and shoved him, saying: "You are going to turn the hogs out."

8. HOMICIDE—DEFENDANT'S MENTAL ATTITUDE.— In a prosecution for murder, it was competent to prove that after deceased was found fatally wounded his brother asked defendant's per-

mission to put him in the wagon, which request defendant at first denied, saying that they must first go and turn loose the other hogs tied in the woods, but later said to them: "Well, throw him in"; such evidence tending to show defendant's mental attitude towards deceased at the time he fired the shot.

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

W. K. Ruddell and *Samuel M. Casey,* for appellant.

1. Evidence that the deceased and his brother had taken up hogs belonging to other people prior to taking the hogs in controversy was competent for the purpose of showing the motive. 8 R. C. L. 201; 99 Ark. 604; 53 Ark. 387; 143 Ark. 419.

2. It was error to refuse permission to prove by the witness Blackie Britt that he and deceased had taken up hogs belonging to Wright, Fisher and O'Neal, claiming them to be wild, on previous occasions. It was competent to throw light on the bona fides of deceased and his associates in their claim of ownership. 33 Am. St. Rep. 242-244; 53 Ark. 387.

3. In the absence of proof of a conspiracy, evidence as to what Jonah Brown did and what he said before the shooting, was not competent. 45 Ark. 132; 59 Ark. 422; 92 Ark. 596; 133 Ark. 477.

Likewise what was said and done by defendant's brothers after the shooting was not competent evidence against the defendant, even if a conspiracy had been proven. 141 Ark. 170; 120 *Id.* 462; 45 *Id.* 165; 78 *Id.* 284.

Statements made by defendant after the parties reached the place where deceased lay, were not competent. 69 Ark. 559; 66 *Id.* 494.

Admission of incompetent evidence prejudicial. 69 Ark. 658; 91 *Id.* 555.

A statement by the defendant to a witness some time prior to the killing to the effect that if he were to catch

a man stealing his hogs he would shoot him, was immaterial and should have been excluded. 73 Ark 366; *Id* 152.

4. The court's modification of the instruction requested by defendant on the subject of defense of himself and his property, deprived the defendant of the benefits accruing to him under §2369, Crawford & Moses' Digest; 44 Am. Rep. 52; 51 *Id.* 153-154; 71 Am. St. Rep. 594; 2 Bishop's New Crim. Law, §706, notes.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. Evidence tendered by a witness to the effect that on one occasion deceased had taken up some wild hogs belonging to the witness, which he identified and deceased surrendered them to him, was not competent. Character or reputation cannot be proved by evidence of specific acts nor from personal knowledge of the witness. 10 R. C. L. 953.

2. The testimony of the witness Wright as to the reputation of the witness Britt was properly excluded because of remoteness, based as it was on acquaintance several years prior to the trial. 29 Ark. 131; 22 Corpus Juris, 480. There is no ground for objecting to the exclusion of the testimony of witnesses who were not sworn and whose testimony was not tendered. 88 Ark. 571; 1 Thompson on Trials, §§703-4; 73 Ark. 407.

3. Where specific objections are made to testimony, all other objections are waived. 58 Ark. 381; 65 Ark. 371.

4. The evidence shows a conspiracy to commit an unlawful act, i. e., to take the hogs away from the Britt brothers by force if necessary; wherefore anything said or done by defendant, or either of his brothers at the time of the fatal encounter, was admissible. 69 Ark. 537; 133 Ark. 261.

5. The plea was self defense. There was no effort

to prove that the killing was done in defense of property. The defendant was not entitled to an instruction on that subject. *Stewart* v. *State*.

S. M. Casey and *W. K. Ruddell* in reply.

There was evidence that defendant killed deceased because he was stealing defendant's hogs. The court had no discretion to refuse instructions appropriate to any theory of the case sustained by the evidence. 50 Ark. 545, 549; 52 Ark. 45. See also 86 Ark. 30, 32.

McCULLOCH, C. J. Appellant was tried under an indictment charging him with murder in the first degree in the killing of Will Britt, and was found guilty of murder in the second degree, his punishment being fixed by the jury at twenty-one years in the penitentiary.

Appellant and Britt were both, according to the evidence, residents of Independence County, and were farmers. The killing occurred in the woods between their respective place of residence. Britt went into the woods with his brother, Elisha, and two neighbors or acquaintances named Coop, for the purpose of catching hogs running on the range. Britt claimed the right to take hogs on the range under a written assignment from one Rust, who asserted a "claim" to wild hogs. The party carried a wagon and team to haul the hogs out of the woods, and, after catching and tying them, they proceeded to load them into the wagon. Appellant came upon the scene with his two brothers, Jonah and Bill, and claimed the hogs as his own, and demanded that Britt release the hogs. At that time there were two hogs loaded on the wagon, and there were two others tied in another part of the woods. Britt refused to give up the hogs, and one of his party suggested that he be allowed to take the hogs home, and that appellant bring replevin to settle the rights of the property, but this was declined by appellant, who was armed with a Winchester rifle, and fired two shots, one of them taking effect in Britt's chest. Britt ran away immediately after receiving the wound,

and it was not known that he had been wounded until he was found lying in the weeds a short distance away when the wagon was moved, and the party proceeded to leave the woods. Appellant's narrative on the witness stand of the circumstances immediately attending the killing was that when he demanded the release of the hogs Will Britt refused the request and proposed to "settle it there man to man," and that his brother Elisha walked from behind the wagon and also remarked, "We will settle it here." Appellant stated that he "stepped back and stumbled," and that when he came up he just threw his gun up and fired and did not put it to his shoulder or take aim.

The case was defended on the ground that appellant acted in necessary self-defense in resisting the threatened assault of Britt, and also that in killing Britt he acted in defense of his property, the hogs which were found in Britt's possession. He invokes the application of the statute which defines justifiable homicide to be "the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony." Crawford & Moses' Digest, § 2369. The case was presented in the court below by appellant's counsel on the theory that the facts brought the case within the application of this statute, and one of the assignments of error relates to the refusal of the court to give the following instruction:

"You are instructed that under the laws of this State a man has a right to defend his home, his person or his property against any one who intends or endeavors by violence or surprise to commit a known felony. And if you believe from the evidence in this case that the defendant, Brown, shot and killed the deceased, Will Britt, while the said Britt was attempting to take away the property of the defendant, Brown, then the killing would be what is known in the law as justifiable or excusable homicide, and you should acquit the defendant."

This instruction is not, however, in accord either with the letter or meaning of the statute, and the court was correct in refusing to give the instruction. Nor do we think there is any evidence which would have justified a submission of appellant's right to commit the homicide on the ground of being in the defense of his property. It will be observed that the statute does not justify the slaying of a person merely for the protection of property, but the justification arises only when there is a manifest intention or endeavor "by violence or surprise to commit a known felony.' A person has no right to slay another merely to protect his property unless he is in possession and the killing is necessary in order to prevent the commission of a felony. The mere fact that property is being wrongfully taken or detained would not justify a homicide. Wharton on Homicide (3 ed.), pp. 390-91; *Utterbach* v. *Commonwealth*, 105 Ky. 723, 88 Am. St. Rep. 329; *State* v. *Tarter*, 26 Ore. 38; *Hill* v. *State*, 43 Texas Criminal Appeal, 583.

The undisputed facts in this case are that the hogs in controversy were not in the possession of appellant, but were in the possession of Britt and his party, who were about to haul them away, and that appellant was endeavoring to compel Britt to release the hogs. The property was not taken by Britt by violence or by surprise, but was taken up under a claim of right. If the property was wrongfully taken, appellant's sole means of redress was an appeal to the law. He had no right to resort to force to regain possession. Therefore the court was correct in refusing to give not only the particular instruction referred to but others on the same subject which were requested by appellants counsel.

Instruction No. 3, requested by appellant, reads as follows:

"You are instructed that the defendant had a right to defend his property against any one who attempted to carry it off, by violence or surprise; and if you believe from the evidence in this case that the defendant shot

and killed the deceased, while they were engaged in an altercation over the ownership of the hogs and while the defendant was excited by the trespass on his property and in the heat of passion caused by the attempt of the deceased and his confederates to carry off the hogs which the defendant believed to belong to him, then the defendant could not be guilty of a higher grade of offense than manslaughter."

The court modified this instruction, over appellant's objection, by striking out the first part of it relating to the right to defend property and by inserting the words "and that such provocation and passion was sufficient under other instructions given relative to manslaughter." The court was correct in striking out the first part of the instruction for the reasons we have already stated in regard to instruction No. 1; and was also correct in adding the words so as to conform the instruction to the law in regard to reduction of the degree of a homicide from murder to manslaughter where the killing is voluntary "upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible." Crawford & Moses' Digest, § 2355. The homicide being unjustified, the degree was not reduced unless the facts brought it within the elements embraced in the definition of manslaughter.

The court made a similar modification in instruction No. 5, requested by appellant's counsel on the subject of reduction of the degree of the offense from murder to manslaughter, and for the reasons stated above this modification was correct. The views we have expressed with reference to the right to kill in defense of property disposes of many of appellant's assignments of error concerning the rulings of the court on the admissibility of testimony. For instance, it is earnestly insisted that the court erred in refusing to permit appellant to introduce proof concerning other efforts of the Britt brothers to take up hogs found running in the woods that were shown to belong to other persons. Such testimony was

wholly immaterial, except in impeachment of the surviving Britt as a witness, and the court did not improperly restrict the right of appellant to impeach the witness.

Complaint is also made that the court erred in refusing to permit appellant to prove the general reputation of the deceased and his brother by a witness named Wright. The court excluded the testimony on the ground that it was too remote in point of time and place, and in this we think the court was correct.

It is further contended that the court erred in refusing to permit appellant's counsel to interrogate Elisha Britt on cross-examination, concerning his own efforts in connection with his brother Will to take up hogs belonging to other persons. It appears from the record that appellant was permitted to ask the witness a number of questions on this subject, and after the witness had stated that this was the first trouble that he had ever had about hogs, and that he had not on a former occasion taken up the hogs of Joe Wright, the court refused to permit counsel to ask further questions on that subject. Witness had already answered the questions by stating that he had not taken up hogs belonging to Joe Wright, and it was within the sound discretion of the court to control the cross-examination and to determine to what extent the questions should be repeated. We do not think that there was any abuse of the court's discretion in this instance.

It is contended that the court erred in permitting witness Coop to testify that, just before the shooting occurred, appellant's brother, Jonah, walked up to Will Britt and patted him on the shoulder and shoved him, saying, "You are going to turn the hogs out." All of this occurred, according to the testimony, in the presence of appellant, and was a part of the controversy there between the two factions concerning the release of the hogs. We think it was competent to show everything that occurred there between the parties in the presence of each other.

After Britt was found fatally wounded lying in the weeds, his brother and one of the Coops asked appellant's permission to put him in the wagon, which request appellant at first denied, saying that they must first go and turn loose the other hogs tied in the woods, but later said to them, "Well, throw him in," referring to the act of putting the wounded man into the wagon. This fact was admitted in evidence, and the ruling of the court is assigned as error, but we think it was competent as a part of the transaction to show appellant's mental attitude toward Britt at the time he fired the shot.

There are other assignments of error in regard to the introduction of evidence, which we do not find to be well founded, and are not of sufficient importance to call for a discussion.

From the viewpoint of appellant and accepting his version of the killing, there is much that can be said in the mitigation of his offense, but the jury has accepted the State's theory as to the circumstances attending the killing and gave the defendant the extreme penalty imposed for the crime of murder in the second degree.

After careful consideration of the testimony, we are unable to say that the evidence does not justify the verdict. Finding no error in the proceedings, the judgment is affirmed.

COPPERSMITH v. STATE.

Opinion delivered September 26, 1921.

1. CONTINUANCE—ABSENT WITNESSES—DILIGENCE.—A motion for continuance was properly denied where it does not appear that the applicant was diligent in procuring process for their attendance, he having waited until the case was set down for trial before securing subpoenas, and having failed to follow up the process to the extent of ascertaining the whereabouts of the witnesses so that their attendance could be procured.
2. CONTINUANCE—ABSENT WITNESSES—LIKELIHOOD OF PROCURING ATTENDANCE.— It was not error to refuse a continuance for the

absence of witnesses who had disappeared from their usual haunts and could not be located, where there was no certainty of procuring their attendance at a future date.

3. CRIMINAL LAW—INSTRUCTION—GENERAL OBJECTION.—Where an instruction did not expressly assume that defendant was connected with or interested in the operation of a gambling house, objection that it impliedly assumed that fact should be raised by specific objection.

4. GAMING—GAMING HOUSE—INSTRUCTION.—In a prosecution for operating a gambling house, it was not error to refuse an instruction upon the question of defendant's guilt or innocence of the offense of unlawful gaming.

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

B. H. Randolph, J. A. Stallcup and *A. J. Murphy,* for appellant.

The motion for continuance should have been sustained. § 10 Art. 2, Const. 1874; 71 Ark. 182; 99 Ark. 398; 21 Ark. 461.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. Instruction No. 6 given by the court did not assume that Piovia's evidence tended to show that defendant was connected with or interested in the gambling place, such assumption having been eliminated by the qualifying clause used by the court; but, if he thought it assumed such fact, defendant should have made specific objection. 136 Ark. 272.

2. Instruction No. 6 requested by the defendant was erroneous in assuming that the indictment for operating a gambling house included the lesser offense of gaming. 14 R. C. L. § 53, p. 211; 22 Cyc. 481.

Sections 2632 and 2639, Crawford & Moses' Digest, provide punishment for two separate and distinct offenses.

3. There was no abuse of discretion in denying the motion for continuance. 130 Ark. 245; *Id.* 592; 133 Ark. 239; 130 Ark. 149; 218 S. W. 170.

McCULLOCH, C. J. The indictment against appellant returned by the grand jury of Garland County is for the offense of operating a gambling house in the city of Hot Springs. It is charged in the indictment that the gambling was conducted in a room, mentioning the number of the room, in a certain hotel in the city of Hot Springs.

When the case was called for trial, appellant presented a motion for continuance in order to procure the attendance of two absent witnesses, George Brown and Whitey Jackson, and the ruling of the court in refusing to postpone the trial is the principal assignment of error urged here for reversal of the judgment. It is stated in the motion that each of the two witnesses would testify, if present, that the room in question was rented and occupied as a bedroom by Brown, and that appellant did not occupy the room for any purpose nor operate a gambling game therein. It appears from the record and from the recitals of the motion for continuance that the indictment against appellant was returned by the grand jury on the 27th day of January, 1921, and that on March 24, 1921, the court set the case down for trial on April 5, a subpoena being issued on that date for each of said witnesses. Brown was a resident of Garland County, and Jackson was a resident of Pulaski County, and the subpoenas were issued respectively to those counties, but were subsequently returned unserved.

Appellant alleged in his motion that the said witnesses were temporarily absent from their respective places of residence; that he had heard of their being in El Dorado, Arkansas, and had sent a subpoena to Union County, but that the same had not been returned up to the day of the trial. The motion contained a formal statement that the witnesses were temporarily absent, and that their attendance upon the trial at a later date could be procured; that their absence was without the procurement or connivance of appellant, and that he could not establish the facts recited by any other witness. The

court overruled the motion, and on a trial of the cause there was a conflict in the testimony as to who operated the gambling game in the room mentioned. There was testimony adduced by the State tending to show that appellant occupied the room and operated the game, and, on the other hand, there was testimony introduced by the appellant tending to show that he had nothing to do with the operation of the game, but that the room was occupied by Brown, and that Brown operated the game. We are of the opinion that the court was correct in finding that appellant had not exercised proper diligence entitling him to a continuance of the cause.

Appellant was not justified in waiting until the case was set for trial in preparing his cause and in having his witnesses summoned. The indictment was returned and appellant was arrested on January 27, but, according to his own statement, he did not set about the procurement of the attendance of the witnesses until March 24, and, even after that date, it does not appear that he was diligent in following the matter up to extent of ascertaining the whereabouts of the witnesses so that their attendance could be procured. Moreover, the fact that the witnesses suddenly disappeared from their usual haunts and could not be located justified the court in concluding that they were evading the service of process, and that there was no certainty of procuring their attendance at a future date. We think that the ruling of the court can be sustained on either of these grounds, and there should be no reversal of the judgment on account of the refusal to postpone the trial.

Another assignment of error relates to the giving of the following instruction:

"You could not convict on the testimony of the witness, Piovia, alone, but if you believe that his testimony which tends to show that defendant was connected with and interested in the place, if it does tend to show that he was connected with it, is corroborated by other evi-

dence tending to prove that defendant was interested in it and you believe from all of the evidence in the case, including that of Piovia, that defendant was interested in the operation of a gambling house or room, you should find the defendant guilty."

The contention is that the court assumed in this instruction that appellant was connected with or interested in the operation of the gambling house. The instruction does not, we think, contain such an assumption of facts—certainly not in express terms; and if it could be construed by implication to contain such an assumption, it was the duty of appellant to call the court's attention to it by a specific objection. *Brinkley Car Works & Mfg. Co.* v. *Cooper,* 75 Ark. 325; *Burnett* v. *State,* 80 Ark. 225; *St. L., I. M. & S. Ry. Co.* v. *Evans,* 96 Ark. 547; *Hogue* v. *State,* 93 Ark. 316; *Miller* v. *Fort Smith L. & T. Co.,* 136 Ark. 272.

It is also contended that the court erred in refusing to give an instruction submitting to the jury the question of defendant's guilt or innocence of the offense of unlawful gaming. It is sufficient to say in response to this contention that an indictment for operating a gambling house does not include the offense of gaming and appellant could not properly have been convicted of the latter offense under that indictment. The court was therefore correct in refusing to submit to the jury the question of appellant's guilt or innocence of the offense of gaming.

Finding no error in the record, the judgment must be affirmed. It is so ordered.

WILLIAMS v. STATE.

Opinion delivered September 26, 1921.

1. HOMICIDE—SELF DEFENSE—INSTRUCTION AS TO BURDEN OF PROOF. —It was not error, in a murder case, to instruct upon the burden of proving circumstances of mitigation that justify or excuse

the homicide, etc., in the language of Crawford & Moses' Dig., § 2342, where the court, in another instruction, told the jury that "it is a sufficient defense if the circumstances of mitigation or justification are such as would raise in your minds a reasonable doubt as to the defendant's guilt."

2. HOMICIDE—DEFENSE OF HABITATION OR PROPERTY.— An instruction upon the right to kill in defense of habitation or property was properly refused as being abstract where there was no testimony to warrant an inference that the killing was done in defense of either home or property.

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

Powell & Smead, for appellant.

1. Instruction No. 5 given by the court erred in that it ignored the rule that on the whole case the burden was on the State to prove the defendant's guilt beyond a reasonable doubt.

2. Instruction No. 7 requested by the defendant was correct, and such an instruction as he was entitled to on the theory of self defense, even though the killing was not committed in defendant's home or place where he was visiting. As a guest in the house where the killing occurred, he had the same right to protect himself and the house as if he had been in his own home. He was entitled to an instruction on his theory of defense. 55 Ark. 593; *Id.* 604; 113 Ark. 454.

3. Requested instruction numbered 9 was based on the statutes, §§ 2372 and 2373, Crawford & Moses' Digest, and should have been given. Cases *supra.*

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. Since appellant in his brief urges error only in respect to the giving of instruction No. 5 and refusing to give instructions numbered 7 and 9 requested by him, all other assignments of error in the motion for new trial will be deemed to have been waived. 147 S. W. 76; 150 S. W. 125.

2. Instruction No. 5 given by the court is the law of the case. Section 2342 Crawford & Moses' Digest; 71 Ark. 459; 120 Ark. 193. It is admitted to be the law by appellant himself in his requested instruction No. 8 which the court gave.

3. Appellant's plea was not that he killed deceased in defense of habitation or property but self defense. There was no error in refusing his requested instructions 7 and 9. Moreover the court fully covered defendant's theory of defense in instructions 3, 4, 5, 6 and 8, given at his request.

WOOD, J. The appellant was indicted for the crime of murder in the first degree in the killing of one Burl Beard. He was convicted of voluntary manslaughter. Burl Beard lived at his father's home, which was about two hundred yards from the home of Dorsey Warrent. In the early morning of October 15, 1920, Beard was out on the porch at his father's house when Warrent called to him, saying, "Come up here, Burl; I want to see you." Burl replied, "I can't; I have to help papa." Warrent called him again and Burl put on his shoes but didn't lace them and went to Warrent's. Warrent accused Beard of being around his house the night before, which Beard denied. The appellant, who had spent the night at Warrent's house, accused Beard of being around the house the preceding night. According to the testimony for the appellant, Beard became enraged at the appellant because he had accused him of being around the house of Warrent the night before, told the appellant that he lied about it, went back to his home and returned to Warrent's. The mother of appellant went over to Warrent's home, and while she was there Beard returned and asked his mother for a key, and started to go in the yard, and his mother and Warrent tried to prevent him. He continued on to the steps of the house when appellant told him not to come any further. Beard made the next step, and the appellant shot him. Beard had his hand behind him and stepped on the porch, and the ap-

pellant fired again. Beard had nothing in his hand. No weapon was found on his person.

Among others, the court on its own motion gave the following instuction:

"No. 5. The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide."

The court refused the following prayers of appellant for instructions:

"No. 7. You are instructed that justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony; and if the jury believe from the evidence in this case that the defendant shot and killed the deceased while in the defendant's home or place of habitation, or where the defendant was visiting, and that the deceased at the time he was shot by the defendant was manifestly endeavoring to assault the defendant for the purpose of taking his life or doing him great bodily harm, then the defendant was not required to retreat, but had the right to stand his ground, and, if it appeared to him, acting as a reasonably prudent person, to be necessary to shoot deceased to prevent such assault, then he is justified in so doing, and your verdict will acquit him therefor."

"No. 9. You are instructed that every man's house or place of residence shall be deemed and adjudged, in law, his castle. And a manifest attempt and endeavor in a violent, riotous or tumultuous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein, shall be a justification for homicide. So, in

this case, if you believe from the evidence that the house in which deceased was shot by defendant was the place of residence of defendant, whether he owned the house or not, and that the deceased, in a violent or threatening manner, entered said house, for the purpose of assaulting or offering personal violence to the defendant, then the defendant would be justified in shooting deceased, and you will find him not guilty."

1. Error is predicated on the ruling of the court in giving instruction No. 5, the contention being that the instruction was erroneous because it ignored the well known rule of law that in criminal prosecutions the burden of proof upon the whole case is on the State. The instruction was a literal copy of section 2342 of Crawford & Moses' Digest. It must be read in connection with another instruction which the court gave, and which appellant fails to abstract, and which reads as follows:

"You are instructed that, while it is true that, the killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense only amounted to manslaughter, or that the accused was justified or excused in committing the homicide, yet you are told that it is a sufficient defense if the circumstances of mitigation or justification are such as would raise in your minds a reasonable doubt as to the defendant's guilt."

The instructions when read together do not conflict and conform to the decisions of this court in *Johnson* v. *State,* 120 Ark. 193; *Brock* v. *State,* 101 Ark. 147; *Cogburn* v. *State,* 76 Ark. 110-112; *Tignor* v. *State,* 76 Ark. 489; *Petty* v. *State,* 76 Ark. 515. The court did not err in giving the above instruction No. 5.

2. The court did not err in refusing appellant's prayers for instructions Nos. 7 and 9. These instruc-

tions, under the evidence, were abstract as appertaining to the home or property of appellant. Although Williams was temporarily at the home of Warrent, there is nothing in the testimony that would warrant an inference that the appellant shot Beard because he was attempting to invade the home of Warrent, or that he shot him to protect his property. The testimony on behalf of appellant tended to prove that he killed Beard because the latter had threatened and was at the time seeking to take the appellant's life. There was therefore no testimony to warrant the court in submitting to the jury the issue as to whether or not the appellant killed Beard in the defense of his habitation or property. The only defense that appellant was justified in making under the evidence was that the killing was done in defense of his person, and this theory of the defense was fully and correctly covered in instructions which the court gave.

We find no error in the court's rulings, and its judgment is therefore affirmed.

WINSTON v. STATE.

Opinion delivered September 26, 1921.

INTOXICATING LIQUORS — MANUFACTURE OF WHISKEY — INSTRUCTION.—Under an indictment for manufacturing "whiskey", it was error to instruct the jury to find the defendant guilty if he manufactured any intoxicating liquor.

Appeal from Faulkner Circuit Court; *George W. Clark,* Judge; reversed.

The indictment charges the manufacture of whiskey. Proof of making choc beer is not sufficient. The words "commonly called whiskey" used in the indictment are descriptive of the offense charged. 129 Ark. 362, 364; 62 Ark. 459; 84 Ark. 285; 71 Ark. 415; 64 Ark. 188; 37 Ark. 408; 141 Ark. 276. One offense cannot be proved by evidence of another, unless the two are so related as to form a part of the same transaction. 91 Ark. 555; 88 Ark. 579; 39 Ark. 278; 100 Ark. 321; 62 Ark. 126.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. Evidence of other offenses or acts similar to the one charged in an indictment is competent for the purpose of showing knowledge, intent or design. 87 Ark. 17.

Where the defendant, testifying in his own behalf, is asked on cross-examination improper and incompetent questions to which he returns negative answers, no prejudice results to him. *Garrison* v. *State,* Ms. Op.

2. A general objection to several instructions will not be considered an appeal, if any of them was good. 105 Ark. 15; 73 Ark. 315; 75 Ark. 182; 76 Ark. 41; *Id.* 482; 78 Ark. 7; 86 Ark. 103.

3. Appellant's request for peremptory instruction was properly refused. The facts and circumstances prove the defendant guilty as charged. 135 Ark. 117; 136 Ark. 385.

WOOD, J. This is an appeal from a judgment of conviction on an indictment which charged that the appellant "unlawfully and feloniously did manufacture and unlawfully and feloniously was interested in the manufacturing of one pint of alcoholic, ardent, vinous and intoxicating spirits commonly called "whiskey." The appellant denied that he had manufactured any whiskey. There was testimony from which the jury might have found that the appellant had manufactured whiskey. There was also testimony from which the jury might have found that the appellant was engaged in the manufacture of "choc beer," and not whiskey.

The court gave one instruction which contained several independent propositions of law in separate paragraphs, but the paragraphs were not numbered. In one of the paragraphs the court instructed the jury in part as follows: "The material allegations in the indictment are, that the accused, within three years and in Faulkner County, Arkansas, before the return of this indictment, unlawfully and feloniously manufactured alcoholic, ar-

dent, vinous and intoxicating liquors. To this indictment, defendant pleads not guilty, and that casts the burden upon the State of proving same beyond a reasonable doubt. If you find from the evidence in this case that the defendant did manufacture any intoxicating liquor used and drunk as a beverage whether it contained one hundred per cent. or one per cent. is immaterial under this statute; he would be guilty of violating this law."

The appellant objected "to each and every instruction given by the court on its own motion." The court overruled the objection, to which ruling the appellant excepted. The objection was not *en grosse,* but was to "each" instruction or declaration of law that the court gave. Although the several declarations of law were not separately numbered, yet each one of these declarations, which were independent and different in meaning, must be treated as a separate instruction. The term "whiskey" in the indictment was descriptive of the offense, and it was incumbent on the State to prove the charge of manufacturing "whiskey" as alleged. *Carleton* v. *State,* 129 Ark. 361, and cases there cited. See, also, *Shuffield* v. *State,* 141 Ark. 276. But, under the instruction given by the court, the jury was authorized to find the appellant guilty if they found that he "unlawfully and feloniously manufactured alcoholic, ardent, vinous and intoxicating liquors used and drunk as a beverage," whether such liquor was whiskey or not. In other words, the jury was authorized to find, and under the testimony may have found, that the appellant manufactured intoxicating liquor called "choc beer" to be used and drunk as a beverage. The instruction was erroneous.

We do not discuss other assignments of error because they may not arise on another trial. For the error of the court as indicated, the judgment is reversed and the cause remanded for a new trial.

SIMON v. STATE.

Opinion delivered September 26, 1921.

1. GAMING—CONDUCTING GAMBLING HOUSE—ACCOMPLICES.—Under Crawford & Moses' Dig., § 2632, imposing a penalty on every person "who shall be interested, directly or indirectly, in running any gambling house," the penalty is leveled only at the person who keeps or rather operates, or is "interested in the keeping or operating of a gambling house or place where gambling is carried on," and not against the patrons of such an establishment or the persons who pay for the privilege of gambling therein and participate in card games played therein for money.
2. CRIMINAL LAW — ACCOMPLICES — CORROBORATION — Under the statute requiring an accomplice to be corroborated, the test to determine whether or not one is an accomplice is, could the person so charged be convicted upon the evidence as a principal or accessory before the fact, or an aider and abetter?
3. CRIMINAL LAW—ACCOMPLICES.—In a prosecution for conducting a gambling house, persons who merely participated in games therein are not to be regarded as accomplices of the defendant.

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

Martin, Wootton & Martin and *C. Floyd Huff*, for appellant.

Players in a card game are accomplices. Crawford & Moses' Digest, § 2308; 16 C. J. 670 to 672; 36 Ark. 126; 90 Ark. 460; 130 Ark. 353; 141 Ark. 421; 129 Pac. 78; 43 L. R. A. (N. S.) 546 and cases cited.

A conviction in a felony case cannot be had upon the uncorroborated testimony of an accomplice. Crawford & Moses' Digest, § 3181.

Whether or not a witness is an accomplice of the accused is a mixed question of law and fact. 51 Ark. 115; 63 Ark. 462; 111 Ark. 299. And defendant was entitled to have the question submitted to the jury under proper instructions. Appellant's requested instruction No. 3 on the subject was refused by the court, which was error under the following decisions: 50 Ark. 526; 64 Ark. 247; 130 Ark. 353; 128 Ark. 452.

In the actions of the State's witnesses there were all the necessary elements of standing by, aiding, abetting, assisting, advising and encouraging the appellant in the perpetration of the crime, to make them accomplices under § 2308, C. & M. Digest, and the necessary "affirmative act" suggested in 141 Ark. 421.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

Appellant's requested instruction No. 3 was properly refused. Participants in a card game are not accomplices. The test of whether or not a witness is an accomplice is, could he himself have been indicted for the offense, either as principal or accessory? 1 R. C. L. § 3, p. 157; Cyc. 445-6; 16 C. J. p. 671. The State's witnesses, by participating in the gambling being conducted, violated § 2639, C. & M. Digest, thereby committing a misdemeanor only. Sec. 3181, C. & M. Digest, requiring corroboration of testimony of accomplices, applies only in felony cases.

Mere knowledge that a crime is being committed cannot constitute one an accomplice, nor can the concealment of such knowledge. 1 R. C. L., Sec. 3, pgs. 157-8.

Where the facts are not disputed, and the acts and conduct of the witnesses admitted, the question then becomes one of law for the court to say whether or not those acts and facts make the witness an accomplice, and is not a jury question. 1 R. C. L., § 3, p. 158.

One who is permitted to play a game of chance upon the premises of another is not an accomplice, where the owner is prosecuted for permitting gambling. 6 Ky. L. Rep. 517; 6 Ky. L. Rep. 217; 43 Mont. 427; 117 Pac. 95. By analogy see 16 C. J. § 1388, p. 681; 41 Tex Cr. 358, 57 S. W. 850; 165 N. Y. S. 386; 16 C. J. note 24, p. 680; 155 Mass. 287, 29 N. E. 512; 203 N. Y. 73, 96 N. E. 362.

WOOD, J. The appellant was convicted under an indictment which charged that he "unlawfully and feloniously did keep, conduct and operate, and was inter-

ested directly and indirectly in keeping, conducting and operating a gambling house or place where gambling was carried on in a certain building on Central Avenue in the city of Hot Springs, Arkansas, and known as the Arkansas Cigar Store, and was interested directly and indirectly in keeping, conducting and operating said gambling house by furnishing money and other articles for the purpose of carrying on said gambling house, against the peace and dignity of the State of Arkansas."

The facts are substantially as follows: The appellant rented a building in the city of Hot Springs from A. B. Gaines, paying as rent therefore the sum of $200 per month. The first floor was occupied as a cigar store, and its rental value was estimated at $125 per month. The proportion of the rental value of the upper rooms was estimated at $75 per month. The upper rooms had in them sixty or seventy chairs, pool tables, billiard tables, two or three round tables, desk, lounge, a kitchenette and a place with periodicals where one could sit down and read.

Among the witnesses who testified for the State were L. D. Cooper, Leon Dinkelspiel, Matt Picchi, Mose Klyman and E. N. Roth. Their testimony does not differ in essential particulars, and is to the effect that they had frequently been in appellant's place of business and had participated in card games played there for money. Each participant in the game of cards paid the sum of $6 for his seat at the table. Players did not pay for their checks when received. It was the custom of the place to have a settlement at periods more or less indefinite. No one was permitted to the rooms except invited guests. The company was select and the participants high-class business men. The $6 paid for the seat and the privilege of participating in the game also entitled the participant to refreshments such as sandwiches, soft drinks and other things to eat and drink. Usually the players would buy $100 worth of checks from which the appellant would deduct $6, which was the charge for the

privilege of participating in the games, and there was no additional charge for the other accessories mentioned above. These were furnished by the appellant free of charge. There was a charge of $1 a deck for the cards to those who participated in the game of poker. No charges were made for the cards used in bridge or whist. There were sometimes as many as eight people seated at a table participating in the game of poker and at different tables as many as twenty people playing poker at one time in separate games. The poker games were played for money. The largest loss that the witnesses had ever known any of the participants to sustain was from $100 to $150. The witnesses participating in the poker games testified that the $6 paid for the "seats" was for the purpose of enabling appellant to conduct the business there and to "keep it open and going."

The appellant requested the court to instruct the jury as follows:

"You are instructed that an accessory is one who stands by, aids, abets, assists, or who, not being present, hath advised and encouraged the perpetration of the crime. And if you find from the evidence in the case that the witnesses L. D. Cooper, Leon Dinkelspiel, Matt Cicchi, Mose Klyman and E. N. Roth, who have testified, contributed money to the defendant, in order to induce or enable him to conduct a gambling house, then each of them so contributing thereby became and was an accessory. And if you find that they are accessories or accomplices as above defined, then you are further instructed that the defendant can not be convicted on their testimony alone. Before one can be convicted on the testimony of an accomplice, there must be corroboration by other evidence, tending to connect the defendant with the commission of the offense. Nor can one accomplice corroborate another; but before the testimony of an accomplice can be considered by you at all as evidence of guilt, there must be other evidence before you, not given by an accomplice, which tends to connect the defendant

with the commission of the offense charged. And unless there be other evidence independent and apart from any given by one or more accomplices, tending independently of any matters testified to by such accomplices, one or more, to connect the defendant with the offense charged, you should find him not guilty."

The court refused the appellant's prayer, to which ruling the appellant duly excepted.

The only error of which the appellant complains here is predicated upon the ruling of the court in refusing the above prayer. There was no error in the ruling of the court. Section 2632, C. & M. Digest, provides as follows: "Every person who shall keep, conduct or operate, or who shall be interested directly or indirectly in keeping, conducting or operating a gambling house or place where gambling is carried on, * * * or who shall be interested directly or indirectly in running any gambling house, * * * either by furnishing money or other articles for the purpose of carrying on any gambling house, shall be deemed guilty of a felony, and on conviction thereof shall be confined in the State penitentiary for not less than one nor more than three years." Act March 11, 1913.

There is no testimony tending to prove that the witnesses for the State, named in the prayer for instruction, *supra,* were interested directly or indirectly in the gambling house kept, conducted or operated by the appellant, nor is there any testimony tending to prove that they furnished any money or other articles for the purpose of carrying on any gambling house. It occurs to us that the penalty of this statute is leveled only at the person who "keeps" or "operates," or is "interested in the keeping or operating of a gambling house or place where gambling is carried on," and not against the mere patrons of such an establishment, or the persons who paid for the privilege of gambling therein and who were participants in any card games that were played therein for money. Giving the testimony of all or any of the

witnesses for the State named in the above instruction its strongest probative force in favor of the appellant, it does not warrant the inference that any of these witnesses had any control over, or management of, or interest in, the house or place where the gambling was carried on. In the sense of the statute, they had no interest directly or indirectly in the running of the gambling house. While some of the witnesses say that the $6 paid by the participants in the poker games was for the purpose of enabling the appellant to "keep the place and run it," yet, when this language of the witness is taken in connection with their previous language, it is manifest that the meaning of the witnesses, and the only meaning of which their testimony is susceptible, is that they were paying $6 a seat whenever they desired to sit at the card tables and participate in the game of poker carried on in the gambling house or place maintained by the appellant; that this sum was paid for the privilege of indulging in the poker games and for the refreshments and other accessories mentioned by them incident thereto which the appellant furnished them in consideration of the charge specified.

"The test, generally applied to determine whether or not one is an accomplice, is, could the person so charged be convicted as a principal, or an accessory before the fact, or an aider and abetter upon the evidence? If a judgment of conviction could be sustained, then the person may be said to be an accomplice; but, unless a judgment of conviction could be had, he is not an accomplice." *Levering* v. *Commonwealth,* 132 Ky. 666-678, and other cases there cited. *State* v. *Gordon,* 105 Minn. 217-219; *State* v. *Durham,* 73 Minn. 150-165, 1 R. C. L. 157, and cases cited in note; 12 Cyc. 445-446. "In order for a witness to be an accomplice, he must not only be implicated in the crime itself, but the evidence must tend to show that he acted in concert with the party on trial and against whom he testified." 16 Corpus Juris 671. Now, when we lay the uncontroverted facts as set forth

above alongside these legal tests for determining who is an accomplice, the conclusion is irresistible that the witnesses for the State named in appellant's prayer for instruction were not the accomplices of the appellant in the crime of which he was convicted. If these witnesses had been indicted jointly or separately for maintaining a gambling house under the above statute, could they have been convicted under the undisputed evidence in this record? Cenrtainly not. They had no control, either directly or indirectly, over the house or place which the appellant maintained as a gambling house. They did not furnish him any money with which to run this house and only paid the fee or tax which he charged for the privilege of gambling and the services incident thereto, which appellant furnished them in consideration of such charge or fee. Appellant was not the agent or partner of these witnesses in the conduct or operation of the gambling house, and there was no concert of action among themselves or between any of them and appellant with reference to this matter.

As we view the record, the testimony is uncontroverted and susceptible to only one conclusion. Therefore there was no room for the submission of the issue to the jury as to whether or not the witnesses named were accomplices of the appellant. These witnesses, of course, under their own testimony, were guilty of the separate and independent offense of gaming under section 2639 of C. & M. Digest, and, as their testimony shows, they paid the appellant for the privilege of participating in games of cards at the gambling house kept and maintained by appellant. These witnesses were no more accomplices of the appellant in the crime of keeping and operating a gambling house than was the appellant their accomplice in the games of poker which they played when he was not a participant.

"The term 'accomplice' can not be used in a loose or popular sense so as to embrace one who has guilty knowledge, or is morally delinquent, or who was even an

admitted participant in a related, but distinct offense. To constitute one an accomplice, he must take some part, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence or silence, in the absence of a duty to act, is not enough, however reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed can not be said to constitute one an accomplice. Nor can the concealment of knowledge, or the mere failure to inform the officers of the law when one has learned of the commission of a crime." 1 R. C. L., § 3, pp. 157, 158.

"Under the rule that an accomplice must unite in the commission of the crime and must be an associate therein, one participating in a gambling game operated by another in violation of a statute punishing one operating gambling games, is not an accomplice." *State* v. *Wakely,* 43 Mont. 427, 117 Pa. 95-99.

"In a prosecution for conducting a gambling game or place of business, persons who merely play in the game or at such place are not regarded as accomplices of the defendant." 16 Cor. Jur. 680.

The above excerpts from the texts are supported by the cases cited in the notes thereto. It follows that there is no error in the record, and the judgment must therefore be affirmed.

CAIN v. STATE.

Opinion delivered September 26, 1921.

1. GAMING—CONDUCTING A GAMBLING HOUSE—EVIDENCE.—Evidence held to justify a finding that defendant was interested in conducting a gaming house.
2. CRIMINAL LAW—MULTIPLICATION OF INSTRUCTIONS.—It is not error to refuse instructions fully covered by those given by the court.
3. GAMING—CONDUCTING A GAMING HOUSE—EVIDENCE.— Evidence that defendant had discharged an employee who was operating

a crooked game in the basement of a pool hall which defendant was operating and that defendant was interested in gaming houses at other places in the same city was competent as tending to show that defendant was interested in a gaming house which was being operated in the basement of such pool hall.

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

Geo. P. Whittington and *R. M. Ryan,* for appellant.

The testimony introduced was wholly insufficient to support the verdict of the jury.

Proof of other crimes, distinct and separate, is inadmissible to establish the guilt of defendant. 37 Ark. 261; 39 Ark. 278; 54 Ark. 621; 80 Ark. 495; 88 Ark. 579; 91 Ark. 555; 110 Ark. 226; 120 Ark. 462.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* for appellee.

1. The evidence was sufficient to sustain the allegation in the indictment that the defendant did unlawfully and feloniously keep, conduct and operate and was interested directly and indirectly in keeping, conducting and operating a gambling house and place of business where gambling is carried on.

2. The court did not err in permitting the State to prove that gambling was carried on at other places which were owned and controlled by the defendant. 130 Ark. 111; 129 Ark. 316; 130 Ark. 358; 130 Ark. 122; 131 Ark. 445.

It was not error for the State to prove by witness Page, on cross examination, that he had been convicted of a crime and attack his credibility as a witness. 136 Ark. 473.

HART, J. Timothy Cain was indicted for conducting and operating, and being interested in conducting and operating, a gaming house in the city of Hot Springs, Arkansas. The defendant was indicted under the provisions of section 2632 of Crawford & Moses' Digest, and pros-

ecutes this appeal to reverse a judgment of conviction against him after a trial before a jury.

It is earnestly insisted by counsel for the defendant that the evidence is not legally sufficient to sustain a conviction.

The evidence on the part of the State tended to show that a gaming house was operated at No. 422 Malvern Avenue in the city of Hot Springs in Garland County, Arkansas. The evidence tended to show that a crap game was run in the basement of the building, and that forty or fifty people were found to be engaged in the game when a raid was made. There were buzzers in the basement, placed there for the purpose of warning the players that a raid was about to be made. The evidence tended to show that the place was run as a common gaming house.

The evidence on the part of the defendant tended to show that the place in question was known as the Pastime Pool Hall, and that it was operated by a man named Page, and that the defendant had nothing nothing whatever to do with its operation.

It is the contention of counsel for the defendant that the evidence on the part of the State is not sufficient to show that the defendant was interested in operating and conducting the gaming house.

We can not agree with counsel in this contention. One witness testified that the defendant was frequently seen in the building where the gaming house was operated, and that, when any squabble or unusual noise occurred in the basement where the gaming was carried on, the defendant would come back to see about it. Another witness testified that on one occasion complaint was made to the defendant that the man who was conducting the game was doing so in a crooked manner and the defendant discharged the employee complained of. Another witness testified that the defendant ran a gaming house at No. 424, Malvern Avenue, in which he had installed new gaming devices, and that he had moved his

old gaming devices from a place in Hot Springs known as the Rollins place to the Pastime place located at 422, Malvern Avenue.

It is fairly inferable from this testimony that the defendant was interested in the Pastime place, and that it was being conducted as a gaming house. The evidence for the State, if believed by the jury, was legally sufficient to show that the Pastime place was operated as a gaming house within three years before the finding of the indictment, and that the defendant was interested in conducting the gaming house.

It is next insisted that the judgment should be reversed because, under one of the instructions given for the State, the jury might have found the defendant guilty of operating a gaming house at any place in Hot Springs, while the State had elected to prosecute the defendant for conducting a gaming house at the Pastime place, or being interested therein.

The instruction in question, together with other instructions, had been given by the court before the State elected to prosecute the defendant for operating a gaming house at the Pastime place at No. 422, Malvern Avenue. After the State had made its election, the court specifically told the jury that it could not convict the defendant for conducting a gaming house other than the one at the Pastime place on which the State had elected to rely, and that proof of similar offenses about the same time at other places in the city of Hot Springs could only be considered as evidence in determining whether or not the defendant was guilty of operating a gaming house at the Pastime place. Thus the jury was told that it could not consider evidence of running a gaming house at other places without restriction; but that such evidence could only be considered for the purpose for which it was admitted.

The instruction, as a whole, properly guarded the rights of the defendant, and, if the defendant thought that the instruction complained of was misleading, he should

have specifically objected to it on the ground that it was necessary to find that the defendant was interested in running a gaming house at the Pastime place in order to convict him; for the jury must be credited with having common sense, and, when the instructions are read as a whole, it is perfectly plain that the jury was restricted to the Pastime place, and that evidence of running a gaming house at other places was only admitted for the purpose of showing that the defendant was guilty of being interested in operating a gaming house at the Pastime place.

It is next insisted that the court erred in refusing to give instruction No. 3 asked by the defendant. This instruction told the jury, in effect, that unless the State had proved, beyond a reasonable doubt, that the defendant had some interest in the Pastime place, and that gaming was carried on therein with his consent and knowledge, it should not convict him. The matters embraced in the refused instruction were fully covered by the instructions given by the court. The jury was specifically told that, in order to convict, it was necessary to find that he operated the gaming house in question and had direction and supervision over it. The court was not required to multiply instructions on the same point.

It is next insisted that the court erred in admitting evidence tending to show that the defendant operated gaming houses at other places in Hot Springs than the Pastime place. There was no error in admitting this testimony to go to the jury. It is true the general rule is that evidence of the commission of other crimes is admissible only when such evidence tends directly or indirectly to establish the defendant's guilt of the crime charged in the indictment or some essential ingredient thereof. The evidence of the commission of other crimes of a similar nature about the same time, however, tends to show the guilt of the defendant of the crime charged when it discloses a criminal intent, guilty knowledge, identifies the defendant, or is part of common scheme or

plan embracing two or more crimes so related to each other that the proof of one tends to establish the other. *Larkin* v. *State,* 131 Ark. 445.

Here the evidence shows that the defendant on one occasion discharged an employee who was operating a crooked game in the basement of the Pastime place and evidence that the defendant was interested in running gaming houses at other places in the city of Hot Springs about this time tended to show that he was operating a gaming house in the Pastime place and was not merely running a game on some particular occasion. Such evidence also tended to show that he had knowledge that a gaming house was being operated in the basement of the Pastime place, which other evidence tends to show that he was interested in and operating.

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

LEAKE v. STATE.

Opinion delivered September 26, 1921.

1. CRIMINAL LAW—LOST INSTRUMENT—SECONDARY EVIDENCE.—In a prosecution for forgery, secondary evidence of the contents of the instrument alleged to have been forged was admissible where all sources of information and means of discovery which the nature of the case would naturally suggest were in good faith exhausted by the prosecuting attorney in trying to find the alleged forged instrument.
2. CRIMINAL LAW—LOST INSTRUMENT—EVIDENCE.—In a prosecution for forgery it was competent for the prosecuting attorney to testify, in regard to the loss of the instrument alleged to have been forged, that he had made inquiry of the outgoing prosecuting attorney as to the whereabouts of the instrument.

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

Powell & Smead, for appellant.

Production of the original order was material. No sufficient foundation was laid for the production of sec-

ondary evidence. The testimony of A. D. Pope, the prosecuting attorney, was pure hearsay. 60 Ark. 141.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

As to whether or not the loss of the order was sufficiently accounted for to warrant the admission of secondary evidence of its contents was a question for the court, and its holding will not be disturbed unless there was a manifest abuse of discretion. 1 Greenleaf on Evidence, § 558; 60 Ark. 141. Diligent search was made by the clerk, the keeper of the records, and by the State's attorney. 10 R. C. L. §76, pp. 917-918; *Id.* §77, p. 919; 136 Ark. 175.

HART, J. Huby Leake prosecutes this appeal to reverse a judgment of conviction against him for the crime of uttering a forged instrument.

The indictment charges the defendant with the crime of uttering a forged order drawn on George Gordon, a merchant of Camden, Arkansas, purporting to be signed by Will Blakely. At the time of the trial the State did not produce the instrument, but proved its contents by George Gordon and Will Blakely, and also proved by them that the defendant uttered the forged order in Ouachita County, Arkansas, within three years prior to the finding of the indictment.

As a foundation for the admission of the testimony of George Gordon and Will Blakely as to the contents of the alleged forged order, the State proved by the clerk of Ouachita Circuit Court that it was the custom of the prosecuting attorney in office at the time the indictment in the present case was returned to pin orders such as the one in the instant case in the grand jury book and that the grand jury book was kept in the office of the circuit clerk; that the circuit clerk made a diligent search in his office for the grand jury book and the order in question, and has not been able to find it.

The present prosecuting attorney testified that, together with the circuit clerk, he made a diligent search

for the grand jury book and the alleged forged order; that he made a special trip to El Dorado to see the prosecuting attorney who drew the indictment and was unable to locate the grand jury book, or the alleged forged order after having made a diligent search for the same. On cross-examination, the prosecuting attorney testified that he searched fairly thoroughly through a plunder room of the office of the attorneys for the defendant, and was unable to find anything that looked like the grand jury book or the alleged forged order in question. The prosecuting attorney testified that he had gone to considerable expense, and had made a diligent search for the alleged forged order and had been unable to find the same.

At the trial the defendant made objections to the admission of the testimony of Gordon and Blakely as to the contents of the alleged forged order on the ground that there was no proof of diligent search or of the loss or destruction of the original. The proof of loss of the alleged forged order being a matter preliminary to the admission of the oral testimony of Geoge Gordon and Will Blakely as to its contents, the question of the sufficiency of the evidence was for the trial court, and of course the testimony offered on that question is subject to review on appeal. In order to show loss of the alleged instrument, it was necessary to prove that a diligent search had been made for it where it was most likely to be found. There is no general rule as to the degree of diligence in making the search; but the prosecuting attorney who alleged the loss was expected to show "that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." *Wilburn* v. *State,* 60 Ark. 141, and *Simpson & Co.* v. *Dall,* 3 Wall. (U. S.) 460.

In the Wilburn case the court said that the diligence exercised did not measure up to the standard laid down above. In that case the indictment charged the defendant

with falsely pretending that he was the owner of a certain growing crop of cotton and corn. The defendant claimed that the court erred in allowing proof of the contents of a rent note executed to him, on the ground that the loss of the note had not been sufficiently established. On this point, it was shown that the prosecuting attorney had, about an hour before the trial, gone to the persons supposed to have the rent note in their possession and asked them to make a search for it. As thorough search as could be made in the limited time was made, but the witness could not say that a thorough search had been made. In fact, he stated that the note must be among the papers of the firm, and that by further search they might possibly find it.

In the present case a thorough search was made for the instrument in the clerk's office where papers of that kind were usually kept. The prosecuting attorney also made a special trip to consult with the outgoing prosecuting attorney as to the place where the instrument might be found. He testified that he made a diligent search and went to considerable expense to find the instrument, but could not do so. As we have already seen, reasonable search is sufficient, although it does not appear that every possible search has been made. There are no circumstances tending to show in the remotest degree that the instrument has been designedly withheld. All sources of information and means of discovery which the nature of the case would naturally suggest were, in good faith, exhausted by the prosecuting attorney in trying to find the alleged forged instrument.

Under the facts disclosed by the record, we do not think the circuit court abused its discretion in finding that the instrument in question had been lost, and that secondary evidence of its contents was admissible. Hence the assignment of error that the judgment should be reversed on account of the admission of the evidence of Gordon and Blakely as to the contents of the alleged forged order is not well taken.

It is also insisted that the court erred in permitting the prosecuting attorney to testify that he had made inquiry of the outgoing prosecuting attorney as to the whereabouts of the instrument. There was no error in the action of the court in this respect. The prosecuting attorney was not permitted to testify what the former prosecuting attorney said to him about the instrument. The paper had been in the hands of the former prosecuting attorney, and it was perfectly proper for the prosecuting attorney to go to him, state the loss, and ask him where he should look for it. It was his duty to make a reasonable search for the paper in all places where it was likely to be found, and, in order to do this, it was perfectly proper for the present prosecuting attorney to go to the former prosecuting attorney and ask him about the paper and where he would be likely to find it.

No other assignments of error are urged to reverse the judgment, and, finding no error in the record, the judgment will be affirmed.

HESTER v. STATE.

Opinion delivered September 26, 1921.

1. CRIMINAL LAW—EVIDENCE—CORROBORATION OF ACCOMPLICES.—One who received goods, knowing them to have been burglariously stolen, is an accomplice within the statutory rule requiring the testimony of an accomplice to be corroborated.
2. CRIMINAL LAW — RES GESTAE. — Statement of defendant's mother, made on the day following the night on which the burglary was committed, to the effect that she was glad the defendant had been at home on the night of the burglary because they could not accuse him of it, as they had done in another burglary case, was inadmissible, not being part of *res gestae.*

Appeal from Greene Circuit Court, Second Division; *R. E. L. Johnson,* Judge; reversed.

Jeff Bratton and *W. W. Bandy,* for appellant.

1. The declaration as to appellant's whereabouts on the night of the burglary, made by his mother immedi-

ately after her husband on the next day reported the occurrence of the burglary, was competent. This exclamation was *res gestae* of the evidentiary fact of her remembrance as to where he was at the time the crime was committed, his whereabouts at that time being the ultimate, or principal, fact to be proved. Corpus Juris, vol. 22, p. 449; 88 S. W. 212, 215; 48 Ark. 333; 17 Cyc., 795.

2. The testimony of the witness Bill Woods, to the effect that after the burglary Cole, in the absence of the appellant, told him who committed the burglary, and that appellant was one of them, was pure hearsay, and not admissible. 73 Ark. 146; 141 Ark. 170; 143 Ark. 315; 37 Ark. 84; 63 Ark. 457.

3. The court erred in refusing to declare, as a matter of law, that the witness, Wood, was an accomplice. At least, the question should have been submitted to the jury. 139 Ark. 385. The evidence shows unmistakably that he was an accessory after the fact, and, therefore, an accomplice; but, if there was any dispute, the question should have been submitted to the jury. 51 Ark. 115; 111 Ark. 299; *Terry and Cornall* v. *State,* ms. op.; Corpus Juris, vol. 16, pp. 139, 670; 130 Ark. 353; 128 *Id.* 452; 63 *Id.* 457; 125 S. W. 16; 36 Ark. 126.

4. The jury should have been instructed not to consider the testimony of the witnesses, Cole and Spillman, as being corroborative each of the other. 51 Ark. 115; 43 *Id.* 369.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. The remark of appellant's mother in conversation at the table the next day after the perpetration of the crime was not a part of the *res gestae.* 1. Wharton on Evidence, §259; 69 Ark. 648; 85 *Id.* 300; 114 *Id.* 267; 138 *Id.* 517; 217 S. W. 482.

2. Conceded that it would have been improper for Woods to testify that appellant was one of the parties implicated in the crime, but Woods did not so testify.

3. On the question as to Woods being an accomplice, the court was correct in its rulings. The test as to whether a witness is an accomplice is whether he could himself have been indicted for the offense either as principal or accessory. 1 R .C. L. § 3, p. 157; 12 Cyc. 445, 446; 16 Corpus Juris, p. 671. Appellant was tried and convicted, not on the larceny charge, but only for burglary. Woods might have been an accomplice of Cole, and still not be an accomplice of appellant. C. & M. Digest, § 2432; *Id.* § 2483; *Id.* § 2495; 1 R. C. L. § 3, pp. 157, 158; *Id.* § 5, p. 159; 132 Ky. 666, 117 S. W. 253; 136 A. S. R. 192, 19 Ann. Cas. 140 and note; 18 S. D. 1, 98 N. W. 171; 5 Ann. Cas. 760 and note. See also 16 Corpus Juris, p. 672.. This testimony, if believed, sufficiently corroborated the testimony of Cole and Spillman to warrant conviction of appellant for burglary. 36 Ark. 653; 32 *Id.* 220.

HART, J. Ray Hester prosecutes this appeal to reverse a judgment of conviction against him for the crime of burglary.

The first assignment of error is that the court erred in not telling the jury that Bill Woods was an accomplice, and that his testimony required corroboration in order to convict the defendant.

Among the witnesses for the State were Walter Cole, Bill Woods, and Gilbert Spillman. Walter Cole and Gilbert Spillman testified that they, in company with Ray Hester, broke into a mercantile establishment in Paragould, Greene County, Arkansas, in April, 1920, in the night time and took therefrom silk shirts, silk hose, shoes, underwear, collars and neckties, worth between $2,000 and $3,000.

Walter Cole testified that they hid the goods under a certain house on the night the burglary was committed; that he told Bill Woods about the burglary before the goods were divided; that he also talked with Bill Woods about the burglary after the goods had been divided; that Bill Woods agreed to help him take his share of the stolen goods to Oklahoma; that they placed the stolen

goods in grips and that he and Bill Woods started to Oklahoma and were arrested soon after they started, and that Bill Woods had part of the stolen goods in his grip at the time he was arrested.

Bill Woods testified that, in a few days after the burglary was committed, Walter Cole told him that Ray Hester, Gilbert Spillman and himself had committed the burglary; that soon afterward witness asked Ray Hester if they had divided the goods, and Hester replied that they had, and that some one had stolen his part. Witness then agreed with Walter Cole to help him carry his part of the stolen goods to Oklahoma for the purpose of disposing of them. Walter Cole and Bill Woods then started to Oklahoma, each carrying a grip with part of the stolen goods in it. Witness knew that the goods had been stolen at the time the storehouse in question was burglarized in Paragould, Arkansas, and he was going with Cole to Oklahoma to help him dispose of his share of them at the time they were arrested.

The court instructed the jury that Walter Cole and Gilbert Spillman were accomplices of the defendant in the burglary, but refused to instruct them that Bill Woods was also an accomplice, and that there could be no conviction upon his uncorroborated testimony.

This raises the question of whether or not the failure of the court to charge that Bill Woods was an accomplice, and that under the statutes his testimony required corroboration, calls for a reversal of the judgment. The word, "accomplice," as used in our statute requiring corroboration, has been construed by the court to include an accessory after the fact. *Edmondson* v. *State,* 51 Ark. 11, and *Stevens* v. *State,* 111 Ark. 299.

But it is insisted by the State that the receiver of stolen goods is not an accomplice of the person committing burglary at the time the goods are stolen. There is a division of the authority in other States on this question. In *Murphy* v. *State,* 130 Ark. 353, the defendant

was charged with the crime of larceny, and it appeared from the testimony that he had delivered some of the stolen goods to one "C." This court held that it was the duty of the court to tell the jury that if "C." received the stolen goods with knowledge that they were stolen, she was an accomplice, and a conviction could not be had unless her testimony was corroborated in the manner provided in the statute.

In the light of the authorities cited, it follows that Bill Woods was an accomplice of the person committing the burglary, so that the conviction of the one can not be sustained on the uncorroborated testimony of the other. In this case it is not shown that the witness, Bill Woods, participated in the original taking, but it is not questioned that he received a part of the stolen goods, knowing they were stolen, for the purpose of helping dispose of the same. Thus the undisputed evidence places him in the attitude of an accomplice, and it was reversible error on the part of the trial court not to charge the jury on accomplice's testimony in the manner provided in the statute.

In view of a new trial, it is thought advisable to consider one other alleged error. It pertains to the refusal of the court to permit the mother of the defendant to give certain testimony in support of his defense of an alibi. On the day following the night of the burglary, the father of the defendant came home and reported the fact of the burglary to his family at the dinner table. The defendant offered to prove that his mother at once stated that she was glad the defendant had been at home on the night of the burglary because they could not accuse him of it, as they had done in the Bertig burglary.

It is claimed that this statement made by the mother of the defendant was a part of the *res gestae,* and should have been admitted in evidence. We do not agree with counsel in this contention. The burglary had been committed on the preceding night and the stolen goods had

been hidden. The statement of the mother had no connection whatever with the burglary and could not be said in any manner to be associated with it. It was simply an utterance on her part relative to a past transaction and constituted no part of the *res gestae*. *Elder* v. *State*, 69 Ark. 648, and *Spivey* v. *State*, 114 Ark. 267.

The mother of the defendant was permitted to testify that her son was at home on the night the burglary was committed and to give in full her reason for recollecting that he was there on that night. This was as far as she was entitled to go, and the trial court committed no error in refusing the excluded testimony just referred to.

For the error in refusing to tell the jury that the witness, Bill Woods, was an accomplice and charge the jury on an accomplice's testimony in the manner provided by the statute, the judgment must be reversed, and the cause will be remanded for a new trial.

WOOD v. STATE.

Opinion delivered September 26, 1921.

CRIMINAL LAW — HARMLESS ERROR.—In a prosecution for murder, defendant's counsel in argument criticised the State for failure to produce the overalls of the deceased worn by him when shot, claiming that if produced they would show powder burns, whereupon the prosecuting attorney produced a pair of overalls and exhibited them to the jury. Upon objection by the defendant's attorney, the court ordered the overalls removed, which was done. *Held*, not prejudicial.

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

R. P. Hamby and *Steve Carrigan*, for appellant.

It was manifest error for the plaintiff to introduce the overalls, which had not been identified, during the closing argument. 3 Wigmore on Evidence, Sec. 1878; 1 Nott & M. C. 153; 2 N. C. Law Rep. 238; 4 S. & R. 480-482; 16 Corpus Juris, 619.

The error was prejudicial and the case should be reversed.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* for appellee.

There was no error committed by the defendant in placing the overalls, which had not been identified, before the jury during the closing argument, but if it was error, it was invited error. 129 Ark. 18; 93 Ark. 66; 104 Ark. 528; 112 Ark. 267; 122 Ark. 509; 12 Cyc. 582; 61 Ark. 157.

SMITH, J. Appellant was indicted for killing Tom Noland, and upon his trial was convicted of voluntary manslaughter, and from the judgment of the court sentencing him to the peniteniary for a period of three years and six months has prosecuted this appeal.

The parties had disagreed about the settlement of an account between them. The State contended that appellant invited Noland to come to the mill yard, where the timber had been stacked, over which the dispute had arisen, to remeasure it. That, after appellant and Noland had met at the mill yard, appellant provoked a difficulty with Noland, and shot him when no demonstration of any kind was being made against appellant, and while the parties were standing eight or ten feet apart.

Appellant contends that he went to the mill by agreement to recheck the timber in dispute. That, after he had gone with Noland to the place where the timber had been piled, they found that part of it had been removed, and that it could not be rechecked. That Noland became angry, drew his knife and opened it, and grabbed appellant in the collar with his left hand and attempted to cut appellant with the knife, but appellant broke loose from Noland's hold, and pulled his pistol, and shot Noland in his self-defense.

It is recited in the bill of exceptions "that during the closing argument of Hon. Steve Carrigan, one of the attorneys for the defendant, he argued to the jury that

if the overalls of the deceased, worn at the time he was shot, had been introduced in evidence, they would have shown powder-burn where the bullet went through them, and said, 'Why didn't they introduce them in evidence?' During the course of the argument of the Hon. O. A. Graves, who concluded the argument for the State, he referred to the argument of Mr. Carrigan with regard to the overalls, and as to whether they would show powder-burn. At this instant the prosecuting attorney unwrapped a bundle and removed therefrom a pair of overalls and walked around behind Mr. Graves and hung the overalls on the back of a chair in the presence and in front of the jury, but neither he nor Mr. Graves referred to the overalls hanging on the chair. Immediately the Hon. Steve Carrigan, one of the attorneys for defendant, arose and objected to said overalls being brought in, for the reason they had not been identified as being the overalls worn by deceased at the time he was shot, and requested the court to order said overalls removed from the courtroom, and to instruct the jury not to consider the same. Thereupon the court ordered the prosecuting attorney to remove the overalls from the presence of the jury, which he did."

No testimony had been offered by either side concerning the overalls, and they had not been offered in evidence, and the first reference made to the overalls appeared in Mr. Carrigan's argument.

It is earnestly insisted that the acts of the prosecuting attorney in producing in court a pair of overalls and exhibiting them to the jury constituted error so prejudicial that "nothing the court could have said or done at the time could shut out from the jury's view or wipe out from their minds the impression made by what they had seen with their own eyes."

In answer to this insistence it is said on behalf of the State that, if error was committed, it was invited by the conduct of appellant's counsel in making the affirma-

tive statement set out above concerning the condition of the overalls when the overalls had not been offered in evidence.

But, without deciding that question, we dispose of the assignment of error by saying that the action of the prosecuting attorney does not call for the reversal of the judgment. The overalls were not admissible in evidence because they had not been identified and had not been offered in evidence. This was the objection made by counsel for appellant, and that objection was sustained. The court ordered the prosecuting attorney to remove the overalls from the presence of the jury; and this he did.

Other exceptions were saved at the trial; but they are not discussed in the brief, and do not appear to be of sufficient importance to require discussion. Judgment affirmed.

BENSON v. STATE.

Opinion delivered September 26, 1921.

1. CRIMINAL LAW—EVIDENCE OF AUTHORSHIP OF UNSIGNED LETTER.—It was not error to refuse to permit defendant to pursue his inquiry as to the authorship of an unsigned letter, giving the information to the officers about the location of a still on defendant's farm, as the letter had performed its function in enabling the officers to locate the still, and it was immaterial who wrote it.
2. WITNESS—PLACING UNDER THE RULE.—Whether any witness or all the witnesses shall be put under the rule is addressed to the sound discretion of the trial court.
3. CRIMINAL LAW—EVIDENCE ILLEGALLY PROCURED.—The fact that evidence was obtained by means of a wrongful search of defendant's premises without a search warrant does not render it inadmissible.
4. CRIMINAL LAW—INSTRUCTION—GENERAL OBJECTION.—A general objection to an instruction is insufficient to raise the objection that it assumes the existence of a still on defendant's premises, where the purpose of the instruction was, not to tell the jury what a still was, but to declare what connection one must have with a still illegally operated to make him a party to the crime thus being operated.

5. CRIMINAL LAW—INSTRUCTION—WEIGHT OF EVIDENCE.— An instruction that the jury, in determining the guilt or innocence of the defendant, might consider certain enumerated facts, if they so found, together with all the other facts and circumstances, if any, proved, and if upon the whole case they believe him guilty, they should convict him, *held,* not objectionable as being upon the weight of the evidence.

6. CRIMINAL LAW—ADMONITION TO JURY.— An instruction urging the jury to get together, and to listen to each other's opinions, *held,* not objectionable.

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

Norwood & Alley, for appellant.

The testimony introduced was not sufficient to justify a conviction. Even if there was an indictment for conspiracy, and Briscoe was shown to have been connected with the offense, it could not be used against the defendant until there was evidence first showing the conspiracy between them. 77 Ark. 444; 78 Ark. 284; 95 Ark. 460; 87 Ark. 34.

The court erred in admitting the evidence of Tisdale, Hazel and Earl Tisdale, as to what was found on the premises of defendant, as they had no warrant, and the search and seizure was unlawful, and any evidence so obtained was unlawfully obtained and not admissible. Amendment No. 4 to Constitution of U. S.; 270 Fed. 578; 251 U. S. 385; 232 U. S. 383; 233 U. S. 481; 252 Fed. 414.

The court erred in not allowing defendant to inquire of the witness, Tisdale, who wrote the unsigned letter, giving diagram and information leading to his arrest.

The court erred in instructing the jury as to the weight of the evidence. 63 Ark. 457. Instructions must not assume facts which are to be determined by the jury. 58 Ark. 504; 71 Ark. 38; 48 Ark. 396.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* for appellee.

1. The evidence is legally sufficient to justify a conviction.

2. The court did not commit error in allowing the witness, Hazel, to testify relative to finding a cooling trough and piece of piping, used for a worm to a still, near a path leading from the home of defendant to the home of Briscoe. No objection being made to this testimony at the time by defendant, an objection, made for the first time on appeal, will be unavailing. 123 Ark. 66.

3. The trial court did not err in admitting the evidence of the Tisdales and Hazel, witnesses for the State, as to what they found on the premises of the appellant. 1 Greenleaf on Ev. § 254a; 157 Mass. 519, 32 N. E. 910; 165 Mass. 11, 42 N. E. 329; 166 Mass. 370, 44 N. E. 503; 192 U. S. 585; 119 U. S. 340, 30 L. Ed. 421, 7 Sup. Ct. Rep. 225; 127 U. S. 700, 32 L. Ed. 283, 8 Sup. Ct. Rep. 1204.

4. There was no error in the court's refusal to allow defendant to inquire of the witness, Tisdale, who wrote the unsigned letter giving diagram and information leading to defendant's arrest.

5. The court did not err in instructing the jury as to the weight of the evidence.

SMITH, J. Appellant was convicted of making intoxicating liquors, and has appealed. He strongly insists that the testimony is insufficient to support the verdict; that the court erred in admitting testimony and in instructing the jury and in permitting a witness named Tisdale to remain in the courtroom during the progress of the trial when other witnesses had been put under the rule.

Testimony tending to support the verdict was offered to the following effect: J. T. Tisdale, a Federal prohibition enforcement officer, received information that a still was being operated. He applied to, and received from, the sheriff of the county a diagram of appellant's premises, as Tisdale was not familiar with the roads in the section of the county where the still was supposed to

be located. Accompanying this diagram was a letter of information and directions, which was not signed. Tisdale went to appellant's home, and found appellant there with his wife. Tisdale was accompanied by his son and by one Hazel, a constable of the county. These officers searched appellant's house, and found a quart fruit jar about half or two-thirds full of moonshine whiskey. Upon further search several jars, jugs and bottles containing small quantities of whiskey were found, and still other receptacles were found which were redolent of whiskey. Before this search was made, appellant had stated that there was no whiskey in his house. The officers testified that about one hundred and twenty-five yards from appellant's residence and on his farm they found a cave which contained a still or where a still had been. The place was afire and had evidently been burning for some hours. They found there six barrels of mash, some of the barrels full and others which had been burned were only partly full. The officers took appellant and his wife to the still and asked what it meant. Appellant's wife, in appellant's presence, suggested that the still had been placed there by some enemy of her husband, because he was, as she expressed it, the "law," meaning thereby that her husband was the justice of the peace for that township. She made the same suggestion in regard to the whiskey in her house. Appellant's explanation of the presence of the whiskey in his home was that a doctor had prescribed and furnished this whiskey for the use of his wife.

The field between appellant's house and the still had been freshly plowed, and there were tracks of a man and woman to and from the still and appellant's house, and there was a well-beaten path from appellant's back gate to the distillery. There were fresh wagon tracks from appellant's barn gate to the still, and appellant admitted he had made these tracks doing some hauling the day before.

The officers also observed that a sweetgum bush had been cut about four feet from the distillery walls. They

also saw in appellant's smokehouse three one-gallon jugs, each containing a little whiskey, and these jugs each contained a stopper made from a sweetgum bush of a size corresponding to the piece that was cut out of the bush near the distillery.

Tisdale testified that, as a prohibition enforcement officer, he had raided or captured about five hundred stills, and was familiar with the manufacture of whiskey, and that the mash or beer found at appellant's place was intoxicating and ready to run. The officers further testified that some of the mash or beer that was found at the still had been boiled off or run through the still.

Hazel, the constable, testified that he found, between the homes of appellant and one Briscoe, which were about half-a-mile apart, a cooling trough and pipe bent for a worm for a still, and that a trail led from appellant's home to Briscoe's house. The trough and piping were found about fifty or seventy-five yards from this path and about half a mile from appellant's house.

Objections were made to the admission of most of this testimony. But we think it was all competent, and that it established the existence of a partly dismantled still, and we think the jury was warranted in drawing the inference that whiskey had been manufactured at this still, and that appellant was a party to the operation of the still. It may be further added that Briscoe was the stepson and tenant of appellant.

Appellant offered the explanation that the excavation in the side of the hill—which the officers designate as a still—had been made while he was prospecting for ore, and he offered testimony tending to show that no whiskey had been made on his place, and that, if any had been made, it had been done without his knowledge or consent. The verdict of the jury reflects the fact, however, that this testimony was not credited by the jury.

Appellant was not permitted to pursue his inquiry as to the authorship of the unsigned letter giving infor-

mation to the officers about the location of the still. He excepted to the ruling of the court on the ground that, if he had been permitted to pursue the inquiry as to the authorship of the letter, he might have ascertained who his enemies were. No error was committed in this respect, as the only purpose of the letter was to enable its possessor to locate the premises. It performed that function, and it was immaterial who wrote it.

Exceptions were saved to the refusal of the court to put the witness, Tisdale, under the rule along with the other witnesses.

In the case of *Oakes* v. *State,* 135 Ark. 221, 229, one Claude Duty, an attorney, had been specially employed to aid in the prosecution of the case then on trial. He was not placed under the rule as the other witnesses had been, and objection was made to his testimony on that account. We there disposed of the question by saying: "The question as to whether any witness, or all the witnesses, shall be put under the rule is one that addresses itself to the sound discretion of the court, and that discretion was not abused in permitting Duty to testify. Kirby's Digest, § 3142; *Vance* v. *State,* 70 Ark. 272; *Hlass* v. *Fulford,* 77 Ark. 603; *St. L., I. M. & S. Ry. Co.* v. *Pate,* 90 Ark. 135."

Tisdale made the search without a warrant, or other process, from any court specially authorizing him so to do. It is insisted, therefore, that, as the search was illegally made, any evidence of guilt thus discovered was inadmissible in evidence. The authorities are against appellant on this proposition. Without inquiring or deciding what right Tisdale had to search appellant's premises, it suffices to say that the evidence of appellant's guilt thus discovered is not rendered inadmissible because Tisdale may have been a trespasser.

At page 2955 of volume 3 of Wigmore on Evidence, in the chapter on "Rules of Extrinsic Policy," Professor Wigmore says: "For these reasons it has long been established that the admissibility of evidence is not affected

by the illegality of the means through which the party has been enabled to obtain the evidence. The illegality is by no means condoned; it is merely ignored." *Starchman* v. *State,* 62 Ark. 238. See, also, 8 R. C. L., p. 196; 24 R. C. L., § 22 of the article on Search and Seizure; 10 R. C. L., § 97 of the article on Evidence, and cases cited in the notes. See, also, numerous cases cited in the brief of the Attorney General.

Among other instructions given by the court was one numbered 2, which reads as follows:

"It is not necessary that you should find that the defendant was the owner of the still, or that he was receiving any pay for his services. It is sufficient if you find beyond a reasonable doubt that the defendant aided, abetted, encouraged or advised the manufacture of intoxicating liquors, or being present was ready and consenting to aid and abet in its manufacture, or was interested in its manufacture."

Only a general objection was made to this instruction, and it is now specifically objected that the instruction assumes that there was a still. We think the objection comes too late. It was not the purpose of this instruction to tell the jury what constituted a still, but its purpose was to declare as a matter of law what connection one must have with a still being illegally operated to make him a party to the crime thus being committed. The general objection was not, therefore, sufficient to raise the question now presented. *Miller* v. *Fort Smith Light & Traction Co.,* 136 Ark. 272.

After having had the case under consideration for some time the jury returned into court for further instructions, whereupon the court orally charged the jury in part as follows:

"In determining the guilt or innocence of the defendant, the jury has a right to take into consideration the fact that moonshine whiskey was found; the fact that a still was found near his home, if they so found; the

fact that a path led to the same, if they so found; the fact that containers, containing small amounts of whiskey, were found in his possession, if they so found, and that the same was upon his enclosure, if they so find; together with all other facts and circumstances, if any, proved. And if, upon the whole case, you believe him guilty, you will convict him."

A general objection was made to the instruction at the time, and it is now insisted that it was erroneous as being a charge on the sufficiency of the evidence.

It will be observed that all the facts stated are recited hypothetically except the fact that moonshine whiskey was found (a fact which was not denied); but the court did not tell the jury that the facts there mentioned were sufficient, if true, to warrant a conviction. Nor did the court limit the consideration of the jury to those facts alone. On the contrary, the court told the jury to consider all the facts and circumstances proved in the case and to thus make up their verdict.

A very similar contention was disposed of by this court in the case of *Hogue* v. *State*, 93 Ark. 316, where it was said: "The practice of framing separate instructions on distinct circumstances, and thus, as it is said, singling them out, is not commendable, and it has been held by this court in several decisions that it is not error to refuse such instructions. *Carpenter* v. *State*, 62 Ark. 286; *Ince* v. *State*, 77 Ark. 418. But the giving of such an instruction is not prejudicial error where the court in the whole charge directs the jury to consider all the facts and circumstances proved in the case, and especially where, as in this case, the court instructs that 'the facts and circumtsances in evidence shall be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence."

It is finally insisted that in the oral charge to the jury the court erred in its admonition to the jury to "get together" on a verdict. The language complained of

reads as follows: "Now, I want to say this: I have not inquired of you how you stand, or anything about it; but this is an important case to Mr. Benson, and an important case to your county, and you gentlemen have absolutely no interest in the matter, and you do not know anything about the matter; and I want you to get together. Some times we find a juryman, or anybody else in life, that says a horse is sixteen feet high, and they want to stand by it, right or wrong. It shows good judgment for a juryman to listen to his fellow-jurors in giving their opinion." The insistence is that the effect of the court's admonition was to advise the individual jurors to make such sacrifice of their individual opinions as might be necessary to arrive at a verdict.

The court, of course, can not give any such direction. But we do not think the instruction susceptible of that construction. In the case of *St. L., I. M. & S. Ry. Co.* v. *Carter*, 111 Ark. 272, 282, we said: "The rule is well settled in this State that the trial court may detail to the jury the ills attendant on a disagreement and the importance of coming to an agreement. The trial judge should not, by threat or entreaty, attempt to influence the jury to reach a verdict. He should not, by word or act, intimate that they should arrive at a verdict which is not the result of their free and voluntary opinion, and which is not consistent with their conscience. He may, however, warn them not to be stubborn and to lay aside all pride of opinion and to consult with each other and give due regard and weight to the opinion of their fellow-jurors." See, also, *Mallory* v. *State,* 141 Ark. 496, 500, 503; *Reed* v. *Rogers,* 134 Ark. 528, 534; *Whitley* v. *State,* 114 Ark. 243; *Jackson* v. *State,* 94 Ark. 169, 174, 175; *Southern Ins. Co.* v. *White,* 58 Ark. 277, 282.

We think the oral instruction did not transcend the trial court's right and duty as thus defined.

No error appearing, the judgment is affirmed.

AVEY v. STATE.

Opinion delivered September 26, 1921.

1. CRIMINAL LAW—CHANGE OF VENUE—DISCRETION OF COURT.— Upon an application for a change of venue in a criminal case upon the ground that the minds of the inhabitants of the county are so prejudiced against defendant that a fair and impartial trial cannot be had therein, it was not an abuse of discretion to deny the application where the affiants were advised as to the state of public sentiment in only 8 of the 24 townships in the county.
2. WITNESS—CROSS-EXAMINATION—IMPEACHMENT.—While a witness who is cross-examined as to a collateral matter cannot be contradicted, if a witness for the defense in a murder case denied any illicit relationship with the defendant, and such relationship, if established, would tend to prove a motive for the killing, such witness may be contradicted, as proof of a motive is not a collateral matter.

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

E. G. Mitchell, Earl C. Casey, Samuel M. Casey, for appellant.

Appellant's petition for change of venue, supported by witnesses who testified as to the state of feeling in regard to him, coming from parties who showed a knowledge of such feeling existing in at least three-fourths of the county, should have been granted. 98 Ark. 139; 121 Ark. 390; 95 Ark.; 83 Ark. 36; 80 Ark. 360.

The purpose of examining the supporting witnesses is not to determine whether or not the accused can obtain a fair trial but to ascertain the credibility of the supporting witnesses. 120 Ark. 302.

Because the witnesses could not remember the names of all the persons to whom they talked about the case does not detract from the value of their testimony. 98 Ark. 139.

It is not necessary to show beyond a reasonable doubt or even by a preponderance of the evidence that a fair and impartial trial cannot be had, to obtain a change of venue, but same should be granted if the show-

ing is such as to raise a reasonable apprehension that the defendant cannot receive a fair trial. 16 C. J. p. 215; 262 Ill. 411, 104 N. E. 804, Ann. Cas. 1915 A. P. 1171.

It was error for the court to give instruction No. 19. Also to allow the impeachment of the witness Vada Avey and the defendant himself upon a collateral matter. C. & M. Digest, § 4187. A witness cannot be impeached by proof of specific acts of immorality, nor as to immaterial collateral matters. 53 Ark. 387; 91 *Id.* 555; 76 *Id.* 366; 120 *Id.* 458; 100 *Id.* 321; 132 *Id.* 522; 99 *Id.* 604; 101 *Id.* 147; *Powell* v. *State,* ms. op.

Bad character of the accused cannot be resorted to from which to infer guilt. 88 Ark. 261.

As to the test of whether a fact inquired into on cross examination is collateral, see 99 Ark. 616.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

The refusal of a motion for a change of venue, after hearing of testimony bearing on the credibility of the persons making supporting affidavit, is in the sound discretion of the court. 85 Ark. 536; 121 Ark. 302. The subscribing witnesses must have fairly accurate information concerning the state of mind of the inhabitants of the entire county toward defendant. Here the witnesses only showed such knowledge in eight of the twenty-four townships in the county.

Unless the trial court abuses its discretion in overruling motion for change of venue, the order is conclusive on appeal. 95 Ark. 239; 98 Ark. 139; 100 Ark. 301.

Testimony of the immoral conduct of the defendant and Vada Avey was not introduced for the purpose of impeaching them but to show a motive for the crime, and is not a collateral issue. 144 Fed. 14, 18, 75 C. C. A. 172, 7 Ann. Cas. 62.

Motive is an inferential fact, and may be inferred, not merely from the attendant and surrounding circum-

stances, but, in conjunction with these, all previous occurrences having reference to and connected with the commission of the offense. 86 Pac. 43, 12 Idaho 424; 4 Sou. 686, 85 Ala. 7, 7 Am. St. Rep. 17; 71 Ark. 112.

SMITH, J. At the trial from which this appeal comes appellant was convicted of the crime of murder in the first degree for killing one Garfield Norman. He was given a life sentence in the penitentiary.

Two points are insisted upon for the reversal of the judgment of the court below. The first is that the court erred in refusing appellant a change of venue. The second is that the court erred in admitting certain testimony, and that the error was accentuated by giving an instruction covering this incompetent testimony.

The affidavit for the change of venue was made by certain residents of Stone County, the county in which the killing occurred. To ascertain the credibility of these affiants, they were examined in open court. At the conclusion of this hearing the court announced its finding and decision as follows: "Gentlemen, the law provides that when a person charged with a crime files the proper affidavit, complying with the statute, and setting out that the minds of the inhabitants of the county, in which he is charged with the crime, are so prejudiced against him that he can not obtain a fair and impartial trial, and this affidavit of two credible witnesses, that a change of venue must be granted.

"Now, the Supreme Court, in a number of cases, has defined what credible witnesses are and among these definitions, or among the holdings of the Supreme Court, they say that the witness should have a sufficient knowledge of the facts to which he has made the affidavit to be a credible witness.

"Now, the witness Foster and the witness Roberts both show that they haven't sufficient information upon which to base the facts, and the further fact that Mr. Roberts stated that he didn't intend to say that this de-

fendant couldn't get a fair and impartial trial. Mr. Foster didn't seem to understand the nature of the petition which he has signed, and he wouldn't say that the minds of the inhabitants of Stone County were prejudiced against the defendant. The witness Haley, however, has testified that in his community, that is, in Chalybeate Township, in the southeastern part of the county, such prejudice does exist. He states, however, that he hasn't been anywhere except at his own home town and to town and to mill. Now, according to my understanding, as to that section of the county, he would be a credible witness; however, as to the county at large and the feeling in the entire county he has shown no knowledge whatever. The witness Johnson, while he made an additional affidavit, shows on examination that the affidavit was prepared by one of the attorneys in the case, and then submitted to him, and he signed it. He shows that he has been nowhere but here and in Sylamore Township. The witness, Lamp, testifies to conditions on Northwest Township and Sylamore and Mountain View, the places where he has been. The witness Gower testifies that he has not been outside of Mountain View, and that he hasn't heard any one say that the defendant, Floyd Avey, can not get a fair and impartial trial in this county. The witness Herrington has heard the matter discussed in Sylamore and Northwest townships and seems to have heard very few people talk about it. The witness McGee says that the sentiment is usually against the defendant around Fox and Rushing where he has been. Now, there is no question, I think, of the witness Conditt in and around the three townships down there. Now, none of the witnesses in this case have shown a general knowledge of the conditions all over the county, and taking them all together, they have shown information—taking their affidavits and statements as true—they have shown more or less general knowledge of the conditions and of the prejudice existing in, I believe, all together they have shown the conditions in eight townships or communities in the county.

"I don't feel that unless a more general knowledge of the conditions existing in the county is shown—there being twenty-four townships in the county—that I would be authorized to grant this motion for a change of venue, and I would have to overrule it."

It appears from the court's statement that he was properly advised as to his duty and as to appellant's rights in the premises. The court limited the inquiry to an ascertainment of the credibility of the affiants as that term has been defined in frequent decisions of this court. He found the fact to be that these affiants, combined, were advised as to the state of public sentiment in only eight of the twenty-four townships in the county, and that, with information thus limited, they were not credible persons within the meaning of the statute when they made an affidavit embracing and including the entire county. We can not say that the court abused the discretion it was required to exercise in passing upon this question, nor can we say that he so far misapplied the testimony that his judgment must be reversed on that account. *Speer* v. *State,* 130 Ark. 457; *Hopson* v. *State,* 121 Ark. 87; *Dewein* v. *State,* 120 Ark. 302.

It was the theory of the State that immoral relations existed between appellant and one Vada Avey, a sixteen-year-old woman who had but recently married appellant's brother, a young man eighteen years of age, and that John Stevens, in whose home Vada Avey had been reared, sought to break up this illicit relation. Vada Avey had been living at appellant's home, working for his wife, and it was the theory of the State that he induced his younger brother to marry her.

The testimony on the part of the prosecution tended to show that appellant and Vada Avey left home in the morning, and remained together until about 3 o'clock in the afternoon, at which time the killing occurred, and that they had traveled only a few miles during this time. Appellant and Mrs. Avey were riding double on a horse, appellant being in front and Mrs. Avey behind,

While thus traveling, they met John Stevens and his son Garland, who were riding horseback and traveling in company with Roy and Zed Satterfield and Garfield Norman. When the parties met, Stevens said to Vada Avey, "Get down, I want to talk to you a minute." She answered, "No, Uncle John, I don't want to get down." But Stevens was insistent, and she dismounted. Appellant also dismounted. Thereafter the testimony is in sharpest conflict. According to the testimony on behalf of the State, appellant shot Stevens without any provocation except that he had been intercepted with Vada Avey, and an attempt was being made to induce her to leave him; and, further, that, after shooting Stevens, appellant turned on Norman, who begged for his life and assured appellant that he was his friend, but Norman was also killed. So far as the killing of Norman is concerned, the State's theory is that this was done to prevent Norman from being a witness against appellant for killing Stevens.

Vada Avey gave testimony favorable to appellant and tending to show that the killings were done in self-defense. Upon her cross-examination, she was asked if she was not appellant's mistress. This she denied. She was then asked if she had not slept with appellant at the home of Mrs. Wallace on a certain night. This she also denied. Thereafter the State called Mrs. Wallace and a Mrs. Brewer and proved by each of them, over appellant's objection, that they had seen appellant and Vada Avey in his bed together at Mrs. Wallace's house on the occasion about which Vada Avey had been asked. In instructing the jury the court referred to this testimony, and told the jury that their consideration of it should be limited to the determination of the existence of a motive, and that, if it did not tend to show the existence of a motive, it would not be proper to be considered for any purpose.

It is the insistence of learned counsel for appellant that the relationship of appellant with Vada Avey was

a collateral matter, and that, if it was proper to ask her at all concerning this relationship on her cross-examination to impeach her as a witness, her answer, whether true or false, was conclusive of the question so far as that trial was concerned.

This would be true if the relationship between Vada Avey and appellant was in fact a collateral matter, and the only purpose of the inquiry had been to impeach her character as a witness. But there was a deeper purpose, to-wit, the proof of a motive for the killing, and the proof of motive is not a collateral matter. *McCain* v. *State,* 129 Ark. 75.

This court has many times held that the State is not required to prove a motive to establish the guilt of one accused of homicide; but the court has also held that, as the absence of a motive is a circumstance tending to show innocence, the State may show the existence of a motive for taking the life of a decedent to be considered with other facts and circumstances in determining the guilt or innocence of the accused. *Hogue* v. *State,* 92 Ark. 323; *Walker* v. *State,* 138 Ark. 517, 528, 529; *Scott* v. *State,* 109 Ark. 391; *Ince* v. *State,* 77 Ark. 418; *Stokes* v. *State,* 71 Ark. 112, 116, 117.

No error appearing, the judgment is affirmed.

BRISCOE v. STATE.

Opinion delivered September 26, 1921.

1. CRIMINAL LAW—EVIDENCE ILLEGALLY PROCURED.— The fact that evidence was obtained by means of a wrongful search of defendant's premises without a search warrant does not render it inadmissible.
2. WITNESSES—PLACING UNDER THE RULE.—Whether witnesses shall be placed under the rule is a matter addressed to the sound discretion of the court.
3. CRIMINAL LAW—EVIDENCE.— It was error to permit an officer in a prosecution for manufacturing intoxicating liquors, after testifying that he found a dismantled still on defendant's premises, to testify further that it had been his experience that persons engaged in illicit distilling generally dismantle their stills after a run had been completed.

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

Norwood & Alley, for appellant.

It being admitted that the officers, Tisdale and Hazel, had no warrant authorizing them to search the premises of the appellant and Benson, it was error to permit them to testify as to what they found as the result of such illegal search, and to admit evidence of anything found at Benson's or of anything he said. Amendment No. 4, Constitution, U. S.; 116 U. S. 616; *Id.* 746; 232 *Id.* 652; *Id.* 383; 270 Fed. 578; 233 *Id.* 481; 263 *Id.* 113.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. Exceptions saved to the giving of instructions without first having objected thereto and sustained an adverse ruling by the court on the objection, afford no ground for review of the instructions on appeal. 129 Ark. 316; 96 Ark. 52. An objection that an instruction assumed a fact or facts as proved, and is misleading for that reason, will not be considered on appeal unless specific objection was made at the time the instruction was given. 111 Ark. 196; 136 *Id.* 272.

2. Since the defendant testified in his own behalf, it was not reversible error to instruct the jury that he had that right and that they should give his testimony the same fair and impartial consideration they would give to the testimony of other witnesses, but that in weighing his testimony they should consider that he was the defendant and interested in the result of their verdict; that they were not blindly to accept it as true, but should consider whether it was true and made in good faith, etc. 58 Ark. 362.

3. The instructions given are to be considered as a whole and as declaring the law of the case. 123 Ark. 583; 109 Ark. 378.

4. There was no abuse of discretion in allowing the witnesses, Tisdale and Hazel, to remain in the court room after the witness had been put under the rule. 90 Ark. 135; 93 *Id.* 141; C. & M. Digest, §4191.

5. The testimony of witnesses Tisdale and Hazel was not rendered incompetent or inadmissible, even if their search was made without a warrant. 62 Ark. 538; 1 Greenleaf on Ev. §254a; 192 U. S. 585; 157 Mass. 519, 32 N. E. 910; 165 Mass. 11, 42 N. E. 329; 166 Mass. 370; 44 N. E. 503; 162 U. S. 585; 119 U. S. 436, 3 L. Ed. 421, 7 Sup. Ct. Rep. 226; 127 U. S. 700, 32 L. Ed. 283, 8 Sup. Ct. Rep. 1204.

6. An assignment of error based on the exclusion of testimony will not be considered on appeal where there was no offer to show what the witness would have testified. 88 Ark. 562; 87 *Id.* 123; 133 Ark. 599.

7. It was within the discretion of the court as to whether or not the jury would be permitted to view the premises, and the refusal of such permission was not error. 114 Ark. 243; 26 R. C. L. 1017.

HUMPHREYS, J. This is an appeal from a judgment of conviction and sentence to the penitentiary for one year of appellant, for manufacturing and being interested in the manufacture of ardent, vinous, malt, fermented, intoxicating, spirituous and alcoholic liquor. Appellant was convicted upon circumstantial evidence J. T. Tisdale, a United States Government prohibition enforcement officer, being informed that appellant was interested in operating a still in Polk County, met appellant on the highway, near appellant's home, and searched his person, and found a pint of moonshine whiskey in his pocket, then proceeded to search appellant's home, and found nearly a gallon of moonshine liquor, also several pint bottles on a table, containing small amounts of it, also two sacks of sprouted or malt-corn in the smokehouse, also a number of fruit jars containing small amounts of whiskey, also a small joint of copper piping,

for use as a worm in the manufacture of whiskey, in the trunk of a Mr. Williams, a joint cropper of appellant; also found, some half mile from appellant's house, in the woods, a pipe bent in the shape of an "S" which had been used as a worm for a still, together with a cooling trough, which had been recently deposited there; also found, in a field at the Benson home, near appellant's, which was cultivated by appellant and Williams, a pit or cave covered with rib poles and shingles, which contained a furnace and pipe and six barrels, four large ones and two small ones, which barrels contained mash or beer, some of which had run out of the barrels on to the ground, and was a composition of distilled mash or beer. At the time the cave was discovered, the roof and entire contents thereof were on fire, and it was so hot that the revenue officer could not secure a sample of the mash or beer. Mrs. Benson was the mother of appellant, and, at the Benson home, containers were found with a small amount of moonshine whiskey in them. A distillery set or furnace was also found some fifty yards below appellant's house, which had been out of use for some time.

These and other circumstances discovered during the search of appellant's person and the homes of appellant and Benson were detailed in the trial of appellant by Tisdale and his assistants in the search. The search was made without a search warrant. In the course of the trial, J. T. Tisdale, the Government prohibition enforcement officer, was recalled for further examination and the record reflects the following occurrence:

"It has been my (Tisdale's) experience when I captured moonshine stills if they are not in operation—

Mr. Alley: "We object to that.

Court: "Go ahead."

Exceptions saved and noted.

"Usually when they get through with these mountain distilleries, they dismantle the still, and the worm, cap and boiler, if there is any, are taken away and hid; and

nine out of ten instances it is that way, and we have to make a considerable search away from the still to find them."

Mr. Alley: I object to that evidence and move to exclude it. It is nothing more than an argument in the case.

Court: "He is just giving his experience with other stills. It is not an argument. I think that it is competent to show the way these wildcat stills are generally run."

Exceptions saved and noted.

J. T. Tisdale and D. A. Hazel, a deputy sheriff who assisted Tisdale in making the search, were permitted to remain in the court room during the trial, over the objection of appellant, to which ruling of the court an exception was preserved. Appellant also preserved an exception to the ruling of the court over his objection permitting the witnesses who made the search to detail the facts and circumstances discovered during said search. Other exceptions preserved by appellant, relating to the sufficiency of the evidence and to instructions given and refused, appear in the record, but we deem it unnecessary to state them, as the case must be reversed and remanded for a new trial because incompetent evidence prejudicial to appellant was admitted.

Appellant contends that the court committed reversible error in permitting J. T. Tisdale and his associates in the search to testify to facts and circumstances discovered during the search of appellant's person, his residence and the residence of W. C. Benson. The court ruled adversely to the contention of appellant on this point in the case of *Benson* v. *State, ante* p. 633.

Again, appellant contends that the court committed reversible error in permitting J. T. Tisdale and D. A. Hazel to remain in the court room during the trial when all other witnesses had been put under the rule and ex-

cluded from the room. This point was also decided adversely to the contention of appellant in the case of *Benson* v. *State, supra.*

Appellant also contends that the court erred in permitting witness Tisdale to testify what had been his experience in capturing moonshine stills and the habits of moonshiners generally in dismantling stills when the run had been completed, and hiding the worm, cap, boiler and other parts at a distance from the still. The admission of these statements was, in effect, allowing the witness to bolster up his own evidence and calculated to give it undue effect, and, as he had testified to the circumstances and facts tending to establish the guilt of appellant, was necessarily prejudicial to him.

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

McCOOL v. STATE.

Opinion delivered September 26, 1921.

1. EMBEZZLEMENT—FAILURE OF OFFICER TO PAY OVER FUNDS.— An indictment which alleges a wilful failure of a county treasurer to pay over to his successor public funds of the county which came into his hands as such treasurer sufficiently alleges a wilful failure to pay over the county funds.
2. EMBEZZLEMENT—FAILURE TO PAY OVER FUNDS.— An indictment of a county treasurer for wilful failure to pay over county funds to his successor in office is defective in failing to allege that he had such funds when his term expired.

Appeal from Grant Circuit Court; *W. H. Evans,* Judge; reversed.

D. E. Waddell, R. R. Posey and *W. D. Brouse,* for appellant.

1. The indictment does not sufficiently describe the funds. It is not a description "in general terms" as is contemplated by the statute. C. & M. Digest, § 2836; *Id.* § 2832; *Id.* § 2835; 60 Ark. 13; 80 *Id;* 310; 99 *Id.* 32.

2. It is defective also in that it fails to allege that the funds were in the care, etc., and under the control of the appellant, at the time it is alleged he failed to pay them over. 80 Ark. 310-313; 60 *Id.* 13.

3. Instruction 1 given, was erroneous in failing to describe the funds and did not charge the jury that they must find that he had the funds in hand or under his control at the time alleged in the indictment. 63 Ark. 477; 102 *Id.* 205; *Arkansas Shortleaf Lumber Co.* v. *Wilkinson.*

4. Instruction 3, being a mere copy of the statute, was abstract and misleading. Cases *supra.*

5. It was erroneous to refuse to instruct the jury not to consider testimony as to county court record made subsequent to Jan. 1, 1919. 99 Ark. 32.

6. It was error to modify the 6th instruction requested by the defendant with reference to the demand, leaving the jury to speculate as to what was a proper demand. 83 Ark. 61; *Arkansas Shortleaf Lumber Co.* v. *Wilkinson,* 149 Ark. 270.

7. Instruction 17 should have been given as asked. Modifying it so as to let in proof that defendant had in hand or under his control public funds prior to Jan. 1, 1919, was erroneous. 80 Ark. 310.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, for appellee.

1. The indictment follows the statutes and properly alleges all the essentials of the crime. C. & M. Dig. §§ 2832, 2835, 2836. It charges but one offense. No election as to counts required. 50 Ark. 305; 60 *Id.* 13; 99 *Id.* 32. It is sufficient in alleging failure to pay over "public funds" of Grant County, without alleging the various classes of funds. Statutes and cases *supra.* The allegation "which had during his administration come to his hands as county treasurer, and which he had not lawfully paid out," sufficiently avers funds on hand Jan. 1, 1919. 80 Ark. 313.

2. Instruction 1 given by the court was correct, and clearly presented the issue as to public funds.

Instruction 3, a copy of the statute, § 2835, C. & M. Dig., was properly given in charge to the jury as a definition of the term "public funds." It does not come within the principle announced in 63 Ark. 477, cited by appellant.

There was no error in modifying appellant's requested instruction 6 with reference to the demand. Demand by the successor in office is not required. Moreover, the duty to pay over without demand is statutory. C. & M. Dig. §§ 1918, 2832. If demand is necessary, that must be made by citation. *Id.* §§ 1918, 10165 and 10166

HUMPHREYS, J. Appellant, ex-treasurer of Grant County, was indicted, tried and convicted in the Grant Circuit Court for wilfully failing, neglecting and refusing to pay over to his successor in office $7,404.04 of the public funds of Grant County, his penalty therefor being assessed at five years' imprisonment in the State penitentiary. The indictment, omitting the caption and signature, is as follows:

"The grand jury of Grant County, in the name and by the authority of the State of Arkansas, accuse E. E. McCool of the crime of failing to pay over public funds to his successor in office as county treasurer committed as follows, towit: The said E. E. McCool in the county and State aforesaid, on the 1st day of January, A. D. 1919, after having served and been the duly elected and legally qualified and acting county treasurer of Grant County, Arkansas, for three successive terms of office immediately before the said 1st day of January, 1919, and during that time had the care, custody, possession and control of the public funds of said Grant County in said State of Arkansas, and that on the 1st day of January, 1919, W. D. Mathews, after being legally elected and qualified as the successor in office as county treasurer of the said E. E. McCool and having legal authority to receive from E. E. McCool all public funds belonging to

Grant County which had been placed in the hands and possession of the said E. E. McCool as county treasurer, and after proper demand, that the said E. E. McCool did unlawfully and feloniously fail, neglect and refuse and did wilfully fail, neglect and refuse to pay over to the said W. D. Mathews as his successor in office $7,404.04 of the public funds of Grant County which had during his administration of said office come into his hands and possession as county treasurer, and which he had not lawfully paid out for the uses and purposes for which they were collected and placed in his hands and possession, but that the said E. E. McCool did unlawfully and feloniously misappropriate and embezzle the said public funds above mentioned, against the peace and dignity of the State of Arkansas.' '

Appellant demurred to the indictment upon the following grounds:

"*First.* That the statements of facts alleged in the indictment do not constitute a public offense.

"*Second.* That if the indictment does charge facts which constitute a public offense, it charges more than one public offense.

"*Third.* That the indictment does not contain a statement of facts constituting an offense in ordinary and concise language in such manner as to enable a person of common understanding to know what is intended."

The court overruled the demurrer, holding that only one offense was charged in the indictment, to-wit, wilfully failing, neglecting and refusing to pay over public funds of Grant County to appellant's successor in office, and also holding that the indictment properly alleged all the essentials of the crime charged as specified in sections 2832, 2835 and 2836 of Crawford & Moses' Digest, under which the indictment was drawn. Exceptions were properly saved, and one purpose of this appeal is to challenge the ruling of the court as to the sufficiency of the indictment in charging a wilful failure to pay over public funds to appellant's successor in office. While the statutes re-

ferred to authorize charges of either embezzlement of, or a wilful failure to pay over, public funds, the Attorney General concedes that the indictment in question does not attempt to charge embezzlement of public funds, and, after a careful reading of it, we agree with him in this regard. The sole question, therefore, as to the sufficiency of the indictment is whether it contains the necessary essentials to charge a wilful failure or omission to pay over public funds of Grant County to appellant's successor in office. Appellant contends that the indictment is fatally defective for failing to describe the kind of public funds withheld. A particular description of the kind or denomination, date or number of the funds failed or omitted to be paid over to the successor in office by a retiring officer is not necessary, but a description in general terms is necessary under the provisions of section 2836 of Crawford & Moses' Digest. It must appear from the description what funds were intended, whether county funds, municipal funds, school funds, etc. The description of the funds in this indictment is insufficient as to all funds except the county funds. We think the designation in the indictment "public funds of Grant County" necessarily means "county funds," and is a sufficient classification of that particular fund.

The indictment, however, is fatally defective in another respect. It is not alleged that any county funds were in the possession or under the control of appellant at the time his term of office expired. The gist of the charge under the statute is a wilful failure to pay over public funds under any classification in the possession or under the control of the retiring officer. If the retiring officer had misappropriated the funds before the expiration of his term of office, he should have been indicted for misappropriation or embezzlement of such funds, and not for a failure or omission to pay them over at the expiration of the term of his office. So also, under the statutes made the basis of this indictment, an ex-officer could not be prosecuted criminally if robbed of the funds or if the

funds were innocently lost in some other way. In construing section 2832 of Crawford & Moses' Digest, upon which this indictment was founded, this court said, in the case of *Davis* v. *State*, 80 Ark. 310, that (quoting the second syllabus), "An indictment of a county treasurer for failure to pay over public funds to his successor in office which alleges that on a certain date he had funds belonging to a school district, and that on a subsequent date when his term expired he failed to pay over such funds to his successor, is defective in failing to state that he had such funds when his term expired."

Under the rule announced in that case, the demurrer to this indictment should have been sustained. In this view of the case, it is unnecessary to discuss whether the evidence was sufficient to sustain the verdict or the alleged errors in giving, refusing and modifying instructions.

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

FAMOUS STORE v. LUND-MAULDIN COMPANY.

Opinion delivered September 26, 1921.

1. SALES—BREACH OF CONTRACT.— Where a contract for the sale of goods contemplated payment within 60 days after receipt of the goods, and three installments of the goods were shipped, for which the vendee failed to pay within the required time, being himself in default, he cannot insist upon the shipment by the vendor of the remainder of the goods.
2. PLEADING—AMENDMENT TO CONFORM TO PROOF.— It was not error to treat the pleading in the count below as amended to conform to proof introduced without objection.

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

H. H. Hays, for appellant.

The court erred in refusing to permit defendant to offer in evidence copy of letter to plaintiff, dated July 25th. The court erred in instructing the jury that de-

fendant was not entitled to recover on his counter claim, and in directing a verdict thereon. 9 Cyc. 732; 22 Ill. 522; 108 Ala. 508; 88 Ark. 422. The court erred in directing a verdict against defendant. 88 Ark. 372; 63 Ark. 94; 77 Ark. 556; 62 Ark. 63; 84 Ark. 57; 89 Ark. 372; 73 Ark. 561; 76 Ark. 520.

Rogers, Barber & Henry, for appellee.

The contract was severable. 88 Ark. 491. The defendant could not stand on the contract and insist on further shipments when it was in default in making payments that were past due under it, at least without tendering the payments. 88 Ark. 422.

HUMPHREYS, J. Appellee instituted suit against appellant in the Desha Circuit Court to recover $181.40 for goods, wares and merchandise sold and delivered by it to said appellant. Appellant admitted the indebtedness, but alleged by way of cross-complaint that appellee was indebted to him in the sum of $1,848 by way of damages for the failure to ship all the goods ordered from appellee.

The substance of the cross-complaint is set out in appellant's abstract, and the allegations therein are:

"That on the first day of March, 1919, N. Dollar, the appellant, ordered from Lund-Mauldin Company, the appellee, three hundred pairs of shoes, particularly described in order No. 11 and invoice No. 849, attached to the cross-complaint, and marked 'Exhibits A, B, C.'

"That the appellee, Lund-Mauldin Company, accepted said order and shipped a part thereof on the 8th day of March, 1919, and agreed to ship the balance on or about August 1, 1919, at the option of appellant, N. Dollar.

"That, immediately after the shipment of March 8, 1919, of the shoes described in invoice No. 849 (which shipment was the basis of the original complaint) the Lund-Mauldin Company notified 'The Famous Store'

that because of the advance in labor and leather they could not make shipment of the balance of the order of March 1, 1919.

"That on the 25th day of July, 1919, the first day of August, 1919, and repeatedly thereafter, shipment of the balance of the order of March 1, 1919, was requested and demanded by 'The Famous Store' and by N. Dollar.

"That the shoes so ordered, shipment of which was refused, advanced in price $7 per pair between the date of the order and August 1, 1919, and that 'The Famous Store' was forced to go into the open market to purchase shoes of the same kind, character, quality and description at an advance of $7 per pair over the contract price as fixed in the order of March 1.

"That they had sustained damages in the sum of $1,848, and prayed judgment therefor, and their cost."

The amended reply to the cross-complaint denied each and every allegation contained therein.

The record reflects that the only witness who testified in the case was N. Dollar, the cross-complainant. On direct examination, he testified, in substance, as follows:

"N. Dollar, doing business as the Famous Store, gave to the traveling salesman of the Lund-Mauldin Company, on the first day of March, 1919, an order for 288 pairs of shoes of the kind, description, size and price set out in order No. 11, exhibited with his cross-complaint, and found fully set out at pages 11, 12, 13 of the transcript:

"That 36 pairs of these shoes were to be delivered immediately, and 252 pairs were to be shipped on or about August 1.

"That the 36 pairs were shipped March 8, 1919, in one shipment of three boxes, each box containing 12 pairs, and were delivered in three separate installments, one box arriving March 14, one box May 18, and one box June 16.

"That no bill of lading, or other information showing delivery to the carrier, was furnished the appellant by the Lund-Mauldin Company. That he made repeated requests and demands upon the Lund-Mauldin Company for shipment of the 252 pairs, and that such demands began July 25, and extended to August 4 or 5, and the only reason or excuse they gave for their failure to make shipment was the advance in the price of shoes. That the purchase price of the 36 pairs shipped March 8, 1919, was not due until sixty days from the receipt of the whole shipment. That because of the failure of the Lund-Mauldin Company to make delivery of the 252 pairs, the balance of the order, the Famous Store was compelled to go into the open market to purchase shoes of the kind, description and quality ordered from appellee, and that the same were purchased at an advance of $4.50 per pair over the contract price."

On cross-examination, N. Dollar made the following responses to the following questions:

Q. The three cases for immediate shipment were shipped March 8?

A. Yes, sir; that is what the bill shows.

Q. Attached to your cross-complaint as an exhibit is this invoice (handing witness paper) that shows your goods were shipped when?

A. March 8, 1919.

Q. When was that invoice due?

A. It was due sixty days after receipt of the shoes.

Q. Within sixty days?

A. Yes, sir.

Q. The first part of your installments that you say you got on March 14, when was that due?

A. The first one?

Q. Yes; when was the first shipment due to be paid for?

A. Within sixty days after I had received the goods.

Q. You had one case in your store about March 14?

A. Yes, sir; I did.

Q. Now the second shipment, when was that due—sixty days from the date you received it, that would be July 18, would it not?

A. Yes, sir.

Q. The first case you received, according to the express receipts, March 14?

A. Yes, sir.

Q. Sixty days from that day would make it May 14?

A. Yes, sir.

Q. That was when the payment for the first shipment was due—sixty days from the day it was received.

A. Yes, sir.

Q. And the second shipment was May 18—sixty days from that time would be July 18?

A. Yes, sir.

In testifying, N. Dollar offered a copy of a letter which he wrote to appellee on July 25, which is as follows:

"July 25.

"Lund-Mauldin Company, 11th and Washington Ave., St. Louis, Mo.:

"Gentlemen: We know that there is an advance in shoes, and we are desirous of being protected on the shoes that we have under order from your house. We want you to ship these shoes C. O. D. by express at once.

"As we are needing these goods at the present time, trusting that you will give this your immediate attention, we beg to remain, Yours very truly,

"The Famous Store,

"Per....."

The court excluded the letter, to which ruling appellant objected and preserved an exception.

At the conclusion of the evidence, the court peremptorily instructed, over the objection and proper exception of appellant, that appellant was not entitled to recover on his cross-complaint, and directed the jury to return a verdict for appellee upon his complaint, for the

assigned reason that the undisputed evidence reflected that appellant first breached the contract by failing to pay for goods he had received within sixty days after receiving same, and, for that reason, was not in a position to demand a shipment of the balance of the goods, and therefore not entitled to damages for the failure of appellee to ship them.

Appellant contends that the court erred in giving the peremptory instruction because, according to his version, the contract was not severable, and the evidence was not undisputed that appellee should pay the amount of each shipment within sixty days after received by appellant. While appellant testified both ways as to when the payment on the shipment of shoes received by him on March 14, May 18, and June 16 became due, when pressed, on cross-examination, he admitted that the payment for the shipment he received on March 14 fell due on May 14, and that payment for the shipment he received on May 18 fell due on July 18. After making such an admission, it does not lie in appellant's mouth to say the evidence is disputed upon that point. Appellant also stated in his evidence that his reason for refusing to pay for the first two bills of shoes received by him was because he concluded appellees was not going to carry out his contract according to agreement. Under the rule announced in *Harris Lumber Co.* v. *Wheeler Lumber Co.*, 88 Ark. 491, the contract in the instant case, as reflected by the evidence, was severable. Under the undisputed evidence in the instant case, as we view it, appellant committed the first breach of the contract and continued to breach it unto the end by failing to pay the first two installments of the purchase money within the proper time after receiving the two shipments of goods, and, being himself in default, was in no position to maintain his cross-complaint. This court said in the case of *Harris Lumber Co.* v. *Wheeler Lumber Co., supra,* that (quoting syllabi 3 and 4): "Where a vendee in a contract of sale

wilfully refused to pay an installment of the purchase money when due, the vendor was authorized to rescind the contract."

"A vendee who is himself in default in failing to pay an installment of the purchase money can not insist upon performance by the vendor as a condition precedent to his performance."

Appellant contends that he can not be held to this breach for the reason that it was not pleaded in the answer or reply to the cross-complaint. The evidence as to the breach was introduced by appellee without objection on the part of appellant. It was within the discretion of the court to allow the breach to be pleaded and to treat the pleadings as amended to conform to the evidence. Appellant did not plead surprise at the new issue injected by the evidence and ask for time to meet it. Having acquiesced in the issue and determination thereof, he can not complain for the first time in the Supreme Court.

Appellant contends that the court erred in refusing to admit the letter of July 25 in evidence. The letter was an order to ship out the balance of the goods, and its exclusion could not prejudice appellant, because he was in default in the payment of the purchase money on the orders theretofore received, and was therefore not in a position to insist upon the performance of the contract by the vendor.

No error appearing, the judgment is affirmed.

FEDERAL TRUCK & MOTORS COMPANY *v.* TOMPKINS.

Opinion delivered June 6, 1921.

EVIDENCE—ENGRAFTING PAROL WARRANTY ON WRITTEN CONTRACT.—Where a complete contract of sale in writing is unambiguous, and contains no warranty, a warranty cannot be proved by parol testimony.

Appeal from Franklin Circuit Court, Ozark District; *Jas. Cochran,* Judge; reversed.

Willard Pendergrass and *Evans & Evans,* for appellant.

1. The court erred in submitting to the jury the question of the breach of warranty. A warranty is so clearly a part of a sale where the sale is evidenced by a written contract that it is incompetent to engraft upon it a warranty by parol. 80 Ark. 505. The written contract signed by the parties was a complete contract. 80 Ark. 505 is decisive of this case. It was not competent to engraft upon it a warranty resting on parol. *Id.* 83; *Id.* 240; *Id.* 283; 94 Ark. 130.

It is not admissible to contradict or to vary or add to a written contract by parol testimony. 24 Ark. 210; 25 *Id.* 339; 30 *Id.* 186; 67 *Id.* 62; 80 *Id.* 507; 83 *Id.* 163; 86 *Id.* 162; 88 *Id.* 213; 1 Greenleaf, Ev. § 275; 140 Ark. 182. See also 142 Ark. 234. It was clearly error to admit parol testimony.

J. P. Clayton, for appellee.

80 Ark. 505 has no application here, nor have the other cases cited by appellant. The court's instruction states the law correctly. The question as to the false representations made by appellant to induce appellee to buy the truck was submitted to the jury, and their finding is conclusive that false representations were made for the purpose of selling the truck. 80 Ark. 240; 73 *Id.* 542, 60 *Id.* 387. The case was fairly submitted to the jury on the facts as proved, and the verdict is conclusive. 46 Ark. 142; 51 *Id.* 196; 56 *Id.* 314; 59 *Id.* 381. Where there is evidence to support, it will not be disturbed. 70 Ark. 513; 117 *Id.* 71. The evidence must be viewed in its strongest light in favor of the finding of the jury. 87 Ark. 101; 97 *Id.* 438.

SMITH, J. On September 7th, 1919, appellee made a contract to purchase a second-hand truck from the appellant company. By the terms of the contract $500 of the purchase price was to be paid in cash. Appellee gave his check for $100 and agreed to pay the balance of $400

when the truck was delivered to him at his place of business in Ozark. He also agreed, on delivery of the truck, to execute ten notes, each for $75, payable one every thirty days. Under the agreement, appellant company was to send the truck from Fort Smith, where the sale was made, to Ozark, but was unable to make delivery, and so notified appellee. Thereafter, on September 20th, appellee, accompanied by one Dodgins, went to Ft. Smith. Dodgins examined the truck, passed judgment upon it and approved it, and was employed by appellant company to drive the truck to Ozark. Thereupon the parties entered into the following contract:

"Original.

"Retail Car Contract.

"Fort Smith, Ark., 9/20/19.

"Federal Truck & Motors Co. (Distributor):

"Gentlemen: Please enter order for one model 1½ ton truck, second-hand, to be delivered on or about 9/20/19 (barring delays in transportation or other causes beyond our control), according to the following plan and specifications:

"Price as per contract $1250.00

"Catalogue Specifications.

"Freight from factory .....

"War tax .....

"Total $1250.00

"Total price of extra equipment:

"Deposit $500.00

"Credit $500.00

"In notes of $75 each 30 days $750.00

"It is understood and made a part of this agreement that title or ownership of car as above described, does not pass to purchaser until final cash payment is made.

"(Salesman) George W. Malecot.

"Dated: Accepted 9/20/1919, at Federal Truck & Motors Co.

"By: S. L. Tompkins (Purchaser)."

Appellee proceeded to use the truck in his business, and, after three of the notes had been paid and two others had matured, proposed to pay the balance if allowed proper discount. This proposition was not accepted, and appellee thereafter refused to make other payments, and this suit was begun in the court of a justice of the peace to enforce payment of the notes.

The case reached the circuit court on appeal, and at the trial there appellee interposed the defense of a breach of warranty. He testified that before completing the payments he discovered that the truck was worn out, and, instead of being only eight months old and in good condition as warranted, it had been in use for three years, and was about worn out. Over appellant's objection the cause was submitted to the jury on this issue, and there was a verdict and judgment in appellee's favor, from which is this appeal.

Appellee defends the judgment of the court below on the theory that he was deceived and induced, by false representations in regard to the age and condition of the truck, to make the contract. But the case was not tried or submitted on that issue. In the instructions submitting the case to the jury the court said: "The defendant admits the execution of the notes, the sale of the motor truck, but says that the truck was warranted or guaranteed to him to be in good condition and not to have been run to exceed eight months and to be as good as new. He says that it was not as good as new and it was not in good condition and it was run more than eight months, and that the warranty has proved to be false * * * *" Having thus stated the issue, the court told the jury to find for appellee if the testimony supported his contention.

The court was in error in submitting the question of warranty. The contract set out above is apparently a complete contract of sale. There appears to be no ambiguity about it requiring explanation, and no warranty is incorporated therein. In *Lower v. Hickman*, 80 Ark.

508, this court said: "A warranty is so clearly a part of a sale that where the sale is evidenced by a written instrument it is incompetent to engraft upon it a warranty proved by parol. The character of the written instrument is not important, so long as it purports to be a complete transaction of itself, and not a mere incomplete memorandum or receipt for money or part of a transaction where there are other parts of it other than warranties. It may be a complete contract signed by both parties and comprehensive and exhaustive in detail, and contain many mutual agreements, terms and stipulations, or it may be a simple bill of sale, or sale note evidencing the sale. The principle is the same in any of these transactions, and oral evidence of a warranty is almost universally excluded when a complete written instrument evidences the sale. It is not important that the instrument be signed by both parties, for acceptance of the other may be equally binding, and the principle here invoked is as often applied to unilateral as to bilateral instruments. For the statement of the principles involved and the many applications thereof see—" citing cases.

What was there said is equally applicable here. See also *Johnson* v. *Hughes*, 83 Ark. 105; *Arden Lumber Co.* v. *Henderson Iron Works*, 83 Ark. 240; *Barry-Wehmiller Machine Co.* v. *Thompson*, 83 Ark. 288; *Bradley Gin Co.* v. *Means Machinery Co.*, 94 Ark. 130; *Morris* v. *S. W. Supply Co.*, 136 Ark. 507; *Sweet Springs Milling Co.* v. *Gentry-Buchanan Co.*, 142 Ark. 234.

For the error of submitting the question of breach of warranty, the judgment is reversed, and the cause will be remanded for a new trial.

APPENDIX

OPINIONS NOT REPORTED.

Adams *v.* State; appeal from Lafayette Circuit Court; Steve Carrigan, Special Judge; affirmed Nov. 28, 1921; *per* Smith, J.

Addington *v.* Jones; appeal from Howard Circuit Court; James S. Steel, Judge; affirmed Oct. 24, 1921; *per* Humphreys, J.

Arkansas Central R. Co. *v.* McCuen; appeal from Logan Circuit Court, Northern District; James Cochran, Judge; reversed in part, November 21, 1921; *per* Hart, J.

Best *v.* State; appeal from Logan Circuit Court, Northern District; James Cochran, Judge; affirmed November 28, 1921; *per* Wood, J.

Blackburn *v.* Nichols; appeal from White Chancery Court; John E. Martineau, Chancellor; affirmed November 14, 1921; *per* Humphreys, J.

Bramble *v.* College Hill Light & Traction Co.; appeal from Miller Chancery Court; James D. Shaver, Chancellor; affirmed July 11, 1921; *per* Smith, J.

Bushmaier *v.* J. R. Watkins Med. Co.; appeal from Crawford Chancery Court; J. V. Bourland, Chancellor; affirmed Oct. 10, 1921; *per* Smith, J.

Byrkett *v.* Josephs; appeal from Lawrence Chancery Court; Lyman F. Reeder, Chancellor; affirmed Oct. 10, 1921; *per* Smith, J.

Dickson *v.* Love; appeal from Columbia Chancery Court; J. M. Barker, Chancellor; reversed Oct. 3, 1921; *per* Smith, J.

Eason *v.* Prairie Pipe Line Co.; appeal from Miller Chancery Court; James D. Shaver, Chancellor; affirmed Oct. 31, 1921; *per* Wood, J.

Erman *v.* Thomason; appeal from Mississippi Circuit Court, Osceola District; R. H. Dudley, Judge; affirmed Dec. 5, 1921; *per* McCulloch, C. J.

Ewing *v.* State; appeal from Hot Spring Circuit Court; W. H. Evans, Judge; affirmed Dec. 5, 1921; *per* McCulloch, C. J.

Hall *v.* Hall; appeal from Garland Chancery Court; O. H. Sumpter, Special Chancellor; affirmed Oct. 31, 1921; *per* Humphreys, J.

Hammett *v.* Dye; appeal from Cross Circuit Court; R. H. Dudley, Judge; affirmed October 24, 1921; *per* Hart, J.

Harmon *v.* Harmon; appeal from Crawford Chancery Court; J. V. Bourland, Chancellor; reversed December 5, 1921; *per* Smith, J.

Hatcher *v.* Ballard; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; affirmed October 17, 1921; *per* Humphreys, J.

Henricks *v.* Garroute; appeal from Crawford Circuit Court; James Cochran, Judge; reversed October 10, 1921; *per* Humphreys, J.

Hixon *v.* Boyce; appeal from Conway Circuit Court; J. T. Bul-

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J. C. Lysle Milling Co. *v.* Rumph; appeal from Ouachita Circuit Court; Chas. W. Smith, Judge; reversed May 20, 1918; *per* McCulloch, C. J.

Jones *v.* State; appeal from Lee Circuit Court; J. M. Jackson, Judge; affirmed September 29, 1919; *per* Wood, J.

Jones *v.* J. C. Stephenson Lbr. Co.; appeal from Howard Circuit Court; James S. Steel, Judge; affirmed November 7, 1921; *per* Humpheys, J.

Kansas City So. Ry. Co. *v.* Dyer; appeal from Little River Circuit court; James S. Steel, Judge; affirmed October 24, 1921.

King *v.* Wilkerson; appeal from Hot Spring Circuit Court; W. H. Evans, Judge; affirmed December 24, 1921; *per* Hart, J.

Lane *v.* Rolfe; appeal from Cross Chancery Court; A. L. Hutchins, Chancellor; judgment modified; *per* Smith, J.

McClintock *v.* Lankford; appeal from Prairie Chancery Court; John M. Elliott, Chancellor; modified November 7, 1921; *per* Smith, J.

Messer *v.* Getson; appeal from Lawrence Circuit Court, Eastern District; Dene H. Coleman, Judge; affirmed October 24, 1921 *per* McCulloch, C. J.

Missouri Pac. R. Co. *v.* Milton; appeal from Cross Circuit Court; R. H. Dudley, Judge; affirmed October 17, 1921; *per* Humphreys, J.

Norsworthy *v.* State; appeal from Cross Chancery Court; A. L. Hutchins, Chancellor; affirmed July 11, 1921; *per* Smith, J.

Rankin *v.* State; appeal from Cleveland Circuit Court; Turner Butler, Judge; affirmed October 24, 1921; *per* McCulloch, C. J.

Satterwhite *v.* Bledsoe; appeal from Hot Spring Chancery Court; Jethro P. Henderson, Chancellor; affirmed November 7, 1921; *per* Hart, J.

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Sconyers *v.* State; appeal from Jackson Circuit Court; Dene H. Coleman, Judge; affirmed December 24, 1921; *per* Humphreys, J.

Smith *v.* Arkadelphia Milling Co.; appeal from Clark Chancery Court; James D. Shaver, Chancellor; affirmed November 14, 1921; *per* Humphreys, J.

Vogler *v.* Dyer; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; reversed November 7, 1921; *per* Wood, J.

Wall *v.* Mills; appeal from Little River Circuit Court; George R. Haynie, Judge; affirmed November 15, 1920; *per* McCulloch C. J.

Wild *v.* Mehaffy, Donham & Mehaffy; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; affirmed November 28, 1921; *per* Wood, J.

Witherspoon *v.* State; appeal from Howard Circuit Court A. P. Steel, Special Judge; affirmed December 12, 1921; *per* Humphreys, J.

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