ARKANSAS REPORTS
VOL. 150

CASES DETERMINED

IN THE

Supreme Court of Arkansas

FROM

OCTOBER, 1921, TO DECEMBER, 1921,

T. D. CRAWFORD
REPORTER

PUBLISHED
BY THE
STATE OF ARKANSAS
1922

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JUN 30 1922

LITTLE ROCK
DEMOCRAT PRINTING & LITHOGRAPHIHG COMPANY
1922

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

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

MORRIS *v.* STATE.

Opinion delivered October 3, 1921.

1. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.—A new trial for newly discovered evidence will not be granted where the party moving for new trial knew of the evidence before the trial and neglected to avail himself of it at the trial.
2. WITNESSES—SELF-INCRIMINATION.—In a prosecution for assault with intent to kill, a third person could not be compelled to testify that he, and not the defendant, shot the prosecuting witness, since one could not be compelled to incriminate himself.

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

S. W. Woods, for appellant.

The motion for new trial on the ground of newly-discovered evidence should have been sustained, as it met all the requirements laid down in 2 Ark. 33.

Under our law the witness Shanks could not have been compelled to incriminate himself by his testimony in the case, but, after his expressed willingness to testify was made known to appellant, this testimony stood in the same position as newly discovered testimony.

The courts of some States have held that where several parties were jointly indicted and tried, and the defendants were not competent witnesses, and part were convicted and part acquitted, those who were convicted were entitled to a new trial, so that they could avail themselves of the testimony of the acquitted defendants. 41 Tex. 172; 19 Am. Rep. 38; 52 Tex. Crim. 465; 56 Tex. Cr. 202.

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

Appellant in his motion for new trial did not meet the requirements laid down by 2 Ark. 33. Shanks could have been put on the witness stand, and if he had there denied that he had done the shooting, under § 4186, C. & M. Digest, appellant could then have introduced various witnesses to whom Shanks had stated that he had shot Taylor. It is worthy of note that these parties to whom Shanks made his statements were all close personal friends of the appellant.

The finding made by the court, after hearing the testimony of Shanks and Ware, that the affidavits made by them were not based on the truth, should have the same sanctity as the verdict of a jury.

McCULLOCH, C. J. Appellant was convicted of the crime of assault with intent to kill, alleged to have been committed by shooting one Taylor with a gun. It is undisputed that Taylor was shot and seriously wounded as he was driving along a lonely part of the road late in the evening of March 26, 1921, returning to his home in Stone County from Mountain View, the county seat.

Taylor testified that appellant did the shooting. His statement was, in substance, that as he was driving along in a wagon he saw appellant come out into the road with a gun on his shoulder, and, after walking a short distance in the direction of the witness, he turned into the bushes, and as the witness drove by he fired the shot which took effect in the shoulder of witness. He testified that he saw appellant and recognized him as he fired the gun.

Appellant testified in his own behalf, and denied that he fired the shot or was present when the prosecuting witness received the wound. Appellant testified that he was out in the woods hunting for strayed goats, and upon hearing the shooting he went to the scene and ascertained for the first time that the witness, Taylor, had been shot. There had been previous difficulties and ill-will between the parties, and each one in his testimony

placed the blame for their troubles on the other. There was other testimony in the case bearing with more or less force on the question as to who fired the shot, but all of the direct testimony on that issue came from the two parties to the encounter, the appellant and Taylor.

After the return of the verdict appellant filed a motion for new trial, setting up, in addition to other grounds, the discovery of new evidence. It was alleged in the motion that Taylor was shot by one Shanks, and there was filed with the motion certain affidavits tending to support the claim that Shanks did the shooting. One of the affidavits was made by Shanks himself, in which he swore that he shot Taylor himself; there was also filed the affidavit of one Ware, stating that he was in the woods near the scene of the shooting and saw Shanks shoot the witness Taylor. There were also affidavits of other parties to the effect that on the night of the shooting Shanks came to a dance in the neighborhood and told them that he shot Taylor. On the trial of the motion Shanks and Ware were introduced as witnesses, and Shanks testified to the same effect as the statement in his affidavit, that he had shot Taylor and did so in self-defense, after having engaged Taylor in a conversation with reference to an alleged slanderous statement made by Taylor concerning the mother of witness. Ware testified that he was standing in the woods near a little branch or creek, and, after hearing a quarrel between the parties, he looked and saw Shanks shoot Taylor. The court overruled the motion for new trial, and in doing so stated that he knew from his own personal knowledge that appellant and his counsel were advised before the trial that Shanks claimed to have done the shooting, and also that the court did not believe that the statements of the witnesses were true.

It appears from the record that Shanks was summoned as a witness and was in attendance at the trial, and on the cross-examination of Taylor appellant's counsel asked him the question whether or not Shanks had

done the shooting. It does not appear that appellant was apprised, before the trial, of the testimony of witness Ware, but it is clear that appellant and his counsel were advised before the trial all about the claim of Shanks that he had done the shooting and his statements to that effect to numerous parties on the night of the dance. There is an entire lack of diligence which is essential before an accused can claim the benefit of another trial on account of newly discovered evidence. Shanks could not have been compelled to testify to facts which would incriminate himself (*Ex parte Butt,* 78 Ark. 262), but after appellant's conviction he volunteered his testimony and would perhaps have voluntarily testified to the facts if he had been called to the witness stand at the trial. At least, it was the duty of appellant, knowing that Shanks had openly avowed that he had done the shooting, to call the latter to the witness stand and give him an opportunity to testify. He had so freely and publicly made the statement to that effect that it was reasonable to assume that he would then as well as later have been willing to narrate the facts on the witness stand. While appellant was not apprised, so far as it appears from the record, that Ware would testify to having seen Shanks do the shooting, it was his duty to make all possible inquiry into the testimony tending to substantiate Shanks' statement that he had done the shooting. Besides this, the story told by Shanks and Ware is so improbable that the court was justified in the conclusion that the whole thing was a "frame-up" after the trial to secure appellant's acquittal and then also to secure Shanks' acquittal on the ground of self-defense. The court was therefore correct in refusing to set aside the verdict.

This is the only ground urged here for reversal of the judgment, and since we find there was no error in refusing to grant a new trial on account of newly discovered evidence, it follows that the judgment must be affirmed, and it is so ordered.

NEWLIN *v.* WEBB.

Opinion delivered October 3, 1921.

1. SALES—ORAL WARRANTY.—Where a complaint in replevin alleged the sale of five mules with reservation of title and that a note for part of the purchase money was executed reciting such reservation, and remained unpaid, with prayer for recovery of possession of the mules and for damages, an answer setting up as a counter-claim a breach of an oral warranty that the mules were free from all defects is good on demurrer; the rule prohibiting the engrafting of an oral warranty on a written contract of sale not applying, as the contract of sale was not in writing.
2. SET-OFF AND COUNTERCLAIM—RIGHT TO PLEAD IN REPLEVIN.—In an action to recover personal property and damages for its detention, defendant may interpose a counterclaim of damages for breach of warranty, and this right cannot be cut off by plaintiff's withdrawal of his claim for damages after the counterclaim was filed.
3. REPLEVIN—COUNTERCLAIM AS DEFENSE.—One sued in replevin to enforce a reservation of title until the purchase money is paid may by way of counterclaim set up a breach of warranty whereby the note which is the basis of plaintiff's right of recovery has been extinguished.

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

H. H. Hays, for appellant.

The court erred in sustaining the demurrer to the cross-complaint. Plaintiff's cause of action was not for the recovery of specific property only, but also to recover damages for the detention thereof. 135 Ark. 531.

Buckner & Golden and *E. E. Hopson,* for appellee.

If the warranty alleged in the cross-complaint had been made by the plaintiff, it merged into the written contract, and cannot be established by parol evidence tending to change the written contract. 108 Ark. 255, 261; 94 Ark. 130; 24 Ark. 210; 25 Ark. 309; 30 Ark. 186; 67 Ark. 62; 80 Ark. 507; 83 Ark. 163; 86 *Id.* 162; 88 *Id.* 213; 102 *Id.* 326; 106 *Id.* 346; 140 *Id.* 187; Greenleaf on Ev. § 275; 120 Ark. 366; 142 Ark. 234.

McCULLOCH, C. J. Appellee instituted this action against appellant in the circuit court of Desha County to recover possession of five mules and for damages for detention in the sum of $35. It is alleged in the complaint that appellee sold the mules in controversy to appellant, and that the latter executed to the former a promissory note for the sum of $500 for the balance of the purchase price, and that in said note there was a stipulation that the title to the mules should remain in appellee until the note was paid in full. The note was exhibited with the complaint. Appellant filed an answer and cross-complaint in which it was stated that the purchase price of the mules was the sum of $1850, of which $1350 was paid in cash, and that the note was executed for the balance; that in the sale of the mules appellee orally gave a warranty that each of the mules "was sound and free from any and all defects." It is further alleged that two of the mules, of the value of $800, "proved to be diseased, crippled and absolutely worthless, and that the plaintiff was informed of said facts and failed and refused to make good his warranty." The prayer of the cross-complaint is as follows:

"Defendant says that by the failure of the warranty of the plaintiff, as aforesaid, and because of the condition of the mules described, he has been damaged in the sum of eight hundred dollars, for which he prays judgment as a set-off, or counterclaim, against the demand of the plaintiff; prays that the note be satisfied in full by cancellation, and for judgment over against the plaintiff for $300, and for all other proper relief to which he may be entitled."

The court sustained a demurrer to appellant's plea, and, on failure to plead further, rendered judgment against appellant and in favor of appellee for recovery of the possession of the mules, without damages. Counsel for appellee defend the ruling of the court, first, on the ground that the contract of sale was in writing and that the writing can not be varied nor anything super-

added by proof of an oral warranty. The contract of sale was not in writing as the note for the purchase price containing reservation of title did not constitute a contract of sale. *Parrett Tractor Co.* v. *Brownfiel,* 149 Ark. 566.

It is next contended that the ruling of the court was correct, for the reason that, this being an action for the recovery of possession of personal property, a counterclaim or set-off could not be asserted. This contention is not well founded for the reason, in the first place, that the action was one not only for the recovery of personal property, but for the recovery of money as damages for detention of the property in controversy. We held in *Smith* v. *Glover,* 135 Ark. 531, that in an action for recovery of real property, where damages for detention were also sought to be recovered, the action was in part one for the recovery of money, and that a counterclaim could be pleaded. The fact that the court did not render judgment for the recovery of damages does not deprive appellant of the benefit of his counterclaim, for the admissibility of his plea must be tested by the state of the pleadings at the time same was filed. Appellant could not cut off the right to assert a counterclaim by withdrawing his claim for damages after the counterclaim was filed. Crawford & Moses' Digest, § 6236.

There is still another conclusive reason why the ruling of the court was erroneous. Appellant had the right to establish his counterclaim in order to show that the debt evidenced by the promissory note, which was the basis of appellee's right to recover the possession of the property, had been extinguished. *Ames Iron Works* v. *Rea,* 56 Ark. 450; *Ramsey* v. *Capshaw,* 71 Ark. 408; *Jones* v. *Blythe,* 138 Ark. 81. The case of *Ames Iron Works* v. *Rea, supra,* was one like this for the recovery of possession of personal property, and there was asserted a counterclaim for unliquidated damages, and Judge BATTLE, speaking for the court, said: "The right to the possession of property sued for is essential to a recovery in

actions of replevin. Any state of facts which will show the existence or nonexistence of such a right is, as a rule, pleadable in such actions. Thus, in an action of replevin by a mortgagee against the mortgagor to recover the possession of the goods mortgaged to him, the mortgagor can successfully defend the action by showing that the debt, which the mortgage was given to secure, has been paid."

For both of the reasons set out above, our conclusion is that the court erred in sustaining the demurrer to appellant's plea. The judgment is therefore reversed, and the cause remanded with directions to overrule the demurrer.

HORNOR TRANSFER COMPANY v. ABRAMS.

Opinion delivered October 3, 1921.

1. BAILMENT—NEGLIGENCE.—A bailee of goods for hire is not absolutely liable for their loss, but only for their negligent loss.
2. BAILMENT—QUESTION FOR JURY.—While the burden is on a bailee for hire who is placed in exclusive possession of the property to explain the loss before the plaintiff can be put upon proof as to negligence, where evidence was adduced by bailees tending to show that the property was lost without negligence on their part, the issue as to their negligence should have been submitted to the jury.

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

P. R. Andrews, for appellant.

The oral instruction given by the court made the defendant the absolute insurer of the safety of the goods stored, regardless of what may have happened to them, and regardless of the degree of care and diligence exercised by it, which was error.

134 Ark. 76 lays down the rule that "a bailee for hire in exclusive possession of the property must explain its loss before it devolves upon the bailor to show that it was lost through the bailee's negligence."

The loss of the property was explained as having been stolen, and it thereupon devolved upon appellee to show that it was through the bailee's negligence.

Under the court's oral instruction it was only necessary for the jury to find, before returning a verdict for plaintiff, that the goods were stored by the defendant and were afterwards lost, which was error.

R. B. Campbell and *John C. Sheffield,* for appellee.

A *prima facie* case of negligence was made against appellant, and he should have explained the loss before it devolved on appellee to show that it occurred through appellant's negligence. 134 Ark. 76; 101 Ark. 75; 6 C. J. 1158, § 160. Unless the appellant overcomes this *prima facie* case that the loss occurred through no fault of his, the appellee may prevail. 168 N. C. 31 (9 A. L. R. 557). There is absolutely no testimony in explanation of the loss; simply a denial of negligence, without any testimony as to the degree of care exercised for the protection of the goods.

Even as a gratuitous bailee some slight degree of care was necessary. 6 C. J. p. 1157, § 154.

The oral instruction was properly given, for the court must confine itself to such principles of law as are applicable to the evidence given. 14 R. C. L. p. 786, § 51. Appellant introduced no evidence explaining the loss, and, upon his failure to do so, the *prima facie* of negligence was not overcome, and the instructions of the court were proper.

McCULLOCH, C. J. This is an action instituted by the plaintiff, Mrs. Abrams, against the defendants, Hornor Transfer Company, a copartnership, to recover the value of certain articles of personal property alleged to have been received from the plaintiff by the defendants at their warehouse and which were not returned on demand. The defendants in their answer denied that they were engaged in the business of operating a warehouse

or that they received plaintiff's property in that capacity, and denied that the property was lost by reason of any negligence on the part of the defendants.

There was a sharp conflict in the testimony concerning the circumstances under which defendants received plaintiff's property and the agreement between them with respect to it. It is uncontradicted that some time during the month of January, in the year 1918, plaintiff received at Helena certain bundles or packages containing the articles in controversy, which had been shipped to her from Cincinnati, Ohio. The packages were shipped to Helena by steamboat. The defendants were agents at Helena for the steamboat company and received all consignments of freight to the city of Helena. Defendants were also engaged in the transfer business in the city of Helena, hauling goods and other property for hire. On receipt of the bill of lading and on the arrival of the goods plaintiff's husband gave the bill of lading to defendants and the goods were placed in the upper story of the elevator building, defendants having their office in the lower story.

The contention of plaintiff is that the defendants accepted the goods for hire and expressly agreed, in consideration of the payment of the charges, to keep the goods as warehousemen. On the other hand, defendants contend that they were not engaged in the warehouse business, but were merely agents for the steamboat company and were engaged in hauling for hire, and that at the request of plaintiff and merely for her accommodation, they permitted her to place the goods in the second story of the elevator building without any agreement with respect to safely keeping the same. They contended that they did not operate a warehouse there, but had permitted several persons to temporarily place goods in the second story of the elevator building, and one of the defendants testified that they kept a watchman on guard at the building and that he visited the second story of the building occasionally to see that everything was in order, and that there was no combustible matter, so as to avoid the outbreak of fire.

Plaintiff did not discover the loss of the goods until about a year after they had been placed in the building, and then made immediate demand for their return or payment, which was refused, and this suit was instituted. The property consisted of a davenport, of the alleged value of $65, a roll of bedding, towels, kitchen utensils, scarfs, chafing dish, an electric iron, and certain other articles, the whole being of the alleged value of $231.50.

The court, at the request of the defendants, submitted to the jury the question whether defendants received the property as warehousemen to keep the same for hire, or whether merely as a gratuitous bailee. The court told the jury, in an instruction given at the request of defendants, that, if they permitted the plaintiff to store the goods in the building for accommodation only, without compensation, the only duty that defendants owed the plaintiff with reference to the goods was to exercise slight degree of care in protecting the same, and that if the goods were stolen from the building while defendants were exercising such care there would be no liability. The verdict being in favor of the plaintiff, we must treat it as having settled in plaintiff's favor the question whether or not defendants received the goods as bailee for hire. But the court went further and gave the following instruction, over the objections of defendants:

"If, on the other hand, you find from the evidence in this case that the defendant company was a bailee for hire, that is, that the goods were stored by plaintiff with the defendant company and the defendant was to make a charge, or to charge for the storage of the goods, and they were lost while in the possession of the defendant company, then you will find for the plaintiff for the value of the goods, as shown by the evidence."

This instruction told the jury, in substance, it will be observed, that if the defendants were bailees for hire, and if the goods were lost while in the possession of the defendants, the latter were liable for the value of the goods. It was error, we think, to give this instruction,

for, even though the defendants were bailees for hire, they were only liable for negligence. *Bertig* v. *Norman,* 101 Ark. 75. It is true that, according to the testimony adduced, the defendants were placed in exclusive possession of the property, and it devolved upon them to explain the loss before the plaintiff could be put upon proof as to negligence. *Phoenix Cotton Oil Co.* v. *Pettus & Buford,* 134 Ark. 76. But there was evidence adduced by the defendants tending to explain the loss of the goods and also tending to show that the same were lost without negligence on the part of the defendants. In other words, there was legally sufficient evidence to warrant a submission to the jury of the question whether or not the loss was explained and occurred without fault or negligence on the part of the defendants. This being true, it was the duty of the court to submit those issues to the jury, rather than take them from the jury by the instruction given, which, in substance, told the jury that the defendants were liable if they held the goods as bailees for hire.

For the error in giving this instruction, the judgment must be reversed and the cause remanded for a new trial. It is so ordered.

HUMPHREYS, J., not participating.

PAYNE *v.* McDONALD.

Opinion delivered October 3, 1921.

1. CARRIERS—FRIGHT OF PASSENGER—QUESTION FOR JURY.—Evidence *held* to sustain a submission to the jury of the question whether defendant's train officials permitted a passenger to use violent, insulting and profane language in plaintiff's presence, without taking steps to quell the disturbance, and to make a move as if to draw a pistol, and whether plaintiff was frightened thereby and suffered a miscarriage, and received other personal injuries.
2. PLEADING—AMENDMENT TO CONFORM TO PROOF.—Where evidence tending to prove negligence was introduced, though the complaint only set forth the facts upon which a recovery was sought without incorporating a formal charge of negligence, in the absence of any claim of surprise, the complaint will be treated as amended to conform to the proof.

3. PLEADING—MOTION TO MAKE MORE DEFINITE.—In an action against a railroad company for permitting a passenger to use violent and threatening language in plaintiff's presence, causing fright and resulting in a miscarriage, the failure of the complaint to make formal charge of negligence should be reached by a motion to make more definite, and not by a motion to strike out testimony.

4. APPEAL AND ERROR—AMBIGUOUS INSTRUCTION—SPECIFIC OBJECTION.—Specific objection should be taken to ambiguous language in the court's instructions.

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

J. B. McDonough, for appellant.

The court should have directed a verdict in favor of defendant. The facts of the case bring it within the rule announced in 135 Ark. 76; 122 Ark. 516; 97 Ark. 24; 32 L. R. A. (N. S.) 529; 111 Ark. 288; 4 R. C. L. 606 to 608.

It would have been a violation of the Interstate Commerce Act to have permitted Wright, the obstreperous passenger, to ride without paying his fare. 34 U. S. St. at L. Sec. 584; Compiled Stat. U. S. 1918, Sec. 8563, par. 5; also a violation of our State law. C. & M. Digest, §§ 848, 850, 917, 919 and 1631.

While the carrier owed a duty to the passenger to protect her, yet its servants did all within their power in a gentlemanly manner to afford such protection, and the judgment should be reversed. 204 S. W. 508; 84 Ark. 194.

Norwood & Alley, for appellee.

The issues were fairly submitted to the jury, and the verdict has settled them against defendant, and on appeal such verdict will not be set aside when supported by substantial evidence. 144 Ark. 227; *Id.* 401; 143 Ark. 122; *Id.* 565; 142 Ark. 159; 13 Ark. 474; 12 Ark. 43.

The cases cited by appellant in support of his contention that a verdict should have been directed in its favor, do not support his contention.

Instruction No. 2 was properly given. 122 Ark. 521. Only a general objection was made to the instruction, whereas appellant should have pointed out his objections and offered what he considered a proper instruction. 71 Ark. 475; 87 Ark. 528; 56 Ark. 594; 69 Ark. 632.

Instruction No. 3 finds support in vol. 2, §§ 580-1-7 White on Personal Injuries on Railroads; 142 Ark. 159; 97 Ark. 28; 55 Ark. 248; 51 Ark. 459. After a general objection only was made at the trial on appeal, specific objections cannot be pointed out for the first time. 99 Ark. 226.

McCULLOCH, C. J. Appellee sued appellant, John Barton Payne, as designated agent of the Kansas City Southern Railway Company, in the circuit court of Polk County, to recover for injuries alleged to have been received while she was a passenger on a train operated on said railroad. The basis of appellee's claim is that there was a quarrel or controversy in her presence between the train auditors and a passenger, which became so violent that it excited and frightened her, and that she became seriously ill, and, being pregnant, a miscarriage subsequently resulted, as well as ill health in other respects. The answer of appellant contained appropriate denials of all the charges contained in the complaint. On a trial of the issues before a jury, there was a verdict in appellee's favor assessing damages in the sum of five hundred dollars.

One of the contentions made for reversal of the judgment is that the evidence is not sufficient to sustain the verdict. Appellee took passage on a train at Texarkana *en route* to Grannis, a station in Polk County. She had her four children with her, ranging in age from five to eleven years, and two of her children were placed in a seat across the aisle from her, and the other two occupied the seat with her. There were two train auditors, Patterson and Whitehead, the latter being a new and inexperienced man, and the former being on duty merely for the purpose of "breaking in" the new man.

There was a stop in the yards at De Queen for the purpose of setting in a new car or setting one out, and during this stop a man named Wright, who was an employee of the railroad in some capacity not shown in the record, boarded the train and entered the coach occupied by appellee. Wright met the two auditors in the aisle immediately in front of the seat occupied by appellee and presented a pass, which was found to have expired, and, on the refusal of the auditors to honor the pass, Wright drew out his union card and presented that to the auditors, claiming the right to free transportation on the faith of his union card. The auditors refused to permit Wright to ride, and the latter became angry and used boisterous language, the extent of which is controverted in the testimony. Appellee in her testimony relates the substance of the occurrence, as follows:

"A. Well, Wright got on the train and wanted Patterson to recognize his pass, and he told him it was out of date, and he couldn't ride on that, and Wright cursed him, and he stood there and let him keep on cursing him and abusing him and used very foul language, and he stood there, I suppose, fifteen or twenty minutes, maybe longer than that, just using that talk over and over until the train started out, and he taken the cash fare from Wright, and let him ride on the train, and he got so abusive until Patterson made an attempt to use a gun right between me and my little children.

Other parts of appellee's examination are as follows:

"Q. Did they pass any licks?" "A. No sir. * * *" "Q. Just state what they did?" "A. Well, they cursed, and just kept cursing and cursing." "Q. Who did?" "A. Wright." "Q. What did Patterson do?" "A. He just stood there and listened at it." "Q. Did he use any abusive language?" "A. No, I don't reckon he did." "Q. What made him start to draw his pistol?" "A. He just told him to hush, and he didn't hush, and he put his hand back in his pocket." "Q. What did you do then?" "A. I don't know what I did do." "Q. Was he close to you

when he started to shoot?" "A. Yes, sir; right at my arm." "Q. Did he make any effort to get Wright to leave the train?" "A. He just told him to get off, and he didn't do it, and he just kept standing there listening at him."

On cross-examination of appellee, the following occurred: "Q. Wright was the man that did the swearing and cursing?" "Yes, sir." "Q. You didn't hear either of the other two men swear or curse?" "A. No, sir." "Q. They didn't swear any at all?" "A. No, sir; they didn't swear." "Q. They didn't use any language of any kind in the way of insulting language?" "A. Not any profanity of any kind; just told him to get off, that he didn't want to fight dogs."

Appellee testified further concerning her fright and excitement and illness which immediately ensued and resulted in a miscarriage. The two auditors were introduced as witnesses, and each testified that they used no improper language nor made any attempt to draw a pistol, and that they were not negligent in any respect. The substance of their testimony is that when Wright presented his pass and union card, which were refused, he became obstreperous and they called the conductor, who required him to pay his fare in money, and that this ended the controversy.

We are of the opinion that the evidence was legally sufficient to warrant a submission of the issues to the jury. *Himes* v. *Rice,* 142 Ark. 159. The evidence justified a finding that Wright became obstreperous and used violent, insulting and profane language, and that the auditors, instead of quelling the disturbance and taking steps to have him ejected, negligently permitted the passenger to continue his conduct for an unreasonable length of time, and even participated in it by making a move as if to draw a pistol, and in replying to the invitation to fight by saying "they did not want to fight dogs." There is also sufficient evidence that appellee's injuries, both physical and mental, resulted from the fright, which was caused by her critical condition of pregnancy.

It is next contended very earnestly that the court erred in refusing to exclude all of the testimony of appellee which related to the conduct of Wright, the contention being that the allegations of the complaint are not sufficient to charge negligence of the train auditors in failing to repress the obstreperous conduct of Wright or cause his ejection from the train. The second paragraph of the complaint, which is the one setting forth the acts upon which recovery is sought, reads in part as follows:

"Plaintiff alleges that on the said 6th day of December, 1919, she was a passenger on one of the passenger trains of defendant, the same being known as passenger train No. 2, north-bound, and had with her four little children of her own, and that as the train was leaving De Queen, the auditor, whose name is Patterson, began taking up tickets, and approached a man named Wright for his ticket, and the said auditor and this man Wright became engaged in a dispute and almost a fight; that they cursed and abused each other in the presence of this plaintiff and in the aisle in the coach immediately between where this plaintiff was sitting and her two little children, who were seated across the aisle from her, and in this difficulty the auditor attempted to draw a pistol from his pocket, as if to shoot the man Wright, and it is the act of the auditor, together with the insulting and abusive language used by the participants engaged in this dispute, so unnerved and excited plaintiff that she became ill as a result thereof. * * *"

There was no demurrer to the complaint, and the question of the effect and sufficiency of the complaint was raised for the first time after the examination of appellee as a witness had been about completed, and a motion was made to strike out all the testimony which related to the conduct of Wright. The complaint only sets forth the facts upon which recovery is sought, without incorporating a formal charge of negligence. If it was thought that the complaint was insufficient, an objection ought to

have been made before the trial commenced. The complaint stated a cause of action, even if imperfectly so; and, if objection was raised, it should have been to make more definite and certain. Appellant's counsel cross-examined the appellee at length before making the motion to strike out the testimony, and when the motion was overruled there was no claim of surprise on account of the omission from the complaint of any specific charge of negligence with respect to the failure of the auditors to stop Wright's improper conduct. The ruling of the court was tantamount to treating the complaint as amended to conform to the proof, and, since appellant was not placed at a disadvantage by surprise, no prejudice resulted from the ruling.

The court gave the following instruction, the giving of which is assigned as error:

"In this case, if you find from the evidence that plaintiff was a passenger on the train of defendant at the time and place alleged, with her children seated across the aisle of the train from her, and that a dispute arose between the auditor of defendant and another party in the aisle and near plaintiff and her children, and that abusive or profane language was used in the dispute or difficulty, and that the auditor acted as though he was going to draw a pistol and fire on the opposing party, and you find that plaintiff became excited and scared because of this trouble, and the acts and disputes of the participants, and as a result of her becoming excited and scared, if you so find from the evidence, she suffered a miscarriage and experienced pain and suffering and injury to her health, and you so find from the evidence, you will find for plaintiff, and assess her damages at such sum as you believe from the evidence she has been damaged, not to exceed the amount sued for, provided you find the same was caused by the negligent acts of defendant or its employees."

The grounds of objection stated to the court at the time were that the evidence was insufficient to justify a

submission of the issues to the jury, and that there was no allegation in the complaint concerning the negligence of the auditors in failing to protect the appellee as a passenger, from the conduct of Wright. There were these specific objections to the instruction, but there was no objection made on the ground that the instruction did not properly submit to the jury the question of negligence of the train auditors in their conduct toward the obstreperous passenger. The instruction, it must be conceded, is not very aptly phrased, but the concluding portion of it does submit to the jury the question whether or not the conduct of the train auditors constituted negligence. If the instruction was ambiguous in its terms, there ought to have been a specific objection to it. It is too late now to criticise the instruction on account of ambiguity in its language. A specific objection, therefore, was essential in order to raise the objections now urged against it.

The same may be said with reference to the objections now made that the use of the words "dispute or difficulty" was improper. If those words were inappropriate in view of the testimony, a specific objection ought to have been made to their use.

There are other assignments of error to the rulings of the court in giving and refusing instructions, but we are of the opinion that the issues were properly submitted, and that there was no error in that respect. Nor is there any error in any other respect.

Judgment affirmed.

INTERURBAN RAILWAY COMPANY v. TRAINER.

Opinion delivered October 3, 1921.

1. DEATH—PARENT'S RIGHT TO RECOVER FOR CHILD'S DEATH.—In an action by a parent for the negligent killing of a child, damages are not to be awarded as a *solatium*, but must be founded on pecuniary loss, actual or expected, and mere injury to feelings cannot be considered.

2. DEATH—DAMAGES FOR LOSS OF CHILD.—The measure of damages to a parent for killing his child is the pecuniary value of his services during minority and the cost and expense incurred by the parent on account of the injury, less the reasonable and necessary expense of raising the child; the value to be such as is ordinary with children in like condition and station in life, without regard to the relationship between them or to the parent's feelings or the child's suffering.
3. PARENT AND CHILD—DAMAGE BY DEATH OF CHILD.—Since parents are entitled to the services of their minor children during minority, the law presumes that a parent has incurred or suffered pecuniary loss and damage in thedeath of an infant of sound body and mind, even before it has arrived at an age to render services of pecuniary value, or when it is of such tender age that the value of such services cannot be estimated in money.
4. DEATH—VALUE OF CHILD'S SERVICES.—In determining what the pecuniary value of the services of a child of tender age would have been to its parents between the time of its death and the age of maturity, the jury should consider the position in life of both parents and child, the occupation of the parents, their physical condition, their circumstances, and also the sex, age, physical and mental condition of the child.
5. DEATH OF CHILD—EXCESSIVE DAMAGES.—Where, in an action for the negligent killing of a child eleven years old, the evidence merely showed that she was helpful, kind and obedient, and that she could do only such work as "kitchen work, sweeping, or odd things about the house," a verdict for $5,000 in favor of the parent for pecuniary loss in the death of the child is excessive, and will be reduced to $2,500.
6. DEATH—PECUNIARY CONTRIBUTIONS TO PARENT.—Where a child was too young to earn anything, a recovery by the parent of pecuniary contributions beyond the child's minority cannot be considered.

Appeal from Phillips Circuit Court; *J. M. Jackson,* Judge; modified and affirmed.

P. R. Andrews, for appellant.

The award of $5,000 to the plaintiff as compensation for the loss of services of the deceased during her minority is manifestly excessive; it is wholly out of proportion to the amount which should have been awarded him under the proof, and can be accounted for only on the ground of prejudice or palpable mistake. 33 Ark. 361, 363; 39 *Id.* 516.

Fink & Dinning and *J. G. Burke,* for appellee.

The jury were the judges of the amount and value of the child's services, and, in the absence of an affirmative showing that their verdict was the result of passion and prejudice, it should be sustained. 47 N. Y. 317; 75 Ill. 469. Cases of this character must be tried each upon its own merits and the particular state of facts affecting that case. The facts in the Barker case, relied on by appellant, are easily differentiated from the facts in this. See 55 Ark. 462, 467; 145 *Id.* 602; 48 So. 85; 95 Ill. 510; 106 Ill. App. 164; 139 *Id.* 160; 190 *Id.* 84; 140 Ky. 579; 181 Pac. 223; 205 Ill. App. 606; 80 So. 790; 207 S. W. 121; 217 *Id.* 950.

WOOD, J. On the 22d of May, 1920, Aline Trainer, a girl eleven years of age, was killed by one of appellant's cars. The jury returned a verdict in favor of the appellee in the sum of $2,000 for the benefit of the estate, and in the sum of $5,000 for the benefit of the appellee, the father of the child.

The liability of the appellant for damages on account of the death of the child is conceded, and the only question for our decision is whether or not the verdict and judgment for $5,000 in favor of the appellee, and for his benefit as father, were excessive. The little girl was a healthy, vigorous child. At the time she was injured she was on an errand for her mother. Her father testified that she was "very helpful, kind, and obedient about the house." He was asked to tell the jury how she would help about the house, and said: "Well, naturally, a child of that age couldn't do only such as kitchen work, such as sweeping, or odd things about the house, but she was always ready to aid her mother; in fact, she was that way in the whole neighborhood. She was exceptional, I think, in manners and behavior at home and to the teachers."

The case of *Little Rock & Ft. Smith Ry. Co.* v. *Barker*, 33 Ark. 350, is the leading case in this State upon the question under consideration. In that case the

mother, who was a poor widow and kept a boarding house for a living, sought to recover damages against the railway company for the killing of her only child, who was five years old at the time he was killed. He was an intelligent, healthy, and promising lad. Judgment was rendered in her favor in the sum of $4,500. In that case, Chief Justice ENGLISH, in speaking for the court, among other things, said: "The damages are not to be given as a *solatium,* but must be founded on pecuniary loss, actual or expected; and mere injury to feelings can not be considered. * * * Nor does our statute limit the amount of the recovery, as the statutes of some of the States do, but juries are not warranted in finding verdicts for sums disproportionate to, or in excess of, the probable pecuniary loss of the parent, occasioned by the death of a child. Reasonable damages only, in view of all of the circumstances in evidence, should be awarded." In concluding the discussion on the issue as to whether the judgment was excessive, the court said: "We are satisfied that if the facts of the case were submitted to one hundred impartial men, of sound, discriminating judgment, of experience and observation in the raising of children, properly instructed in the law as to the measure of damages, ninety-nine, if not all of them, would say that the damages awarded in this case for loss of probable service were excessive, and such is our judgment."

The judgment in that case was reversed because it was excessive, and the cause was remanded for a new trial. On the second trial the jury awarded damages in the sum of $3,500. From this sum the plaintiffs (appellees) voluntarily remitted the sum of $1,235, and the trial court allowed the verdict to stand for $2,265, and entered judgment for that sum, and this court affirmed the judgment, stating: "It is not probable that another jury would give a less amount. There must be an end to litigation in the case."

In the course of the opinion on the last appeal, Judge ENGLISH said: "So, where the death of a person earning or capable of earning wages or doing service is the subject of the action, what he was earning or capable of earning at the time of his death may be proved by witnesses, as the basis of forming a judgment of probable future earnings. But where the death of a child, incapable of earning anything, or rendering service of any value, at the time of its death, as in this case, is the subject of the action, the value of the probable future services to its parent during its minority must in the nature of things be matter of conjecture. * * * The amount of damages to be recovered is not limited by the statute, and could not be under the constitutional provision above cited. But a jury is not left without restraint in the matter of assessing damages for death of a minor, or in any other case. If the damages assessed are so enormous as to shock the sense of justice, and to indicate that the verdict is the result of passion or prejudice, the trial judge may set aside, and, if he refuse, this court, on appeal or writ of error, may do so." *Little Rock & Fort Smith Ry. Co.* v. *Barker,* 39 Ark. 491.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Freeman,* 36 Ark. 41, we held (quoting syllabus) that "the measure of damages to a parent for killing his child is the pecuniary value of his services during minority, and the cost and expense incurred by the parent on account of the injury, less the reasonable and necessary expense of raising it; the value to be such as is ordinary with children in like condition and station in life, without regard to the relationship between them, or to the parent's feelings or the child's suffering."

In this case it was not essential to recovery that the value of the services of the child to its parents be shown by any affirmative evidence, for, as was said by this court in *Little Rock & F. S. R. Co.* v. *Barker, supra*: "Where damages are claimed for the death of a child incapable of earning anything, or rendering service of any value,

the value if its probable future services to the parent during its minority, is a matter of conjecture, and may be determined by the jury without the testimony of witnesses." See also *Hines* v. *Johnson,* 145 Ark. 602.

Since parents are entitled to the services of their minor children during their minority, the law presumes that a parent has incurred or suffered pecuniary loss and damage in the death of an infant of sound body and mind, even before it has arrived at the age to actually render services of a pecuniary value, or when it is still of such tender age that the value of such services can not be estimated in money. Because it accords with the general observation and experience of mankind in civilized society that such children, before they reach their majority, are capable of rendering, and do generally render, to their parents services that have a pecuniary value. In determining what the pecuniary value of the services of a child of tender age would be to its parents between the time of its death and the age of maturity, the jury should take into consideration the position in life of both parents and child, the occupation of the parents, their physical condition, their circumstances, and also the sex, age, physical and mental condition of the child. While the law is liberal in allowing the jurors to voice their own opinions and conclusions as to the pecuniary value of the services without any specific proof or opinion of such value by affirmative evidence, yet such conclusion as reflected by their verdict must be predicated upon the facts and circumstances as above detailed and accord with what reasonable men in viewing such facts and circumstances would decide. *Chicago* v. *Choate,* 75 Ill. 490.

Learned counsel for appellants have cited cases where verdicts in sums greater than in the present case have been upheld. We have examined these cases, and find that several of them are differentiated by the facts from the case at bar, while in some of them the facts are similar. But whatever may be the rule in other juris-

dictions, it occurs to us that under the interpretation given the statute (1074-5, C. & M. Digest) by our own court in *Little Rock & F. S. R. Co.* v. *Barker,* and *St. Louis, I. M. & S. R. Co.* v. *Freeman,* and *Ry. Co.* v. *Davis,* 55 Ark. 462, and the rule declared in those cases for measuring damages, the verdict and judgment based thereon in this case must be pronounced excessive. The jury awarded a sum equivalent to $714.28 per year, $59.52 per month, or $1.98 per day during the entire seven years of her minority, making no deduction for the expenses that her parents would have to incur for boarding, clothing, education, loss of time, and expense of probable illness. In other words, the jury assumed that the child would be of this pecuniary value to her father every day, every month, and every year.

In the meagre testimony in this record it appears that the little girl could do only such as "kitchen work, sweeping, or odd things about the house." She had not reached the age where she had shown herself "able and willing to make her own living and to contribute out of her earnings to the support of her parents." Therefore, a recovery for probable future pecuniary contributions to them beyond her minority could not be taken into consideration. In the cases of *Ry. Co.* v. *Davis, supra, Memphis, D. & G. Rd. Co.* v. *Buckley,* 99 Ark. 422, and *St. L., I. M. & S. Ry. Co.* v. *Jacks,* 105 Ark. 347, we held that the jury, in assessing damages to the father for the death of his minor son, may take into consideration the parent's expectation of pecuniary benefit from the life of the child beyond minority. The reason for this holding is bottomed expressly upon testimony in each of the cases showing that the minor was able and willing to make his own living, and "to contribute out of his earnings to the support of his parents." In the last two cases the minors were contributing all their earnings—quite substantial sums—to their parents, and expected to continue to support them as long as they lived. But there is no testimony in this record to warrant an infer-

ence that there would be any pecuniary benefit to the parents of this child beyond her minority, and the rule as announced in *Little Rock & F. S. R. Co.* v. *Barker,* and *St. Louis, I. M. & S. R. Co.* v. *Freeman, supra,* must govern. The little girl was bright and "exceptional in manners and behavior," and her injuries were horrible. The resultant conscious suffering for the few hours she lived was terrible in the extreme. For this, as stated, her estate recovered the sum of $2,000. We realize that it is most difficult for jurors and judges, in rendering verdicts and judgments in such cases, to shut out all considerations of sympathy for the natural affection and consequent mental anguish of parents. But it must be remembered that at the common law the death of a human being was not the subject of civil action, and that, under our statute as it has been construed by this court, there can be no recovery as a "solatium," and that mental anguish can not be considered. Therefore, jurors and judges must abjure these but natural and laudable impulses and set their faces like flint toward the Constitution and laws which they are sworn to administer that they may resist and overcome the natural feelings of sympathy and humanity in every normal breast toward the distressed and sorrowing. Otherwise, they can not give to every litigant defendant in such cases that which is due him under the law, justice.

Now, we can find no basis in reason to sustain the judgment of $5,000 as a compensation to the appellee for the strictly pecuniary loss to him in the death of his child. In the ordinary course of the domestic relation between father and daughter, it occurs to us that the sum of $2,500 would be the very highest amount that could be recovered for his pecuniary loss under any reasonable view of the evidence most favorable to him. This sum would meet every probable or possible contingency that could arise in the usual course of family affairs by which the services of this child would have been enhanced to her parents during the period of her minority. Of

course, the jury can not be allowed to speculate on the value of services that in the ordinary course of the family relation and environment it would be improbable or impossible for the minor to ever render.

The judgment therefore will be modified by deducting therefrom the sum of $2,500. As thus modified, it is affirmed.

ARNOLD v. STATE.

Opinion delivered October 3, 1921.

1. JURY—COMPETENCY OF JUROR.—A juror was not incompetent by reason of relationship to a witness, though he stated that such relationship might affect him in reaching a verdict, where he stated that he would not give any more credence to the testimony of such witness than he would to any other credible witness, although his relationship and personal knowledge of the witness might cause him to give greater credit to his testimony than he would give to that of another witness.
2. CRIMINAL LAW—INSTRUCTION OF COURT.—After the jury had deliberated for some time, they returned into court, and announced that they could arrive at a verdict "if what we recommend to the court would be given any consideration as to suspending sentence or making it so that his wife and child wouldn't suffer while he was taken away from them." The court refused to make any agreement as to suspending the sentence, and instructed the jury to find defendant guilty if the evidence convinced them beyond a reasonable doubt of his guilt. *Held* no error.
3. CRIMINAL LAW—TESTIMONY OF JURORS TO IMPEACH VERDICT.—A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot.

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

George P. Whittington, for appellant.

1. The court erred ruling that the juror who was related to the witness, Dr. King, was a competent juror, thereby compelling appellant to exhaust a challenge.

2. The statements made by the foreman of the jury in open court prior to the return of the verdict, make it clear that the verdict was agreed upon only in pursuance

of an agreement by the jurors that a suspension of sentence should be recommended. These proceedings had in open court and made a part of the record, independently of the testimony of the jurors afterwards, which was introduced without objection on the part of the State, establishes the fact that the verdict would not have been arrived at, had there not been such agreement. C. & M. Digest, § 3219.

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

1. Relationship of a juror to a witness is not a disqualification. 16 R. C. L. § 77, p. 259; 87 S. C. 434; 69 S. E. 1077, Am. Cas. 1912B, 1057 and note; 100 Ark. 437; 74 *Id.* 286; 58 *Id.* 363; 16 R. C. L. § 106, p. 292; 123 U. S. 131; 17 Stand. Ency. Proc. § 6, pp. 256-257.

2. At the hearing on the motion for new trial, the testimony of the jurors did not establish that the verdict was made by lot, and their testimony was therefore incompetent and inadmissible. C. & M. Dig. § 3220; 29 Ark. 293. Lot defined: 42 N. E. 1103, 1105; 144 Ind. 86; 31 L. R. A. 835; 55 Am. St. Rep. 168; 49 Ala. 396; 114 *Id.* 34; 137 *Id.* 101; 74 N. Y. 63; 1 N. Y. Cr. Rep. 252, 258. Affidavits of jurors, or other evidence of statements made by them, after the trial, is not competent to impeach a verdict in which they have joined. 59 Ark. 132; 70 *Id.* 244; 35 *Id.* 109; 15 *Id.* 403; 126 *Id.* 562.

WOOD, J. The appellant appeals from a judgment of conviction for carnal abuse. He presents two questions for our consideration.

1. Gibbons King, while being examined as to his qualifications to sit as a juror, in response to questions asked him by counsel for appellant, stated: That he was related to Doctor King, one of the witnesses in the case, and that his relationship might affect him in reaching a verdict. He further stated, in response to questions by the court and counsel, that he would not give any more credence to the testimony of Doctor King than he would

give to any other credible witness. He stated that his personal knowledge of Doctor King and relationship to him might determine him to be a credible witness as compared with any other witnesses and cause him to give greater credibility to his testimony.

The court held that the juror was qualified, to which counsel for appellant objected, and appellant excused the juror. The appellant afterward exhausted all his peremptory challenges. The appellant duly excepted to the ruling of the court in holding the juror, King, qualified. The court did not err in its ruling. The testimony of Doctor King only tended to prove that he made a vaginal examination of the prosecuting witness and found that her hymen had been ruptured, but there was nothing to indicate whether she had had sexual intercourse three or four days before. His testimony did not tend to prove any fact connecting the appellant with the commission of the offense charged against him, and the appellant did not attempt in any manner to controvert his testimony. Besides, the answers of the juror to the questions propounded by the court and counsel showed that he was an impartial juror and would not, on account of his relationship to Doctor King, be biased against the appellant in the consideration of his case; that he would not give any greater credence to the testimony of Doctor King on account of his relationship to him than he would that of any other credible witness.

2. The record shows that, after deliberating for some time, the jury returned to the courtroom, and, upon being asked if they had reached a verdict, the foreman responded: "We could arrive at a verdict, but, on account of this defendant having a wife and child, we do not feel like, under the circumstances, inflicting the penalty, but we could arrive at a verdict if what we recommend to the court would be given any consideration as to suspending sentence or making it so that his wife and child wouldn't suffer while he was taken away from them."

To this the court responded: "Well, the court wouldn't feel like making any agreement about it, gentlemen; you will just have to do your duty regardless of that. You haven't a right really to consider those things. The question is just one of guilt and innocence." To this the foreman responded: "Of course, we understand that, but we didn't know whether you could enter into that kind of an agreement with us or not." The court replied: "I do not feel like the court ought to enter into an agreement of that kind. On a question as to the amount of punishment, you could consider that, of course, but the law fixes the minimum punishment; you have a right to fix that at anything within the range which the law prescribes. If you find the defendant guilty, then as a matter of course a punishment ranging in between one and twenty-one years follows. You can now retire. It is your duty to come to a verdict if the evidence convinces you beyond a reasonable doubt of his guilt."

The appellant objected and excepted to the rulings of the court. The jury retired to further consider their verdict, and later returned into court and rendered the following verdict: "We, the jury, find the defendant guilty as charged, and fix the punishment at one year in the penitentiary."

Afterward the appellant filed his motion for a new trial, and assigned as one of the grounds of his motion "that the court erred in giving its instruction to the jury when they returned to the courtroom after having deliberated for a considerable length of time, and which proceeding was had in the following manner:" (Setting forth the proceedings as above.) To sustain this ground of his motion the appellant introduced as witnesses before the court several of the trial jurors, who testified substantially to the effect that the jury had not agreed upon a verdict of guilty at the time they sought information from the court as to whether or not the court could suspend sentence before the jury returned a verdict of guilty. One juror said: "We took the points of

the case into consideration and decided that we could come to a verdict and petition or ask the judge to stay the sentence." Before that they had not come to a verdict. Some of the jurors in the consideration of their verdict offered that as an inducement to finally agree on a verdict of conviction. One of the jurors further stated that, after taking the evidence of the case into consideration, they agreed to come to a verdict and then petition for a stay of the sentence. The agreement to petition the court for a stay of the sentence and to return a verdict of guilty "all came in together and was discussed at the same time." The purpose of the agreement to petition the judge for a stay of the sentence was "to bring about an agreement on the verdict of conviction." This juror further testified that the court informed the jury, when they sought the information, that "the verdict would have to be reached before anything could be done." They went back to the jury room and afterward returned their verdict.

The juror further stated: "My understanding of it was that, by reaching a verdict and coming to a verdict, that the judge should be petitioned afterward to stay the sentence." He further stated, in response to a question by the court: "The jurors were all agreed on the facts of the case, and thought from the evidence that the defendant had carnal knowledge of this prosecuting witness according to the testimony. Up to the time the agreement was entered into to seek information from the court, some of the jurors had voted on all votes taken on the question of guilt or innocence 'not guilty.' "

Another one of the jurors stated that, after the jurors couldn't get together, they went into an agreement to petition the judge. "They thought the punishment was too severe, and the fellows that were not for 'guilty' wouldn't agree to anything, and that agreement to petition the judge brought the jurors who prior to that time were voting for 'not guilty' to vote for a verdict of 'guilty.' " It was the information of this juror that the

verdict of "guilty" would not have been agreed to by all of the jurors but for the agreement by all of them to petition for a stay of the sentence.

The ruling of the court was correct. At the time the verdict was rendered the appellant did not ask to have the jury polled, which he had the right to do. If he had done so, and any of the jurors had answered that the verdict returned was not their verdict, then the verdict could not have been received. Section 3216, C. & M. Digest.

The proceedings, to which the appellant objects, were brought to the attention of the court after the verdict had been received and the jury discharged. The only testimony by which appellant sought to impeach the verdict was by the jurors themselves. "A juror can not be examined to establish a ground for a new trial, except it be to establish as a ground for a new trial that the verdict was made by lot." Section 3220, C. &. M. Digest; *Pleasants* v. *Heard,* 15 Ark. 403; *Fain* v. *Goodwin,* 35 Ark. 109; *Smith* v. *State,* 59 Ark. 132; *Griffith* v. *Moore,* 70 Ark. 244; *Wilder* v. *State,* 29 Ark. 293; *Williams* v. *State,* 66 Ark. 264; *Hampton* v. *State,* 67 Ark. 266; *Osborne* v. *State,* 96 Ark. 400. See, also, *Capps* v. *State,* 100 Ark. 109; *Jenkins* v. *State,* 131 Ark. 312; *Kindrix* v. *State,* 138 Ark. 594; *Speer* v. *State,* 130 Ark. 457-464.

The appellant does not contend, and indeed it could not be contended, that the testimony of any of the jurors proved that the verdict was arrived at by lot. There was no element of chance, hazard, or fortune in the method by which the verdict was decided, as shown by the testimony of the jurors. "Lot" is defined to be "a contrivance to determine a question by chance or without the action of man's choice or will." Webster's Dict.; *Chavannah* v. *State,* 49 Ala. 396; *Loiseau* v. *State,* 22 So. 138; *Johnson* v. *State,* 34 So. 1019. See also *Lynch* v. *Rosenthal,* 144 Ind. 86; 42 N. E. 1103, 31 L. R. A. 835.

In *Speer* v. *State, supra,* at page 464, we said: "Lot involves an element of chance." To allow a verdict to be impeached in the manner herein attempted would contravene the statute and be subversive of a sound public policy which the statute was intended to conserve.

The judgment is correct, and it is therefore affirmed.

BELCHER *v.* WINTER.

Opinion delivered October 3, 1921.

MORTGAGES—CROP TO BE GROWN BY MORTGAGOR.—A mortgage on the crop of cotton which the mortgagor will cultivate and agrees to cultivate on the mortgagor's farm did not give the mortgagee any lien on cotton grown on such farm by tenants of the mortgagor who paid their rent in money, and not by sharing their crops, as the landlord had no title to such crops, but merely a lien thereon.

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

B. J. Semmes, for appellants.

Winter's interest in the crop, being that of a landlord who furnishes and supplies his tenants who work the land, was expressly conveyed in the chattel mortgage, whereby he conveyed all his "right, title, claim and interest" in the crop. 80 Ark. 431. He intended to convey a lien on the 1920 crop on the Gray place, and this lien attached when the crop came into existence. 52 Ark. 439. The mortgage was in existence and on record before Winters delivered the rent notes to the bank. The facts differentiate this case from cases relied on by appellee, viz: 33 Ark. 737, and 37 *Id.* 43. Assignment of a rent note does not carry with it the landlord's lien. 61 Ark. 266; 39 *Id.* 344; 37 *Id.* 43; 31 *Id.* 597.

Mann & Mann, for appellees.

1. The chattel mortgage does not cover the cotton involved in this suit. Where a mortgage purports to cover crops to be grown by the mortgagor, it will not ininclude the crops grown by his tenants or other persons. 11 Corpus Juris, 505.

2. The lien of appellants under the mortgage is not superior to the rights of appellees in the cotton in controversy. The bank being the holder of the rent notes, the tenants were within their rights in seeing that the cotton or its proceeds was applied to the payment thereof. 123 Ark. 528; 52 *Id.* 58; 37 *Id.* 43.

WOOD, J. On April 1, 1920, W. A. Winters was indebted to Crutcher & Company in the sum of $4500, evidenced by promissory note of that date, due November 1, 1920, and secured by a mortgage executed on the 8th day of April, 1920, in which the property mortgaged is described as "all their right, title, claim and interest in the entire crops of cotton, cotton seed, and corn, which the party of the first part (Winter) will cultivate, and agrees to cultivate and produce, during this year on what is known as the Walter Gray place farms, or elsewhere in the county and State aforesaid." Winter owned what is known as the Walter Gray place farms in St. Francis county. Winter leased these farms to negro tenants for the year 1920 and took their notes for their rents, amounting in the aggregate to $2,800. Winter furnished to these tenants in the aggregate more than $4000 to enable them to make and gather crops. Winter was indebted to the First National Bank in a sum in excess of $6000, secured by a deed of trust on certain lands and by mortgage on chattels.

On the 30th day of November, 1920, Winter deposited the rent notes mentioned above with the First National Bank as collateral security for his indebtedness to the bank. This was in addition to the other security which he had given the bank. At the time he deposited these notes as collateral, he did not obtain from the bank any more money or additional consideration. On the first day of December, 1920, Winter delivered to the First National Bank ten bales of cotton which had been grown by his tenants on the Walter Gray place farms.

This suit was begun by a complaint in equity filed by Crutcher & Company, and at their instance an attachment was issued and levied upon the ten bales of cotton which had been delivered to the First National Bank. Crutcher & Company alleged that they had a lien on the cotton by virtue of the chattel mortgage executed by Winter to them, and the First National Bank alleged that it had a right to the cotton because same had been delivered to them by Winter on the notes of his tenants which Winter had deposited with it as collateral. At the time the bank accepted these notes as collateral, it knew of the existence of the chattel mortgage which Winter had executed to Crutcher & Company. Before the attachment issued, the First National Bank had sold the cotton, and had received therefor the sum of $641.62.

The above are the facts upon which the trial court rendered a judgment in favor of the appellees, from which the appellants prosecute this appeal.

The decree of the court was correct. The language of the mortgage is: "The party of the first part (Winter) has bargained, granted and sold, and does by these presents bargain, grant and sell to said party of the second part (Crutcher & Company) their heirs, administartors and assigns, all their (his) right, title and interest in the entire crops of cotton, cotton seed and corn, which the party of the first part (Winter) will cultivate and agrees to cultivate and produce during this year on what is known as the Walter Gray place farms in the county and State aforesaid."

The above language is not sufficient to create in favor of the appellants any lien on the cotton in controversy. For this cotton was cultivated and produced by the tenants of Winter and not by Winter himself. But the language of the mortgage only conveyed to Crutcher & Company "all the right, title, claim and interest in the crops of cotton" which Winter himself "will cultivate and agrees to cultivate and produce" on the farms mentioned. Winter had no right, title, claim and interest

in and to the crops of cotton grown on his farms by his tenants. These tenants were not share-croppers. They paid their rent in money, and not by sharing their crops with Winter. True, Winter, as the landlord, had a lien on the cotton grown on the farms during the year 1920 for the rent and supplies furnished the tenants by him for that year. Sections 6889, 6890, C. & M. Digest. But such lien did not give Winter any right, title, claim and interest in the cotton itself grown on his farms by his tenants. The crops grown by Winter's tenants on Winter's farms belonged to the tenants and were only subject to his lien for rents and supplies which he furnished them.

"A lien is neither property nor a debt, but a right to have satisfaction for a debt out of property, and is not the subject of sale or assignment." *Roberts* v. *Jacks,* 31 Ark. 597. See also *Buckner* v. *McIlroy,* 31 Ark. 631. But, even if it could be said that the language "all right, title, claim and interest" was broad enough to include future cotton afterward grown on Winter's plantations and delivered to him by his tenants, nevertheless such cotton was not conveyed by the mortgage, for the reason that the language, as before stated, only purports to convey to appellants the entire crops of cotton which Winter himself would cultivate and produce. He did not cultivate and did not produce the cotton in controversy.

The case of *Delta Cotton Co.* v. *Ark. Cotton Oil Co.,* 80 Ark. 431, upon which appellants rely, does not sustain their contention. By the language of the mortgage in that case the mortgagor conveyed the "entire crop of cotton, cotton seed and corn *grown* and to be *grown* during the year 1903 on certain described real estate in the county of Jefferson and State of Arkansas." No such language is contained in the clause of the mortgage under review.

In the case of *Blakemore* v. *Eagle,* 73 Ark. 477, the deed of trust described the property conveyed, as fol-

lows: "The entire crop of cotton and corn that I (the mortgagor, Blakemore) may raise or cause to be raised during the year 1898 on my plantation known as the Blakemore place in Lonoke county, etc." In that case Mr. Justice RIDDICK, speaking for the court in construing the above language, expressed the opinion that the cotton delivered to Blakemore by his tenants in the settlement of accounts for supplies furnished by him was not covered by the trust deed. While this language, as the opinion further shows, was not necessary to the decision in that case and was therefore *obiter,* nevertheless it is very persuasive as to the proper construction of such language.

And in the later case of *Delta Cotton Co.* v. *Ark. Cotton Oil Co., supra,* Judge BATTLE, in the concluding part of his opinion, expressed the view that the court in *Blakemore* v. *Eagle, supra,* was of the opinion that the language of the deed of trust in that case was not sufficient to cover cotton raised and cultivated during the year by the tenants on the plantation of the mortgagor (Blakemore), and the court in making the distinction between the cases of *Delta Cotton Co.* v. *Ark. Cotton Oil Co.* and *Blakemore* v. *Eagle,* recognized that the latter case decided that the language therein contained was not sufficient to cover cotton raised by tenants on the plantation of the mortgagor. So we feel that our opinion and judgment in the case at bar is fortified by the opinions of two former very able judges of our court.

In 11 Corpus Juris, § 178 (3), p. 505, the following language is used by the authors of the text: "As a general rule, where the mortgage purports to cover crops to be grown by the mortgagor, it will not include crops grown by his tenants, or other persons, but will cover the crops grown by him on the land designated. * * * But a mortgage on crops to be grown during a certain year on certain lands will include crops grown on the premises by tenants and share-croppers of the mortgagor."

Several cases are cited to support the first part of the text, and, to support the latter part of the text, our own case of *Delta Cotton Co.* v. *Arkansas Cotton Oil Co., supra,* is cited.

We conclude that there was no error in the decree of the court, and the same is therefore affirmed.

GLENN *v.* UNION BANK & TRUST COMPANY.

Opinion delivered October 3, 1921.

1. PRINCIPAL AND SURETY—REQUIRING CREDITOR TO SUE.—Under Crawford & Moses' Dig. § 8287, 8288, providing that a surety on a note, after action accrued thereon, may in writing require the person having the right of action forthwith to sue the principal, and that if such suit be not commenced within thirty days after service of the notice the surety shall be exonerated from liability, a written notice to the creditor advising him to bring suit, but not requiring him to do so, is insufficient.
2. CONTRACTS—NOVATION.—Parties to a written contract may, subsequent to its execution, rescind it in part or *in toto* and substitute a new oral agreement therefor.
3. PRINCIPAL AND SURETY—RELEASE.—Release of a surety by the creditor in consideration of the debtor furnishing additional security *held* binding.
4. PLEADING—SUFFICIENCY OF ANSWER.—In an action against a surety on a note, an answer alleging a new contract whereby the bank holding the note in consideration of the principal debtor's assignment of a claim against the United States released the surety from liability was sufficient, though it did not allege that the president of the bank had authority to make the contract; such authority being a matter of evidence.

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

STATEMENT OF FACTS.

The Union Bank & Trust Company sued E. H. Glenn to recover the sum of $1,390 alleged to be due plaintiff on a promissory note executed by the defendant and others.

As a defense to the action the defendant stated that he had signed said note as surety for J. C. Sheperd and J. R. Wilson, who were the principals, and that after the note became due he wrote and mailed to the bank the following letter or notice:

"Denver, Col., June 10, 1920.

"C. D. Metcalf, Batesville, Ark.

"Dear Charley: I am just in receipt of yours of the 7th relative to the Sheperd and Wilson note.

"My advice would be for you to take the legal steps to collect the debt, advertise and sell the truck, etc., applying that on the debt, and getting a judgment for the balance."

We quote from the answer of the defendant another paragraph, as follows:

"Further answering plaintiff's complaint, defendant says that on the 4th day of August, 1919, his co-defendant, J. C. Sheperd, made an assignment of his 'war minerals claim' against the government of the United States, under the 'War Minerals Relief Act,' which assignment was in writing, and that in consideration of said assignment being made, and to secure further loans from plaintiff bank, it was agreed between the defendant, Sheperd, the defendant, E. H. Glenn, and D. D. Adams as president of said bank, that this defendant should and would be released from all liability on said note aforesaid."

The plaintiff filed a demurrer to these two paragraphs of the answer, which was sustained by the court. The defendant refused to plead further, and, upon final judgment being entered against him on the demurrer, duly prosecuted an appeal to this court.

W. M. Thompson, for appellant.

1. Appellant had the right under the law to require the appellee to bring suit against the principal debtor. C. & M. Dig. § 8287. The statute must be strictly construed. 82 Ark. 407; 124 *Id.* 48; 127 *Id.* 462; 128 *Id.* 221. If, after notice by the surety in writing to the creditor to

sue the principal debtor, the creditor fails to bring suit within thirty days, the surety is discharged. 48 Ark. 254; 82 *Id.* 407; 124 *Id.* 48. The statute does not prescribe any form of notice; therefore, substantial compliance is sufficient. 124 Ark. 48; 29 *Id.* 579.

2. The court erred in sustaining the demurrer to the second paragraph of the amended answer. The consideration for releasing the surety by the bank, on the assignment of the war claim, was sufficient under the facts set out in the second paragraph. An oral release from the terms of a written contract is binding. 94 Ark. 165. See also, as to consideration, 112 Ark. 503; 75 *Id.* 360; 34 N. J. L. 54; 2 Met. 283; 12 L. R. A. 463; 5 *Id.* 856; 43 U. S., 2 How. 426, 11 Law. Ed. 326.

Samuel M. Casey, for appellee.

1. The notice in the form of a letter advising appellee to "take the legal steps to collect the debt" was not a compliance with the requirements of the statute. C. & M. Dig. § 8287. It should be strictly construed. 82 Ark. 247; *Id.* 207; 113 *Id.* 198. A mere failure to sue a surety on a note or to enforce collateral security is no defense to the surety. 50 Ark. 229; 74 *Id.* 241; 88 *Id.* 108; 128 *Id.* 222; 35 *Id.* 469.

2. The second paragraph to which the demurrer was sustained fails to show any consideration to appellee for releasing appellant. 52 Ark. 174; 136 *Id.* 204. The purported agreement to release the appellant as surety was not such a contract as the president of the bank would be authorized to make, unless he was acting by authority of the board of directors. 62 Ark. 33; C. & M. Dig. § 683. The payment of a sum of money by one who is legally bound to pay the same is not a valid consideration for a contract.

HART, J. (after stating the facts). It is insisted by counsel for the defendant that the court erred in sustaining the demurrer to the first paragraph of his answer because he notified the plaintiff after the note became

due to sue the principal on the note forthwith, and that, the bank not having brought the suit within thirty days after the notice was given, the defendant is exonerated from liability on the note under the statute.

Section 8287 of Crawford & Moses' Digest requires that a surety on a note in order to exonerate himself from liability shall, after the note becomes due, by a notice in writing, require the person having the right of action to forthwith commence suit against the principal debtor and other party liable. The following section provides that, if such suit be not commenced within thirty days after the service of the notice, the surety shall be exonerated from liability to the person notified.

In *Wilson* v. *White,* 82 Ark. 407, the court held that the statute, being in derogation of the contractual rights of the parties, must be strictly complied with by the surety before he can claim exoneration from liability on the obligation sued on.

Under the language of the statute the requirement to sue must be unconditional. It contemplates a peremptory requirement of the surety to the creditor to commence suit forthwith.

The notice in the present case is advisory merely. The language is, "My advice would be for you to take legal steps to collect the debt * * * and getting judgment for the balance." The surety only advises the creditor to bring suit. The notice does not contain a demand or requirement for the creditor forthwith to commence suit. Not having shown a clear requirement or demand to the creditor to institute suit forthwith upon the note, the notice is insufficient because it is merely advisory, or at most a request to collect from the principal, and, if he fails to do so, to bring suit.

This view of the statute is taken in the early case of *Bates & Hughes* v. *State Bank,* 7 Ark. 394. In that case the surety gave notice to and requested the bank "to put the obligation in a train of collection," and the court held that the notice was not sufficient under the statute. The

court said that the statute gave the surety the right to require the plaintiff to commence suit forthwith, but that, if he wished to exonerate himself from liability, he must give such notice as to leave no option with the plaintiff. To the same effect see 32 Cyc. 104; *Baker* v. *Kellogg,* 29 Ohio St. Rep. 663; *Rice* v. *Simpson,* 9 Heisk. (Tenn.) 809; *Parrish* v. *Gray,* Humph. (Tenn.) 87; *Kennedy* v. *Falde* (Dak.), 29 N. W. 667; *Benge* v. *Eversole* (Ky.), 160 S. W. 911, and *Edmonson* v. *Potts* (Va.), 21 Ann. Cas. 1365.

It is also contended that the judgment should be reversed because the court erred in sustaining a demurrer to the second paragraph of the answer, and in this contention we think counsel for the defendant is correct.

Counsel for the plaintiff seeks to uphold the judgment on the rule laid down in *Smith* v. *Spradlin,* 136 Ark. 204, and cases cited, to the effect that the payment of a sum of money by one who is already legally bound to pay the same is not a valid consideration for a contract. Counsel claims that, inasmuch as the defendant was already bound to pay the note, there was no consideration for the contract whereby he was released from the payment of it, and that the case calls for the application of the well-known rule just announced. We do not think, however, that the rule contended for has any application to the facts of the present case. According to the allegation of the answer, the parties entered into a new contract with essentially different terms and imposing additional obligations upon the bank and the principal debtor.

In *Weaver* v. *Emerson-Brantingham Implement Co.,* 146 Ark. 379, the court held that the parties to a written contract may, subsequent to its execution, rescind it in part, or in whole, and substitute a new oral agreement therefor. Hence the parties had a right to make the new agreement. According to the allegations of the answer, which must be taken as true on demurrer, J. C. Sheperd, the principal debtor, made an assignment in writing of

his war minerals claim against the United States to the bank, and it was agreed between Sheperd, the principal debtor, Glenn, the surety, and the cashier of the bank that the surety should be released from liability on the note.

The assignment of Sheperd's claim against the United States to the bank constituted additional security to the bank. The bank had the right to accept this new security in lieu of the surety, and its action in doing so was sufficient consideration for making the new contract. The president of the bank doubtless thought that the assignment of Sheperd's claim against the United States was better security for the bank than the signature of Glenn to the note, and for that reason made the contract. In any event he had the right to make the agreement with Sheperd and Glenn that the latter should be released from liability on the note in consideration that Sheperd would assign his claim against the United States to the bank. See *Kilgore Lumber Co.* v. *Thomas,* 98 Ark. 219, and *Phoenix Cement Sidewalk Co.* v. *Russellville Water & Light Co.,* 101 Ark. 22.

It is also insisted that the demurrer to the answer should have been sustained because the answer does not allege that the president of the bank had authority to make the contract in question. The authority of the president to make the contract would come up upon the proof in the case, and was not required to be alleged in the answer.

For the error in sustaining the demurrer to the second paragraph of the answer, the judgment must be reversed, and the cause remanded for a new trial.

THOMAS v. THOMAS.

Opinion delivered October 3, 1921.

1. COURTS—OPERATION AND EFFECT OF OPINIONS.—Every decision must be construed with reference to the facts of the particular case.

2. COURTS—APPEAL FROM PROBATE COURT.—Where the record on appeal from the probate to the circuit court shows that an affidavit for appeal was filed in the probate court while that court was in session, and that the judge marked on the petition "examined and approved," and signed the same as judge, this was a sufficient compliance with the statute in regard to taking appeals, (Crawford & Moses' Dig. § 2258), though the record fails to show that the appeal was granted.

3. APPEAL AND ERROR—CONCLUSIVENESS OF CIRCUIT COURT'S FINDINGS.—Findings of fact made by a circuit court are as conclusive as the verdict of a jury, and will not be disturbed on appeal unless the evidence is legally insufficient to support them.

4. MARRIAGE—HOW PROVED.—Marriage may be proved in civil cases by reputation, by the declarations and conduct of the parties, and by other circumstances usually accompanying that relation.

5. COURTS—JURISDICTION OF PROBATE COURT.—The probate court, in the exercise of its jurisdiction to administer the estates of decedents, is authorized to determine what property belongs to the estate.

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

STATEMENT OF FACTS.

This suit originated in the probate court of Ashley County, Arkansas.

Alsie Thomas filed a petition in that court asking to be appointed administratrix of the estate of James Thomas, deceased, and for dower in his estate. She alleged that James Thomas died in Ashley County, Arkansas, on the 9th of January, 1920, owning a valuable farm of 160 acres and considerable personal property; that she was the lawful widow of James Thomas and resided with him on his farm at the time of his death, and that they owned certain personal property in common.

James Thomas had no children, and his brothers and sisters became parties to the proceeding, and they denied that Alsie Thomas had ever been legally married to James Thomas, and that she had any interest in his estate as widow or otherwise.

The probate court found the issues against Alsie Thomas, and rendered judgment dismissing her petition.

The case was tried *de novo* in the circuit court, where the issues were found in favor of Alsie Thomas. The case was tried before the circuit court sitting as a jury, and the court found that Alsie Thomas had legally married James Thomas, and was entitled to dower in his estate. Letters of administration were granted to her, and she was given a share in certain personal property in addition to her dower.

Judgment was rendered in accordance with the findings of the court, and to reverse that judgment this appeal has been prosecuted.

John Baxter, G. P. George and *Compere & Compere,* for appellants.

No order of appeal was made by the probate court, and this appeal should be dismissed. The order "examined and approved" is no order of appeal, and no presumption can be indulged in its favor. 65 Ark. 419. The filing of an affidavit is not a compliance with statute requiring an order of appeal. 181 S. W. 287; 126 Ark. 211.

The question of jurisdiction can be raised for the first time in the Supreme Court. 170 S. W. 221.

The circuit court on appeal was without jurisdiction to try the title to personal property, which it adjudged to appellee, as the probate court had no such jurisdiction. 116 Ark. 350. There is no presumption that the probate court had jurisdiction. 185 S. W. 796. The pleadings did not put into issue the title to the personal property. The decree was without the issue, 87 Ark. 210, and, the title to the personal property not being involved, any judgment relating thereto is void. 76 Ark. 152; 90 Ark. 196.

The law presumes marriage and not concubinage, but such presumption is rebuttable. 18 R. C. L. 424-425, 433; 26 Cy. 877, 886, 889.

The weight of the evidence shows that there was no legal marriage, and appellee is not entitled to dower. 82 Ark. 76; 88 Ark. 196.

The general and special findings are inconsistent, and the former controls the latter. C. & M. Dig. § 1304. The same is true as to findings of fact by trial judge or jury. 84 Ark. 359.

U. J. Cone, for appellee.

The affidavit for appeal required by Sec. 2258 C. & M. Digest, was properly made, and the "approval" thereon of the judge could only mean one thing—that which was asked for—an appeal granted. 29 Cyc. 1514 I; 4 C. J. 1462. The appeal in the instant case meets the requirements in 93 Ark. 263 and is not contrary to 95 Ark. 148; 104 Ark. 113; 138 Ark. 131, and 140 Ark. 331.

The marriage is established by competent evidence. 26 Cyc. 886. There is always a presumption of a valid marriage, and the proof of such in this case is stronger than that in 82 Ark. 76. See also 1 Bishop, Marriage & Divorce, § 77. General repute in the community is admissible on the question. 26 Cyc. 872, 888; 32 Ark. 205; 15 L. R. A. (N. S.) 190; 28 Ark. 19; 131 Ark. 221; 15 Ark. 555 at p. 605. The burden of proving the invalidity, or the fact of no marriage at all, rests upon the attacking party. 121 Ark. 361; 34 Ark. 518; 67 Ark. 281.

Without the aid of Attorney Compere's testimony the testimony of Mrs. Herring was incompetent. His testimony was incompetent and against the "communications rule." 40 Cyc. 2366.

John Baxter, G. P. George, Jos. F. Wallace, Compere & Compere, for appellants, in reply.

The cases cited by appellee to sustain his contention that the appeal was properly taken do not do so.

The testimony of Thos. Compere, attorney, was competent. 220 S. W. 677; 9 A. L. R. 1076; 183 Ky. 679; 211 S. W. 441; 5 A. L. R. 972.

HART, J. (after stating the facts). It is first earnestly insisted by counsel for appellants that the circuit court was without jurisdiction to try the case, and for that reason the appeal should be dismissed. No motion

was filed or presented in the circuit court to dismiss the appeal from the probate court for want of jurisdiction, and the question of jurisdiction in the circuit court to try the case is raised here for the first time.

The record of the proceedings in the cause in the probate court is contained in the transcript. It shows that the judgment of the probate court dismissing the petition of Alsie Thomas was entered of record on the 28th day of February, 1920, and that this was a day of the regular January, 1920, term of the Ashley Probate Court. The probate record also shows that C. D. Oslin was the judge of the probate court who rendered the judgment. In addition we copy from the record the following:

"AFFIDAVIT FOR APPEAL.

"*In re* Estate of James Thomas. Petition for Assignment of Dower.

"Alsie Thomas respectfully prays an appeal from the judgment of the probate court herein to the circuit court of Ashley County, and says that said appeal is taken because she verily believes she is aggrieved, and is not taken for the purpose of vexation or delay.

"Alsie Thomas.

"Subscribed and sworn to before me this 28th day of February, 1920.

"U. J. Cone, Notary Public.

"Filed February 28, 1920.

"George T. Gardner, Clerk.

"Examined and approved this February 28, 1920.

"C. D. Oslin, Judge."

It is claimed by counsel for appellants that the record of the probate court does not show that an appeal to the circuit court was granted, and that the circuit court acquired no jurisdiction of the case. Counsel for appellants invoke the general rule announced in *Matthews* v. *Lane,* 65 Ark. 419; *Walker* v. *Noll,* 92 Ark. 148, and other

decisions of this court to the effect that it is necessary, in order to invest the circuit court with jurisdiction, that it appear from the record that the affidavit and prayer for appeal were presented to the probate court, and that the appeal was granted. In certain cases the statute requires that the county court shall grant the appeal to the circuit court, and under such statutes it has also been held that the granting of the appeal by the county court is a prerequisite to the exercise of the jurisdiction by the circuit court. Hence counsel places particular reliance upon the decision in *Drainage District No. 1* v. *Rolfe,* 110 Ark. 374. In that case it was held that the circuit court was without jurisdiction, and that the judgment on appeal from the county court was void, where the record did not disclose in the matter of a formation of the drainage district that any of the steps were taken perfecting an appeal from the county to the circuit court. The court further held that, inasmuch as the record showed that the circuit court was without jurisdiction of the cause, the defect of jurisdiction was not waived by a failure to move the court to dismiss the appeal.

Every decision must be construed with reference to the facts of the particular case. In that case the record of the Supreme Court contained a transcript of the proceedings in the county court, and did not show anything about a remonstrance against the formation of the district being filed in the county court; nor did it show an appeal from the county court, if any was granted; nor any of the steps necessary in taking an appeal. The statute required the county court to grant the appeal, and, having prescribed the method for taking an appeal, such method must be substantially followed in order to give the circuit court jurisdiction. In that case there was an entire absence, in the record brought to the Supreme Court, of any showing that the county court had granted the appeal, or that the parties interested had taken any of the necessary steps toward taking an appeal. Here the facts are essentially different. The record shows that

an affidavit for appeal substantially in the language of the statute was filed and sworn to on the day that the judgment of the probate court was rendered. Attached to this affidavit is the following: "Examined and approved this February 28, 1920. C. D. Oslin, Judge." The record of the probate court shows that February 28, 1920, was a day of the regular January, 1920, term of the Ashley Probate Court, and that it was the day upon which the judgment in question was rendered and entered of record. The probate record also shows that C. D. Oslin was the judge who rendered the judgment. The notation made by him on the petition is sufficient to show that the prayer for appeal was granted. Alsie Thomas had complied with the statute with regard to taking the appeal, and was entitled to have it granted as a matter of right. The record shows that the petition was filed while the court was in session, and the fact that the presiding judge marked on the petition the words, "Examined and approved," and signed the same as judge, is evidence that he intended to act upon the petition and to grant the appeal.

It is true that the order was not entered of record, but that was not necessary in order to invest the circuit court with jurisdiction. The granting of the appeal by the probate court upon the filing of a proper petition by the losing party was sufficient to confer jurisdiction upon the circuit court. The entering of such an order upon the records of the probate court was merely evidence of the fact that the appeal had been granted. The judicial act of the presiding judge of the probate court in term time in granting the appeal upon proper affidavit filed invested the circuit court with jurisdiction, and the manner of proving that the order was made could be waived, and it was waived by the appellants here not appearing in the circuit court and moving to dismiss the case there for want of jurisdiction. If they had made a motion to dismiss in the circuit court, they might have insisted that the record of the probate court was the best proof of

whether or not an appeal to the circuit court had been granted, or they might have waived the production of the record and have permitted other proof to have been introduced of the fact that an appeal had been duly granted. The essential thing that gives the circuit court jurisdiction is the granting of the appeal by the probate court upon proper affidavit filed, and not the manner of proving the granting of the appeal. In short, under our decisions the parties could not waive the granting of the appeal by the probate court, but they could waive the manner of proving the same. This is shown by other decisions bearing on the question.

In *Stricklin* v. *Galloway,* 99 Ark. 56, there was an insufficiency of the affidavit of appeal from the probate court to the circuit court, and the court held that this was waived by the parties appearing in the circuit court and taking substantive steps in the case.

Again in *Huffman* v. *Sudbury,* 117 Ark. 628, the court held that it is not essential to the exercise of jurisdiction by the circuit court that the affidavit for appeal filed in the probate court should appear in the record, but that the fact that it was so filed might be established by other evidence. So, too, in *Spybuck Drainage Dist. No.* 1 v. *St. Francis County,* 115 Ark. 591, where the statute required the county court to grant the appeal upon an affidavit filed in the manner provided by the statute, the court held that it was not necessary that the record of the county court should show that the affidavit for appeal had been filed, but that this fact might be shown by other proof that the affidavit for appeal was filed with the proper officer, and that when such proof was made the jurisdiction of the circuit court attached.

In the application of this rule to the instant case it may be said that the record contains affirmative testimony from which the circuit court might have legally inferred that the probate court granted an appeal to the circuit court, and appellants will be deemed to have waived the proof of that fact by the entry of the order granting

the appeal on the records of the probate court, because they did not move to dismiss the appeal in the circuit court on the ground that the jurisdictional facts were not shown by the best evidence.

Therefore it can not be said that the appeal was not granted by the probate court, and that on this account the circuit court acquired no jurisdiction in the case.

On the merits of the case, it is earnestly insisted that the findings of fact made by the circuit court are not supported by the evidence. The court found that Alsie Thomas was the widow of James Thomas, deceased, and as such was entitled to dower in his estate. Appellants introduced testimony tending to show that James Thomas and Alsie Thomas had never been legally married, and that they lived together in a state of concubinage. We need not set out this evidence in detail, because the case was tried before the court sitting as a jury, and the circuit court made a general finding of fact in favor of appellee. It has been uniformly and repeatedly held that the findings of fact made by a circuit court are as conclusive as the verdict of a jury, and will not be disturbed on appeal unless the evidence is legally insufficient to support them. *Huffman* v. *Sudbury,* 117 Ark. 628; *Gay Oil Co.* v. *Akins,* 100 Ark. 552; *Fort Smith & Van Buren Bridge Dist.* v. *Scott,* 111 Ark. 449; *Cady* v. *Pack,* 135 Ark. 445, and *Matthews* v. *Clay County,* 125 Ark. 136.

This brings us to a consideration of whether the evidence adduced by appellee was legally sufficient to sustain the judgment. Appellee was a witness for herself. According to her testimony, James Thomas died on January 9, 1920, at his home in Ashley County, Arkansas, and they had lived there as husband and wife for about eight years before he died. James Thomas and Alsie Thomas were married at Fort Smith, Ark., on the 6th or 7th of April, 1910, and lived together as husband and wife until James Thomas died. Appellee lived in the same house with James Thomas about six years before 1910, and cooked for him. She did not stay in the same room with

James Thomas, but slept in another room with Causey Drew and his wife. James Thomas asked her to marry him, but put off their marriage. Finally she told him she was going to leave and go to Fort Smith to live because he had not married her as he had agreed to do. A few weeks after she went to Fort Smith James Thomas wrote her and asked her if she would marry him if he would come to Fort Smith for that purpose. She answered that she would. He then wrote her to meet him at the train at Fort Smith on a certain day. On that day she did meet him, and he had a marriage license that was issued by the clerk of Ashley County, and as they walked along the street from the train they met an old negro preacher named Mooney, who used to live in Ashley County, and James Thomas procured him to marry them. James Thomas turned over the marriage license to the old preacher, and they never saw it afterward. The marriage license was never returned to the clerk by the preacher as provided by the statute.

Two physicians who practiced medicine in Ashley County near where James Thomas lived after he brought Alsie back from Fort Smith testified that James Thomas told them that Alsie was his wife and always spoke to and of her as his wife.

One of the physicians testified that he did their practice for four years, and during all of this time James Thomas conducted himself toward Alsie as his wife and treated her as such.

A salesman in the store where they traded stated that James Thomas always spoke of and treated Alsie as his wife.

Several other witnesses testified that they lived near to James Thomas several years before he died, and that he always spoke of Alsie as his wife and treated her as such.

According to common repute in the neighborhood, they were regarded as husband and wife.

It was shown on the part of appellants that the old colored preacher whom Alsie testified as having performed the marriage ceremony between James Thomas and herself in 1910, had died in Ashley County before that time. For this reason it is insisted that her testimony is not entitled to any probative force. We can not agree with counsel in this contention. This was a matter which affected her credibility as a witness only. It diminished the weight of her testimony, but did not destroy it.

The law in this State is that marriage may be proved in civil cases by reputation, the declarations and conduct of the parties, and other circumstances usually accompanying that relation. Declarations of the parties are evidence tending to establish marriage. *Kelly's Heirs* v. *McGuire,* 15 Ark. 555; *Jones* v. *Jones,* 28 Ark. 19; 2 Greenleaf on Evidence (16 ed.), § 462; 1 Wigmore on Evidence, 268, and vol. 3, §§ 2082-2083.

In the light of these authorities, it may be said that the testimony of appellee to the effect that she and James Thomas were married in Fort Smith in 1910 under a license he had procured in Ashley County is testimony of a fact which, if true, established a ceremonial or legal marriage between them. Her testimony is not overcome because the marriage license was not returned by the preacher as required by the statute. Proof that they procured a license as required by the statute and were married by a minister of the Gospel showed a legal marriage, and the return of the minister of that fact on the marriage license was only evidence that the marriage had been performed by him, but did not of itself constitute the marriage. It may be that appellee was mistaken in the preacher who married them, but this did not overcome her testimony to the effect that they were married by a minister of the Gospel after James Thomas had procured a license therefor as provided by the statute. Her testimony is corroborated by that of several witnesses to the effect that James Thomas ever afterward referred to appellee as his wife and treated and conducted himself to-

ward her as such. The testimony of appellee and the other witnesses was testimony of a substantive character and legally sufficient to support the findings of the circuit court to the effect that appellee was the widow of James Thomas, deceased, and as such entitled to dower in his estate.

It is also insisted that the judgment should be reversed because the circuit court found that certain of the personal property was the individual property of appellee and rendered judgment in her favor for it. It is contended that the circuit court acquired only such jurisdiction on appeal as the probate court had in the original proceeding, and that the probate court had no jurisdiction in a contest between the administrator and others over property rights.

It is true that the jurisdiction of the probate court is confined to the administration of the estate of the decedent. The probate court had jurisdiction to appoint appellee as administratrix of the estate of James Thomas, deceased, and to allot her dower in his estate as his widow. According to the evidence adduced by her, she and her husband lived on a farm in Ashley County, Arkansas, and he had accumulated considerable personal property which was kept on the farm. Certain articles of this property, however, belonged to her, and the court gave it to her. In order to properly administer the estate of James Thomas, deceased, and to allot dower to his widow, it was necessary for the court to determine what property belonged to the estate, and the question of the title to certain articles arose as a necessary incident to the determination of the main matter before the court. In such case the probate court can determine the question of title to the property, for this is necessary in properly administering the estate and allotting the property to those entitled to it as distributees under the statute. *King* v. *Stevens,* 146 Ark. 443.

It follows that the judgment must be affirmed.

JEFFERSON v. SOUTER.

Opinion delivered October 3, 1921.

1. MORTGAGES—ABSOLUTE DEED—EVIDENCE.—While equity will permit parol evidence to be introduced to show that a deed absolute in form was intended as a mortgage, the evidence to establish that fact must be clear, unequivocal and convincing.

2. MORTGAGES—ABSOLUTE DEED—EVIDENCE.—For the purpose of ascertaining whether an absolute deed was intended by the parties as a mortgage, the court will consider all the surrounding circumstances, including the value of the land, the price paid, and the acts and declarations of the parties at the time the transaction was had.

3. EVIDENCE—DECLARATION AGAINST INTEREST.—Declarations against interest are admissible against all who succeed to the declarant's interest or who claim under him.

4. EVIDENCE—MATTER OF COMMON KNOWLEDGE.—It is a matter of common knowledge that lands appreciated greatly in value between January, 1912, and January, 1917.

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

STATEMENT OF FACTS.

In January, 1917, J. T. Souter brought suit in the circuit court against Lillie Jefferson to recover possession of 81 acres of land in Columbia County, Ark.

Lillie Jefferson filed an answer, asserting title to the land in controversy and setting up facts tending to show that the transaction with the plaintiff was not an absolute sale of the land to him, but was only intended by the parties as a mortgage. She asked that the cause be transferred to the chancery court, which was done.

According to the testimony of Lillie Jefferson, on the 17th day of December, 1902, L. H. Pearce executed a deed to the land in controversy to Scott Jefferson for the consideration of $240. Scott Jefferson was her husband. As soon as the land was purchased, they moved on it, and Scott Jefferson finished paying for it in January, 1904. They continued to occupy the land

as their homestead until Scott Jefferson died on the 13th day of April, 1914. After his death Lillie Jefferson claimed the land as her homestead and rented it out, but never collected any rent therefor. On the 24th day of December, 1908, Scott Jefferson and Lillie Jefferson, his wife, executed an absolute deed to L. H. Pearce to the land in controversy for the consideration of $301.30. It was intended by the parties that the transaction should be a mortgage to secure Pearce the amount named as the consideration in the deed. On the 4th day of March, 1911, L. H. Pearce and wife executed a deed to George Pickler to the land in controversy for the consideration of $331.42. On February 25, 1911, Scott Jefferson, by an instrument in writing, which was not recorded, notified L. H. Pearce that he had transferred all his interest in the contract concerning the land in controversy made by Pearce to Scott Jefferson and directed Pearce to execute a deed to the land to G. T. Pickler. On the 20th of January, 1912, G. T. Pickler and his wife executed a deed to J. T. Souter to the land in controversy for the consideration of $320. In the spring of 1914, a short time before he died, Scott Jefferson caused a suit to be filed in the chancery court against J. T. Souter for the specific performance of an alleged contract for the purchase of the land in controversy.

The attorney for Scott Jefferson testified that he went to see J. T. Souter about the matter, and that Souter claimed that Jefferson owed him $592; that he made a tender of this amount to Souter; that Souter refused to accept the tender and to make a deed to Scott Jefferson to the land in controversy. The attorney for Scott Jefferson also testified that he dismissed the suit for specific performance in 1916, before the present suit was instituted, and that the land in controversy was worth $1,000 at the time the present suit was brought.

According to the testimony of J. T. Souter, he did not agree with Scott Jefferson to pay off the amount that Jefferson owed Pickler, which was secured by a lien

on the land in controversy, and to receive a deed from Pickler to the land as security therefor. On the other hand, it was intended by the parties that J. T. Souter should receive an absolute deed from G. T. Pickler to the land in controversy, and that the transaction was in no sense to be considered as a mortgage to secure Souter for an indebtedness owed him by Scott Jefferson. At the time the transaction was had, Souter did make a verbal agreement with Scott Jefferson for a resale of the land to him if Jefferson would pay him the amount he had paid for the land together with an account which Jefferson owed him. The whole amount was $592, and Souter would have conveyed the land to Jefferson if the latter had paid him this amount. Souter denied that Jefferson or his attorney had ever tendered him this amount. In the first part of 1914, Jefferson saw that he was not able to pay Souter the $592, and agreed to pay Souter rent for the land thereafter. Jefferson began to trade with another firm that year, and Souter, at the instance of Jefferson, by an instrument in writing, waived his landlord's lien for supplies. After Jefferson agreed to pay rent on the land in 1914, Souter expended $500 in making permanent improvements on the place and thereafter paid the taxes on the land.

The merchant who agreed to furnish Scott Jefferson supplies for the year 1914 testified that, before he would furnish Jefferson, he required Souter to waive his landlord's lien for supplies. Scott Jefferson told the merchant who agreed to furnish him in 1914 that J. T. Souter would not claim anything but the rent, and the merchant had Jefferson to get a statement from Souter to that effect before he furnished him supplies.

The chancellor found the issues in favor of the plaintiff, Souter, and a decree was entered accordingly. To reverse that decree, the defendant, Lillie Jefferson, has duly prosecuted this appeal.

Joe Joiner and *Henry Stevens*, for appellant.

In determining whether an instrument which is in form a deed, is a mortgage or a deed, the court will consider the situation of the parties, the property conveyed, its value, the price paid, defeasances, verbal or written, and the acts and declarations of the parties. 112 Ark. 607; 27 *Id.* 404. A deed absolute in form will be treated as a mortgage if the proof of such intent is clear and convincing. 110 Ark. 632. See also, 23 Ark. 479; 193 S. W. 264; 107 Ark. 1; 95 *Id.* 509; 225 S. W. 24, 203 *Id.* 1039; Ann. Cases, 1917C, 974.

The instrument under which appellee holds is a mortgage, and the heirs are entitled to the property on payment of the debt.

McKay & Smith, for appellee.

The evidence does not show that Jefferson ever paid Souter anything on the purchase price of the land nor that he took possession pursuant to the contract. Possession alone will not take the case out of the statute of frauds; it must have been taken pursuant to the contract. 206 S. W. 896; 21 Ark. 277; 44 *Id.* 334; 63 *Id.* 100; 75 *Id.* 526; 6 Pomeroy's Equitable Remedies, Vol. 2, §§819, 820. The evidence is uncontradicted that the verbal contract of sale existing between Souter and Jefferson was cancelled prior to the year 1914, and that Souter rented the land to Jefferson. Since appellants did not plead the statute of frauds, they cannot take advantage of the fact that this contract of cancellation was verbal. However, if it was void under the statute of frauds, the fact that Souter took possession and made valuable improvements on the land by building houses is sufficient to take the case out of the statute.

HART, J. (after stating the facts). The deed to J. T. Souter to the land in controversy is absolute on its face. While equity will permit parol evidence to be introduced to show that the transaction was intended as a mortgage, in order to overcome the presumption of law and show from the absolute form of the deed that the

transaction was intended by the parties as a mortgage, the evidence must be clear, unequivocal and convincing. *Wimberly* v. *Scroggin,* 128 Ark. 67, and *Snell* v. *White,* 132 Ark. 349.

According to these and other decisions of this court, for the purpose of ascertaining the true intention of the parties, the court will consider all the surrounding circumstances, including the value of the land, the price paid, as well as the acts and declarations of the parties at the time the transaction was had.

Tested by this rule, it can not be said that Lillie Jefferson showed by clear, unequivocal and convincing testimony that the deed to the land in controversy to J. T. Souter was intended to be treated by the parties as a mortgage. On the one hand, Lillie Jefferson testified that her husband induced J. T. Souter to pay off an indebtedness against the land and to take an absolute deed thereto as security. On the other hand, Souter denied that he made such an agreement with Scott Jefferson, and testified that it was intended that the deed should be an absolute one. He admitted, however, that he made a verbal agreement with Scott Jefferson for a resale of the land if Jefferson would pay him back the purchase money and an account for supplies which he owed him. Souter received a deed to the land on the 20th day of January, 1912. He waited on Jefferson during the years 1912 and 1913 to carry out his contract to repurchase the land. Jefferson failed to carry out his part of the contract for the repurchase of the land, and it was then agreed that Jefferson should begin to pay rent for the land. Souter is corroborated by the testimony of the merchants who agreed to furnish Jefferson with supplies in 1914.

The merchant testified that Jefferson told him that Souter only claimed a lien for rent and would waive his landlord's lien for supplies. The declaration of Jefferson to the merchant was against his interest and is ad-

missible against his successors in interest and all who claim under him. *Russell* v. *Webb,* 96 Ark. 190, and *Strickland* v. *Strickland,* 103 Ark. 183.

It is claimed that the testimony of Lillie Jefferson is corroborated by the fact that the consideration agreed to be paid for the land was grossly inadequate. Counsel point to the fact that Souter only claimed $592 and that the land was worth $1,000. Souter purchased the land in January, 1912, and the testimony showing the land to be worth $1,000 referred to the time when the present suit was brought, which was in January, 1917. It is a matter of common knowledge that lands appreciated greatly in value during the period of time referred to, and the alleged inadequacy of price is not, under the circumstances, of any weight in determining whether the transaction was an absolute sale or not.

It is true that the testimony of Lillie Jefferson is corroborated by the attorney who testified that he had made a tender of the amount claimed to be due by Souter, and that the latter had refused to accept the tender and execute a deed to Jefferson to the land. The testimony is in direct and irreconcilable conflict, and Lillie Jefferson failed to establish her claim by that clear, unequivocal and convincing testimony which is required under the settled law in this State.

It follows that the decree must be affirmed.

KNIGHTS AND LADIES OF SECURITY *v.* LEWELLEN.

Opinion delivered October 3, 1921.

INSURANCE—NONPAYMENT OF PREMIUM —WAIVER. —Where the constitution and by-laws of a benevolent society provided that on failure to pay a monthly assessment when due the delinquent member should automatically stand suspended, it was error to instruct, in effect, that, if the society subsequently notified the member of his delinquency, this was evidence that the society had waived the delinquency.

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

Calvin T. Cotham and *A. J. DeMers,* for appellant.

A. B. Belding, W. D. Swaim and *James E. Hogue,* for appellee.

SMITH, J. Appellee was the beneficiary in a certificate issued to T. J. Lewellen, her husband, by appellant, a fraternal insurance company. The certificate was issued on the 31st day of May, 1919, and the insured died on August 13, 1919. The premium was payable monthly on the first day of each month in advance, and there was a provision in the constitution and by-laws of the order that, if any member should fail to pay any monthly assessment by the last day of the month for which the assessment was due, the delinquent member should automatically stand suspended.

The controlling question of fact in the case is whether the insured had paid two premiums or only one. The parties practically agree that if two premiums were paid the company is liable, whereas, if only one premium was paid, appellant is not liable. In fact, appellee, in stating the case, says: "The paramount issue, and really the only issue, in the case was as to whether the assured had paid his dues."

We do not set out the testimony bearing upon this issue, as it may be different upon the retrial of the cause.

In submitting the case to the jury the trial court, among other things, said:

"If he failed to pay his dues, then he would stand automatically as suspended unless the association would voluntarily carry him on its books. On that feature of it, even though he had not paid his dues for the month of July, if they still carried him on the books and charged that dues to him and notified him that he was in arrears and made a demand on him, I think there was some evidence here to that effect, why that would be a waiver of that part of the constitution and by-laws which says that

a member is suspended for the nonpayment of dues, but unless they did carry him on that way, if he failed to pay the dues for July he was suspended and dropped automatically and could not claim any right at all under the certificate."

The only testimony on this feature of the case was that on August 6, 1919, the home office of the appellant company addressed to Lewellen, the insured, a formal notice that he was in arrears for his July dues. Objection was made to the introduction of this testimony on the ground that it was irrelevant and incompetent, inasmuch as the original notice was not produced or its loss accounted for. We think, however, that the introduction of the original of the notice would not have warranted the giving of the instruction set out above.

It does not appear how the insured would have been reinstated if, in fact, he was delinquent. It may be that payment of the delinquent dues would have been sufficient, but no contention is made that any dues were paid after the date of this notice. It is certain, however, that the mere giving of formal notice of delinquency did not operate to reinstate the suspended member, as he was not thereby induced to take any action or to pay any money. 2 Bacon's Life & Accident Ins., 601.

The certificate sued on was for the sum of $2,000, but it contained the provision that, if the member should die within six months after the delivery of the certificate to the member, the company would be liable to the beneficiary for only sixty per cent. of the amount of the certificate; and, inasmuch as the assured died within six months of the date of his certificate, it is conceded that the appellant company is not liable for more than $1200. The judgment rendered was for this amount. It is claimed, however, that this sum is excessive under another section of the policy; and such appears to be the fact. Section 7 of the policy reads as follows: "It is herein further provided that, for the purpose of creating and maintaining a reserve fund, that, on the death of the

said member, the National Council shall retain fifty dollars of each one thousand dollars of this certificate, less one dollar per thousand for each year this certificate shall have remained in force." This certificate is for $2,000, and would have been enforceable for that amount if the assured had not died within six months of the date of his certificate. The beneficiary is not entitled to the credit of the dollar per thousand as the certificate had not been in force for one year. The necessary effect of this section of the policy is therefore to further reduce the amount of the recovery by a hundred dollars (in the event liability is properly found upon the retrial of the cause).

Other assignments of error are argued, but, as they may not arise on the retrial of the cause, we do not discuss them.

For the error in giving the instruction set out above, the judgment is reversed, and the cause remanded for a new trial.

HALL v. WEBB.

Opinion delivered October 3, 1921.

1. TRUSTS—JURISDICTION OF EQUITY.—Courts of equity have full and complete jurisdiction over trusts independently of statute, whether the same arise by express declaration and agreement or result by implication of law.
2. TRUSTS—INVESTMENT IN BANK STOCK—LIEN.—Where trust funds have been wrongfully invested in bank stock, equity has authority to declare a lien on the stock and to order a sale thereof.
3. CONSPIRACY—JOINT LIABILITY.— Where the complaint alleged and the evidence established a conspiracy to defraud the beneficiaries of a trust fund, it was not error to render a joint judgment against the conspirators.

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

Appellants *pro se.*

1. The demurrer should have been sustained. The complaint alleged wrongful possession. The statute, C. & M. Dig. §§ 55-57 provides an adequate remedy at law.

15 Ark. 381; 134 *Id.* 484. The bill is essentially a bill of discovery which is not permitted by statute. C. & M. Dig. §§ 1037-1038; 49 Ark. 311. The question of title to the property was one for a jury, hence the court should have transferred the case to the circuit court, or held it for determination of title. 177 S. W. 1146; 156 Pac. 590; 80 Ore. 132; 158 Pac. 810; 74 Ark. 104.

2. The money in controversy having been delivered by the deceased in his lifetime to appellants, Hall, in conformity with his intention, as shown by the evidence, to leave what he had at the time of his death to those caring for him until that time, the title thereto at the time of his death was in said appellants, and not in his estate. 105 Ark. 116; 134 *Id.* 484.

3. The statute, C. & M. Dig. §6144, does not prohibit co-defendants from testifying as to conversations and transactions between the deceased and other parties defendant. 43 Ark. 307. The statement of deceased to Rutherford was competent, as was also a similar statement made by deceased in the letter. Greenleaf on Ev. §108; 12 Ark. 782; 43 Ark. 103. Letter was properly identified and made an exhibit without objection. Objection thereto for the first time after the deposition was read to the court, was insufficient. C. & M. Dig. §§4248-4249.

4. The evidence does not establish the allegation that delivery of the money was procured by fraud and deceit. Fraud will not be presumed. 108 Ark. 415. The burden of proving fraud was upon appellee.

Garner Fraser, W. E. Hall and *J. Allen Eades,* for appellee.

1. The demurrer was properly overruled. The complaint states a case clearly within chancery jurisdiction. 21 C. J. 50; *Id.* 110; *Id.* 116, 117; 70 Ark. 191; 101 *Id.* 455; 121 *Id.* 85; 74 *Id.* 121; 227 S. W. 2.

2. Considering the whole of appellants' testimony in connection with that of other witnesses, a court of

conscience could have rendered no other decree. The chancellor's findings on the evidence are at least persuasive. 95 Ark. 528.

3. Appellants were not competent witnesses as to transactions with and statements of the intestate. Their testimony as to these matters should not be considered. 79 Ark. 73, 74; 43 *Id.* 307.

HUMPHREYS, J. Appellee instituted suit against appellants and Cinda Hall, the wife of John Hall, in the Van Buren Chancery Court, to recover $3,300 alleged to have been received from Jasper Webb a short time before his death, for the purpose of distribution among his heirs after his death. In addition to alleging that the defendants, under a false claim of ownership, converted the money thus received to their own use, and that $1,000 of same was invested in bank stock, which they were about to sell to innocent purchasers, and that they were insolvent, and that appellee was without any adequate remedy at law, the bill contained the following allegation: "That the deceased was so weak in mind and body that he was incapacitated and unable to look after his business or financial interests and affairs; that he reposed absolute and explicit faith and confidence in the defendants; that the defendants, taking advantage of said faith and trust so reposed in them, and taking advantage of their relationship to the deceased, with the fraudulent intent, purpose and design to obtain possession of his property, overreached him and misled and deceived him, and falsely and fraudulently represented to him that, if he would turn over and deliver to them his money and other personal effects, they would care for same, and would correctly distribute same in the event of his death. That, relying upon said promises and representations so made to deceased by defendants, he delivered to them as trustees and fiduciaries for safe-keeping the sum of $3,300 to be by them taken care of for him." The prayer of the bill sought in substance to hold the defendants as trustees of the funds received and to enjoin a transfer of the stock and the expenditure of the fund.

To this bill, appellants and Cinda Hall filed a motion to transfer the cause to the circuit court, and a demurrer challenging the jurisdiction of the chancery court, and, without waiving their rights under the demurrer, answered, denying the material allegations of the bill and alleging that the moneys received were gifts to the appellants.

The cause was heard upon the pleadings and evidence adduced, which resulted in a decree overruling the demurrer and the motion to transfer to the circuit court and the dismissal of the bill against Cinda Hall for the want of equity, and in a finding that appellants received $1,450 belonging to the estate of Jasper Webb, deceased, out of which sum $874.41 had been invested in fifteen shares of bank stock in the Bank of Scotland, Arkansas, owned at the time of the rendition of the judgment by T. S. Hall, and that appellee should have a lien declared thereon for said amount. Judgment was rendered in accordance with the findings, from which an appeal has been duly prosecuted to this court, and the cause is here for trial *de novo*.

Jasper Webb, who had resided in California from young manhood until a few weeks before his death, informed John Hall, a nephew by marriage, by letter, that he had sold his farm, was in poor health and would like to spend his remaining days in Arkansas if he could come or send for him. He enclosed in the letter $500 for the Jeff Webb family, consisting of five persons, with directions that John Hall see that each received his respective share. This money was divided as directed. In response to John Hall's next letter, the following letter was written by Jasper Webb to him:

"Springville, Cal., Aug. 24, 1919.

"Mr. John Hall,

"Scotland, Arkansas.

"Dear Nephew: Your letter to hand found me still improving some in health but slowly. I guess I shouldn't complain for a man 84 years old. I hope these few lines

will find you well. You said you was not able to make the trip, but would send after me if I wanted to come and live with you the rest of my days. I written you before that I have sold my little farm and reserved a right to live on it as long as I wanted to, but now if you will be kind enough to come or send after me and take care of me the rest of my days which I am sure are but few, you shall have what little I have got. It is not much, but enough to do us a while. So let me hear from you soon.

"Your uncle,

"Jasper Webb."

T. S. Hall, a son of John Hall, went to California soon after the receipt of the last letter to bring his great uncle to Scotland, Arkansas, where John Hall resided and conducted a hotel. One witness testified that T. S. Hall told him that Jasper Webb sent him $100 to pay his way to California. T. S. Hall denied that he made the statement. John and T. S. Hall testified that T. S. Hall took $400 of John Hall's money to California for the purpose of paying the return expenses of Hall and Webb if needed, and, if not needed, to convert it into gold and bring it back. T. S. Hall testified that, after reaching California, Jasper Webb made him a present in all of about $450; that, when he started back, Jasper Webb purchased a draft payable to himself for $1,000, being all the money he had except expense money for the return trip; that he, Hall, purchased a draft for $800, payable to himself; that, in the purchase of the draft, he used his own money and $400 that his father had given him before he left for California; that the expense of the return trip was borne largely by his uncle and partly by himself; that, after his return, his uncle indorsed the $1,000 draft and he placed it, together with the $800 draft, to his personal credit in the Scotland bank and gave his uncle $1,000 in cash, which he gave to his father, John Hall, for taking care of him the rest of his life. John Hall testified he gave him $40 at one time, $80 at another, and the balance of the thousand at another, for agreeing to

take care of him the rest of his life; that he had expended practically all the money at the time he testified, and was unable to give any itemized account of the expenditures. Webb and Hall reached Scotland about September 19. Webb went at once to the hotel conducted by John and Cinda Hall, and, after a short illness, died on October 14, 1919. On October 27 thereafter, Dr. Hatchett transferred ten shares of the bank stock to T. S. Hall and five shares to John and Cinda Hall jointly; that the stock was paid for by a check in the sum of $1,175, drawn by T. S. Hall on his account; that in the latter part of the year 1919, John and Cinda Hall transferred the five shares of stock, which had been transferred to them jointly, to T. S. Hall. J. H. Lindsey testified that, on September 26, 1919, T. S. Hall deposited $1,970, of which the two California drafts represented $1,800; that, on October 27, 1919, the account had been reduced down to $874.40; that, on that day, Hall deposited $379, and the bank paid his check to Dr. Hatchett of $1,175 for the fifteen shares of stock. Also that T. S. Hall asked him whether he could deposit $1,500 in gold in the bank and receive it back in gold a short time after he returned from California. He was informed that he could.

R. W. Hall, an uncle of T. S. Hall, testified that, soon after returning from California, he told him his Uncle Jasper was feeble, and that when starting he forgot $750 in gold that was hidden in the stove-wood box and went back and got it.

Dr. Hatchett testified that John Hall came to him the evening he agreed to sell fifteen shares of stock in the bank to T. S. Hall for $1,175 and wanted to know what one-third of $1,175 was, without explaining why he wanted to know.

John Hall, Cinda Hall and T. S. Hall all testified that one-third, or five shares, of the stock was sold by T. S. Hall to his mother for cash, but none of them could explain why the five shares were transferred to John and

Cinda Hall jointly, or why later in the year it was transferred to T. S. Hall, except that Cinda Hall got tired of owning the stock.

T. S. Hall testified that he had paid a portion of the $1,800 out and borrowed $750 from Cleve Hall to aid in the purchase of the fifteen shares of bank stock, and also got $500 from his mother for the same purpose; that he did not put a cent of the old man's money in the stock.

Cleve Hall testified that he loaned his brother, T. S. Hall, $750 about that time and produced the note which was given to him.

W. O. Rutherford, a neighbor of Jasper Webb, Sr., for years in California, testified that he purchased his farm in 1919 for $1,750; that $500 of the money was sent to John Hall for the Webb heirs, and $1,000 was used to purchase the $1,000 draft which he took to Arkansas with him; that he believed Webb had about $800 at home in addition to that amount.

Jasper Webb, Jr., a nephew of Jasper Webb, Sr., and brother to Cinda Hall, testified that his uncle told him he had given his money to no one about a week before his death; that, while they were talking, Cinda Hall came to the door and said, "I wish you would not bother our old uncle." Cinda Hall denied making the statement.

N. A. Simpson, brother-in-law of T. S. Hall, testified that he sent a car to Morrilton for Hall and Webb when they returned to Scotland; that, when they reached Scotland, T. S. Hall offered to pay him; he inquired what luck he had on the trip, and Hall showed him some gold and other money in his pocketbook. T. S. Hall denied bringing any gold back with him from California, but testified that, if he showed Simpson any, it was what had been taken in at the store in his absence.

Clara Webb, wife of appellee, testified that, on Sunday before Jasper Webb, Sr., died, she heard him ask T. S. Hall for his money, and T. S. Hall answered: "I am keeping it, You don't need it;" that he asked for his money a second time and received the same answer;

that she went to the kitchen and told Cinda Hall what occurred in her hearing; that Cinda Hall said T. S. Hall had a part of the money and went to the room and stopped the conversation. John Hall, Cinda Hall and T. S. Hall denied the conversation, or that Clara Webb was at the Hall home that day. Judge and Mrs. Griggs both testified that she and T. S. Hall were there on the day mentioned. Mrs. Lindsey testified that Clara Webb told her of the occurrence the day Jasper Webb died.

Sallie Simpson testified that she was at the home of John and Cinda Hall the Sunday when Clara Webb was there; that Clara Webb was there, but was on the front porch next to town and remained there not more than ten minutes; that she had a talk with Jasper Webb, who said he had some money, that he had divided all except enough to do him while he lived; he said, "T. S. Hall was going to be paid for his trouble in going after him, and the rest to my papa and mamma for keeping him; and this conversation was about a week after Jasper Webb came.

W. J. Watson testified that Jasper Webb, Sr., told him that he aimed for John Hall to have his money for taking care of him.

Cleve Webb testified that John Hall told him there would be $900 or $1,000 left by deceased after payment of expenses, and that, if each of the others would turn back the $100 received by them before Webb left California, he would be willing to divide the whole sum equally. John Hall denied making the statement.

Rice Webb, father of the appellee and nephew of Jasper Webb, Sr., testified in substance, as follows: Came to see his uncle at the home of John and Cinda Hall and spent a week with them. Was told by deceased that he had deposited with the Bank of Scotland a draft in the amount of about $1,500, and that T. S. Hall had in his possession $1,200 or $1,500 in gold belonging to him, the deceased. Deceased desired witness to take charge of and wind up the estate; wanted his property divided

equally among his heirs. Deceased asked T. S. Hall why he did not put his money in the bank. T. S. Hall replied that it was all right any way. The attitude and conduct of defendant, Cinda Hall, his sister, was resentful and unfriendly toward him. She seemed to resent his talking to his uncle, and her actions made him feel that he was not wanted at her home. No one was present while he was talking with Jasper Webb. He would not talk if any one came in while he was talking to him. Admitted that he later wrote to John Hall the letter exhibited with his deposition in which he said that the deceased had told him that he had in the bank at Scotland $1,000 and that T. S. Hall had $1,000 in gold of his.

After the death of Jasper Webb, Sr., two letters were written to inquiring relatives by T. S. Hall, one was written for his father and the other at the instance of his father with directions to sign his mother's name to it. His mother, Cinda Hall, testified that she did not know of or authorize the letter. He explained that he had not written either letter as his father intended. In further explanation he said: "Well, the way I understood the last one—I am not quite sure now, but I think he was there and had me to write it—the first one I know he was not there, and I must have wrote it sort of by guess work and signed mother's name to it after he had told me what to write." In further explanation, he said: "Papa came in one day when I was putting up the mail. I had my mind on my own business while he was telling me something like this to write to Manda Ellis—to write her that the old man was dead, and that he would not have anything left counting anything for his expenses and trouble and for his mother's and his tombstone it would leave him in the hole something like $25. So after he had gone out, or sometime during the day, I happened to have time and thought about it so I written about what I could think of. But he told me later I did not write it like he intended." The letters are as follows:

"Scotland, Ark., October 22, 1919.

"Manda Ellis, Spiro, Oklahoma.

"Dear Sis: I reply to your letter. Uncle Jasper died 14th of October. You said something about coming. If you wanted to come, why didn't you come while he was living? We paid all expenses while he was sick and burial expenses and had to pay $25 out of our own money, and would like if you all are willing to help me make this amount up. It wouldn't be much apiece. He had nothing but what he sent in, and that was what we done and give you all. "Your sis,

"Cinda Hall."

"Scotland, Ark., Nov. 1, 1919.

"Mr. Rice Webb.

"Dear Brother: Cleve (Webb) told me you wrote him and wanted to know about Uncle Jasper's money. Never had very much; so I would write you the truth about it as I have heard so much about it first one way and then another. You know a man can hear anything now. I know all about his money, and will tell you the truth about it, as I don't want anything that don't belong to me. After paying expenses and doctor bill and burial expenses, he had one hundred and sixty-two dollars left, and I bought your mamma and him a tombstone apiece. So I thought that would be best to do with that little amount of money, as it wouldn't be much apiece. And Cleve said that would be what he would do with it if he was me, so I done so. My wife said you wanted a pair of his glasses. Write me the kind of case they was in and I will send them to you by mail. All well. It rains here every day. Write me a long letter when you have time. "Yours,

"John Hall."

Appellant first insists that the court erred in overruling the demurrer and refusing to transfer the cause to the circuit court. We can not agree with this contention. The gist of the bill, according to its salient allegations, was to regulate and enforce a trust fund which had

been and was being diverted and misappropriated without a complete and adequate remedy at law to prevent dissipation of the fund. The allegations state a cause of action peculiarly within the powers of courts of equity to examine. 25 C. J. 116-117. It was said by this court in *Spradling* v. *Spradling,* 101 Ark. 451, that "courts of equity have inherent and exclusive jurisdiction over all kinds of trusts and trustees. They have full and complete jurisdiction of trusts independently of statute, whether the same arise by express declaration and agreement, or result by implication of law. The court therefore did not err in overruling the demurrer to the complaint."

The next contention of appellant is that the decree of the court is against the clear preponderance of the evidence. The evidence is quite voluminous; hence we have only attempted to summarize it. An extended written analysis of it could serve no useful purpose. Our conclusion, after a careful reading and analysis of the evidence, is that Jasper Webb, Sr., had about $1,800 when he left California for Arkansas; that it was his intention to pay the necessary expenses incident to his removal to Arkansas and to give John Hall the balance for taking care of him the rest of his life. This was indicated in his first two letters; also indicated after reaching Arkansas by statements made to Sallie Simpson and W. J. Watson. This intention thus expressed is the only circumstance in the record tending to corroborate the evidence of the appellants to the effect that the gift was consummated. All other statements made by Jasper Webb, Sr., to other witnesses tended to show that he changed his mind, and that the gift he intended to make was never consummated. Practically every statement and act of John, Cinda and T. S. Hall during the illness and for a time after the death of Jasper Webb, Sr., indicate that he never gave any money to appellants. We can not reconcile a *bona fide* gift with the attempt at secrecy on the part of the Halls concerning the amount received and the

disposition made of it. The two letters written to relatives by T. S. Hall, concerning the money of deceased and the disposition thereof, not only conflict with each other but both abound in untruths concerning the amount of the money the deceased had before he started to Arkansas and the disposition made of it. The impression intended to be conveyed by the letters was that the $500 sent from California and divided between the heirs absorbed all the assets of the deceased. The letters were evidently written to forestall or prevent an inquiry as to the disposition of about $1,800 which had been reserved by Jasper Webb, Sr., at the time he sent the $500 to the heirs. The explanation attempted for writing these letters simply makes a bad matter worse, for they do not explain. We can not say the chancellor's finding against the gift was contrary to a clear preponderance of the evidence.

It is practically undisputed that at least $1,000 of deceased's money was deposited to the individual account of T. S. Hall in the Scotland Bank in September, and that the account had not been reduced below $874.45 up to and including the time a check for $1,175 was given to Dr. J. K. Hatchett in payment of fifteen shares of stock. That check absorbed the balance and all of an additional deposit made on that day, except $96.41. The court did not err in declaring the balance on that day the property of the estate of the deceased, as it will be presumed that Hall checked prior to that time, against his individual funds and not against the trust funds. Nor did the court err, as contended, in declaring a lien upon the stock for the trust fund and making an order to sell the stock to satisfy the lien. To have simply impounded and delivered the stock to the administrator would have forced him to accept stock in lieu of his judgment, which might have been of less value than the judgment. The declaration of a lien and order of sale was in effect a foreclosure, cognizable in a court of equity and not within the exclusive jurisdiction of a probate court, as suggested by appellants.

The last contention of appellants is that the court erred in rendering a joint judgment against appellants. The allegations of the bill in effect charge a conspiracy against appellants to divert the trust fund, and the allegations are fully sustained by the evidence. Under the theory and proof of a conspiracy, it was proper to render a joint judgment against the appellants.

No error appearing, the judgment is affirmed.

WEBB v. STATE.

Opinion delivered October 3, 1921.

1. CRIMINAL LAW—HARMLESS ERROR.—No prejudice can result to a defendant by reason of being convicted of a lower degree of homicide than is warranted by the evidence.
2. HOMICIDE—IMPLIED MALICE.—The law implies malice where one purposely kills another with a deadly weapon without provocation.
3. CRIMINAL LAW—EXCLUSION OF EVIDENCE—MATERIALITY.—Error in the exclusion of testimony will not be considered on appeal, in the absence of a showing as to what the excluded testimony would have been.
4. CRIMINAL LAW—INSTRUCTIONS CONSTRUED AS A WHOLE.—Where there is no conflict between the instructions given, it is proper to read them together to ascertain whether the law in the case is correctly declared.

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

James B. Gray, Caldwell, Triplett & Ross, and *Nixon, Levine & Nixon,* for appellant.

The verdict of murder in second degree is without evidence to sustain it, as it was based on mere supposition or guess. 56 Ark. 8; 49 Ark. 364.

Malice, express or implied, must be proved, and the absence of proof on that point is basis for reversal where there is a conviction of murder in the second degree. 141 Ark. 57. No presumption of malice where the killing is shown to have been necessary, and none of the circumstances manifest a wicked or abandoned dispo-

sition. 82 Ark. 545. Proof of killing does not make out the offense of murder nor supply proof of malice, when circumstances of mitigation appear. 38 Ark. 221.

Evidence of previous difficulty between the deceased and Nick Webb, communicated threats, etc., should have been admitted on the trial of this defendant, as his guilt hung on that of his brother Nick. 58 Ark. 235.

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

Appellant can not complain of the action of the jury in convicting him of a lesser degree of homicide than the evidence warranted. 113 Ark. 301; 68 Ark. 310; 37 Ark. 433; 133 Ark. 373.

The law presumes malice from an unexplained attempt to take life. 82 Ark. 540; 96 Ark. 52. Or in the sudden killing of one without provocation. 25 Ark. 405; 70 Ark. 272, 278.

The alleged error in excluding the testimony of Nick Webb will not be considered on appeal because appellant did not offer to show what the answers to the questions propounded would have been. 88 Ark. 562; 87 Ark. 123; 133 Ark. 599.

Instructions 10 and 11 were not bad because they failed to embody all the law of the case, for appellant's contention was covered in other instructions. 88 Ark. 433. Several instructions upon the same subject-matter must be taken together as a whole. 48 Ark. 396; 133 Ark. 206.

HUMPHREYS, J. Appellant was indicted and tried in the Jefferson Circuit Court for murder in the first degree for shooting and killing one King Waters, found guilty of murder in the second degree, and as a punishment therefor sentenced to serve a period of twenty-one years in the State penitentiary, from which judgment and sentence an appeal has been duly prosecuted to this court.

Appellant's first insistence is that the evidence on behalf of the State tended to establish murder in the first degree, and that adduced on behalf of appellant tended

to establish a justifiable homicide, and, for that reason, the evidence is insufficient to support a verdict for murder in the second degree. This court is committed to the doctrine that no prejudice can result to a defendant if convicted of a lower degree of homicide than warranted by the evidence. *Allen* v. *State,* 37 Ark. 433; *Bruce* v. *State,* 68 Ark. 310; *McGough* v. *State,* 113 Ark. 301; *Lasater* v. *State,* 133 Ark. 373. If, therefore, the evidence is sufficient to support a verdict for murder in the first degree against appellant, he can not complain because a verdict of murder in the second degree was returned against him.

It is admitted by appellant and his brother that he and his brother, Nick Webb, shot King Waters, their tenant, in a field being cultivated by him; that they shot him in the legs; that he, appellant, fired only one shot with a pistol, 32-caliber, which at the time contained nine cartridges, and his brother one shot with a pump gun; that his brother had about a half box of shells with him, a part of which was loaded with buckshot; that, at the time they fired the shots, they were standing near a thicket, and the deceased, King Waters, had approached them to a point about 75 yards distant; that Waters grabbed his knees and began to stagger around; that neither waited to see the result, but passed through the thicket and to their car, which had been left at their father's, and then went home and telephoned to the officers at Pine Bluff; that Nick Webb and King Waters had a difficulty the day before the tragedy occurred, of which appellant had been informed; that the difficulty was discussed just before starting to that part of their farm cultivated by Berry Webb which adjoined that part cultivated by King Waters. The evidence on the part of the State tended to show that King Waters was shot down while examining a piece of wet land to ascertain whether it was dry enough to plow; that he stated several times during the short time he survived that he did not see or know who fired upon him; that three shots

were heard, two being from a pistol and one from a shotgun; that eleven shot entered Waters' body between his knees and groins—the two highest being larger than the others, the highest entering the groin and supposed to be the fatal shot, as it severed an artery; that, after being shot, Waters staggered around considerably before falling; that his pistol, which he carried in a scabbard, was found on the ground near him with loads in every chamber; that, upon examination, a place in the thicket was observed where some one had apparently stood and whittled, and at or near which an empty 32 pistol shell was found.

The testimony adduced on behalf of appellant tended to show that they took the loaded weapons along with them on the visit to the farm on account of the difficulty the day before and for protection in case an attack was made by King Waters upon Nick Webb; that, in passing around the thicket on the side of the field cultivated by Waters, *en route* to that part of the land cultivated by Berry Webb, they were discovered by Waters, who immediately advanced upon them with drawn pistol, cursing and abusing them, and, when ordered to stop, instead of doing so, fired upon them, when a shot was fired by each in succession in necessary self-defense.

If the evidence introduced by the State was believed by the jury, it was sufficient to sustain a verdict for murder in the first degree. If, however, the jury disregarded the State's evidence tending to establish an assassination, they were not necessarily driven, under the evidence in this case, to the conclusion that the homicide was justifiable. The jury may have believed that part of appellant's testimony to the effect that they were walking around the thicket and were in plain view at the time the fatal shot or shots were fired, and yet may have concluded that the killing was unnecessary. They might well have argued that, on account of leaving the scene of the tragedy immediately, appellant and his brother had fired upon Waters, without sufficient provocation or justification,

for, had they fired in necessary self-defense, in all probability they would have remained to assist the wounded man or to have explained the details of the tragedy to the first who might appear on the scene. In this event, malice, a necessary essential in second degree murder, would arise by implication from the manner and circumstances of the killing. The law implies malice where one purposely kills another with a deadly weapon without provocation. *McAdams* v. *State,* 25 Ark. 405; *Vance* v. *State,* 70 Ark. 272.

In the course of the trial, over the objection and exception of appellant, the court refused to permit Nick Webb to testify concerning the trouble which occurred between him and King Waters the day before the tragedy. He was permitted to state that they had a difficulty, and that he communicated this fact to his brother, but was not permitted to go into details concerning it. Appellant insists that the court erred in excluding this evidence, because, under the theory of the State that he was present, aiding and abetting, or present and ready and consenting to aid and abet Nick Webb, he was entitled to have all facts go to the jury in mitigation or exculpation of Nick Webb. If this contention were true, the case could not be reversed in the state of this record on that account, for the reason that the record fails to show what his brother would have said concerning the details of the trouble if permitted to prove them. Unless the excluded testimony of a witness is offered and set out in the record, it is impossible to determine its materiality to the issue involved. This court said in the case of *National Life & Accident Ins. Co.* v. *Henderson,* 133 Ark. 599, that "objection to the exclusion of testimony would not be considered on appeal, in the absence of showing what the testimony would have been." The same announcement was made in *St. L. S. W. Ry. Co.* v. *Myzell,* 87 Ark. 123, and *Boland* v. *Stanley,* 88 Ark. 562.

Appellant insists that instructions numbered 10 and 11, given by the court, as to the necessity of an accused to do all in his power to avoid a killing or to avert the

necessity therefor before resorting to force in his own defense, are fatally defective, because they did not define the test by which an accused may determine the danger and necessity for acting. It is true this phase of the law of self-defense was not included in the instructions referred to, but was thoroughly covered in the instruction numbered 5, requested by appellant and given by the court. There was no conflict between instruction No. 5 and the two instructions given by the court. Where there is no conflict between instructions, it is proper to read them together to ascertain whether the whole law in the case is correctly declared. *Ward* v. *Blackwood,* 48 Ark. 396; *Burke* v. *Sharp,* 88 Ark. 433; *Yellow Rose Mining Co.* v. *Strait,* 133 Ark. 206.

No error appearing, the judgment is affirmed.

DUPREE v. SMITH.

Opinion delivered October 3, 1921.

1. ABATEMENT AND REVIVAL—PARTIES.—In an action involving the title to land the cause should be revived, after the death of one of the litigants, in the names of his heirs.
2. ABATEMENT AND REVIVAL—LIMITATION.—Crawford & Moses' Dig. § 1065, providing that "an order to revive an action against the representatives or successors of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made," is mandatory.
3. ABATEMENT AND REVIVAL—NECESSARY PARTIES.—Where a cause of action involved the title to land and incidentally the rents for its unlawful detention, upon defendant's death no revival could be had by the plaintiff without the consent of defendant's heirs, unless had within one year from the time it could have been first made; the consent of defendant's administrator alone being insufficient, as the right to recover rents from the estate was dependent upon the title being adjudged to be in plaintiff.

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

D. Dudley Crenshaw, for appellant.

1. When by mistake of the draftsman of a deed the grantor is made to convey a wrong tract of land, a court of equity will correct the mistake and reform the deed so as to convey the tract intended. 48 Ark. 498; 79 *Id.* 592.

2. Upon the death of the defendant whose interest in land is involved, the suit must be revived against the heirs at law, and until this is done there can be no adjudication concerning the title. 1 R. C. L. 26; 93 Ark. 307; 113 *Id.* 207; 74 *Id.* 149; 69 *Id.* 215; 61 *Id.* 414; 51 *Id.* 82; 39 *Id.* 104; *Id.* 235; *Id.* 306; 34 *Id.* 379; 16 *Id.* 168. Without the proper parties before it, the court had no jurisdiction to render final judgment concerning the subject-matter of the suit. 81 Ark. 468; 93 *Id.* 307.

John Baxter, for the heirs.

The judgment should be set aside, and the cause dismissed, because: 1. The heirs were necessary parties. 2. The cause of action was barred before any suggestion was made of the death of M. M. H. Dupree. 3. The administrator had no authority to enter his appearance after the action was barred. 93 Ark. 307; 113 Ark. 207; 49 *Id.* 87; C. & M. Dig. §§6312-13; 103 Ark. 601; 112 *Id.* 6.

Buckner & Golden, for appellee.

1. The burden was on the appellants to establish mistake. A deed will not be reformed except upon proof that is clear, unequivocal and convincing. 96 Ark. 251; 11 *Id.* 66; 95 *Id.* 523; 101 *Id.* 611; 221 S. W. 481. Reformation will not be ordered on the ground of mistake unless the mistake was mutual. 89 Ark. 309; 53 *Id.* 185. If there was a mistake, the grantor should have acted promptly to obtain a correction of the deed, and not waited until suit was entered against him. 99 Ark. 486.

2. An administrator has the right to sue or defend in ejectment. 42 Ark. 25, 28; 8 *Id.* 9; 62 *Id.* 64. The rents sued for was a demand against the estate of M. M. H. Dupree, and made in time. 105 Ark. 95; 28 *Id.* 500; Kirby's Dig. §111. An administrator may bring an ac-

tion without joining with him the persons for whose benefit it is prosecuted. Kirby's Dig. §6002. The order of revivor was made by consent of parties and appearance entered by the administrator. It stood revived even though the time had elapsed. Kirby's Dig. §§6306, 6313; 103 Ark. 606; 110 *Id.* 39; *Id.* 317.

3. A plea of limitations is a general plea, and since the heirs in their motion to dismiss pleaded the statute of limitations without reservation, they thereby entered their appearance. Having entered appearance for one purpose, they were in court for all purposes. 89 Ark. 509, 511; 90 *Id.* 316.

4. The attorney for an administrator may enter his appearance. 110 Ark. 317; 104 *Id.* 1; 84 *Id.* 527.

5. The appeal by the heirs and Baxter was premature. An order of revivor is not final, and not a ground for appeal. 92 Ark. 101. Unlike *Ex parte Gilbert* relied on by appellants, the administrator in this case is a general administrator and takes possession of all property for full adjustment. The contest here is over possession of property. 50 Ark. 551; 57 *Id.* 153; 109 *Id.* 281.

6. The chancellor's findings will be sustained unless against the clear preponderance of the evidence. 120 Ark. 37; 86 *Id.* 212; 106 *Id.* 583; 92 *Id.* 546.

HUMPHREYS, J. Suit in ejectment was brought, on the 8th day of January, 1918, by appellee against M. M. H. Dupree and B. F. Dupree, her husband, in the Chicot Circuit Court, to recover the possession of lot 15 in block 4, Holland's Addition to the town of Dermott, Ark., and for $300 damages for the detention of same, alleging ownership thereof under deed from them of date March 16, 1912.

The Duprees filed answer, admitting the execution of the deed and denying damages for the use of same, but alleging in a cross-complaint that the said M. M. H. Dupree, being the owner of both lots 14 and 15 in block 4 of said addition, sold appellee lot 14 and intended to convey him said lot, but, through a mutual mistake, lot 15,

instead of 14, was described in said deed; that, a short time thereafter, they erected a residence and other improvements upon said lot 15, of the value of $650, and have retained the continuous possession of said lot. The prayer of the cross-complaint was for a reformation of the deed so as to describe lot 14, instead of lot 15, and for a transfer of the cause to the chancery court of said county. The motion embodied in the complaint to transfer the cause to equity was sustained, and the cause was transferred to the chancery court pursuant to an order of the circuit court. During the pendency of the suit in the chancery court, M. M. H. Dupree died, on the 20th day of April, 1919, leaving as her only heirs her two sons, J. M. Holland and S. L. Holland, and two grandchildren, Lucile Dupree and Dorris Freeman. John Baxter afterward purchased the interest of S. L. Holland in said lots. The suit remained upon the chancery docket after the death of M. M. H. Dupree without any steps being taken until April 4, 1921. On that date, the surviving heirs and John Baxter appeared for the sole purpose of filing a motion to dismiss the cause of action because barred by the statute of limitations, which was pleaded, requiring that causes be revived after the death of a plaintiff or defendant in a real property action within one year from the time the order of revivor might have first been made.

On the same date, appellee suggested the death of M. M. H. Dupree and prayed for a revivor of the cause in the name of B. F. Dupree, her administrator, who had been appointed as administrator of her estate on May 8, 1919. Thereupon, B. F. Dupree, as administrator, entered his appearance and consented that the case be revived in his name as such administrator.

Upon hearing of the motions, the court revived the cause against B. F. Dupree, as administrator of the estate of M. M. H. Dupree, but dismissed the motion of the heirs of M. M. H. Dupree and John Baxter for the want of

equity, from the dismissal of which motion the heirs and John Baxter prosecuted an appeal to this court.

Immediately thereafter, the court proceeded to hear the cause upon the original pleadings and exhibits and the depositions of James Smith and B. F. Dupree, which resulted in a decree establishing the ownership of said lot 15 in appellee, and a judgment of $195 for damages by way of rental against B. F. Dupree, as administrator of the estate of M. M. H. Dupree, from which decree B. F. Dupree, as administrator, has prosecuted an appeal to this court.

The effect of dismissing the motion of the heirs of M. M. H. Dupree and John Baxter and of reviving the cause in the name of B. F. Dupree, as administrator of the estate of M. M. H. Dupree, only, was to exclude the heirs and John Baxter from participation in the cause of action. In other words, it was a ruling on the part of the court that the heirs of M. M. H. Dupree, deceased, were not necessary parties to the adjudication of the title to the land of which she died possessed and to which she claimed title. The heirs and the parties claiming through them were necessary parties to the controversy, because the relief sought affected the title to said real estate. *Chowning* v. *Stanfield,* 49 Ark. 87; *Ex parte Gilbert,* 93 Ark. 307; *Mayers* v. *Lark,* 113 Ark. 207. It was said by this court in *Mayers* v. *Lark, supra,* that (quoting syllabus 1): "In an action involving the title to land, the cause should be revived, after the death of one of the litigants, in the name of his heirs." The court proceeded to a hearing of this cause without reviving it against the heirs of M. M. H. Dupree or treating them as proper or necessary parties. The cause could have been revived against the heirs upon proper notice the first day court was in session after the death of M. M. H. Dupree, and the cause could not have been revived against them without their consent after the expiration of one year from the time the order of revivor might have first been made. Section 1065, Crawford & Moses'

Digest. This section of the statute is mandatory in nature. *Anglin* v. *Cravens,* 76 Ark. 122. Almost two years had expired after the death of M. M. H. Dupree and after the appointment of an administrator for her estate before an attempt to revive the cause was made, and, at that time, a revivor against the administrator only was sought, no revivor having at any time been sought against the heirs. The right to revive against the administrator was contingent upon the right to revive against the heirs, for the reason that the cause of action involved the title to real estate, and the right to recover rents against the estate of M. M. H. Dupree, deceased, was dependent upon the title of the real estate being adjudged to appellee, which could not be done without the necessary parties before the court. The causes of action were not severable, so that appellee might revive and prosecute his suit for rents against the administrator of the estate of M. M. H. Dupree. The consent therefore of the administrator to a revivor availed appellee nothing. The court erred in overruling the motion of the heirs of M. M. H. Dupree and John Baxter to dismiss the proceedings. The court should have stricken the cause from the docket upon the motion. Section 1067, Crawford & Moses' Digest.

For the error indicated, the judgment is reversed and the cause remanded with directions to strike the cause from the docket.

HUCKABY v. HOLLAND.

Opinion delivered October 10, 1921.

1. TRIAL—INSTRUCTION—SPECIFIC OBJECTION.—To an ambiguous instruction, not inherently incorrect, the objection should be specific, and not general. So *held* where, in an action on a note to which the defense was that the note had been altered by striking out a clause retaining title to a chattel sold, an instruction that "if you should find from the evidence that the note had the cause retaining title to the car in plaintiff *erasure* [instead of *erased*], then you should find for defendant," was not open to a general objection.

2. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.—It was not error to deny a new trial for newly-discovered evidence which was merely cumulative, where there was a lack of diligence in securing such evidence.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

J. E. London and *Robt. J. White,* for appellant.

A new trial should have been granted because the verdict was not supported by the evidence. C. & M. Digest, §311, par. 6; 137 S. W. 925; 135 S. W. 922.

The court should have granted a new trial upon the grounds of newly discovered evidence, sufficient diligence having been shown. C. & M. Digest, §1311, par. 7; 26 Ark. 496; 92 Ark. 519. It must be sustained by affidavits showing its truth. Kirby's Digest, §6219.

The affidavits of Corbin Holland, Lizzie Burket, his attorneys and Crawford were of sufficient probative force to entitle him to a new trial, and were not cumulative merely. 70 S. E. 975; 81 Pac. 184; 111 N. W. 540; 93 S. W. 10; 104 Pac. 529; 69 N. E. 264; 33 Ind. 309; 99 Miss. 274; 110 Pac. 699; 15 N. W. 258; 66 Ark. 612; 141 S. W. 196; 85 Ark. 179; 190 S. W. 851; 222 S. W. 724; 126 N. E. 841; 77 S. W. 397; 94 N. E. 428; 218 S. W. 827; 126 N. E. 223; 101 S. E. 192; 174 N. W. 339; 175 N. W. 166; 177 Pac. 859; 209 S. W. 45; 80 So. 858; 255 Fed. 182; 122 N. E. 670; 170 N. W. 224; 173 N. Y. Sup. 15; 207 S. W. 487.

E. L. Matlock, for appellee.

The court did not err in giving the instruction and in saying that it stated all the law there was in the case. No specific objection to the instruction was made at the time. 137 Ark. 319; 135 Ark. 499. If appellant thought the instruction would mislead the jury, a specific objection should have been made at the time. 132 Ark. 54; 137 Ark. 530; 135 Ark. 499.

The court properly instructed the jury, and there was substantial legal evidence to sustain the verdict. 90

Ark. 100; 75 Ark. 111; 84 Ark. 406; 85 Ark. 193. The burden was upon appellant to show that the note had been changed before he signed it. 119 Ark. 282.

Cumulative evidence is not sufficient to justify the granting of a motion for new trial.

If there was a reservation of title, it was waived by bringing suit on the debt. 67 Ark. 206; 78 Ark. 501; 78 Ark. 569; 91 Ark. 319; 92 Ark. 530; 97 Ark. 432.

McCULLOCH, C. J. D. C. Holland and appellant, T. R. Huckaby, executed a promissory note to appellee, J. F. Holland, for the sum of $1,100, the price of an automobile sold by appellee to D. C. Holland. Appellant's name appears signed to the note as one of the joint makers, but, according to the undisputed evidence, he signed merely as surety for D. C. Holland. The note concludes with the following clause: "The above note was given for Dodge car." This is a suit on the note, and the only defense is that the note, when signed, contained a clause retaining title to the automobile in appellee as the seller thereof, and that this clause had, without the consent of appellant, been erased.

There is a conflict in the testimony, and we think there was testimony adduced legally sufficient to justify the submission of the issue whether the clause mentioned was a part of the note when signed by appellant. It appears from the testimony that, after the parties had agreed upon the execution of the note, they repaired to a certain mercantile establishment and there obtained a printed form of note containing a clause for the retention of title. That clause appeared at the time of the trial to have been erased, but appellant's testimony was to the effect that the clause was in the note at the time of its execution. Appellee testified positively and unequivocally that the clause retaining title to the car was not a part of the note at the time it was signed. We can not, therefore, sustain the contention of counsel that the verdict in appellee's favor on this issue was altogether without testimony to support it.

It is insisted that the court erred in giving the following instruction:

"If you find that the note in suit has been changed in a material matter since it was signed, by erasure or otherwise, then it will be your duty to find for the defendant, Huckaby, against the plaintiff, but if you should find from the evidence that the note had the clause retaining title to the car in the plaintiff *erasure,* then you should find for defendant Huckaby. That is all of the law there is to the case."

It is contended that this instruction is so vague that it is misleading. There was, however, no specific objection to it, and the only objection was a general one, We think that, while the instruction is ambiguous, and therefore, uncertain to some extent, it is not inherently incorrect, and that the objection to it should have been specific, so as to point out to the court the defect in the language used. It is manifest that the court meant to tell the jury that, if the clause retaining title to the car in the plaintiff had been erased after execution of the note, the verdict should be for appellant, and the error in the instruction is doubtless a clerical one in copying.

The assignment of error most earnestly insisted upon here relates to the ruling of the court in refusing to grant a new trial on account of evidence alleged to have been newly discovered. Appellant filed with his motion for a new trial several affidavits, one being from W. T. Crawford, who was assistant cashier of a bank at Alma, who testified that the note was sent to that bank for collection, and that it then had in it the clause retaining title to the car. Affidavits of other witnesses tended to show admissions on the part of appellee that the note had originally contained the clause in question, but that the same had been erased. This testimony was cumulative, and for that reason the court was justified in refusing to grant a new trial on that ground. Moreover, there was a lack of diligence, which justified the court in granting the motion.

Appellee further contends, in defense of the judgment, that, since he had the right to make an election not to enforce the clause retaining title, an alteration of the note in that regard was not material. It is unnecessary, however, to discuss that question, for the reason that we find that the case was submitted to the jury upon the sole issue joined by the parties themselves whether the erasure was made before or after the note was signed, and that that issue was properly submitted to the jury, and there is no error in the proceedings. The judgment is therefore affirmed.

FORREST v. BENSON.

Opinion delivered October 10, 1921.

1. REPLEVIN—SUFFICIENCY OF EVIDENCE.—In replevin to recover an automobile, evidence *held* legally sufficient to justify the submission of the question whether or not plaintiff was the owner.
2. PROPERTY—PRESUMPTION FROM POSSESSION AND BURDEN OF PROOF.—Possession of personal property is only *prima facie* evidence of title which yields to the actual title when it is asserted, and the buyer who trusts to appearances must suffer the loss if they prove delusive.
3. REPLEVIN—INSTRUCTION.—In an action to recover an automobile it was error to submit to the jury whether plaintiff "permitted the property to be disposed of to an innocent purchaser under such circumstances as would lead an ordinarily prudent person to believe that the property was rightfully sold," where there was no proof of any such misleading circumstances.
4. ESTOPPEL—PERMITTING ANOTHER TO TAKE OUT LICENSE ON AUTOMOBILE.—The fact that the owner permitted one to whom he had loaned his automobile to take out license in his own name will not estop him to claim the car as against one purchasing from the lendee without knowledge of such fact.

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

Floyd Terral and *J. C. Marshall*, for appellant.

Mere possession of personal property belonging to another is not a sufficient badge of ownership or right of disposition in the possessor to enable him to confer title

on an innocent purchaser. 25 L. R. A. (N. S.) 760, note; 25 Am. Dec. 604, note; 62 Ark. 84; 20 Wend. 278. An estoppel cannot be created by merely intrusting possession of personal property to another. 54 Minn. 71. Possession by a bailee of personal property of the bailor does not confer colorable authority upon the bailee to sell or work an estoppel against the owner. 53 Minn. 27; 100 S. W. 351; 70 Am. Dec. 226; 42 Am. Rep. 332; 42 Ill. 417; 42 Ark. 473. Forrest was not present at the sale, hence the estoppel created by standing by and encouraging a sale, or failing to object thereto, is absent. 10 Ark. 211; 14 Ark. 505. There is no showing in the record of any of the indicia of a right of disposition in Green, nor any act on the part of Forrest calculated to mislead any one into believing that Green had the right to sell the car or give title to it.

Troy W. Lewis, for appellee.

If the owner of personal property suffers another to have possession of the property and of the documents which are the indicia of property, a *bona fide* purchaser for value from such possessor can hold the property against the true owner. Burdick on Sales, 198, 200; 35 Cyc. 357, note 6; 24 R. C. L. 665 and authorities.

McCULLOCH, C. J. This is an action instituted in the Pulaski Circuit Court by appellant against appellee to recover possession of a Ford automobile, the ownership of which is asserted by appellant. Upon a trial of the issues before a jury it resulted in a verdict in appellee's favor.

Appellant resides in the city of San Antonio, Texas, and claimed that he was the owner of the automobile there and lent it to one Green, who brought it to Little Rock and, without appellant's knowledge or consent, sold it to R. L. Bibb, who in turn sold it to appellee. It is undisputed that Bibb purchased the car from Green in good faith and without any information concerning appellant's claim of ownership, and that Benson likewise was innocent of any information concerning an adverse

claim when he purchased the car from Bibb. The car was originally purchased by Green from a factory agency in San Antonio, and Green executed a mortgage on the car to secure the purchase price. According to appellant's testimony he made payments on the car for Green, and finally paid off the mortgage and caused the same to be assigned to him, and that Green thereupon sold and delivered the car to him. This occurred in the summer of 1918. In February or March, 1919, Green left San Antonio with the car in company with one Staehle, and made a tour of several States engaged in some kind of an advertising business. They went to New Orleans and spent a few days, and thence to Baton Rouge, Natchez, Vicksburg, Monroe, Shreveport and Texarkana, and on August 17, 1919, they arrived in Little Rock, and placed the car in a garage with which Bibb was connected in some capacity. Green stopped at one of the hotels in Little Rock and became indebted in a considerable amount for a board bill and pledged the garage claim check or ticket to the hotel management as security for the board bill. On August 23 appellant came to Little Rock in response to a telegram from Staehle, stating that Green had been injured in a fight, and after appellant's arrival here he advanced money to Green with which to pay his board bill. Appellant immediately returned to Texas, and on September 4 Green sold the car to Bibb, and about a week later Bibb sold it to appellee. Appellant testified that he owned the car, that he acquired it in the manner stated above, and that he merely lent the car to Green without giving the latter any interest in it or any authority to sell it. He testified that when he left Little Rock his agreement with Green was that the latter should immediately drive the car back to Texas. According to the testimony, the Texas license for the operation of the car was taken out in Green's name on February 8, 1918, and was renewed in his name on February 8, 1919.

The court refused to give any of the instructions requested by appellant, but submitted the issues to the jury on the following instruction:

"The owner of property which he had not transferred title to may be replevined by him wherever found, unless by his own actions he has permitted the property to be disposed of to an innocent purchaser under such circumstances as would lead an ordinarily prudent person to believe that the property was rightfully sold. Therefore, if you find from the evidence in this case that Forrest was the owner of the automobile in question at the time of the institution of this suit, and was entitled to the immediate possession of same, plaintiff would be entitled to recover, unless you find from the evidence that by his own voluntary acts and conduct he permitted Green to so use and exercise ownership over it as to cause defendant to honestly believe that Green had a right to dispose of it, in which event your verdict will be for the defendant."

The principal contention of counsel for appellant as ground for reversal is that the evidence is not sufficient to support the verdict. We are of the opinion, however, that, the burden being upon appellant as the plaintiff in the case to establish his right to recover the property, there was evidence legally sufficient to justify the submission of the question as to whether or not he was the owner. The only direct testimony as to appellant's ownership of the car was that given by himself, and all of the other testimony adduced by him was merely in corroboration of his statements.

In view of the circumstances in the case which have already narrated, we think it was a question for the jury to determine whether or not appellant was stating the truth when he testified that he acquired the title and possession from Green, and that in returning the car to Green he merely lent it to him.

But we have reached the conclusion that, if appellant was really the owner of the car, there was no testi-

mony that he "permitted the property to be disposed of to an innocent purchaser under such circumstances as would lead an ordinarily prudent person to believe that the property was rightfully sold," and that the court erred in submitting that question to the jury. It has long been ruled by this court that possession of a chattel is not conclusive evidence of ownership and of the right of disposal. In *McIntosh* v. *Hill,* 47 Ark 364, Chief Justice COCKRILL, speaking for the court, said: "Possession of personal property is only *prima facie* evidence of title, and the doctrine of *caveat emptor* prevails, notwithstanding the possession. The *prima facie* title must yield to the actual title when it is asserted, and the buyer who trusts to appearances must suffer the loss if they prove delusive."

All of the circumstances proved in the case, except the one that appellant, after he claimed to have purchased the car, permitted the Texas license to be issued in the name of Green, merely tend to establish the fact that appellant voluntarily entrusted the possession of the car to Green; but, as we have already said, the law on this subject is that this does not amount to *indicia* of absolute ownership so as to protect an innocent purchaser. There is no evidence that either Bibb or appellee was apprised of the fact that the Texas license had been issued in the name of Green, or that they acted on the faith of apparent ownership of Green on account of the license issued to him. Unless they knew of this fact and purchased the car on the faith of this fact as an evidence of ownership, it does not afford a ground for submitting the question whether or not appellant held out Green as the owner of the car. In the present state of the proof there is therefore no issue to submit to a trial jury except the single one as to appellant's asserted ownership of the car.

For the error in giving the instruction referred to the judgment is reversed, and the cause remanded for a new trial.

WESTERN RANDOLPH COUNTY ROAD IMPROVEMENT DISTRICT v. CLIFFORD.

Opinion delivered October 10, 1921.

1. CONTRACTS—ALTERATION.—Where H agreed in writing to purchase the entire anticipated bond issue of a road improvement district created by a special act, and deposited a certified check "to guarantee compliance with the terms of the contract", the check to be held in trust until the bonds were tendered in compliance with the contract, and subsequently the Legislature materially changed the act creating the district, and thereby substantially altered the contract itself, H's estate was absolved from liability on the certified check.
2. HIGHWAYS—LIABILITY OF DISTRICT IN CONTRACT.—A road improvement district was not bound by its contract to sell a contemplated bond issue entered into in advance of a contemplated assessment of benefits.

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

Page, Campbell & Davis, for appellant.

No time was specified in contract for delivery of bonds, hence a reasonable time, in view of all the circumstances, was intended. Page on Contracts (2nd. Ed.) Vol. 4, p. 2647; 33 Conn. 1; 101 Ala. 14; 13 N. Y. S. 922. A tender of the bonds within eight months was within a reasonable time, as there were unusual circumstances connected with the case causing the delay.

A formal tender of the bonds was unnecessary, since appellant was notified that they would not be accepted. 96 Ark. 156; 93 Ark. 497; 68 Ark. 505; 132 Ark. 84.

The refusal to accept the bonds was not justified by changes in the law, as the contract was not thereby made more burdensome. 109 Ky. 408; 125 Md. 450; 128 N. Y. S. 697; 24 Pa. Dist. 477; 42 N. Y. 126; 13 C. J. p. 646, §720; Page on Contracts (2nd. Ed.) Vol. 5, p. 4765.

The reason for the refusal to accept the bonds was because of the break in the bond market, but changing events is no ground for preventing specific performance of a contract. 144 N. Y. 152.

Not necessary for the district to probate claim against Hahn's estate. Upon the refusal of the representative to accept the bonds, the contingency happened which gave the district the right to cash the certified check. It then became an absolute claim, not against the estate of Hahn, but against the bank on which the check was drawn. 116 Ark. 1; 5 R. C. L. pp. 528-9, §§48-50.

John F. Clifford, for appellee.

The very nature of the contract makes time its essence, regardless of whether it is expressly so stated or not. 105 Ark. 626; 134 U. S. 68; 23 R. C. L. p. 1371; 11 L. R. A. 526. The words "as expeditiously as possible," should receive a literal construction. 126 Ark. 46.

After the passage of the amendatory legislation the board could no longer deliver the article contracted for, and they necessarily tendered comething not contemplated by the original contract, which the appellee was not bound to accept. 85 Ark. 596; 13 C. J. 642-3.

The law does not place upon the representative of Hahn's estate the duty to continually notify the district that it is expected to comply with its contract. 62 Ark. 316; 76 Ark. 570; 89 Ark. 204.

McCULLOCH, C. J. Appellant is a road improvement district in Randolph County created by a special act of the Legislature, approved February 27, 1919 (Road Acts 1919, p. 356), and on June 17, 1919, the district entered into a written contract with appellee's intestate, E. J. Hahn, for the sale of bonds to be issued for the purpose of raising funds to be used in the construction of the improvement. It was stipulated in the contract that the purchaser should accept the "entire anticipated bond issue in the sum of $400,000, or so much as the district may require, the bonds to be serial and run from one to twenty-five or thirty years, as the district may elect, to be dated October 1, 1919, and to bear interest at the rate of six per cent. per annum, payable semi-annually." It was further agreed in the contract that

the purchaser should, within ten days, deliver to the secretary of the board a certified check, in the sum of $10,000, "to guarantee compliance with the terms of the contract," the check not to be cashed, but to be held in trust until the bonds were tendered in compliance with the contract. Still another stipulation in the contract was that the commissioners agreed "to use their best efforts to have the assessment of benefits confirmed and the bonds issued with the least possible delay." Hahn delivered to the secretary of the board of commissioners a certified check for the sum of $10,000 on a bank in Little Rock, in compliance with the terms of the contract, and, shortly thereafter, before anything else had been done under the contract, Hahn died. The subsequent dealings with the district were conducted by Hahn's personal representative and those associated with him in the business. The bonds were never accepted by Hahn's representative, and this is an action instituted by the administrator to restrain appellant district from collecting the check and to restrain the bank from paying the same. The chancellor granted the relief prayed for in the complaint, and the district has appealed.

There was a clause in the contract to the effect that the purchaser of the bonds should make advances to cover the preliminary expenses of the district, which advances were to be paid out of the first issue of bonds. Sums of money were furnished from time to time, aggregating about $15,000, and negotiable promissory notes were executed by the district to cover the same, but it does not appear in this record what became of those notes, and they are not involved in the present litigation—the sole subject-matter of the suit being the check deposited by Hahn as a guaranty for the performance of the contract.

The district covered a large area in Randolph County, said to constitute about four-fifths of the county, and the original statute creating the district provided for surfacing the specified roads with crushed rock and

constructing necessary bridges along certain roads in the district. There were eleven roads mentioned, which were to be improved. The statute also contained a provision that the average cost of the road should not exceed $3,000 per mile, and it was estimated by the engineer during the progress of the preliminary work that the improvement could not be constructed within the limits thus specified as to cost. An amendatory statute was enacted at the extraordinary session of the Legislature in January, 1920, providing that the limitation of $3,000 per mile upon the cost of the improvement was to be exclusive of the cost of bridges and culverts. The amendatory statute provided also for the improvement of three additional roads, making fourteen in all, instead of eleven, as originally provided for, and it also provided that the roads described should be graded and drained, and that such parts of them as the commissioners deemed advisable should be surfaced with gravel or crushed rock. The new act also provided for repairing and strengthening the bridge across Black River. The final estimates and plans of the engineers were filed with the commissioners April 26, 1920, and were approved by the commissioners on that day. The lists of assessments of benefits were filed with the county clerk on May 21, 1920, and, after publication of notice, the same were completed on June 8, 1920. In a letter dated March 25, 1920, the personal representative of Hahn's estate indicated to the commissioners a refusal to accept the bonds, it appearing that at that time there had been very considerable depreciation in the market price of bonds of this character. Further correspondence took place between the parties, but those representing the Hahn estate persisted in the refusal to accept the bonds, formal tender of which was made after the approval of the final plans and specifications and the completion of the assessment of benefits.

It is contended by counsel for appellee that the Hahn estate was absolved from liability under the con-

tract on two grounds: First, that the contract itself was altered by the amendatory act of February 4, 1920; and, second, that the district committed the first breach by delaying an unreasonable length of time before putting itself in an attitude to make delivery of the bonds. We are of the opinion that the first contention of counsel is correct, and it is therefore unnecessary to discuss the second. Nor is it necessary to discuss the question how far the parties were bound by the executory features of the contract, as we are dealing now with the sole question of the right of Hahn's estate to prevent the collection of the check which had been deposited with the district as a guaranty of the performance of the contract. It is to be remembered that the purchaser obligated himself to accept the entire anticipated bond issue of the district, estimated to be the sum of $400,000 "or as much more as the district may require." The obligation was to accept the entire bond issue, whatever it might be under the law and the necessities of the district as then existing. The changes wrought by the new statute were very material and constituted a substantial alteration of the contract itself. It removed certain limitations as to the cost of the improvement and enlarged the scope of the improvement by providing for the improvement of three additional roads. It also changed the purpose from one to surface all the roads with crushed rock to the surfacing only of such roads as the commissioners might decide upon. This is not a case, as argued by counsel for appellants, where the law has merely imposed additional obstacles or burdens on the performance of a contract. Therefore, the cases cited in the brief of counsel are not applicable. It is a case where the contract itself has been changed by authority of law, and it is unimportant that this change was not a voluntary one on the part of the district itself, but was compelled by the lawmakers. The district is a creature of the law, and any changes made by the lawmakers were tantamount to changes made by the district itself. The

original statute, creating the district and the powers and duties conferred and imposed thereby, entered into the contract and became a part thereof, and a change in the law necessarily constituted a change in the contract, in so far as it altered the obligations of the parties. In this respect, the case presents merely the familiar question of one party attempting to change the contract without the consent of the other. The difference is this, however, that in the case of individuals a change can not be made by one without the consent of the other who has a right to insist upon the performance of the contract as made; whereas, in this instance, the change is made by the sovereign power of the law which controls the action of the improvement district. Nor is there any question involved of the impairment of the obligation of the contract, for it was merely tentative, and was not binding on the district in advance of a completed assessment of benefits demonstrating that the cost of the improvement would not exceed the benefits. *Cherry* v. *Bowman,* 106 Ark. 39; *Thibault* v. *McHaney,* 119 Ark. 188.

It follows that the decree of the chancery court was correct, and the same is affirmed.

WADE *v.* TEXARKANA BUILDING & LOAN ASSOCIATION.

Opinion delivered October 10, 1921.

1. PRINCIPAL AND AGENT—APPARENT AUTHORITY.—Where vendors by their conduct held out a third party as authorized to collect payments from the vendee on his contract of purchase, they are estopped to deny that he had such authority.

2. VENDOR AND PURCHASER—WAIVER OF FORFEITURE.—Where vendors reserved the right after default to declare the contract of purchase at an end and to treat the purchaser as a tenant, such right is waived where after default they permitted the purchaser to remain in possession, make payments on the purchase money and pay the taxes, and where they never notified the purchaser that they considered his contract of purchase as forfeited and would thereafter treat him as a tenant.

3. COVENANTS—DAMAGES—EVIDENCE.—In a suit for breach of warranty in a deed, as a general rule, parol testimony is admissible to show the true consideration, for the purpose of increasing or diminishing the damages; but a grantor may estop himself by his conduct from disputing the specified consideration.

4 COVENANTS—LIABILITY OF COVENANTOR.—A covenant of warranty runs with the land; and where the purchaser or covenantee conveys, the covenant passes to his vendee or assignee, who may, in case of eviction or failure of title, recover from the original grantor the sum which the latter received from his grantee, with interest from the date of the conveyance to the last conveyance.

5 COVENANTS—LIABILITY OF COVENANTOR.—Where vendors wrongfully deeded land to a third person after their purchaser had paid for the land and was entitled to a deed in fee, and thereby enabled such grantee to defraud his mortgage, they are liable to the mortgagee, upon failure of the latter's title, to the extent of the consideration expressed in their deed, even though the true consideration was less than the express consideration.

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

Jones & Head, for appellants.

The contract of purchase automatically became null and void when payments were sixty days behind, and all payments made were forfeited as rents. 48 Ark. 413; 54 Ark. 16; 87 Ark. 593; 76 Ark. 578; 139 Ark. 60.

John W. Welch had no authority to collect payments. 49 Ark. 320; 96 Ark. 456. No one has the right to trust to mere presumption of authority, nor to the mere assumption of authority of an agent. 62 Ark. 33; 92 Ark. 315. He must ascertain his authority. 117 Ark. 173; 105 Ark. 111. An agent who is employed to solicit orders and make sales of goods not in his possession has no implied authority to require payment therefor. 100 Ark. 360; 101 Ark. 68. The existence of an agency cannot be established by proof of the acts and declarations of the agent. 122 Ark. 357; 131 Ark. 197; 126 Ark. 405. The authority of an agent cannot be proved by the mere fact that he exercised the authority. 53 Ark. 208; 105 Ark. 446.

The covenant of general warranty runs with the land. 31 S. W. 200; 11 Cyc. 1170; 37 S. W. 455; 67 S. W. 405; 54 Ark. 195; 79 Am. Dec. 463; 11 L. R. A. 176. Parol evidence is admissible to show the consideration paid for the purpose of affecting damages. 54 Ark. 195; 71 Ark. 497.

A purchaser of land in another's possession takes with notice of equities existing against the title. 76 Ark. 25.

Arnold & Arnold, for appellee.

There was a waiver of forfeiture by continuing to accept payments. 87 Ark. 593; 139 Ark. 60; 142 Ark. 300.

Measure of damages is not limited by the benefit of the breach to the party making it. 54 Ark. 195.

WOOD, J. On the 7th day of April, 1921, Frank Mosley and M. C. Wade entered into the following contract:

"I hereby make application for lots 12 and 13 in block 3 in Iron Mountain Addition to Texarkana, Arkansas, at the price of $425, payable $10 per month without interest, except after maturity, and all past due payments to draw 10 per cent. interest. It is agreed that I am to get general warranty deed when I have paid amount due in full. It is understood and agreed that when payments are sixty days behind, this contract is null and void, and all payments made shall be forfeited as rents."

M. C. Wade and B. H. Kuhl were the owners of the lots described, and Wade, in entering into the above contract, was acting for himself and Kuhl. The Iron Mountain Addition was a negro settlement. John W. Welch, a negro, was employed by Wade and Kuhl to sell lots for them and to receive and turn over to them contracts of sale made by him with purchasers of lots, and to collect the first payment. The sales he made were

subject to the approval of Wade and Kuhl. The contracts, when entered into, were to be signed by Wade and returned by Welch to the purchaser.

The above contract was consummated in this manner. Following the printed matter on the sheet were blanks to be filled in, showing the particular date and amount of each payment. All of the payments made under the above contract were made to Welch. Of the amounts paid Welch he turned over to Wade and Kuhl the sum of $317.50. Mosley testified that he made other payments to Welch which were not turned over by him to Wade and Kuhl, and these payments were indorsed on the contract, which brings the total amount of the payments made by Mosley as shown by the indorsements to $412.50. The last of the these indorsements was made July 15, 1919. Mosley made a further payment to Welch as shown by a receipt dated April 24, 1920, of $30, making a total of $442.50 paid as purchase money by Mosley to Welch on the lots under the contract above mentioned.

According to the testimony on behalf of Wade and Kuhl, all the payments under the contract matured in 1915. Mosley never complied with the terms of the contract, but the vendors continued to receive payments under it long after maturity of the contract. In November, 1919, there being still a considerable sum due, the vendors elected to declare the contract of sale void and to treat the payments as rents, and on December 1, 1919, they sold the lots mentioned to John W. Welch, executing to him a warranty deed for the same in which the consideration mentioned was $425. John W. Welch actually paid them the sum of $142.20. Kuhl testified concerning this transaction as follows: "We deeded the lots to John W. Welch, without figuring the interest on the deferred payments, for practically what was due on the contract at the time he purchased. We took his representation for it. He claimed that Mosley had left the country; was down in South Texas or somewhere, and his wife was here in bad circumstances; and we told

him at the time that the contract was void because the time had elapsed, and we declared it now void, and we wanted him to go ahead and sell it to some one else. He begged because I think he said Mosley's wife was his cousin, and asked if I would allow him to preserve the woman's equity in the property by paying the balance and deeding it to him, and let him in turn deed it to her, and I said I would under the circumstances. * * *The sum of $142.20 paid by John W. Welch was the balance due at the time of the contract, without figuring the interest on deferred payments." Mosley went into possession of the lots soon after the contract for the purchase thereof was entered into, and made improvements thereon, and has since continuously occupied the same with his family as a home.

On January 16, 1920, the Texarkana Building & Loan Association took a mortgage from John W. Welch on certain properties, including the lots mentioned, to secure a note for $2,525, representing the amount of money which the association had loaned Welch.

This suit was instituted by the Texarkana Building & Loan Association and the trustee in the mortgage against John W. and Mattie Welch, his wife, to foreclose the mortgage. Mosley intervened, and set up that he was the owner of the lots in controversy under his contract of purchase above mentioned, which he alleged had been fully executed on his part by the payment of the purchase money. He alleged that he had no knowledge of the warranty deed executed by Wade and Kuhl to John W. Welch, and that the same was executed by the parties to it by collusion and with a fraudulent intent to defeat him of his rights of title to the property; that the grantees, Welch and wife thereafter executed a mortgage or deed of trust to the Building & Loan Association conveying the lots in controversy with a fraudulent intent also to deprive him of his title; that the association and its trustee, Sanderson, were cognizant of

and charged with notice of Mosley's equity in the lots. He prayed that his title to the property be declared and vested in him.

The Building & Loan Association answered the intervention of Mosley, setting up the deed from Wade and Kuhl to Welch and wife and the mortgage from Welch and wife to it, and asked that the same be foreclosed. It is also alleged that, if Wade and Kuhl breached their contract with Mosley by conveying the lots in controversy to Welch, it was entitled to recover of Wade and Kuhl the sum of $425, the amount of the consideration named in the warranty deed from them to Welch, because it had relied upon said deed in making the loan to Welch. It also set up that Mosley had forfeited his contract with Wade and Kuhl. It prayed that the intervener take nothing; that Wade and Kuhl be made parties, and that, in the event it be adjudged that Mosley was the owner of the lots, it have judgment against Wade and Kuhl for breach of warranty of their deed to Welch in the sum of $425, the consideration named therein. Wade and Kuhl were made parties, and they also answered the intervention of Mosley, denying all of its allegations, set up the contract mentioned, and claimed that Mosley had forfeited his right as purchaser thereunder, and that they had declared such forfeiture and had treated the contract as one of rental, and had declared the same null and void as to Mosley, and had conveyed the property by warranty deed to Welch. They also answered the cross-complaint of the Building & Loan Association and the trustee in the mortgage, denying its allegations, and setting up that they had executed a warranty deed to Welch for the actual consideration of $142.50, and that the sum of $425 mentioned in the deed was not the true consideration. They prayed that the intervention of Mosley be dismissed, and their deed to Welch be confirmed, and for all proper relief.

The above are substantially the issues and the facts upon which the court rendered a decree vesting the title

to the lots mentioned in Mosley and divesting the title out of Welch and wife and out of Wade and Kuhl, and also entered a decree in favor of the Building & Loan Association against Wade and Kuhl for breach of warranty in their deed to Welch in the sum of $425 with interest at 6 per cent. from January 16, 1920, and also foreclosing the mortgage on the other property mentioned therein. It was shown that the Building & Loan Association derived from the mortgage foreclosure the sum of $1,824.35, leaving a balance due it under the decree of $618.40. From the decree of the court Wade and Kuhl and Mrs. Kuhl prayed and were granted an appeal.

Both the appellants, Wade and Kuhl, testified that Welch had authority to sell the lots in controversy and to collect the first payment, but they also testified that he had no authority beyond this. But whether Welch had any actual authority to collect any but the first payment, we need not stop to consider, for it is certain from the preponderance of the evidence in this case, which it is unnecessary to set out and discuss in detail, that Welch had apparent authority to represent the appellants, not only in making the sale and collecting the first payment, but also in collecting subsequent payments. Mosley continued to make the subsequent payments to Welch which the appellants received from him and credited on Mosley's contract of purchase. Indeed, Mosley testified that he paid all the money on the property to Welch, and the appellants do not controvert this, nor do they controvert the fact that they received such payments as were made by Welch and credited the same on Mosley's contract of purchase. By their conduct they clearly held Welch out to Mosley as having authority to receive the payments made by him on his contract of purchase, and they are now estopped from saying that Welch had no such authority.

By the express terms of the contract under review, it became null and void as a purchase con-

tract if Mosley defaulted in the payments for sixty days, and the appellants had the right under the contract after such default to declare the contract of purchase at an end and to treat Mosley thereafter as their tenant and the payments made by him as rents. *Sorrells* v. *Marble,* 142 Ark. 300; *Hamson* v. *Brown,* 139 Ark. 60; *Souter* v. *Witt,* 87 Ark. 593. But the provision forfeiting the right of Mosley as purchaser upon default in making payments as prescribed was one made for the benefit of the appellants which they could waive. See above cases. The facts are that Mosley, immediately upon the execution of the contract, entered into possession of the property and continued in the possession of the same, making improvements, paying the taxes, and holding the same continuously as purchaser and owner and not as a tenant. The appellant testified that Mosley made default after the first payment, but the uncontroverted testimony in the record shows that the appellants never at any time indicated to Mosley that they considered his contract of purchase forfeited and would thereafter treat him as a tenant. On the contrary, they continued, even to the time of making the warranty deed to Welch, to treat Mosley as the purchaser, and the testimony of Kuhl himself shows that their warranty deed was executed to Welch for the consideration of $142.50 upon the representation made by the latter that he should be allowed "to preserve the woman's equity in the property by paying the balance and deeding it to him and let him in turn deed it to her." The issue as to whether the appellants had waived the forfeiture was one depending upon the facts and circumstances developed by the testimony, and, as we view the evidence, the facts are undisputed and show clearly that the appellants had waived their right to treat Mosley as their tenant rather than as the purchaser. See *Souter* v. *Witt* and other cases *supra.*

As between the appellants and Mosley, the next question then is: had Mosley complied with the terms of the contract by making full payment of the purchase money?

This is purely an issue of fact. The original contract of purchase shows indorsements of payments made thereon and the last payment of $10 was indorsed July 15, 1919, which brought the total payments to that date to $412.50 and left a balance due at that time on the principal of $12.50 not including interest. Mosley testified that on April 24, 1920, Welch brought the final report showing that the balance due on the purchase money for the lots was $70, and he presented in connection with it a deed purporting to be signed by Wade and Kuhl to Mosley and wife; that he paid Welch at that time the sum of $30, leaving a balance due of $40; that he was going away and told Welch that he would pay the balance when he returned. When he came back, Welch had gone, and the $40 claimed by Welch as the balance was not paid. But it appears from the indorsements on the original contract of purchase that, exclusive of interest, after the last payment on July 15, 1919, there was only due the sum of $12.50. Therefore, the payments made by Mosley of $30 on April 24, 1920, overpaid the balance due of the purchase money in the sum of $17.50, not including interest. But we are convinced from the testimony of Kuhl himself that the appellants did not intend to, and did not, charge Mosley any interest on the deferred payments of purchase money, for the reason that the testimony of Kuhl shows that the appellants received the sum of $142.50 as a balance of the consideration due by Mosley under the contract. Kuhl expressly stated that the sum of $142.50 was paid by Welch and received by the appellants as the balance due under that contract.

As before stated, the testimony clearly shows that Mosley had paid to Welch, treating him as the agent of the appellants, more than the amount called for as purchase money under the contract, not including interest. It occurs to us that the determination of the appellants to charge Mosley interest on the deferred payments of purchase money was an afterthought and one of the eventualities of this lawsuit. That suit was not in contemplation of the parties at the time Welch, acting for the ap-

pellants, received from Mosley payments which in the aggregate exceeded the balance due by Mosley at the time the last payment of $30 was made. That Welch did not account to his principals for all the money which Mosley paid him is not the fault of Mosley. The appellants, as we have shown, held Welch out to Mosley as having authority to receive these payments, and Mosley was justified in so treating him and in making the payments to him. The court, therefore, was correct in holding that Mosley had paid the full consideration for the lots and in entering a decree investing and quieting title to same in him.

The court entered a decree in favor of the Building and Loan Association against the appellants in the sum of $425, the amount of the consideration named in the warranty deed from appellants to John W. Welch with interest thereon at the rate of six per cent. per annum from the date of the mortgage by Welch to the association. The decree in this respect was correct. When Welch executed the mortgage to the association including the lots in controversy, he presented to the association a warranty deed from appellants to him showing as a consideration for the lots in controversy the sum of $425. On the mortgage debt to the association, Welch is still due the sum of $618.42 with interest and costs of the foreclosure suit. Under the circumstances disclosed by the undisputed testimony, the appellants, as between them and the association, are estopped from claiming that they only received a consideration of $142.50 for their warranty deed to Welch conveying the lots in controversy. Welch represented to Wade and Kuhl that the $142.50 was being paid by him for Mosley on the latter's contract of purchase. The testimony of Kuhl showed that the appellants acted upon this representation and made a deed to Welch expecting him in turn to deed the lots to Mosley. In making up the consideration for the deed, the former payments that had been made by Mosley to Welch were embraced. By deeding the lots directly to Welch, instead of to Mosley, they thus put it in the power of

Welch to defraud the Building and Loan Association by presenting their warranty deed to him. Appellants knew at the time they executed the deed to Welch that Mosley's contract of purchase was outstanding. The appellee did not know this. In a suit for breach of warranty in a deed, as a general rule, parol testimony is admissible to show the true consideration for the purpose of increasing or diminishing the damages. *Barnett* v. *Hughey,* 54 Ark. 195; *Davis* v. *Jernigan,* 71 Ark. 494-97. But the appellants can not avail themselves of that rule against the association, because their conduct in connection with their deed to Welch should estop them from disputing the consideration which they specified.

The covenant of warranty runs with the land, and when the purchaser or covenantee conveys, the covenant passes to his vendee or assignee, and such vendee or assignee, in case of eviction or failure of title, may recover from the original or remote grantor or warrantor the sum which such original grantor or warrantor received from his grantee, with interest thereon from the time of the conveyance to the last vendee or assignee, but he can not recover more than this sum. *Barnett* v. *Hughey, supra; Hollingsworth* v. *Mexia,* 37 S. W. (Tex.) 455; *Lewis* v. *Ross,* 67 Tex. 405. See, also, *Phillips* v. *Reichart,* 17 Ind. 120, 79 Am. Decisions, 463; *Brooks* v. *Black,* 11 L. R. A. (Miss.) 176; *Rogers* v. *Golson,* 31 S. W. (Tex.) 200; see, also, 11 Cyc. 1170.

Since appellants, under the circumstances, must be held to have received from Welch the sum of $425 for the purchase of the land, and are estopped from asserting otherwise, the court was correct in awarding a decree in favor of the appellee for that sum with interest thereon at six per cent. from the date of its mortgage from Welch. The decree being in all things correct, it is affirmed.

PEARCE v. HARDEN.

Opinion delivered October 10, 1921.

EXEMPTIONS—EXCEPTIONS TO SCHEDULE.—Where plaintiff filed exceptions to a schedule of exemptions claimed by defendant which in effect challenged the truth and accuracy of such schedule, it was error to sustain a demurrer to the exceptions.

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

Cul L. Pearce and *Stephens Moore,* for appellant.

Plaintiff's exceptions state grounds sufficient to call into question the correctness of defendant's schedule, and he was entitled to a hearing and decision on the merits. C. & M. Dig. §§ 5545, 5546. Laborers and mechanics are entitled, under the foregoing statutes, to the exemption of personal property and wages, not to exceed five hundred dollars, but claimants of such exemptions must bring themselves strictly within the two qualifications. As to what constitutes a *laborer* or a *mechanic,* see Webster's Int. Dict.; Anderson's Law Dict., 1913 Ed.; A. & E. Enc. of L., 2nd Ed., Vol. 12, p. 100; 113 Ga. 1085; 46 Ga. 466; 78 Fed. 498; 151 N. C. 320; 36 L. Ed. 226; 127 Ga. 444; 46 S. W. 918; 107 Fed. 585; 12 Phila. 402; 17 Ill. App. 196; 73 Ga. 343.

The burden is on the claimant to show affirmatively his right to claim the property as exempt. A. & E. Enc. of L., 2nd. Ed. Vol. 12, p. 261; 52 Ark. 547; 65 *Id.* 40; 23 *Id.* 101; 36 Ark. 496; 18 Ind. 119; 28 Fla. 1; 87 Ind. 156; 77 Cal. 194; 85 Ill. 157; 11 R. C. L. 558; 31 Ann. Cases, 243 and notes.

John E. Miller and *C. E. Yingling,* for appellee.

The schedule was duly verified. The exceptions thereto raise no denial of any statement therein, no question of fact for decision. The exceptions were properly dismissed. C. & M. Dig. § 5549.

The question as to whether or not the defendant is a laborer or a mechanic is not material to a correct determination of the issue, *supra;* Const. 1874, §2, Art. 9.

Defendant is not claiming exemption under the provisions of § 5546, C. & M. Dig. Plaintiff had a right to execution as provided in the statute, § 5550, if he thought defendant had other property than that named in the schedule.

WOOD, J. The appellant obtained a judgment in the justice court against the appellee in the sum of $77. The appellee filed the following schedule:

"G. H. Harden, defendant in the above styled cause, states: That he is a resident of the State of Arkansas and the head of a family; that he is the owner of the following described property in addition to the wearing apparel of himself and family, towit:

"Ninety-two dollars and ten cents due him from Brundidge & Neelly; $60.30 due said defendant from J. F. Dyson; about $235 due defendant at this time as salary from the counties composing the First Judicial District, and $25 cash on hand. $412.40.

"That a writ of garnishment has been issued by A. Neelly, justice of the peace, against his property. That under the provisions of article 9 of the Constitution of the State of Arkansas, he claims as exempt from seizure under such writ of garnishment the following described personal property, being all of his aforesaid personal property:

"$92.10 due him from Brundidge & Neelly; $60.30 due said defendant from J. F. Dyson; about $235 due defendant at this time as salary from the counties composing the First Judicial District, and $25 cash on hand.

"That this writ of garnishment was obtained in a suit for debt by contract.

"This, the 2d day of June, 1919.

"G. H. Harden.

"I, G. H. Harden, solemnly swear that the above and foregoing schedule embraces all of my property of every kind except my wearing apparel and that of my family, and that the personal property claimed as exempt does

not exceed in value the sum of five hundred dollars, and that I am the head of a family, and a resident of the State of Arkansas, and the claim of plaintiff is for debt by contract.

"G. H. Harden."

The appellant filed the following exceptions to the schedule:

"*First.* That under the law the defendant, who is the duly appointed, qualified and acting court reporter of the First Judicial Circuit of Arkansas, is neither a laborer nor mechanic and therefore is not entitled to claim exemption of sixty days' wages.

"*Second.* Defendant does not list any household furniture, furnishings and supplies which he owns, if he is at the head of a household.

"*Third.* The defendant does not show in said schedule of exemptions a list of all moneys received by him during the sixty days for which he is claiming exemption of his wages, which list should show his salary for said time.

"*Fourth.* Defendant does not state for what given period of time he is claiming exemption of wages.

"*Fifth.* Defendant does not state in what way he is the head of a household, which would entitle him to claim exemptions.

"Wherefore, plaintiff prays that his exceptions and objections to said schedule of exemptions be heard by the court, and, finally, that said schedule of exemptions be rejected and he be permitted to proceed according to law in the collection of judgment due him.

"Cul L. Pearce, Plaintiff."

The justice of the peace overruled the exceptions and issued a supersedeas. The appellant appealed to the circuit court. In the circuit court the appellee filed a motion to dismiss the exceptions, which the court treated as a general demurrer, sustained the same, and, appellant

electing to stand on his exceptions, the court entered a judgment dismissing the appeal, from which appellant prosecutes this appeal.

While the exceptions of the appellant filed to the schedule of the appellee are not artistically framed, the effect of these exceptions, when taken together, was to challenge the truth and accuracy of appellee's schedule and to put in issue the declarations contained in said schedule. True, the exceptions were not as specific as they should have been, but no motion was made to make them more specific, and the court on demurrer erred in treating them as wholly defective and insufficient to raise an issue as to the truth of the allegations contained in appellee's schedule. The effect of sustaining the demurrer was to deprive the appellant under the allegations contained in his exceptions from raising the issue as to the correctness of the appellee's schedule, whereas the exceptions should have been treated as a denial of the allegations contained in the appellee's schedule. It can be very plausibly contended that there is no denial in specific terms of the allegations contained in the appellee's schedule, but, as before stated, the effect of these various exceptions is to deny that the appellee was entitled to the exemption claimed by him, and this was sufficient at least on demurrer to raise the issue and place the burden upon the appellee to prove by a preponderance of the evidence that he was entitled to have the property specified declared exempt from execution to satisfy appellant's judgment. *Blythe* v. *Jett,* 52 Ark. 547; *Porch* v. *Arkadelphia Milling Co.,* 65 Ark. 40-45.

The exceptions of the appellant, in other words, should be treated as something more than a mere demurrer or general objection to the form of appellee's schedule. Appellant's prayer to his exceptions show that appellant intended something more than a general objection to the form.

Exceptions No. 2 and No. 5, while not specifically denying, should nevertheless on demurrer be treated as a denial of, the appellee's allegation that he was the head

of a family, and these, with the other allegations, should be treated as denying that the appellee was entitled to hold specific articles which he set up in his schedule exempt from appellant's judgment. The appellant prayed "that his exceptions and objections to said schedule of exemptions be heard by the court." The trial court, instead of dismissing the appellant's exceptions under the above prayer, should have treated them as raising an issue on the facts alleged in appellee's schedule. The judgment is, therefore, reversed, and the cause remanded with directions to overrule appellee's demurrer to appellant's exceptions.

MILES v. AMERICAN RAILWAY EXPRESS COMPANY.

Opinion delivered October 10, 1921.

1. DAMAGES—BREACH OF CONTRACT.—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered either as arising naturally from the breach of the contract or as having been in contemplation of both parties at the time they made the contract, as the probable result of a breach of it.
2. DAMAGES—CONTEMPLATED DAMAGES.—In determining what damages were contemplated by the parties to a contract, it is proper to consider the nature and purpose of the contract and the attending circumstances known to the parties at the time the contract was executed, and those damages should be awarded which might reasonably have been expected to follow from a breach of the contract.
3. CARRIERS—BREACH OF CONTRACT TO MAKE PROMPT DELIVERY—CONTEMPLATED DAMAGES.—Where the head of a dog supposed to be afflicted with rabies was delivered to an express company for shipment to a medical laboratory to determine whether the dog was rabid, and its delivery was delayed until the head was so decomposed that it was impossible to determine that fact, the express company was liable to the shipper, whose child had been bitten, for expenses incurred in giving the child the Pasteur treatment, as the express company, having notice of the purpose of the shipment, must be held to have anticipated that, if the package was not delivered promptly, the Pasteur treatment would be administered to the child.

4. PARENT AND CHILD—RECOVERY BY PARENT FOR CHILD'S SUFFERING. A parent suing a carrier for negligent delay in delivering to a laboratory the head of a dog by whom child had been bitten, thereby rendering examination for rabies impossible, could not recover for the child's physical suffering in taking the Pasteur treatment.

5. DAMAGES—MENTAL SUFFERING.—The parent of a child bitten by a dog supposed to be mad, suing a carrier for failure to deliver the head of the dog shipped for microscopical examination, could not recover damages for mental suffering, since damages for mental suffering cannot be recovered in absence of physical suffering; nor could such parent recover punitive damages, in the absence of express malice.

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

Culbert L. Pearce, for appellant.

1. As to the disease of hydrophobia or rabies and its effects on the human body, and for a proper understanding of the reasons why the local physician advised the father to send the dog's head by express to Little Rock for microscopical examination, see Ander's Practice of Medicine. 13 Ed., p. 292; DaCosta's Modern Surgery, 8 Ed., 351; DaCosta's Handbook of Mod. Treat. vol. 1, p. 144; Encyc. Britannica, 11 Ed. vol. 14, p. 167; Roseneau on Preventive Med. & Hyg. (1918) pp. 45-53.

We find no parallel case to this in the reports, but, as supporting the theory of the express company's liability under the facts alleged in the complaint, see 138 Ky. 704; 8 Tex. Civ. App. 363; 9 Exch. 341; 4 R. C. L. 737; *Id.* 745; *Id.* 936, 938; Hutchinson on Carriers, §1367; 89 Tex. 428; 94 Wis. 44; 92 S. W. 40; 91 *Id.* 1121; 88 *Id.* 870. On the question of special damages: 74 Ark. 358; 90 *Id.* 452; 76 *Id.* 220; 82 *Pac.* 502; 115 Ark. 142; 40 Cal. 657; 90 S. C. 366, 73 S. E. 772; 1 Q. B. Div. 274.

The patron of an express company is warranted in expecting quicker and safer service from such company than he could expect from an ordinary carrier. 104 N. C. 278; 6 L. R. A. 271.

2. The defendant having been informed in advance of the special purposes of the shipment, and its atten-

tion daily called by the father to the unnecessary delay, its failure to deliver was gross and willful negligence for which he is entitled to recover punitive damages for his own distress of mind and for the pain and suffering of the child. 5 Am. & Eng. Enc. of L., 2nd. Ed., 392; 4 R. C. L. 934; Hale on Damages, 102.

Mehaffy, Donham & Mehaffy, for appellee.

1. The facts stated in the complaint do not show that either of the plaintiffs suffered any damages or had to pay out any money because of negligence on the part of the express company. 1 Shearman & Redfield on Negligence, p. 11; *Id.* pp. 42, 48; 20 R. C. L., 9.

2. The fathers in this case could not recover for the pain and suffering of the children, nor for their own mental distress and anxiety. 27 S. W. 830; 9 *Id.* 598; 64 N. E. 595.

HART, J. This is an appeal from a judgment sustaining a demurrer to and dismissing the complaint for damages for an alleged breach of contract.

On January 31, 1921, E. W. Miles filed an amended complaint against the American Railway Express Company which is as follows: "The plaintiff alleges:

"That defendant is and was at all times hereinafter mentioned a common carrier engaged in the carriage of express matter for hire, over the line of the Missouri Pacific Railroad Company, between the town of Bald Knob and the city of Little Rock, Arkansas.

"That on the 15th day of June, 1920, plaintiff, through his agent, the Huffaker Mercantile Company, delivered to defendant, and the defendant accepted at its office in the town of Bald Knob, one metal bucket properly packed, iced and labeled, containing the head of a dog to be transported to the city of Little Rock, a distance of fifty-seven miles, and there delivered to the hygienic laboratory, and that plaintiff, through his said agent, paid the sum required of him as charges for said services, and

at the time informed defendant's agent of the contents of said shipment and the specific purpose for which it was intended to be used.

"That, on the morning of said day, the dog from which the head was afterward severed, while showing symptoms of hydrophobia—which symptoms also show in other and less dangerous diseases of dogs—severely bit and lacerated Florence Miles, aged six, a daughter of the plaintiff.

"That plaintiff, for the purpose of protecting the said child from the probable danger of contracting hydrophobia from the bite of said dog, and acting upon the advice of a local physician, killed said dog, severed the head therefrom and caused the same to be shipped as aforesaid for microscopical examination to determine whether said dog was affected with hydrophobia or rabies, a dangerous and dreaded disease which may be communicated to human beings, and which in most instances causes great suffering and certain death.

"That defendant wilfully, negligently and wrongfully failed and refused to deliver said bucket to the consignee until the evening of the fourth day after the day of shipment, at which time said dog head was so decomposed that a microscopical examination to determine the presence or establish the absence of hydrophobia germs could not be successfully made, and plaintiff was thereby deprived of the only method known and recognized by medical science for determining whether the said dog was infected with germs of hydrophobia.

"That plaintiff repeatedly communicated with the said hygienic laboratory by telephone, seeking information concerning the results of the intended examination, but each time was informed that no such shipment had arrived; and each time thereafter plaintiff went to defendant's office at Bald Knob and urged its agent to investigate the delay, but was given no information or satisfaction by the defendant's said agent, he appearing very indifferent about the matter.

"That, on the account of the failure as aforesaid to determine the presence or to establish the absence of hydrophobia germs in said dog by means of a microscopical examination, which failure was caused by the negligence of the defendant, plaintiff was then advised by his physician that the only reasonable course left for the protection of the said child from the probable dangers of hydrophobia would be to cause it to undergo a preventive treatment, which treatment is commonly and generally known as the Pasteur treatment for prevention of hydrophobia or rabies.

"That plaintiff, acting upon said advice, took said child to the department of pathology of the University of Arkansas School of Medicine, located in the city of Little Rock, and caused it to undergo the said treatment, which treatment required a twenty-one days' course and caused the said child much pain and suffering.

"That plaintiff expended the sum of $127.50 for medical services and medicine, attendant for said child, hospital fees, board, railroad fare and other necessary items, including express charges on said shipment and telephone messages in trying to secure delivery thereof, all of which he was compelled to expend on account of defendant's wilful negligence and wrongful failure and refusal to deliver said package within a reasonable time, and plaintiff further suffered much annoyance and inconvenience by reason of said default and suffered great anxiety and distress of mind on account of the pain and suffering of his said child by reason of said anti-hydrophobia treatment.

"That plaintiff is entitled to the sum of $127.50 for money actually expended as aforesaid, and the sum of $500 for special and exemplary damages on account of defendant's negligence as aforesaid.

"Wherefore plaintiff prays judgment for the sum of $127.50 on his first count, and for the sum of $500 on his second count, and for costs and for all other and proper relief."

On the same day W. N. White filed an amended complaint against the American Railway Express Company which is the same as the above complaint, except as to the name of the plaintiff and the name and age of the plaintiff's child.

The defendant filed a demurrer to the complaint in each case. The cases were consolidated by order of the court, and a demurrer to each complaint was by the court sustained.

The plaintiffs elected to stand on their amended complaints and refused to plead further. Whereupon the court dismissed the plaintiffs' cause of action and gave judgment against them for costs.

Counsel have not cited us to a case similar to the one at bar, and, after a somewhat diligent search, we have not been able to find a case directly in point. Counsel in their respective briefs have ably discussed the general principles of law applicable to the case. It is not necessary to go beyond our own decisions to find a statement of the general principles governing suits for damages for breach of contract. This court has always intended to follow the old English case of *Hadley* v. *Baxendale,* 9 Exch. 354, on this subject.

In *Western Union Tel. Co.* v. *Short,* 53 Ark. 434, the court said that the rule is correctly laid down in *Hadley* v. *Baxendale,* as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.,* according to the usual course of things, from such breach of contract itself; or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of a breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would

be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

To the same effect see *Hooks Smelting Co.* v. *Planters' Compress Co.*, 72 Ark. 275. In determining the reasonable contemplation of the parties, it is proper to consider the nature and purpose of the contract and the attending circumstances known to the parties at the time the contract was executed, and those damages should be awarded which might reasonably have been expected to follow from a breach of the contract.

In the case at bar the express company might have reasonably anticipated that plaintiffs would be put to the expense of the Pasteur treatment, if the package containing the head of the dog, which bit the plaintiffs' children, should not be promptly carried and delivered at the point of destination, and this, too, regardless of the fact that the dog might not have been rabid. It is commonly known that the Pasteur treatment diminishes the dangers by hydrophobia from the bites of rabid dogs. Under the allegations of the complaint, the express company knew, when it received the dog's head for shipment, that the object of the analysis was to ascertain whether or not the dog that bit the children was suffering from rabies. The express company must have reasonably anticipated that the Pasteur treatment would not only be administered to the children if an analysis of the dog's head showed that the dog was rabid, but that it would also be given as a precautionary treatment if the package was not delivered promptly so that an analysis of the dog's head might be made. So it may be justly assumed that such damages were within the contemplation and purposes of the parties in entering into the contract, and that the breach of

contract on the part of the express company was the proximate cause of the damages suffered by the plaintiffs in giving the Pasteur treatment to their children.

Counsel for the defendant urged that, if the dog suffered with rabies, the Pasteur treatment would have been given in any event, and that the complaint is faulty because it does not allege that an analysis would have shown that the dog was not a rabid animal. The argument is faulty in this respect. Counsel do not take into consideration the fact that the plaintiffs made known to the defendant the object and purposes of the analysis, and the defendant might have anticipated that it would be necessary to give the Pasteur treatment, regardless of the fact of whether the dog was a rabid animal or not, if there was a violation of the contract by the defendant in respect to the prompt carriage and delivery of the package containing the dog's head. The parties knew the purpose for which the package containing the dog's head was sent, and might have reasonably anticipated that a breach of the contract would cause the plaintiffs of necessity to go to the expense of the Pasteur treatment, and that the breach of the contract was the direct cause of the damage suffered by the plaintiffs.

This is a suit by parents for damages, and they can not recover for the physical suffering endured by their children. Neither can they recover damages for mental suffering. The parents did not receive any physical injury, and it is well settled in this State that mental suffering alone, unaccompanied by physical injury, can not be made the subject of an action for damages against the carriers. *St. L., I. M. & S. Ry. Co.* v. *Taylor,* 84 Ark. 42; and *St. L., I. M. & S. Ry. Co.* v. *Buckner,* 89 Ark. 58.

There was no element of wilfulness or statement of facts from which malice might be inferred. Hence there is nothing to justify the infliction of punitive damages against the defendant. *St. L. S. W. Ry. Co.* v. *Evans,* 104 Ark. 89, and *St. L., I. M. & S. Ry. Co.* v. *Dysart,* 89 Ark. 261.

It follows that the court erred in sustaining the demurrer to the complaint, and for that error, the judgment will be reversed, and the cause remanded for a new trial.

STRODE v. HOLLAND.

Opinion delivered October 10, 1921

1. REPLEVIN—ALLEGATION OF OWNERSHIP.—Where the court sustained a demurrer to a complaint in replevin because it was not shown by the allegations whether the plaintiff claimed under a general or a special ownership, it was proper to permit the plaintiff to amend his complaint to show that he claimed under a special ownership.
2. TRIAL—MOTION TO TRANSFER TO EQUITY—WAIVER.—Where defendant in an action at law filed an answer setting up an equitable defense and moved to transfer the cause to equity, he waived his right to such transfer by withdrawing his answer from the file.
3. APPEAL AND ERROR—ABSENCE OF BILL OF EXCEPTIONS—ERRORS CONSIDERED.—In the absence of a bill of exceptions the Supreme Court can review the judgment only for error manifest upon its face and can consider only the facts recited in such judgment.
4. MORTGAGES—REMEDIES OF HOLDER OF CHATTEL MORTGAGE.—The holder of a chattel mortgage, upon the mortgagor's default, may sue at law to recover the mortgaged chattel or for its conversion, or he may sue in equity for the foreclosure of the lien which he has by virtue of the mortgage.
5. TRIAL—TRANSFER TO EQUITY.—A defendant in replevin who pleads a set-off is not, on that account, entitled to have the cause transferred to equity, as the set-off is a good defense at law (Crawford & Moses' Dig. § 8654a).

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

STATEMENT OF FACTS.

On the 24th day of August 1920, O. J. Holland brought suit in replevin against H. A. Strode to recover possession of one 15 DC-180 Western Electric Power and Light Outfit.

Plaintiff also filed an affidavit for replevin, and in it alleged that he had a special ownership in said property by virtue of a lien in writing to secure the balance due on the purchase price.

The defendant filed a demurrer to the complaint, which was sustained by the court. The defendant also filed an answer and motion to transfer the case to equity. Subsequently he filed an amendment to his answer in which he pleaded a set-off of $75 on the amount due by him to the plaintiff on the property sued for.

The court refused to transfer the case to equity, and by leave of the court the defendant withdrew from the files his answer and amended answer.

The plaintiff filed an amended complaint in which he stated that by virtue of a lien in writing he had a special ownership in, and was entitled to the immediate possession of, one 15 DC-180 Western Electric Power and Light Outfit of the value of $300. He stated further that the defendant had possession of said property and unlawfully detained the same.

The plaintiff prayed judgment for said sum of $300, and that his lien on said property be enforced and the property sold to pay his debt.

The defendant filed a motion to strike the amended complaint from the files on the ground that it stated a new cause of action or was inconsistent with the original cause of action and the relief sought in the original complaint. The court overruled this motion, and the defendant excepted to the ruling of the court and refused to plead further.

The judgment recites that the cause was submitted to the court sitting as a jury, "upon the amended complaint, affidavit, defendant's demurrer to the original complaint and defendant's motion to strike and the obligation in writing of the defendant and the evidence of the plaintiff, O. J. Holland, and the court, being sufficiently advised as to the facts and as to the law, doth find

that this is a suit in replevin for the possession of the following described property, to wit, one 15 DC-180 Western Electric Power and Light Outfit or the balance due on the lien or mortgage."

Judgment was rendered in favor of the plaintiff against the defendant for the property, or the balance due under the mortgage, which is found to be $300.

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

John P. Streepey, for appellant.

1. The amount claimed by the plaintiff was much less than the amount the defendant had paid. The case should have been transferred to equity to prevent a forfeiture of the amount paid on the purchase price, and where, on account of plaintiff's insolvency, defendant might obtain the benefit of the damage he claimed by way of set-off. 56 Ark. 450; 134 Ark. 404.

2. The amended complaint stated a new cause of action in that it prayed for a money judgment, whereas the original complaint was in replevin seeking the recovery of personal property. The court erred in not striking the amended complaint from the files. 102 Ark. 20.

H. L. Sternberg and *Lee & Moore,* for appellee.

The action was in replevin for mortgaged chattel. The answer pleads a set-off of $75 for failure to comply with the contract. The remedy was complete at law, and the motion to transfer was properly overruled. C. & M. Dig., § 8654a. The holder of a chattel mortgage may sue in replevin if he so elects. 97 Ark. 432.

If the amended complaint set up new facts, the defendant could have moved for further time. 125 Ark. 553. But there is no essential difference between the original complaint and the amended complaint, and they both conclude with a prayer for general relief, under which it was proper to grant any relief the facts warranted. 15. Ark. 555; 47 Ark. 31.

John P. Streepey, for appellant, in reply.

Under the original complaint, the only proper judgment would have been for the return of the property. C. & M. Dig. § 8654a; 37 Ark. 544; 54 Ark. 121. Under the amended complaint the only judgment to be rendered was for money. It stated a different cause of action.

HART, J. (after stating the facts). The original complaint stated that the plaintiff was the owner of the property, and his affidavit for replevin stated that he had a special ownership by virtue of a lien in writing. The defendant interposed a demurrer to the complaint which was sustained by the court. The plaintiff then filed an amended complaint in which he stated that he had a special ownership in the property by virtue of a lien in writing.

It is contended by counsel for the defendant that the amended complaint stated a new cause of action, or at least that the amended complaint was inconsistent with the original complaint.

We can not agree with counsel in this contention. In *Climer* v. *Aylor,* 123 Ark. 510, the court held that a complaint in replevin was defective because it was not shown by the allegations whether the plaintiff claimed under a general or special ownership. The court said that the complaint was not wholly defective, and that the defect could have been reached by a special demurrer, in which case the plaintiff could have amended his complaint to show whether his ownership was general or special, and, if special, to set forth the facts upon which his claim of special ownership was based.

In the instant case the plaintiff alleged a special ownership in the property by virtue of a lien in writing. If defendant wished the plaintiff to set forth the facts more in detail upon which his claim of special ownership was based, he should have filed a motion to make the complaint more definite, instead of a motion to strike the amended complaint from the files. *Wm. R. Moore Dry Goods Co.* v. *Ford,* 146 Ark. 227.

The question of whether the defendant's motion to transfer the case to equity should have been granted is not raised by the appeal for the reason that the defendant obtained leave to withdraw his answer from the files of the court and thereby eliminated the question from the case. The case was heard before the court sitting as a jury. There was no bill of exceptions filed, and the judgment recites that the case was heard upon the pleadings, the obligation in writing of the defendant, and the evidence of the plaintiff.

The judgment recites that this is a suit in replevin for certain specifically described personal property or the balance due under a lien or mortgage. The judgment further recites that the plaintiff have judgment for the property which is specifically described, or the balance due under the mortgage.

There being no bill of exceptions, we can only review the judgment for errors manifest upon the face of it, and in doing so can only consider the recital of facts contained in the judgment upon which it is based. *Baucum* v. *Waters*, 125 Ark. 305; *Sizer* v. *Midland Valley R. Co.,* 141 Ark. 369; and *Carroll County* v. *Poynor,* 142 Ark. 546.

It will be seen that the judgment recites that the replevin suit was under a mortgage of the property held by the plaintiff from the defendant. In the absence of a bill of exceptions, and in view of the recitation in the judgment that the case was heard upon the written obligation of the defendant and the evidence of the plaintiff, the presumption is that the evidence adduced at the trial sustained the finding of the circuit court and warranted the judgment rendered.

The holder of a chattel mortgage may, upon the mortgagor's default, sue at law to recover the mortgaged chattel, or for its conversion, or he may sue in equity for the foreclosure of the lien which he has by virtue of the mortgage. *Thornton* v. *Findley,* 97 Ark. 432.

To reverse the judgment counsel for the defendant rely upon the case of the *Southern Cotton Oil Co.* v. *East,* 134 Ark. 404. In that case the defendant set up an answer which was exclusively cognizable in chancery, and the court held that he was entitled to have the issue determined by the chancery court, and for that reason the trial court erred in not transferring the case to equity. As we have already seen, the defendant, by leave of the court, withdrew his answer from the files, and this action eliminated any alleged error in refusing to transfer to equity.

Moreover, the defense interposed by the defendant in his answer was not exclusively cognizable in equity. He could have set-off at law as well as in equity that the plaintiff was only due a certain amount under the mortgage. Our statute authorizes proof of payment of the mortgage indebtedness or a set-off for the purpose of determining whether or not the debt has been discharged in full, or, in case of partial discharge, the amount of the balance due. *Jones* v. *Blythe,* 138 Ark. 81.

It follows that the judgment must be affirmed.

ARKANSAS FOUNDRY COMPANY *v.* STANLEY.

Opinion delivered October 10, 1921.

1. BRIDGES—SINGLE IMPROVEMENT.—Special Acts 1919, p. 74, creating the Broadway-Main Street Bridge District of Pulaski County, is not arbitrary and void in providing that the construction of two bridges across the Arkansas River, four blocks apart, shall be undertaken and prosecuted as one improvement.
2. CONSTITUTIONAL LAW—JUDICIAL QUESTIONS.—In a suit to enjoin the construction of two bridges, under Special Acts 1919, p. 74, the court will not concern itself with the expediency of the improvement.
3. BRIDGES—AUTHORITY OF BRIDGE DISTRICT TO EMPLOY BROKERS.—Special Acts 1919, p. 74, § 9, authorizing the commissioners of a bridge district to borrow money at a rate of interest not exceeding six per cent., to issue negotiable bonds therefor, did not prohibit the commissioners from employing a broker to sell the bonds, but, on the contrary, impliedly authorized them to do so if reasonably necessary to sell the bonds.

4. BRIDGES—POWER TO BORROW MONEY.—Under Special Acts 1919, p. 74, authorizing the commissioners of a bridge district to sell bonds at not less than par and to pay interest at not more than 6 per cent. and to pledge the assessments as security, such commissioners are authorized to borrow money from banks at the prescribed rate and pledge the assessments therefor.

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

STATEMENT OF FACTS.

The Arkansas Foundry Company, an owner of real property lying within the limits of the Broadway-Main Street Bridge District of Pulaski County, brought this suit in equity against the commissioners of said district to restrain them from employing agents in selling and disposing of the bonds of the district, and from proceeding further with the construction of the bridges contemplated by the passage of the act.

The complaint, amongst other things, alleges the following:

"Par. 2. Said commissioners, in order to raise money to construct said bridges, are now threatening to borrow money from the banks in the City of Little Rock by issuing, or executing, ordinary evidences of indebtedness, and are threatening to pledge and mortgage the assessments for the security of said loans. That the commissioners are not authorized to so borrow money, the only method being pointed out by section 9 of the act, which method is by the issuance of negotiable bonds at a rate of interest not to exceed six per cent.

"Par. 3. Said commissioners, having offered and failed to dispose of the bonds of the district, are also threatening and arranging to employ agents to dispose of said bonds, and to pay such agents a commission therefor; that said bonds bear interest at the rate of six per cent. per annum; and if the commissioners are permitted to pay to said agents a commission for disposing of said bonds, the commissioners will receive from the sale thereof less than the par value of the bonds. Plain-

tiff avers that under the limitations of the power and authority of the commissioners, contained in said act, said commissioners have no power or authority to employ such agents and pay the commission for such purposes.

"Par. 4. That the board has no power or authority to construct the two bridges under a single improvement district. The General Assembly had no power to pass an act creating a district to make two separate improvements, and the act is void for want of power.

"That the construction of two bridges as proposed by the commissioners would entail a large and unnecessary expense upon the taxpayers in the district, one bridge being sufficient to accommodate the traffic between the cities of Little Rock and North Little Rock."

The bridge commissioners filed a demurrer to the paragraphs of the complaint above set forth, and the court sustained the demurrer to the second and fourth paragraphs of the complaint, and overruled it as to the third paragraph of the complaint. The defendants elected to stand upon their demurrer to the third paragraph and refused to plead further. Accordingly it was decreed that the defendants be enjoined from employing agents or brokers to sell the bonds of said district, or to pay any commissions for services in that behalf. And, plaintiff declining to plead further, it was decreed that the prayer of the complaint for an injunction against defendants restraining them from borrowing money and issuing evidence of indebtedness in the form of notes and from proceeding with the construction of the proposed bridges across the Arkansas River, be denied, and paragraphs two and four of the complaint be dismissed for want of equity.

Both parties have duly prosecuted an appeal to this court.

George A. McConnell, for appellant.

The construction of the two bridges four blocks apart, is not a single improvement, and cannot be likened to a road district such as found in 125 Ark. 325. The legislative finding that the improvement is a single one is a mere presumption, and is not conclusive. 141 Ark. 288. If the statute including certain territory in the district is arbitrary and discriminatory, it is void. 139 Ark. 574; 143 Ark. 203; 142 Ark. 52; 142 Ark. 73; 118 Ark. 294.

The act provides the method of raising money, which is by issuing bonds, not notes, and the board has only such power as is expressly granted by said act. 106 Ark. 39. This case is different from that in 79 Ark. 229.

The commissioners have no authority to employ brokers and pay them commissions to sell the bonds, as the act requires that the bonds shall not be disposed of at less than par and shall not bear more than six per cent. interest. In 86 Pac. 75 and 150 S. W. 90, the agency being dealt with was a city council, which has more im-implied authority than a special improvement district, as is shown by 79 Ark. 234. The practice of a city paying brokers' fees is condemned in 156 Pac. 825. Par value is defined in 50 N. E. 973, as a dollar in money for a dollar in security. See also 53 N. E. 1116. Where the statute provides that bonds shall sell at par, nothing less can be accepted, even by way of paying brokers' commission. 151 Pac. 117; 160 S. W. 1161; 160 N. W. 425; 82 Pac. 601.

Vaughan & Rector, Moore, Smith, Moore & Trieber, for appellee.

The power of the Legislature to create districts for the purpose of making local improvements is not open to question. 59 Ark. 513. When so exercised, it is a legislative determination, in the exercise of its power, which can not be disturbed by the courts unless the power has been exercised arbitrarily. 93 Ark. 113; 85 Ark. 12; 130 Ark. 507; 95 Ark. 496.

The court will take judicial notice of geographic and commercial conditions in connection with bridges. 125 Ark. 553; 106 *Id.* 83; 88 *Id.* 37; 181 P. 223.

The two bridges constitute one improvement. The same principle was upheld in 142 Ark. 73; *White* v. *A. & M. Highway Dist.*, 147 Ark. 160; 137 Ark. 355, and various other cases.

The board, under the statute, has the general power to borrow money and may do so by issuing notes, as well as by bonds. The power to issue negotiable bonds is permissive, and does not have the effect to limit the commissioners to that form of security. 79 Ark. 229.

The board was authorized to employ and pay brokers for the sale of the bonds. 145 S. W. 8; 130 S. W. 90, Ann. Cas. 1913 E p. 83 and cases in note on p. 86. See also 2 Dillon on Municipal Corp. sec. 895 (5th Ed.); 22 N. E. 24; 11 N. E. 1120; 1 Atl. 88; 86 Pac. 75; 78 N. W. 115; 8 Paige 527; 53 N. E. 1116.

HART, J. (after stating the facts). On the part of the plaintiff, it is contended that the two bridges contemplated in the act are four blocks apart, and that the construction of one has no relation to the other. Therefore counsel insists that the construction of the two bridges constitutes independent improvements, and that the act of the Legislature in creating the district as a single improvement district was arbitrary, and the act is consequently void. The act is entitled, "An Act to Create a Broadway-Main Street Bridge District of Pulaski County," and was approved February 5, 1919. Act 49 of the Special Acts of 1919, page 74.

Section 1 of the act creates the district, defines its territory, and names the commissioners. It authorizes the commissioners to build a bridge across the Arkansas River from a point on Broadway Street, in the city of Little Rock, to a point across the river in the city of North Little Rock to be selected by the commissioners. It also authorizes the construction of a bridge from a point on Main Street in the city of Little Rock to a point

on the opposite side of the Arkansas River in the city of North Little Rock. The proposed bridges are four blocks apart, and the court will take judicial notice that there are connecting streets between Broadway and Main Streets in the city of Little Rock and between the corresponding streets on the opposite side of the river in the city of North Little Rock.

Under our former decisions bearing on the question, the statute can not be assailed on the ground that it embraces more than one improvement. The Legislature, in passing the statute creating the district, must have found, as a matter of fact, that two bridges were necessary to carry the traffic between the two cities, and that the business centers of the proposed district were so situated, with respect to the contemplated improvements, as to justify treating them as parts of a common enterprise and as a single improvement. With the expediency of the proposed improvement in its present form, we have no judicial concern. It is sufficient for us to say that the Legislature must have found that the construction of the two bridges was necessary to secure a convenient and useful means of approach between the two cities, and that by uniting them in a single improvement they could best promote the improvement of the property within the district. When the topography of the proposed district is considered in connection with the density of population, it can not be said that the action of the Legislature providing that the construction of both bridges should be undertaken and prosecuted as one improvement is arbitrary and void. We consider the question no longer an open one in this State, and that it has been settled by the decisions cited below as well as many other decisions of this court. *Bennett* v. *Johnson,* 130 Ark. 507; *Easley* v. *Patterson,* 142 Ark. 52; *Johns* v. *Road Imp. Dist.,* 142 Ark. 73; *Tarvin* v. *Road Imp. Dist. No.* 1, 137 Ark. 355; and *White* v. *Ark. & Mo. Highway Dist.,* 147 Ark. 160.

It follows that the chancery court did not err in holding that the construction of the two bridges constituted, under the circumstances, a single improvement.

In the third paragraph of the complaint it is alleged that the commissioners are arranging to employ agents or brokers to dispose of the bonds to be issued under the provisions of the act for the construction of the improvement, and that this action is in violation of the terms of the act.

Section 9 of the original act reads as follows: "In order to do the work, the board may borrow money at a rate of interest not exceeding six per cent. per annum, may issue negotiable bonds therefor, signed by the chairman and secretary of the board, and pledge and mortgage all assessments for the repayment thereof. Said bonds shall not be disposed of at less than par on the basis of interest at the rate of six per cent. per annum. But, if they should bear a less rate, they may be disposed of at less than par provided that the district shall receive therefor and pay thereon the equivalent of not more than six per cent. per annum at par. "No bonds issued under the terms of this act shall run for more than thirty years; and all issues of bonds may be divided, so that a portion thereof may mature each year as the assessments are collected." Special Acts of 1919, No. 49 p. 74.

The evident object of the Legislature by the enactment of this section was to prevent speculation in the bonds to be issued by the commissioners for the construction of the proposed improvement and to insure to those who must pay the bonds a dollar in currency for every dollar of bonds issued. Par means equal, and par value means a value equal to the face of the bonds. So it is generally said that a sale of bonds at par is a sale at the rate of a dollar in currency for a dollar in bonds. Under the statute, the commissioners were not authorized to sell the bonds at a discount by reason of any commissions or attorneys' fees paid to the purchasers, or to their agents or attorneys or by reason of issuing bonds

drawing interest from a certain date and allowing the purchaser the use of the money loaned for a period of time thereafter.

Counsel for the plaintiff insists that under the statute the commissioners could not employ a broker to sell the bonds, regardless of the fact of whether he was the agent of the commissioners or the purchasers of the bonds. To support his contention, counsel cites the following: *Uhler* v. *Olympia* (Wash.), 151 Pac. 117; *Davis* v. *San Antonio* (Tex. Civ. App.), 160 S. W. 1161, and *Whelen's Appeal* (Penn), 1 Atl. 88. In each of these cases the purchaser was allowed a discount by way of compensation paid it, or its agents, for commission, interest, or attorneys' fees, and the court properly held, as a matter of law, that this constituted an evasion of the statute.

In *Spear* v. *Bremerton* (Wash.), 156 Pac. 825, the statement of facts shows that a contract for the sale of the bonds was made with John E. Price & Company, whereby that company agreed to attend to all the proceedings necessary in the issuance of the bonds, and to take the bonds at a discount of five per cent. The court properly held that this was clearly an evasion of the statute, and the reason given was that, under a statute forbidding the sale of the bonds at less than par, the taxpayer could not be put to the burden of paying the purchaser of the bonds anything in the way of commission or bonus, or for attorney's fees and expenses of printing, etc. So, too, in *Bay City* v. *Lumberman's State Bank* (Mich.), 160 N. W. 425, the court held that under the facts stated the transaction was a sale and purchase of the bonds by the bank from the city, and that the payment of the commission to the bank by the city was a discount in violation of the statute. The bank in that case claimed that it merely acted as the agent of the city in selling the bonds, but the court held that under the facts the bank took over the whole issue of bonds itself and resold them to its customers. The court said

that, after the bank took over the bonds, the city had no interest in the selling value of the bonds, and, if they had appreciated in value, the bank and not the city would have received the benefit. On the other hand, had they depreciated, the loss would not have fallen upon the city. The bank never made any report of its sales of the bonds to the city, and there was no accounting for the proceeds of the bonds that it sold. The bank simply took over the whole issue of the bonds and disposed of them as it saw fit to its customers.

In the case of *Paul* v. *Seattle* (Wash.), 82 Pac. 601, relied on by counsel for the plaintiff, the charter of the city provided that no debt or obligation of any kind against the city should be created by the city council except by an ordinance specifying the amount and object of the expenditure. Therefore, the court properly held that the comptroller had no implied authority to contract with a broker to sell the bonds of the city.

Another case relied on by counsel is *Fort Edward* v. *Fish* (N. Y.), 50 N. E. 973. In that case the bonds contracted to be sold by the water board included accrued interest and amounted to $50,444.44, whereas the contract price was but $50,000. The court held that the executory contract provided for the sale of the bonds at less than their par value, and was absolutely void because this was prohibited by the statute.

So it will be seen that where the contract in express terms shows that the purchaser of the bonds is to receive a discount, the courts hold as a conclusion of law that there has been an evasion of the statute. On the other hand, where the evasion of the statute appears from the facts stated and not from the contract itself, the courts hold, not as a matter of law, but as a matter of fact, that there has been an evasion of the statute. Whenever the facts show a subterfuge for an actual sale at less than par, or if the charges made are grossly unreasonable, or the transaction is attended by bad faith, the

courts will not hesitate to declare such transaction fraudulent and void. No allegation of bad faith on the part of the commissioners in seeking the service of a broker to sell the bonds is made in the complaint. The plaintiff merely alleges that under the statute the commissioners have no authority, either express or implied, to procure the service of a broker to sell the bonds or to aid them in the sale thereof.

This contention is against the weight of authority on the question. The statute gave the commissioners express power to issue and sell the bonds at not less than their par value and to pay interest thereon at not more than six per cent. per annum. The power to sell the bonds carried with it the implied authority to pay a broker to sell them, or to assist the commissioners in doing so, if this was reasonably necessary. The employment of a broker might be reasonably necessary in order to sell the bonds, and, if so, the expenses of his commission would be incidental to the express authority to sell and would fairly come within the scope of the main power. The authorities cited below sustain this view, and say that it is according to the weight of authority. *State* v. *West Duluth Land Co.* (Minn.), 78 N. W. 115; *Manitou* v. *First Nat. Bank of Colorado Springs* (Col.), 86 Pac. 75; *Church* v. *Hadley* (Mo.), 145 S. W. 8; *Armstrong* v. *Fort Edward* (N. Y.), 53 N. E. 111, and cases cited; *Miller* v. *Park City* (Tenn.), Ann. Cas. 1913 E 83, and *Brownell* v. *Greenwich* (N. Y. Ct. of Appeals), 22 N. E. 24.

We believe that the above states the law applicable to this case, and that under the facts alleged in the complaint the commissioners would have the authority, if reasonably necessary to enable them to sell the bonds, to employ a third person as a broker for that purpose.

Therefore, the court erred in overruling the demurrer to the third paragraph of the complaint, and in enjoining the commissioners from employing brokers to sell the bonds of the district.

According to the allegations in paragraph two of the complaint, the commissioners are about to borrow money from the banks of the city of Little Rock and to pledge the assessments for the security of the said loans. It is claimed by counsel for the plaintiff that the act only authorizes the commissioners to issue negotiable bonds at a rate of interest not exceeding six per cent. The complaint does not allege that the commissioners are going to pay more than six per cent. interest to the banks in the city of Little Rock from which they borrow money for the purpose of constructing the bridges. The bonds of the district would be nothing more than evidence of indebtedness of the district, and it could make no difference whether the commissioners borrowed the money in the city of Little Rock or from banks or other persons elsewhere.

The issuance and sale of the bonds of the district is nothing more than borrowing money by the commissioners for the purpose of constructing the improvement. The only prohibition in the statute is that they shall get face value for the amount borrowed and shall not pay more than six per cent. interest per annum. Consequently the court was right in sustaining the demurrer of the defendants to the second paragraph of the plaintiff's complaint.

From the views expressed, it results that the chancery court was right in sustaining the demurrer of the defendants to the second and fourth paragraphs of the complaint, and in these respects the decree will be affirmed.

It also follows that the court erred in overruling the defendants' demurrer to the third paragraph of the complaint, and for this reason the decree will be reversed and the cause remanded with directions to enter a decree sustaining the demurrer to the third paragraph of the complaint, and for other proceedings in accordance with the principles of equity and not inconsistent with this opinion.

KING v. BANK OF PANGBURN.

Opinion delivered October 10, 1921.

1. TRIAL—BOTH PARTIES REQUESTING PEREMPTORY INSTRUCTION.—Though both parties requested the trial court to give a peremptory instruction, yet if appellant, in addition, asked other instructions, the court should not have directed a verdict against him if the testimony, viewed in the light most favorable to him, would have supported a verdict in his favor.
2. PRINCIPAL AND SURETY — RELEASE — CONSIDERATION. — Where an agreement to release a surety on a note was fully executed by the holder erasing his name from the note, and by writing opposite his name the notation "not on renewal," it being agreed that the note should be renewed without his signature, the question of consideration for the release became immaterial.
3. CONTRACTS—CONSIDERATION.—Where a contract is fully performed on both sides, the question of consideration becomes immaterial.

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

John E. Miller, C. E. Yingling and *W. R. Davenport,* for appellant.

The court erred in giving a peremptory instruction for the plaintiff.

1. There was ample testimony to show that L. King signed the note as surety only. 54 Ark. 97; 92 Ark. 604; 143 Ark. 498.

The note itself shows that the appellant's name was cancelled and stricken off the note by the cashier of appellee bank. C. & M. Dig. § 7885, sub-divisions 3 & 4. The bank is estopped from asserting that it did not release appellant from liability. 131 Ark. 82.

2. The appellee renounced its rights against the appellant by the cancellation of his name on the note. C. & M. Dig. § 7888.

3. There was no satisfactory proof introduced by appellee to show that the name of appellee had been cancelled through mistake. C. & M. Dig. § 7889; 127 Ark. 234.

4. The note was materially altered and is void. C. & M. Dig. § 7891. Any material alterations avoid the note. C. & M. Dig. § 7890; 131 Ark. 178; 127 Ark. 234; 5 Ark. 377; 32 Ark. 166; 82 N. J. Law 662; 82 Atl. 901; Ann. Cases 1913D, p. 721.

The cashier had authority to alter the note and to release the appellant, and the bank is bound by his acts. 92 Neb. 539; 138 N. W. 741; Ann. Cases 1914A, 57 and note; 18 Am. & Eng. Ann. Cases, 413 and note.

Brundidge & Neelly, for appellee.

1. The court was correct in directing a peremptory instruction for the plaintiff.

There is no testimony to show the cancellation of the note. There was no consideration for the cancellation.

2. Appellant's liability was primary and absolute, demand and notice unnecessary. 143 Ark. 501.

3. If the note was altered, it was through appellant's procurement, and he could not take advantage of that fact. 131 Ark. 184; 112 U. S. 139-142; 2 C. J. p. 1219, n. 1; 1 R. C. L. 982; 26 Mich. 249; 35 Ark. 147; 148 Ill. 349.

4. The agreement to strike the appellant's name off the note was void for want of consideration. 106 Ark. 159. An agreement, in order to be binding, must have a consideration to support it. 96 Ark. 268. An agreement without consideration is void and does not suspend the rights of the parties. 12 Wheat. (U. S.) 554; 26 Ark. 155; 54 Ark. 97.

An extension of time to the principal, without consent of surety, discharges the latter. 34 Ark. 44; 82 Ark. 28; 103 Ark. 43; 123 Ark. 463.

SMITH, J. This cause comes here on appeal from a judgment rendered on a verdict returned by a jury under the directions of the court. Appellee insists this judgment must be sustained if there was any testimony legally sufficient to support it, inasmuch as both parties asked the court to give peremptory instruction in the trial below. It is true both parties asked a peremptory

instruction; but, in addition thereto, appellant asked other instructions, and the court should not, therefore, have directed a verdict against him, if the testimony in his behalf, viewed in the light most favorable to him, would support a verdict in his favor. *Webber* v. *Rodgers,* 128 Ark. 25.

Thus viewing the testimony, the facts may be stated as follows: The suit is upon a promissory note for the sum of $1,500, which, as executed, reads as follows:

"$1,500. Pangburn, Ark., June 28, '19.

"Thirty days after date, for value received, we or either of us promise to pay to the order of Bank of Pangburn fifteen hundred no 1/100 dollars at the Bank of Pangburn, Pangburn, Arkansas, with interest at the rate of ten per cent. per annum from date until paid. The makers and indorsers of this note hereby severally waive presentment for payment, notice of nonpayment, and protest, and authorize extension of time without notice thereof. Interest unpaid when due to become as principal and draw the same rate of interest.

Due—Demand. P. O.—City. No. 150.

Witness: R. H. Dickenhorst.

J. W. Pierce,
J. Morrow,
R. T. King,
L. E. Morrow,
L. King."

J. W. Pierce, J. Morrow and R. T. King were principals, and L. E. Morrow and appellant, L. King, were sureties. Appellant King is the only signer who made defense, and this appeal involves only the question of his liability.

At or about the time the note fell due King was about to change his residence on account of his health, and he went to the bank to ascertain whether the note had been paid. Finding that it had not been paid, King demanded that the cashier give all parties notice to come to the bank and pay the note, King stating at the time

that he did not want to leave any unfinished business behind. The cashier, on his own initiative, suggested that he did not care to press the makers of the note for payment, but that if he (King) would cause $400 to be paid on the note the time for the payment of the balance would be extended, and King released from further liability. Acting upon this suggestion, King saw the makers of the note and had them to pay the sum of $400 on the note. About two days later King called at the bank to see if this payment had been made. Only the assistant cashier was present in the bank at that time, but that officer, who was familiar with all the facts, promised to call the matter to the attention of the cashier. Relying on this promise, appellant King gave the matter no further attention until this suit was brought.

Thereafter the following notations were made on the note by the cashier of the bank: The payment of the $400, with the date of payment, was indorsed on the back of the note. Above the date of the note there was written with pen and ink the words, "Renewal date 7-29-19." The words, "Thirty days," appearing in the original note, were obliterated by drawing a line through them with pen and ink and the word "Demand" written above them. The name of "L. King"—this appellant—was canceled by drawing a line through it and immediately following the name the words "Not on renewal" were written above with pen and ink. The words "Ten days," in the lower left-hand corner of the note, were obliterated by a line drawn through them, and the word "Demand" written above them.

Appellee defends the action of the court below in directing a verdict in its favor upon the ground that the agreement to release appellant was without consideration, and says the transaction between the parties constituted, in effect, a mere renewal of the note, and, being only a renewal, King was not discharged, and, in support of this position, cites and relies upon the case of *Hamiter v. State National Bank of Texarkana,* 106 Ark. 157. We

have here, however, the converse of the case of *Hamiter* v. *Bank, supra.* There the note was renewed under an agreement to accept the new note of Hamiter in payment of the note sued on—the original note—the agreement being made after the original note had fallen due, and without a surrender of the original note or any change therein. Here we have an executed agreement to release King. The signature of King was obliterated. Other material alterations were evidenced by other mutilations. These mutilations were made in the execution of the agreement to release King, and to further conclusively evidence the execution of the agreement to release King there was written opposite his name the notation, "Not on renewal." King thus ceased to be a maker of the note sued on.

The agreement to release King having been fully performed, it becomes immaterial to determine whether it was enforcible prior to its performance. The agreement has been executed. It became an accomplished fact. *Kerr* v. *Birnie,* 25 Ark. 225, 234.

If a contract is fully performed on both sides, the question of consideration becomes immaterial. 1 Page on Contracts, § 540; 1, Elliott on Contracts, § 202, p. 330.

The note is now, in effect, a new note to which King is not a party, and he can not therefore be now sued as if he were a maker thereof. The judgment of the court below must therefore be reversed, and, as there is no dispute about the controlling facts, the cause will be dismissed.

MODEL WINDOW GLASS COMPANY *v.* MOODY.

Opinion delivered October 10, 1921.

MASTER AND SERVANT—LIABILITY FOR WAGES.—Where appellee had worked for appellant during the previous year under a wage scale known as the "National Agreement," by the terms of which the appellant was bound to pay an employee, who reports for duty and finds the plant not ready to operate, at the rate of $20 per week until the plant is in operation, and in September, 1918,

appellees were invited by appellant to be at appellant's factory on December 8 following, and they waited there several weeks before the plant resumed operation, the invitation was for appellees to work under the existing agreement, and appellant became liable thereunder, though this agreement, by its terms, expired on December 8, 1918, and the union to which appellees belonged failed to agree upon a new wage scale for the ensuing year.

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

W. H. Dunblazier and *J. B. McDonough,* for appellant.

The court should have submitted the issues to the jury. New facts were developed on this, the second trial of the case, and the former ruling of the court is not conclusive, and the trial court may apply a different rule of law. 129 Ark. 43. It is only in cases where the testimony is precisely the same that the former decision controls. 134 Ark. 605; 204 S. W. 618.

There was no contract in existence when appellees were requested to report for work, and therefore no liability on the part of appellant. The constitution, rules and by-laws of a union constitute the contract between the members of the union. Martin on Modern Labor Unions. Sec. 287.

Webb Covington, for appellees.

The appellant recognized the existence of the contract under which the suit was brought by making two payments thereunder to each of the appellees. This alone should support the verdict.

HUMPHREYS, J. This case is before us on a second appeal. The appellees were appellants in the former appeal. This court ruled on that appeal that the trial court had erred in peremptorily instructing a verdict in behalf of the Model Window Glass Company, and remanded the cause for a new trial. The case was quite fully stated in the former opinion, and the statement there found is adopted as the statement in this case, in so far as the facts in the two cases are alike. For the statement, see

Moody v. *Model Window Glass Co.*, 145 Ark. 197. The additional evidence introduced on the new trial was to the effect that the wage scale in effect up to December 8, 1918, expired on that date, by reason of the inability of appellant and the union, of which appellees were members, to agree upon a wage scale for the ensuing year. The witnesses introduced testified that the failure to agree upon a wage scale on that date for the ensuing year rendered the old contract nugatory, and that none of the provisions in the old contract were binding upon the parties after that time and until a new wage scale was agreed upon by and between the representative of the union and the appellant, or its representative. At the conclusion of the evidence, the court peremptorily instructed a verdict for appellees, and rendered judgment in accordance therewith, from which judgment is this appeal.

Appellant contends that the additional evidence adduced made an entirely different case from what it was when here before. In rendering the opinion on the former appeal, after reciting the facts, this court said: "The facts stated constituted an implied contract, if not an express contract, to settle with appellants according to the terms of the national agreement. The correspondence set out above warranted appellants in believing, under the circumstances of the case, that they would be given employment, or be paid in accordance with the provisions of the national agreement, with reference to which the parties must be held to have contracted." Appellees had worked for appellant during the preceding year under the provisions of the contract denominated the "national agreement." Article 5 of the agreement reads as follows: "Any company hiring a member and said member, upon arriving and reporting for duty, finding no vacancy existing or plant not ready to operate, as per notification, shall pay said member at the rate of $20 per week until place is vacant or plant in operation, or, at the option of the member, said company shall defray all expenses incurred by said member from the time he left his home or

place of starting until his return to destination." Both parties were familiar with this clause in the contract. The invitation of appellant to appellees to return to Fort Smith and go to work was an offer to give them their positions under the terms of the old contract. The letter of September 6, 1918, urging appellees to work for appellant the coming season, contains the following statement: "Will say I am depending on you and Moody in your old places this coming season. Please advise me by return mail if you will be on hand." The subsequent letter of November 19, 1918, notifying appellees to be at Fort Smith on December 9 and asking whether the company could depend on them being ready to work on that date, was tantamount to saying to appellees that the new wage scale, which must under the evidence be a basis for the contract for the ensuing year, had been, or would be, settled and agreed upon by that time. The offer and acceptance of employment had reference to employment under the terms of the old contract. Therefore, the new evidence offered, to the effect that no wage scale had been fixed for the ensuing year, was immaterial. Being immaterial, it was not incumbent upon appellees to inquire before leaving California, as argued and contended by appellant, concerning the new wage scale.

No error appearing, the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v. FUQUA.

Opinion delivered October 10, 1921.

1. CARRIERS.—NEGLIGENCE.—Where there was evidence from which the jury might have found that employees of defendant in charge of its parcel room were negligent in not taking steps to save plaintiff's suit case from destruction in a fire which destroyed defendant's depot, a finding of negligence on defendant's part will not be set aside as unsupported by evidence.
2. CARRIERS—LIABILITY FOR LOSS OF GOODS STORED.—The language of a contract providing that "the carrier will not be responsible for loss, damage or detention of articles left in storage for any amount in excess of $25" is broad enough to limit the carrier's liability for loss on any account, including loss by fire.

3. WAREHOUSEMEN—LIMITATION OF LIABILITY.—A warehouseman may limit his liability to an agreed value of the article received where the rate charged is based upon the value of the article.

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

Ponder & Gibson and *Thomas B. Pryor,* for appellant.

The appellant is only liable to ordinary care as a warehouseman. 27 R. C. L. Sec. 53; 136 Am. Rep. 243; 6 Am. St. Rep. 602; 1 Am. St. Rep. 76. It is not an insurer of goods in its care and not liable for their loss by accidental fire. 32 Ark. 225; 42 Ark. 200; 21 Ark. 560; 52 Ark. 30; 97 Ark. 288; 90 Ark. 260; 24 Am. Dec. 143; 40 Cyc. 432.

It must be shown by the proof that there was negligence on the part of appellant or its servants. 27 R. C. L. Sec. 53; 49 Am. Rep. 430; 35 Am. Rep. 263; 24 L. R. A. (N. S). 1117; 61. Am. Dec. 423.

When a contract is based upon a consideration, a stipulation reducing the amount of liability is valid. 83 Ark. 502; 108 Ark. 115; 110 Ark. 612; 227 U. S. 639; 68 S. E. 289; 18 L. R. A. (N. S.) 295.

The owner is bound by the conditions printed on the check, although he failed to read them. 12 C. B. N. S. 75; 17 L. T. N. S. 469.

Brundidge & Neelly, for appellee.

Appellant was guilty of negligence in failing to remove baggage which was uncalled for by the owner.

Liability by reason of the negligence of appellant cannot be limited, even though the contract contained this provision. 90 Ark. 258 and cases cited.

HUMPHREYS, J. Appellee instituted suit against appellant in the White Circuit Court to recover $300 for a suitcase and its contents, alleged to have been destroyed by fire on the 7th day of April, 1920, through the negligence of appellant in failing to remove it after discovering that its depot at Little Rock was on fire.

Appellee filed an answer, denying the material allegations of the complaint, but pleaded in the alternative

that, should appellee be permitted to recover the amount, it should be limited to a maximum of $25, as per stipulation in the check issued to him when he left the suitcase in storage.

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 $150, from which judgment is this appeal.

The record reflects that appellee, en route to Oklahoma, remained in Little Rock over night. He checked his suitcase in the parcel room of appellant, and, upon payment of ten cents, received a parcel stub check containing the provision that appellant "will not be responsible for loss, damage or detention of articles left in storage for any amount in excess of $25." There was an outside door and window to the checking room, and a chute to the basement. The depot was destroyed that night by an accidental fire, which started about 8 o'clock. The employees in the checking room were driven out by the fire within thirty minutes after it started. There were three employees in the room, who busied themselves finding and delivering parcels to those who called for them in person. About one hundred parcels were saved by delivering in this way to those who rushed to the room. About fifty parcels were left in the room and burned. No effort was made by any of the appellant's three employees in the room to save the uncalled-for parcels, among which was appellee's suitcase. The employees said they were busily engaged the entire time before leaving the building in getting parcels to those who applied in person for them; also that, had they thrown the parcels out, some one would have carried them off, as they could not have gotten a reliable person to watch them; also that, had they carried any of them out, the police force and firemen would not have permitted them to return to the building. During the fire, employees in the basement were engaged in removing parcels to a safe place.

It is contended by appellant that, in the exercise of ordinary care, it could not have prevented the destruction of the suitcase and its contents. We think there is some substantial evidence tending to show otherwise. No effort whatever was made to save the parcels of those who did not call for them. Three employees were in the room, and they devoted their entire time to handing out parcels to those who called for them, spending frequently a minute in searching for the particular parcel. The jury might well have concluded that all the parcels might have been saved had they gotten them out and searched out the particular parcels and delivered them later. All might have been thrown down the chute where other employees were engaged in carrying the parcels to a place of safety from the basement; or the parcels might have been thrown through the door or window to a safe place on the outside. One of the employees might have guarded them on the outside while the other two removed them from the checking room. We think the evidence sufficient to sustain the verdict.

It is also contended by appellant that the court committed error in permitting a recovery in excess of $25. Appellee contends otherwise, insisting, first, that the contract makes no attempt to exempt appellant or limit its liability by reason of negligence; second, that appellant could not limit its liability growing out of its own negligence.

(a) We think the contract broad enough to limit appellant's liability on any account. The language of the contract is: "The carrier will not be responsible for loss, damage or detention of articles left in storage for any amount in excess of $25." It is broader than the language used in the *Gulf Express Co.* v. *Harrington*, 90 Ark. 258.

(b) A warehouseman may limit his liability to an agreed value of the article received, where the rate charged is based upon the value of the article. This character of contract does not contravene the principle

that one cannot contract for exemption or limitation from liability on account of his own negligence. The rule is stated in keeping with the principle announced in *K. C. S. R Co.* v. *Carl,* 227 U. S. 639.

The judgment is therefore reversed and modified by a reduction in the amount to $25.

ROAD IMPROVEMENT DISTRICT NO. 4 OF PRAIRIE COUNTY *v.* MOBLEY.

Opinion delivered October 10, 1921.

1. COURTS—JURISDICTION OF SUPREME COURT.—The jurisdiction of the Supreme Court, under Const. 1874, art. 7, §§ 4, 5, is merely appellate and supervisory, except in the exercise of original jurisdiction to issue writs of quo warranto.
2. COURTS—SUPREME COURT—JURISDICTION.—In its review of the errors of inferior courts, the Supreme Court is confined to the record made below, and has no authority to inquire beyond the record made below.
3. CERTIORARI—CONSTRUCTION OF STATUTE.—Crawford & Moses' Dig. § 2237, providing that the circuit courts shall have power to issue writs of certiorari to any inferior tribunal to correct any erroneous or void proceeding, has no application to original applications for certiorari in the Supreme Court.
4. COURTS—JURISDICTION OF SUPREME COURT.—The Supreme Court has no original jurisdiction to issue a writ of certiorari to review a judgment of the circuit court upon the sole ground that the court stenographer failed, without fault of petitioners, to prepare the transcript of the oral proceedings within the time allowed by the lower court, and that petitioners were thus, without fault, prevented from preparing the record for an appeal.

Certiorari to Prairie Circuit Court, Northern District; *George W. Clark,* Chancellor; petition denied.

Emmet Vaughan, Brundidge & Neely, for appellant.

Roy D. Campbell, F. E. Brown, John F. Clifford, for appellee.

PER CURIAM. This is a petition for a writ of certiorari to bring up for review a judgment for the recovery of money, rendered against petitioners by the circuit court of Prairie County on September 10, 1920, in favor of the respondents, who were the plaintiffs in the action below. It is alleged in the petition that a motion for a new trial

was filed and overruled by the court; that an appeal to this court was granted by the trial court; and that time was allowed (120 days) within which to prepare and file a bill of exceptions. The sole ground urged for the issuance of the writ of certiorari is that the court stenographer failed, without fault of petitioners, to prepare the transcript of the oral proceedings within the time allowed by the court, and that petitioners were thus prevented, without fault on their part, to prepare the record so that an appeal was available for a review of the record in this court.

The jurisdiction of this court is, under the Constitution, merely appellate and supervisory, except in the single instance of the exercise of original jurisdiction in the issuance of writs of *quo warranto*. Constitution of 1874, article 7, sections 4 and 5. The various writs authorized to be issued by this court are merely in aid of such appellate or supervisory jurisdiction. *Ex parte Jackson,* 45 Ark. 158; *State v. Neel,* 48 Ark. 283. And a review by this court for errors of inferior tribunals is confined to the record made below. This court has no authority to inquire beyond the record made by those courts. Such further inquiry would constitute the exercise of original jurisdiction. It is not claimed that there is any error appearing in the record made in the court below. In other words, it is not claimed that there is any error on the face of the proceeding, but the claim is that the petitioners were prevented, without their fault, from making a record by bill of exceptions, which would have disclosed errors in the proceedings; and the contention is that they are entitled to relief under the remedy afforded by the writ of certiorari.

Counsel for petitioners rely upon decisions of this court, holding that the remedy under the writ of certiorari is available where the right of appeal has been unavoidably lost. *Burgett* v. *Apperson,* 52 Ark. 213; *Lamb & Rhodes* v. *Howton,* 131 Ark. 211. Those were cases where relief was sought in the circuit court from judgments of inferior courts over which that court had

supervisory control, and under and pursuant to the statute which authorizes a review of proceedings in inferior courts for relief against either erroneous or void judgments. Crawford & Moses' Digest, section 2237. Those cases, therefore, have no application to the question of the authority of this court, for this court has no original jurisdiction, and such original jurisdiction for relief against fraud, accident or mistake is cognizable in courts of chancery, and in that court alone must petitioners seek relief for the alleged unavoidable loss of the right of appeal. *Kansas & Arkansas Valley Rd. Co.* v. *Fitzhugh,* 61 Ark. 341; *Little Rock & Fort Smith Ry. Co.* v. *Wells,* 61 Ark. 354.

The writ is therefore denied.

WILLIAMS v. SANDERSON.

Opinion delivered October 17, 1921.

EVIDENCE—COMPETENCY.—In an action by a real estate broker against a purchaser of land to recover for services in the purchase of the land, testimony of a witness that he was present at an interview between plaintiff and the person who sold the land, offered merely for the purpose of proving that plaintiff was attempting to purchase the land for defendant's intestate, *held* competent.

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

Henry Moore, for appellant.

The court erred in admitting the testimony of witness Hinton as to conversations had between appellee and Paup in the absence of appellant's intestate and in refusing appellant the right to introduce testimony to negative that of witness Hinton.

Appellee was acting as the agent of both parties without their knowledge and consent which is not permissible, 143 Ark. 1, and appellant's instruction based thereon should have been given.

Jones & Head, for appellee.

The case cited by appellant to support his contention that his instruction No. 2 should have been given is clearly against him. 82 Ark. 381.

McCULLOCH, C. J. Appellee presented in the probate court of Miller County a claim for allowance against the estate of appellant's intestate, and the case was tried in the circuit court on appeal, resulting in a verdict and judgment in favor of appellee for the allowance of the claim.

The claim of appellee is for the sum of $500 as commissions for services alleged to have been performed by him for the decedent in the purchase of a farm from W. W. Paup. There was no attempt in the trial below to establish an express agreement between appellee and appellant's intestate for the payment of a commission, but the testimony adduced by appellee tended to prove that decedent engaged his services in an effort to buy the farm from Paup, that appellee's services procured the purchase from Paup, which was duly consummated, that the price of the farm was about $50,000, and that the amount sued for was reasonable compensation for the services rendered. These issues were submitted to the jury upon correct instructions, and the verdict settled the issues in appellee's favor.

Error of the court is assigned in permitting witness Tom Hinton to testify concerning a conversation between appellee and Paup in the absence of appellant's intestate. The witness testified concerning interviews, at which he was present, between deceased and appellee, and between deceased, appellee and Paup, and also between appellee and Paup. The witness testified that he had two conversations with decedent in regard to appellee's services in this matter, in the first one of which witness advised decedent to get appellee to handle the matter with Paup, and in the second conversation decedent stated to witness that appellee was working on the matter and "was still trying to get it lined up." The witness also testified to being present at a conversation between decedent and Paup and appellee, in which Paup said, in connection with stating the price, that he would not pay any commission on the sale. The witness was then permitted to testify, over the objection of appellant, that he was present at an interview

between appellee and Paup concerning the purchase of the farm for appellant's intestate. Counsel for appellee offered this testimony merely for the purpose of proving that appellee was attempting to purchase the farm for decedent, and not for the purpose of proving the statements of Paup and appellee to each other. The court admitted the testimony for that purpose alone, and we are of the opinion that there was no error committed in that respect. There was no attempt to bind appellant's intestate by the statements made by appellee and Paup to each other, but this testimony tended to establish the fact that the efforts of appellee brought about the purchase of the farm from Paup and that the commission was earned.

The sale of the land by Paup was consummated by a joint deed to appellant's intestate and to C. R. Crank and Allen Winham. Appellant offered to prove by Crank and Winham that they were interested with appellant's intestate in the purchase of the farm, and that appellee had not presented any bill to them for compensation for making the purchase. The court was correct in excluding this testimony, for the reason that there was no contention on the part of appellee that he had performed the service at the instance of or for the benefit of Crank or Winham. The fact that he had not made any claim against those gentlemen for compensation had no probative force in determining whether or not appellee's claim against the estate of the decedent Williams was well founded.

It was developed in the testimony that, shortly after the consummation of the sale, Paup paid appellee the sum of $500, and the contention of appellant was that this was paid as commission on the sale, that the payment thereof demonstrated the fact that appellee was attempting to act for both parties, and was claiming a commission from each of them. Appellee and Paup each testified that the payment of $500 by the latter to the former was not as a commission on this sale, but was for other

services; and the court submitted that issue to the jury in instructions which told the jury that, if appellee was acting as agent for both parties in the transaction, he could not recover against the estate of Williams unless there was an express promise on the part of Williams to pay a commission with knowledge of the fact that appellee was acting as agent for both parties; but that, if the payment of $500 was not made as compensation for services in making this sale, it would not affect appellee's right to recover compensation from appellant's intestate.

We find no error in the proceedings, and since the evidence is legally sufficient to sustain the verdict, the judgment must be affirmed, and it is so ordered.

WRIGHT v. BENNETT.

Opinion delivered October 17, 1921.

1. PRINCIPAL AND AGENT—MISREPRESENTATIONS OF AGENT.—A principal has a right to rely upon the representations of his agent, without inquiring as to their correctness, and his failure to make inquiry will not deprive him of relief against his agent's fraud.
2. BROKERS—FRAUD—RELIEF.—Though a principal consummated an exchange of lands after ascertaining that his agent had made false representations concerning the exchange, he will not be barred from relief against the agent where the other parties to the exchange were not parties to the misrepresentations.

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

Duty & Duty and *Lee Seamster,* for appellant.

Appellee, *pro se.*

McCULLOCH, C. J. Appellee owned a farm in Benton County, and listed it with appellant for sale or exchange, agreeing to pay a commission. A. L. Pickerall and L. A. Dykes also owned a farm in Benton County, and listed same with appellant, who negotiated an exchange between appellee and those parties. Under the terms of the exchange, Pickerall and Dykes were to pay the sum of $600 to appellee. They executed a note to appellant for said amount, and appellee instituted this action against appellant to restrain him from collecting the

note, on the ground that he had misrepresented the terms of the sale to appellee. The controversy between appellant and appellee relates to the amount of the commission and certain alleged representations made by appellant to appellee concerning the terms of the trade between the appellee and Pickerall and Dykes. The contention of appellee is that he first demanded the sum of a thousand dollars in the trade, but finally agreed to accept $600 on condition that appellant would only require him to pay $200 commission; but that appellant subsequently represented to him (appellee) that Pickerall had refused to consummate the trade unless he should receive $300 of the $600 that was paid in the exchange, and that appellee, in order to consummate the trade and in reliance upon the representations of appellant concerning the demand of Pickerall, consented to this arrangement. The allegation of the complaint is that the representations made by appellant concerning the dedemand of Pickerall were false; and there was testimony tending to sustain appellee's contention on that point. Appellant contends, on the other hand, that he made no such representations to appellee in regard to such demand from Pickerall; that appellee agreed to pay him a commission of $500 on the exchange, and that he had tendered to appellee the sum of a hundred dollars—the difference between the amount of the note and his commission.

The testimony is sharply conflicting, and is confined mainly to the testimony of the two parties themselves—appellant and appellee. There was another witness, named Holcomb, a nephew of appellant, who testified that he was present when the parties went out to look at the farms, and heard appellee agree to pay a commission of $500. The contention, however, of appellee is that, at that time, he was holding out for a difference of a thousand dollars in the exchange, and that afterwards, when Pickerall and Dykes offered $600, he consented to the reduction on condition that appellant would reduce his commission to $200. Pickerall testified that he made

no demand on appellant that he should be paid $300 out of the note when collected, and he testified that he and Dykes gave the note for the difference with no expectation that any of it would be returned

Viewing the testimony in the record, it appears to be about evenly balanced, and under those circumstances it is our duty not to disturb the finding of the chancellor.

The point is made that appellee had no right to rely on alleged representations of appellant, but should have pursued the inquiry and ascertained from Pickerall that no such demand had been made. The answer to that contention is that appellee had the right to rely upon the representations of appellant as his agent, and the fact that he did so rely upon these representations, without inquiring further, does not deprive him of relief against the fraud of his agent.

Again, it is contended that appellee should be denied relief on the ground that he consummated the exchange after ascertaining the falsity of the alleged representations made to him. This contention is not sound, for the reason that Pickerall and Dykes were not parties to the misrepresentations, and appellee was bound by his contract with them, notwithstanding the misrepresentations of his agent, and appellee's only remedy was to consummate the sale and seek a remedy against his agent.

The state of the record is, as before stated, such that we cannot say that the preponderance of the evidence is against the finding of the chancellor. The decree is therefore affirmed.

FERRELL v. MASSIE.

Opinion delivered October 17, 1921.

1. HIGHWAYS—COLLECTION OF ASSESSMENTS—TIME OF APPEAL.—Crawford & Moses' Digest, § 5687, providing that a transcript on appeal from decree enforcing the collection of a highway assessment "shall be filed in the office of the clerk of the Supreme Court within twenty days after the rendering of the decree appealed from," is mandatory.

2. HIGHWAYS—COLLECTION OF ASSESSMENTS— TIME OF APPEAL.—Crawford & Moses' Digest, § 5687, requiring the transcript on appeal from a decree enforcing the collection of a highway assessment to be filed within 20 days after the rendering of the decree, applies in the case of an appeal from such a decree though the defendant by cross-bill seeks to attack the validity of the district or of the assessment of benefits.

3. HIGHWAYS—ENFORCEMENT OF ASSESSMENTS—STATUTES CONSTRUED.—There is no conflict between the statute authorizing vacation decrees on stipulation of counsel (Crawford & Moses' Dig. § 2190) and the statute (Crawford & Moses' Digest., § 5681) providing that the chancery court shall be always open for the purpose of taking any step in the enforcement of highway assessments, and both statutes are applicable to suits to enforce such assessments.

Appeal from Prairie Chancery Court, Southern district; *John M. Elliott,* Chancellor; appeal dismissed.

Mehaffy, Donham & Mehaffy, for appellants.

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

McCULLOCH, C. J. Appellees constitute the members of the board of improvement of an improvement district created under the general statutes in the town of Hazen for the purpose of improving certain streets and sidewalks, and this action was instituted in the chancery court of the county to enforce the payment of assessments and penalties thereon. The complaint contains allegations in general terms setting forth the creation of the district, the assesment of benefits, etc., and the non-payment of the assessments by the defendants. A list of the unpaid assessments was exhibited with the complaint.

Appellants, who were defendants below and are the owners of property in the district, filed a joint answer, in which they denied all the allegations of the complaint with respect to the creation of the district, and the levy of assessments, and the non-payment thereof. They also incorporated in the answer a cross-complaint attacking the validity of the district and the assessment of benefits on numerous grounds, alleging failure to comply with the statute with respect to the original petition for the

creation of the district, the second petition, the publication of notice, the enactment of the ordinances, and various other things required by the statute. Crawford & Moses' Digest, §§ 5647 *et seq.* The prayer of the answer and cross-complaint is that the ordinances in regard to the district be declared invalid, and that the commissioners be restrained from attempting to collect assessments and from further proceedings under the ordinances.

The cause was heard by the chancellor in vacation on stipulation of counsel, and a decree was rendered in favor of appellees for the collection of the unpaid assessments and for the sale of the property of appellants if the assessments be not paid, and also dismissing the cross-complaint for want of equity. An appeal was prayed and granted by the chancellor; but the transcript was not filed in this court within twenty days.

There is a motion to dismiss the appeal on the ground that the transcript was not filed within the time required by statute. The statute in regard to improvement districts situated wholly within municipalities provides that, if the assessments on the property be not paid within the time required, the board of improvement shall "straightway cause complaint in equity to be filed in the court having jurisdiction of suits for the enforcement of liens upon real property for the condemnation and sale of such delinquent property;" that the courts shall always be open for the purpose of taking every necessary step in such suits; that in the decree of condemnation the court "shall direct that if the sum adjudged shall not be paid within ten days the property shall be sold by a commissioner appointed for that purpose;" that no appeal shall be prosecuted from such decree "after the expiration of twenty days herein granted for filing the transcript in the clerk's office of the Supreme Court;" and that the transcript "shall be filed in the office of the clerk of the Supreme Court within twenty days after the rendering of the decree appealed from." Crawford & Moses' Digest, §§ 5673 *et seq.*

We have held that this statute is mandatory with respect to the time for obtaining the appeal and for filing the transcript. *Crandell* v. *Harrison,* 105 Ark. 110; *Miller* v. *White,* 108 Ark. 253.

This is a suit for the collection of delinquent assessments, as provided in the statute; but the contention is that the cross-complaint of appellants, attacking the validity of the district and the assessment of benefits, takes the case out of the operation of the statute with respect to the limitation of time for taking an appeal and filing the transcript.

The majority of the court are of the opinion that this contention of counsel is not well founded. The manifest purpose of the statute is to expedite the final disposition of suits to enforce collection of assessments in improvement districts of this kind (*Miller* v. *White, supra*); and when a suit is instituted for that purpose, it still retains its character, notwithstanding an effort, by way of cross-complaint, to adjudicate invalidity of the district. The statute prescribes the form of the decree in such cases and fixes a limitation upon appeals "from any such decree." The decree in the present case falls squarely within the terms of the statute, and the effect of this limitation is not avoided by the fact that appellants, in presenting a defense against the enforcement of the assessments, pleaded new matter by way of cross-complaint.

It is further contended by counsel that, since the statute provides that the chancery court shall always be open for the purpose of taking necessary steps in suits to enforce the collection of assessments (Crawford & Moses' Digest, § 5681, the statute authorizing vacation decrees on stipulation of counsel (Crawford & Moses' Digest, § 2190) has no application, and that, if the vacation decree in this case be valid, the suit must be treated as one not falling within the statute in regard to suits for the enforcement of assessments. The two statutes are not at all inconsistent with each other, and are

both applicable to suits of this character. The fact that under the statute the court is open at all times for the hearing of such cases does not affect the application of the other statute providing for vacation decrees on stipulation.

The transcript not having been filed within the time specified in the statute, it follows that the appeal must be dismissed. It is so ordered.

HART, J., (dissenting). Judge Wood and myself do not think that the majority opinion is sound when all the material facts contained in the record are considered. Not only did the defendant file a cross-bill assailing the validity of the improvement district on numerous grounds, as stated in majority opinion, but in addition it may be said that no objection was made by the plaintiffs to the filing of the cross-bill. On the contrary, they filed an answer in which they specifically denied every allegation of the cross-bill seeking to assail the validity of the district.

The court below then made an order allowing the defendants to make proof on the issues thus raised. Proof was taken, and the case was heard in the chancery court upon the pleadings and the proof made. The court made specific findings sustaining the validity of the organization of the district and specifically dismissed the cross-bill of the defendants for want of equity.

The parties and the court below having all treated the case as a suit to test the validity of the district, it is manifestly unjust for this court on appeal to characterize the case as one brought under the statute solely to collect assessments. If objection had even been made to the filing of the cross-bill, the case might be different, but we cannot perceive how the case still retains its character solely as a suit to collect assessments under the statute, when both parties by their pleadings made it a suit to test the validity of the district, and the court below so treated it.

The chancery court had jurisdiction of a suit to test the validity of the district, and, the parties having submitted themselves to the jurisdiction of the court in such

a suit, and the court below having treated it as a suit to test the invalidity of the district, and having decided the issues thus raised, we think that the statute governing appeals in general should control, instead of the special statute relating to appeals upon proceedings to collect assessments.

Therefore Judge WOOD and the writer respectfully dissent.

MILLAR v. MAUNEY.

Opinion delivered October 17, 1921.

1. MINES AND MINERALS—IMPLIED COVENANT TO DEVELOP MINE.—In a lease of lands for the purpose of exploring for diamonds and other precious stones and minerals upon a royalty basis, there is an implied covenant on the part of the lessee that he will with proper diligence search the land described in the lease for minerals and develop the same.
2. MINES AND MINERALS—ABANDONMENT OF LEASE.—Where the conduct of the lessees in mining leases, given in consideration of a royalty to be paid, is such as to show that the lessees do not intend in good faith to perform the covenants by which they are bound, they have, in legal effect, rescinded those covenants and released the lessors from the obligations of the contract, and the latter are justified in treating the contract as rescinded.
3. MINES AND MINERALS—ABANDONMENT—REMEDIES OF LESSOR.—Where a lessee in a mining lease, the consideration of which is a royalty to be paid, has, after a reasonable time, failed to begin and to continue the work of development and exploration provided in the contract, the lessor has three remedies, viz., (1) he may sue in equity to cancel the contract and recover incidental damages; (2) he may sue at law for damages for breach of the contract; or (3) he may treat the contract as rescinded and sue at law to recover possession of the property leased.
4. TRIAL—TRANSFER TO EQUITY.—Where the lessors in a mining lease in an action at law sought to recover the leased property, alleging that the lessees had abandoned the lease, allegations in the answer that the lessors had annoyed and harassed the lessees by lawsuits and otherwise and prevented them from fulfilling their contract *held* not sufficient to entitle the lessees to have the cause transferred to equity or to have injunctive relief against interference with the property.

5. EVIDENCE—RELEVANCY.—Where the lessors in a mining lease alleged a breach of the covenants therein by reason of non-performance of the contract on the lessees' part since a certain date, it was not error to refuse to permit the lessees to prove due diligence on their part prior to that date.

6. EVIDENCE—RELEVANCY.—It was not error to permit lessors of a diamond mine, seeking to enforce a forfeiture for nonperformance of the lessees, to prove what might have been accomplished by the lessees in testing the extent of the "hardibank" by a diamond drill, instead of by shaft, such testimony being relevant on the issues of diligence and good faith of the lessees.

7. MINES AND MINERALS—FORFEITURE OF LEASE FOR NONPERFORMANCE. —Where the lessors, by their conduct in instituting law suits or otherwise, put obstacles in the way of the lessees which caused them to fail to perform their covenants, the former would be estopped from setting up an abandonment or forfeiture by the lessees.

8. MINES AND MINERALS—LEASE—ABANDONMENT.—The good intentions of a lessee in a mining contract given on a royalty basis will not avail him unless he has the ability to perform, and actually does perform, the covenants of his contract within a reasonable time; and he will be held to have abandoned his right or privilege if he, without fault of the lessor, is unable after a reasonable time to perform such covenants.

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

Tompkins, McRae & Tompkins and *Fordyce, Holiday & White,* for appellants.

The court erred in refusing to transfer the cause to chancery. Cancellation of instruments is a recognized ground of equity jurisdiction. 96 Ark. 251.

The lease contained no clause for forfeiture. It was error to overrule defendant's demurrer. A law court cannot order a forfeiture. 41 Ark. 532; 24 Cyc. 1349, citing cases; Wood, Landlord & T. p. 453; 1 Underhill, Landlord & T. p. 625; Tiffany, Landlord & T. p. 1366.

Forfeitures are regarded with disfavor. Ordinarily where forfeitures are desired they are expressed in the contract. 100 Ark. 568; 125 Ark. 110.

Rose, Hemingway, Cantrell & Loughborough, and *W. C. Rodgers,* for appellees.

This was not an action to cancel an instrument. It was an action to recover land. The cause should not have been transferred. When the tenant's term expires from any cause, the landlord may bring ejectment. Wood, Landlord & T. § 571.

While forfeitures are not favored, equity will cancel a contract where there is an abandonment of performance. 100 Ark. 568.

WOOD, J. This action was instituted by the appellees against the appellants in the Pike Circuit Court April 20, 1920, to recover the possession of certain lands alleged to contain diamonds. The appellees alleged in substance that the appellee Bettie L. Mauney is the widow, and that the other appellants are the children and sole heirs at law of M. M. Mauney, deceased, who leased the lands in controversy in 1912 to the appellants; that the lease was for a period of fifty years, beginning January 1, 1912. There was a condition in the lease that the lessee, his associates and assigns, undertake "to diligently and faithfully" prosecute the work of development of the property as outlined in the lease in a scientific and practical manner * * * by taking such preliminary steps toward the preparation of plans and purchases of machinery necesary to carry on the work in contemplation, and to erect and install a modern washing and concentrating plant of African type within one year from April 10, 1912, and in good faith and with diligence to treat and wash for the recovery of diamonds and other precious stones a minimum of 10,000 loads of material from the first-described tract of land known as the Mauney diamond property during each and every year of this lease, and as much more as can reasonably be done, a load being a unit of measure and sixteen cubic feet. The lease also provided that the lessor should have one-fourth of all diamonds and other precious stones and valuable minerals recovered from the land. The lessees were to have the management and sale of the diamonds, and every three months the lessees should fix a price for

the product of the mine, and the lessor was given the right to buy the diamonds by paying to the lessees three-fourths of the price thus fixed. If no price was fixed, the output was to be sold to the lessee, and one-fourth of the proceeds of the sale was to be paid to the lessor.

The complaint further alleged that the lessees "covenanted and agreed with the lessor that the operation undertaken shall be prosecuted and carried on in good faith and with loyalty and fidelity to all the parties to the lease, and agreed to furnish the lessor an accurate statement of the number, character, quality and weight of all diamonds and other valuable minerals taken from said mine, together with quarterly statements of sales made, with payment in full for all royalties due to the lessors under the lease contract;" that since the 27th of April, 1918, no reports of the recovery of diamonds had been made nor an opportunity given the lessors to purchase the output, nor had the lessees washed and treated as much as 10,000 loads of material; that the property had been in possession and under the control of the appellants before and since April 27, 1918; that appellants were holding the same under and by virtue of the lease mentioned, and upon no other ground whatever. The concluding portion of the complaint is as follows:

"That the defendants have not substantially complied with said contract; that they have, on the contrary, refused to even attempt to carry out the terms thereof in good faith as required thereby; that they have lain idle and ceased operations ever since April 27, 1918 to the time of filing this complaint (April 1920); that they have not recovered any diamonds in that time, although during the year 1914 they reported the recovery of several hundred diamonds, and hundreds in other years prior to April 27, 1918. That the plant on the site at Kimberly was burned on or about January 13, 1919. since which time, as well as before, there has been no effort on the part of the defendants to operate in good faith under said contract; that they have abandoned all work under said contract, and are arbitrarily and mali-

ciously holding possession of said land mentioned in said lease contract without right and in violation of the rights of the plaintiffs to the full enjoyment thereof, and to any benefit they may have by reason of operating or controlling said mine themselves, or having others to do so who will be faithful to such contracts as the plaintiffs might enter into.

"The defendants have done no work in the said Mauney mine since April 27, 1918, and have not attempted to do any since said time. On the contrary, they have abandoned the said mine and the operation and development thereof completely and in every way since April 27, 1918, since which date they have failed, neglected and refused to substantially comply with and conform to the requirements of said lease, and by reason of the abandonment thereof as herein set forth, they have ever since April 27, 1918, lost and forfeited all right of possession of said land mentioned in said lease and supplement thereto. That the plaintiffs are owners of all of said land and entitled to the possession thereof."

The lease was made an exhibit to the complaint. The appellants answered and set up that, subsequent to the lease, there was an agreement by which the written reports required in the lease were dispensed with and it was agreed that the diamonds should be divided in kind. They allege that the diamonds already recovered had, by order of the chancery court in a former suit, been brought into court and held there until May, 1920, when they were delivered back to the appellants, and that appellants had been trying to divide the diamonds ever since, and had tendered them in a suit pending between the parties in federal court. The answer alleged that, under the terms of the supplemental lease, the parties were authorized, when it became necessary to make a change to underground system in mining, to have such time as was necessary for so doing without forfeiting the lease; that in 1917 appellants determined that it was necessary to resort to underground mining, but that by reason of the war with Germany they could not secure

the necessary labor for doing the necessary excavation and running the washing machine until the 13th of January, 1919, when the plant was destroyed by fire of incendiary origin. They admitted that since April, 1918, they had not washed as much as 10,000 loads of dirt, and alleged that they were not required to do so. They alleged that, ever since the making of the lease, the appellees had persistently and without right constantly engaged them in litigation, having filed against them more than thirty separate suits, all of which have been decided adversely to the appellees; that, notwithstanding the annoyance and harassments, appellants had expended more than $150,000 in undertaking to develop the mine; that the product of the mine for the last three years has been tied up by the court at the instance of appellees, who had refused to fix a price upon them or to divide them as provided by the verbal agreement made in 1916; that it will cost a quarter of a million dollars to reconstruct the plant, and that, by reason of the annoyance and harassments caused by the appellees, the appellants had been hampered in making their necessary financial arrangements; that their labor had been disorganized, and that one of the appellees sought to assassinate two of the appellants on the public highway; that diamond-bearing dirt had been uncovered on about five acres of the mine, and that appellees had wrongfully engaged the appellants in litigation for the purpose of fraudulently undertaking to secure a cancellation of the lease for the purpose of appropriating to the use of the appellees the labor and expenditures of appellants; that appellants during the last seven years had not had as much as three months free from litigation in which to undertake the development of the mine; that the mine is in the shape of a V with the point extending toward the south, and the northern part of the mine is covered by non-diamond bearing rock, the extent of which is not known, and cannot be known, until the appellants are permitted to sink a shaft to determine how far down this rock extends. The answer concluded with a prayer that it be taken as a

cross-bill, and that the court fix a reasonable time within which the appellants may peacefully pursue the prosecution of the work, and that until that time expires appellees be restrained from further proceedings.

Embodied in the answer was a general demurrer which challenged the sufficiency of the complaint to state a cause of action, and also the jurisdiction of the court. There was also a motion to transfer the cause to the chancery court. The demurrer and motion to transfer were overruled, and the cause was sent to the jury to be heard on the evidence and the instructions. Such other facts as may be necessary will be stated as we proceed. The trial resulted in a verdict and judgment in favor of the appellees, which judgment appellants are seeking to reverse on the following grounds:

1. That the complaint did not state a cause of action giving the trial court jurisdiction, and that the court therefore erred in overruling the demurrer. The contract set up in the complaint does not create the ordinary relation of landlord and tenant. It is not a contract by which the lessees are to occupy the property for residence, mercantile, manufacturing or agricultural purposes, and in which the lessor, landlord, receives a certain stipulated sum for one month or one year for the use of the premises leased. But it is a contract for the exploration and development of the leased lands "for diamonds and other precious stones and valuable minerals." As compensation for the use of his lands for such purposes, the lessor receives by way of rental or royalty a certain percentage of the output from the development of the leased property. In other words, this is strictly a lease for "mining purposes," such as was under consideration by this court in the case of *Mansfield Gas Co.* v. *Alexander*, 97 Ark. 167. In that case we said: "In the construction of mineral leases such as is involved in this case, the authorities uniformly hold that there is an implied obligation on the part of the lessee to proceed with the search and also with the development of the land with reasonable diligence according to the usual course

of such business, and that a failure to do so amounts in effect to an abandonment and works a forfeiture of the lease." And further: "According to the uniform holding of the authorities, the law will read into this lease a covenant on the part of the lessee that it will with due and proper diligence search the land described in the lease for minerals and with due and proper diligence develop the same. This implied covenant is in effect a condition upon which the lease was made; a failure or refusal to perform that condition results in a forfeiture of the lease."

In the above case many authorities are cited to support the rule announced therein. The same doctrine is announced in an action in equity brought by the Mauneys to cancel the lease involved herein. *Mauney* v. *Millar,* 134 Ark. 15-21, and also in *Millar* v. *Mauney,* 142 Ark. 486-490. See also *Mansfield Gas Co.* v. *Parkhill,* 114 Ark. 419. Although the above doctrine was enunciated in suits in chancery to cancel the lease, it is equally applicable in actions at law to recover the possession of the property if there has been such a failure on the part of the lessees, still in possession, to observe the covenants by which they are bound as to be tantamount to an abandonment of those covenants and a consequent forfeiture of all their rights under the contract. If the conduct of the lessees in contracts of this nature is such as to show that they do not intend in good faith to perform the covenants by which they are bound, then they have, in legal effect, rescinded those covenants and released the lessors from the obligations of the contract, and the latter are justified likewise in treating the contract as rescinded.

As was said in *Huggins* v. *Daley,* 99 Fed. 606-613: "Such leases vest no present title in the lessee, and if, at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor because of want of mutuality; and, where the only consideration is prospective royalty to come from exploration and development, failure to explore and develop renders the

agreement a mere *nudum pactum,* and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done." The reason for the rule is that where the lessor receives as royalty or rental a certain percentage of the output of the lands as his only compensation for their use by the lessee for exploration and development, when such work ceases, his compensation ends, and the consideration for the lease fails. In such contracts the lessee usually expressly undertakes, as was the case here, to "diligently and faithfully prosecute the work of development," and, if there is no express covenant to that effect, as we have seen, such a covenant will be implied from the very nature of the contract. Unless it is otherwise provided in the lease, it is always in the contemplation of the parties to such a contract that the lessee is able, financially and in every other way, to perform his undertakings in the time and manner specified in the contract. If, after a reasonable time, he fails to begin and to continue the work of development and exploration provided in the contract, but nevertheless holds possession and exercises control over the leased lands for promotion purposes or financial exploitations, he has by such conduct worked a forfeiture of his rights under the lease and may thereafter be treated as having abandoned his contract and as holding the land as a trespasser adversely to the lessor. In other words, the lessee under such a contract will not be allowed to speculate upon the chance of being able at some indefinite and unreasonable time in the future to begin and to continue the work of exploration and development required of him under the covenants of his contract. When the contract has been thus virtually rescinded and abandoned by the lessees, the lessors have three remedies, either of which they may pursue. They may go into a court of equity to cancel the contract and recover any incidental damages; they may in a separate action at law sue for damages for breach of the contract; or they may treat the contract as rescinded and sue to recover possession of the property. 1 Pomeroy's Equity Juris-

prudence, § 110. That an action at law by the lessor to recover possession of the property leased is an appropriate remedy in such cases is well sustained by the authorities. *Aye* v. *Philadelphia Co.,* 193 Pa. St. Rep. 451; *Paine* v. *Griffiths,* 86 Fed. 452, 38 Atl. Rep. (N. J. Law) 813. See also *Acme Oil & Mining Co.* v. *Williams,* 74 Pa. 296 and cases there cited. 1 Pomeroy's Equity Jurisprudence, *supra;* White, Mines & Mining, § 425. We conclude, therefore, that the appellees had the right to institute this action at law to recover the possession of the lands in controversy. The allegations of the complaint are sufficient to state a cause of action, provided they state facts showing an abandonment of the lease contract by the appellants.

We will not repeat here all the allegations of the complaint. Among other allegations are the following: "That at no time since April 10, 1918, have the defendants washed and treated for the recovery of diamonds as much as 10,000 loads of material from the said Mauney mine, and they have done no work in the said Mauney mine since April 27, 1918, and have not attempted to do any since said time; that at no time since April 27, 1918, have the defendants, or any of them, reported to these plaintiffs, or any of them, the recovery of any diamonds or other precious stones; neither have the defendants, or any of them, given these plaintiffs, or any of them, an opportunity to buy the output of said mine at any time since April 27, 1918." These and other allegations in the complaint were sufficient, if true and undenied by the appellants, to constitute a cause of action at law against the appellants for the abandonment of the contract. On demurrer we must treat all the allegations, properly pleaded, as true and admitted. The court was correct therefore, in overruling the demurrer to the complaint.

2. The answer of the appellants contained allegations which, in effect, denied or completely explained all material allegations of the complaint and showed that there had been no abandonment by them of the property. They admitted that they had not since April, 1919, washed

as much as 10,000 loads of dirt, and alleged that by the terms of the supplemental lease they were not required to do so. They alleged that their washing machinery was destroyed by fire of incendiary origin on January 13, 1913; that the product of the mine had been tied up in the courts on account of litigation at the instance of the appellees, who had refused to fix the price of the product or to divide them; that appellants had not made reports and divisions of the output of the mine as provided in the contract because there was a subsequent verbal agreement entered into in 1916 which made the same unnecessary. They alleged generally that in a litigation of more than thirty separate suits filed by the appellees against the appellants, all of which had been decided adversely to the appellees, the appellants had been subjected to annoyance and harassment of various kinds, including intimidation of their labor, and an attempt by the appellee to assassinate two of the appellants, all of which was for the purpose of fraudulently undertaking to secure a cancellation of the lease and requiring the labor expended in undertaking to develop the mine with a view of appropriating it to their own use and benefit; that during the last seven years appellants had not had as much as three months free from litigation in which to undertake the development of the mine. They set up that, notwithstanding the litigations, they had made large expenditures in undertaking to perform the contract on their part. In short, they denied that there had been an abandonment of their contract, and alleged on the other hand that they in good faith had performed and intended to perform all of their covenants under said contract. They made their answer a cross-complaint and asked, by way of affirmative relief, that they be allowed to peacefully prosecute their work under the contract for at least one year, and that the appellees be restrained from proceeding against them during such time.

It is unnecessary to discuss in detail all of the allegations in appellants' answer. Such of them as were relevant were sufficient to raise the issue as to whether or not

the appellants had abandoned their contract, but they were not sufficient to entitle appellants to have the cause transferred to the chancery court, and to entitle them to the injunctive relief which they prayed.

The appellants do not allege any specific facts in their answer to show in what manner the various suits instituted by the appellees against them had operated to interfere with the performance of their covenants under said contracts since April 27, 1918. The allegations of the answer show that all suits prior to April 27, 1918, as well as the suits instituted on that day, had been determined in appellee's favor, and they do not allege specific facts showing how the suit of April 27, 1918, which was decided in their favor by this court on March 8, 1920, had prevented the appellants in the meantime from carrying out their contract. Such facts properly pleaded, if proved, would be a complete defense on the issue of abandonment. Moreover, a court of equity has no power to restrain the appellees from seeking redress in a court of law for an alleged abandonment by the appellants of the contract under review and the resultant forfeiture of their alleged rights thereunder. Counsel for appellants have not cited us to any authority, and we do not know of any, which holds that a court of equity has such power. Such of these matters as were pertinent appellants could allege and prove in their defense of the action at law on the issue as to whether there had been an abandonment by them of the contract. But appellants could not by such allegations lift the action at law out of the jurisdiction of the law court and have the same transferred to the chancery court. The court was therefore correct in overruling the motion to transfer.

3. Appellants complain because the trial court refused to permit them to prove that, beginning with April 1913, about a year after the lease contract in controversy was executed, the appellees instituted a suit against them to cancel the lease, and since that time to the time of the present action had been in litigation with the appellants aggregating more than thirty-five suits, all of which, be-

fore this action was instituted, had been decided adversely to the appellees; that the effect of these suits had been to disorganize their labor and make it impossible for them to secure financial assistance, and that but for these suits the testing of the mine would have been completed; that these suits had cast a cloud upon appellants' title and had deterred parties who had promised them financial assistance from rendering such assistance, and that all this testimony was competent as tending to prove that the appellants in good faith had endeavored to carry out their lease contract and had not before or since April 27, 1918, abandoned the same.

The appellants alleged in their answer that all litigation prior to the present action had been decided in their favor. In the case of *Mauney* v. *Millar,* 134 Ark. *supra,* we said: "Right of action in this case, if there is one, extends back no further than the last of the adjudications thereof, and must be tested solely by testimony tending to show a breach of the contract since that time." That case was decided April 22, 1918, and on April 27, 1918, the last suit, the one just prior to the present action, was instituted and disposed of on March 8, 1920. A little more than a month thereafter, April 20, 1920, the present suit was instituted.

In the present action the appellees do not claim that there had been any abandonment of the contract prior to April 27, 1918, and only assert that appellants since that time had "lain idle and ceased operations," and thus had completely abandoned the mine and the performance of their covenants under the lease contract. In one of its instructions the court told the jury that "the burden is on the defendants to show by a preponderance of the evidence that the shooting of Walter Mauney, or the pendency of suits during the period from April, 1918, to April, 1920, actually hindered or delayed the lessees in the performance of the contract, and, unless you find that they did delay or hinder the lessees in performing the contract, you should disregard the testimony as to such shooting and such suits." The court allowed the appellants in

their testimony to cover all the time between the 27th of April, 1918, and April 20, 1920. That embraces the period of the alleged abandonment of the contract by the appellants. The court gave the appellants the privilege of proving by competent testimony what had been the effect, if any, of the suits instituted by the appellees against appellants, since April 27, 1918, in the matter of interfering with, or putting obstacles in the way of appellants' performance of their contract. For instance, the court ruled that defendants (appellants) "may prove any injury to their credit by the bringing of the libel suits since April, 1918, up to the bringing of this suit, the effect they had upon their labor, and upon capital or borrowing of money."

Since the appellees, by the present action, have not challenged the loyalty and fidelity of appellants to their contract obligations prior to April 27, 1918, it occurs to us that it would not be germane to the issues in this case to prove that appellees had not fulfilled their covenants, nor that appellants, in good faith, had kept theirs to April 27, 1918. Such matters were beyond the scope of the issue in the present action, and the court correctly so ruled.

The court likewise did not err in admitting testimony tending to prove what might have been accomplished by appellants in testing the extent of the "hardibank" by a diamond drill, instead of by shaft. This testimony was relevant on the issues of the diligence and good faith of appellants. We find no error in any of the rulings of the court in admitting or excluding testimony.

As to the law of the case, but little need be added to what we have already said in passing on the demurrer and motion to transfer. Since the instrument herein did not convey or grant to appellants any legal title or estate in the land itself, but only the privilege or right of possession for the purpose of mining, the appellants could abandon such right or privilege by a failure to perform their covenants for exploration and development as specified in the lease. See 1 Cor. Jur. p. 10, § 14. Good faith is required of both parties in the observance of their cov-

enants. If the appellees, by their conduct in instituting lawsuits or in any other manner, put obstacles in the way of appellants which caused them to fail to perform their covenants, then the appellees would be estopped from setting up an abandonment or forfeiture by the appellants.

The good intentions of the lessee in such contracts to perform the same will not avail him unless he also has the ability to perform, and actually does perform, the covenants of his contract within a reasonable time. To abandon means to quit; usually the voluntary relinquishment of a right or privilege which one enjoys. But in cases like this the lessee will be held to have abandoned his right or privilege if he, without fault on the part of the lessor, is unable after a reasonable time to perform the covenants of his lease. Abandonment is ordinarily a mixed question of law and fact. White, Mines and Mining, p. 561, § 423. It was so here. It cannot be said that the undisputed evidence showed that appellants had not abandoned, nor can it be said as a matter of law that they had abandoned and forfeited, their rights under the lease. The issue of fact in this case was therefore one peculiarly for the jury to determine from all the facts and circumstances adduced in evidence under the guide of appropriate instructions from the trial court. The instructions of the court show that it understood and correctly interpreted the contract. Its charge, as a whole, fully and fairly covered every phase of the evidence. These instructions but declared elementary and familiar principles of law applicable to the particular facts which the testimony adduced tended to prove in support of the contentions of the respective parties. There is no error in the rulings of the circuit court, and its judgment must therefore be affirmed.

SMITH, J., dissenting.

SOVEREIGN CAMP WOODMEN OF THE WORLD v. PEAUGH.

Opinion delivered October 17, 1921.

1. INSURANCE—WAR RISK—ADDITIONAL PREMIUM.—A provision in a contract of life insurance requiring the insured, in the event he entered the United States Army or Navy, to notify an agent of the insurer at its home office and to pay to such agent a certain sum in addition to the regular premium, in order to keep the policy alive for the full amount specified, is a valid and binding provision.
2. INSURANCE—PAYMENT OF ADDITIONAL WAR PREMIUM—ESTOPPEL.—Where a policy of life insurance required that if insured entered the army he should notify insurer's general agent at its home office and pay to such agent an additional sum, in order to keep the policy alive, the insurer is not estopped to avail itself of the defense that such requirement was not observed by reason of the fact that insured left sufficient money in bank to pay the additional sum and instructed the cashier thereof to pay his dues, and that the local agent of the insurer did not notify the cashier to pay such sum; the local agent not having authority to give such notice or to receive such payment.

Appeal from Clay Circuit Court, Western District; *R. H. Dudley,* Judge; affirmed with modification.

T. E. Helm, for appellant.

The insured failed to notify the sovereign clerk of the fact of his having entered the army, and also failed to pay the additional premium as required by the terms of his contract. The insured was charged with such notice, and the local clerk could not waive any of the conditions of the contract. 188 S. W. 941; 58 So. 100; L. R. A. 1915 E 152; 4 L. R. A. (N. S.) 421; 183 U. S. 308, note; 180 Pac. 2; 40 S. W. 553; 174 Mo. App. 250; 186 Cal. 204; 69 N. E. 718; 141 S. W. 1055; 84 Conn. 356; 151 Mo. 552; 153 Wis. 225; 93 Kan. 485; 87 Minn. 417; 188 S. W. 941; 60 Col. 585; 42 Okla. 25; 181 N. W. 819; 230 S. W. 540.

The appellant has power to make by-laws fixing and regulating its own duties and that of its members. 71 Ala. 436; C. & M. Dig. § § 6071, 6086, 6095. All parties are bound by the terms of the contract (71 Ark. 295), and relief can only be granted according to its terms (52 Ark. 201; 112 Ark. 171). It is not against public policy for

an insurance company to exempt itself from death of insured while in military or naval service. 138 Ark. 442. This is true whether such service is voluntary or result of draft. 106 S. E. 32; 107 S. E. 177.

F. G. Taylor, for appellee.

Appellant is estopped by the acts and conduct of its local clerk. 79 Ark. 315; 142 Ark. 132; 144 Ark. 345. The fact that deceased had entered the army was communicated to appellant's clerk, who promised his mother to look after the matter of his assessments. The knowledge of the local clerk was the knowledge of the company. *Sovereign Camp W. O. W.* v. *Key,* 148 Ark. 562; *Illinois Bankers' Life Assn.* v. *Dowdy,* 149 Ark. 72. This has been the rule in this State since the decision in 52 Ark. at p. 11. Since the appellant failed to introduce the local clerk as a witness, it is presumed his testimony would be against the company. 32 Ark. 337.

WOOD, J. The appellee instituted this action against the appellant on a benefit certificate issued by the appellant on February 23, 1918, to the son of the appellee. The appellee was named as the beneficiary in the certificate, and in her complaint set up the certificate, and alleged that she had complied with all of the terms of the contract and was entitled to recover thereon the sum of $500. The appellant admitted that it had issued the certificate, but denied that the appellee was entitled to recover the sum of $500. It admitted that, under the contract, it was due the appellee the sum of $17.76, and offered to confess judgment for that amount. The essential facts are substantially as follows:

The appellant is a fraternal benefit society doing business in this State. Its constitution and by-laws are expressly made a part of the contract of insurance. The contract contained the following provision:

"In the event the holder of this certificate shall die while serving in any branch of the United States army or navy, either as an officer or enlisted man, outside of the boundaries of the United States of America,

then the amount due under this certificate shall be such proportion of the amount thereof as the period he has lived since becoming a member bears to his expectancy of life at the time of becoming such member, determined by the National Fraternal Congress Table of Mortality; provided that, should the holder of this certificate so desire, he may, within thirty days after entering the service in any branch of the United States army or navy as an officer or enlisted man, notify the sovereign clerk at the home office of the society, Omaha, Nebraska, United States of America, that he has entered such service of the United States of America and pay in advance to the sovereign clerk, for the society, the sum of $37.50 per one thousand dollars insurance per annum in addition to the regular assessment prescribed by section 56 of the constitution and laws of the Sovereign Camp of the Woodmen of the World; and upon so doing at the death of the member, or as soon thereafter as possible, the amount prescribed in this certificate shall be paid to his beneficiary or beneficiaries."

Peaugh enlisted as a private in the United States army on April 13, 1918, and on October 26, 1918, he was killed while engaged in a battle in France. The insured did not pay the additional $37.50 to the sovereign clerk, and did not notify the sovereign clerk that he had enlisted in the United States army. Before leaving for France, Peaugh arranged with the cashier of the Bank of Success to pay all of his assessments as they were presented. He had on deposit with the bank more than $100. The cashier paid the dues for several months as they were presented by the clerk of the local camp, and would have paid the additional sum of $37.50 if it had been called to his notice that it was necessary to do so in order to keep Peaugh's policy alive. Appellee went to see the clerk of the local camp concerning the payment of her son's dues. The clerk told her that he was looking after the payment of the dues. He knew that her son had gone to the army.

The court, in effect, instructed the jury that if the insured had made arrangements with the cashier of the bank where he had sufficient money on deposit for the payment of his dues to pay these dues and had arranged with the clerk of the local camp to collect the dues from the bank, and the clerk of the local camp told the appellee that he was looking after the collection of the dues and premiums on the policy in her favor, and failed or neglected to collect the $37.50 additional insurance, and they further found that it was his duty to collect the same and report the same to the sovereign clerk, the appellant would be estopped from saying that the required notice was not given and the additional premium was not paid. The appellant asked the court to instruct the jury to find for the appellee in the sum of $17.76, and to instruct the jury that upon the uncontroverted facts they could not return a verdict for the appellant in a greater sum.

The provision in the contract requiring the insured, in the event he entered the United States army or navy, to notify the sovereign clerk at Omaha, Nebraska, of such fact and to pay the sovereign clerk the sum of $37.50 in addition to the regular sum in order to keep the policy alive for the full amount of $500 specified therein, was a valid provision and mutually binding upon the parties to the contract. *Miller* v. *Illinois Bankers' Life Association,* 138 Ark. 442; *Security Life Insurance Co. of America* v. *Bates,* 144 Ark. 345. See also *Sovereign Camp W. O. W.* v. *Ricks,* 106 S. E. 185; *Nowlan* v. *Guardian Life Insurance Co.,* 107 S. E. 177; *Marks* v. *Supreme Tribe of Ben Hur,* 230 S. W.540; *Huntington* v. *Fraternal Reserve Association of Oshkosh,* 181 N. W. 819; *McQueen* v. *Sovereign Camp W. O. W.,* 106 S. E. 32. The contract expressly required of the insured, in the event that he entered the service of the United States army or navy, to notify the sovereign clerk at the home

office of the Society at Omaha, Nebraska, of that fact and to pay "in advance to the sovereign clerk for the society the sum of $37.50." The undisputed testimony shows that this was not done.

The facts in this case clearly differentiate it from the cases of *Sovereign Camp W. O. W.* v. *Newsom,* 142 Ark. 132; *Security Life Insurance Co. of America* v. *Bates supra; Sovereign Camp W. O. W.* v. *Key,* 148 Ark. 562; and *Illinois Bankers' Life Association* v. *Dowdy,* 149 Ark. 72. The appellant is not estopped by its conduct from availing itself of the defense that the requirements of the "war clause" of the contract were not observed in the matter of giving the notice and paying the additional sum of $37.50. The local camp clerk was not a general agent, and there is no testimony to show that he was authorized to act for the sovereign clerk in giving the notice and receiving the payment required by the above express provision of the contract. The court therefore erred in submitting this issue to the jury and in not instructing the jury as requested by the appellant. Since the above provision of the contract was not complied with on the part of the insured, the appellee under the undisputed evidence is only entitled to recover the sum of $17.76, for which the appellee offered to confess judgment.

The judgment of the court will be modified by reducing same to the sum of $17.76, and as thus modified it is affirmed.

GARRETT v. BIG BEND PLANTATION COMPANY.

Opinion delivered October 17, 1921.

1. BANKRUPTCY—ANNULMENT OF GARNISHMENT LIEN.—Under § 67f of the Bankruptcy Act of 1898, nullifying all levies, judgments, attachments or other liens obtained within four months prior to the filing of a petition in bankruptcy against an insolvent person in case he is adjudged a bankrupt, a garnishment lien procured against a creditor of an insolvent person is annulled by adjudication of bankruptcy against such person had within 4 months from the date the garnishment lien was obtained.

2. BANKRUPTCY—EVIDENCE OF ADJUDICATION.— While the record of the bankruptcy court is the best evidence of the rendition of an adjudication of bankruptcy, it is unnecessary to prove such fact where it is admitted.

3. GARNISHMENT—DEPOSIT IN LIEU OF GARNISHED FUND.—Where a defendant filed a bond to secure the release of a garnished fund, and subsequently deposited in the registry of the court a sum of money equivalent to that fund, such sum will be treated as in lieu thereof.

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

STATEMENT OF FACTS.

R. B. Garrett, receiver of the First National Bank of Judsonia, brought suit by attachment against the Big Bend Plantation Company, a corporation duly organized under the laws of the State of Arkansas, and as grounds for the attachment alleged that said corporation was disposing of its property with the intention of delaying and hindering the plaintiff in the collection of his debt.

A writ of garnishment was issued against the Bald Knob State Bank, alleging that it had in its possession money belonging to the said corporation.

The garnishee filed an answer in which it admitted that it was indebted to the Big Bend Plantation Company in the sum of $1105.69. Avery M. Blount intervened in the action, and asked that the money garnished be turned over to him, as receiver for the Big Bend Plantation Company, which had been adjudged a bankrupt by the federal court.

On the trial, it was shown that, at the time the garnishment was issued, a bond was given, and the Big Bend Plantation Company drew the money out of the bank. Subsequently the Big Bend Plantation Company deposited in the bank $1105.69 to procure the release of the bond, and the bank paid that money to the circuit clerk and authorized him to release the bond. This was sometime before the Big Bend Plantation Company went

into bankruptcy. The writ of garnishment was issued on Aug. 19, 1920, and the answer of the garnishee was filed on September 11, 1920.

According to the testimony of Avery M. Blount, the Big Bend Plantation Company filed a petition in bankruptcy on the 4th day of December, 1920. We quote from his testimony the following:

Q. Has the Big Bend Plantation Company been adjudged a bankrupt?

A. They have.

(We object to that because they cannot prove it in that way).

A. I have the original record.

Q. Do you know what date the petition was filed?

A. Yes, sir, I know the date.

Q. What date was it?

A. Dec. 4, 1920.

Q. Has the Big Bend Plantation been adjudged a bankrupt?

A. Yes, sir.

I object to it.

The objection is sustained.

Note the exception.

Q. Do you know whether or not the Big Bend Plantation had been adjudged a bankrupt?

We object, it is a matter of record.

The objection is sustained.

Note the exception.

Mr. Barber: "I want to call the court's attention to the fact that when this question came up last Monday the attorneys admitted that the voluntary petition had been filed and that the Big Bend Plantation Company had been adjudged a bankrupt."

Mr. Brundidge: "That may be true, and I guess they have been adjudged a bankrupt, but we object to that way of proving it."

The circuit court found that the garnishment proceedings in this cause were commenced within four

months prior to the filing of the petition in bankruptcy against the defendant, Big Bend Plantation Company, and that the Big Bend Plantation Company was duly adjudged a bankrupt in the Federal court.

The court further found that the garnishee, the Bald Knob State Bank, had turned over to the clerk of the circuit court $1105.69 belonging to the Big Bend Plantation Company. Judgment was rendered turning it over to Avery M. Blount, receiver of the Big Bend Plantation Company, bankrupt, in the Federal court.

The case is here on appeal.

Brundidge & Neelly, for appellant.

Appellee was not insolvent at the time of the filing of the suit and issuing of attachment and garnishment, and the fact that it was placed in involuntary bankruptcy just a few days before the expiration of the four months period, would not avail the appellee anything unless it can be shown that the company was insolvent at the time of the filing of the suit in the circuit court. 7 C. J. 197; 227 Fed. 975 and cases cited; 260 Fed. 93 and cases cited.

Rogers, Barber & Henry, for appellee.

This is a case for the bankruptcy courts. 2 Remington on Bankrupty, § 1599. Where the possession of the State court has created a lien by legal proceedings within four months of the bankruptcy and while the debtor is insolvent, the State court does not retain jurisdiction. Remington on Bankruptcy, Vol. 2, § 1500, also § 1461; 2 A. B. R. 97; 3 A. B. R. 283; 115 Fed. 906.

HART, J., (after stating the facts).

Sec. 67f of the Bankrupt Act of 1898 provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly

discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustees for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect. Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

In the case of *Clarke* v. *Larremore,* 188 U. S. 486, it was contended that, inasmuch as the sheriff had sold the goods levied upon before filing the petition in bankruptcy, the proceeds of the sale were the property of the plaintiff in execution, and not of the bankrupt at the time of the adjudication, and that the trustee therefore had no title to the same. The contention involved the construction of the section of the bankruptcy act quoted above.

MR. JUSTICE BREWER in construing the section, and disposing of the contention made, said:

"This contention cannot be sustained. The judgment in favor of petitioner against Kenney was not like that in *Metcalf* v. *Barker,* 187 U. S. 165, one giving effect to a lien theretofore existing, but one which with the levy of an execution issued thereon created the lien; and, as judgment, execution and levy were all within four months prior to the filing of the petition in bankruptcy, the lien created thereby became null and void on the adjudication of bankruptcy. This nullity and invalidity relate back to the time of the entry of the judgment and affect that and all subsequent proceedings. The language of the statute is not 'when' but 'in case he is adjudged a bankrupt,' and the lien obtained through these legal proceedings was by the adjudication rendered

null and void from its inception. Further, the statute provides that 'the property affected by'—not the property subject to—the lien is wholly discharged and released therefrom. It is true that the stock and fixtures, the property originally belonging to the bankrupt, had been sold, but having, so far as the record shows, passed to a *bona fide* purchaser for value,' it remained by virtue of the last clause of the section the property of the purchaser, unaffected by the bankruptcy proceedings. But the money received by the sheriff took the place of that property."

In the application of the rule there announced to the present case, when the Big Bend Plantation Company was adjudged a bankrupt, the bankruptcy statute quoted above operated to nullify and render void the garnishment lien obtained by the plaintiff garnishing the Bald Knob State Bank and to wholly release and discharge the debt due the Big Bend Plantation Company from such lien. The plaintiff obtained his garnishment lien subject to the lien being defeated if a petition in bankruptcy was filed against the defendant, Big Bend Plantation Company, within four months from the date the garnishment lien was obtained and it was adjudicated a bankrupt. In such cases the invalidity relates back to the inception of the lien, so that, for all purposes, the lien may be said never to have existed.

Therefore it was not necessary to prove that the Big Bend Plantation Company was insolvent at the time the garnishment lien herein was obtained. See 2 Remington on Bankruptcy, (2nd. Ed.) § 1467.

It is admitted that the record shows that the petition in bankruptcy was filed within four months from the time the garnishment lien was obtained, but it is insisted that the record does not show that the Big Bend Plantation Company was adjudged a bankrupt, and that on this account the motion of Avery M. Blount to dismiss should have been overruled. The court expressly found that the Big Bend Plantation Company had been adjudged a bankrupt upon a petition filed in the Federal court,

and we are of the opinion that the record fairly supports its finding. We have copied in our statement of facts the record on this phase of the case. It is true the record of the bankruptcy court was the best evidence of the rendition of the judgment. The record here shows that, upon objection being made to the oral testimony of Avery M. Blount, the receiver in bankruptcy, to the effect that the Big Bend Plantation Company had been adjudged a bankrupt, he answered that he had the original record of the bankruptcy court.

The court sustained an objection to the adjudication being proved by oral testimony. The attention of the court was then called to the fact that the question had already been before the court in the case, and that the attorneys for the plaintiff had admitted that a voluntary petition in bankruptcy had been filed and that the Big Bend Plantation Company had been adjudged a bankrupt in the Federal court. The attorneys for the plaintiff then responded that this might be true. Under this state of the record, it was not necessary to prove the fact again. If it had already been admitted in the case, this avoided the necessity of again proving the fact, and the court might find that an adjudication of bankruptcy had been made in the Federal court. The record clearly shows that the petition was filed within four months after the garnishment lien was obtained. Therefore, the court properly sustained the motion to dismiss filed by the receiver in bankruptcy.

It is further insisted, however, that the judgment should be reversed because the Big Bend Plantation Company had withdrawn and spent the money which was the subject-matter of the garnishment proceedings.

Under the state of the record here presented, it is fairly inferable that the plaintiff in this action deposited $1105.69 with the Bald Knob State Bank to take the place of the bond it had filed when the attachment proceedings were sued on and that, with the consent of the plaintiff, the Bald Knob State Bank deposited this money with the circuit clerk to be paid out under

the orders of the court. In short, the parties treated this as the deposit of the money in the registry of the court to be ordered paid by the court after a judicial ascertainment of the proper person to receive it.

It follows that the judgment must be affirmed.

CUMMINS BROTHERS v. SUBIACO COAL COMPANY.

Opinion delivered October 17, 1921.

1. DEEDS—CONSTRUCTION.— A deed must be so construed that all of its parts may be harmonized and may stand together, if the same can be done, and yet carry out the manifest intention of the parties.
2. DEEDS—CONSTRUCTION.— To ascertain the intention of the parties, not only must the contents of the deed as a whole be considered, but also the relation of the grantor to the property conveyed.
3. GUARANTY—CONSTRUCTION.—On February 19, 1917, plaintiffs conveyed to defendant's incorporators a one-acre tract of land to be used as a coal tipple. On May 17, 1917, defendant entered into an agreement to guaranty to plaintiff a minimum royalty for coal to be mined under 40 acres of land. On May 14, 1918, plaintiffs conveyed to defendant 4.2 acres of land by description which included the one acre described in the deed of February 19, 1917, reciting that the latter deed is in addition to the former deed conveying the one-acre tract, and for the purpose of conveying the additional land described in the latter deed. *Held* that the latter deed did not cancel the guaranty agreement.
4. APPEAL AND ERROR—NECESSITY OF BILL OF EXCEPTIONS.—Where a decree itself contains a recital of the testimony as to a certain fact, no bill of exceptions is necessary to bring up such testimony.
5. APPEAL AND ERROR—EXHIBITS TO PLEADINGS AS PART OF RECORD.— In an equity case, exhibits attached to pleadings become a part of the record, and may be considered on appeal.

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

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellee for the recovery of a sum of money alleged to be due them by appellee as royalty under a coal lease and to cancel a coal lease and deed to one acre of land.

The facts are as follows: On Feb. 19, 1917, appellants, by their deed, conveyed to Jas. P. Hoye and R. B. Chitwood one acre of land in Logan County, Ark., described as follows:

"Beginning at a point (40) forty feet due east of the center of hoisting shaft sunk by Hoye and Chitwood and running due north (60) sixty feet, thence west to west line of the 40 acres, thence south to a point directly west of the point. One hundred and twenty feet south of the point of beginning, thence east and north to beginning, containing one acre more or less, and which is located in the SW¼ of the NE¼ of section 23, township 8 north of range 24 west." Immediately following this description is the following: "It is expressly agreed and understood that the essence of this conveyance is to facilitate the opening of the mine and conducting mining operation; and when this land ceases to be used for this specific purpose for a continuous period of three years, it shall thereupon revert to the within grantors, and this title shall be null and void. This conveyance covers only the surface and gives no title to coal cr mineral."

Then follows the habendum clause of the deed. The deed was duly recorded on the day of its execution and filed for record on the 17th day of March, 1917.

Jas. P. Hoye and R. B. Chitwood organized a corporation called the Subiaco Coal Company, to take over their leases to mine coal on a certain tract of land owned by appellants. On May 17, 1917, Jas. P. Hoye, R. B. Chitwood, and the Subiaco Coal Co., by Jas. P. Hoye, president, entered into the following agreement with appellants, Cummins Brothers:

"We, the undersigned, hereby agree to guarantee to the Cummins Brothers, owners of the NW¼ of the SE¼ of sec. 23, township 8 north, of range 24 west, a mininum royalty of two hundred and fifty dollars per annum, commencing January 1, 1918, until all of the coal under the above-described land is worked out or can

be worked at a profit from the shaft to be sunk on land adjoining. The above obligation is made in consideration of a certain tract of land given to us for tipple purposes."

On the 14th day of May, 1918, appellant conveyed to the Subiaco Coal Co., for the consideration of $200 recited in the deed, 4.2 acres of land in Logan County, Ark. The land described in the deed also includes the one acre described in the deed of Feb. 19, 1917. Immediately after the description of the land in the deed is the following:

"This deed is in addition to former deed executed by the grantors herein to Jas. P. Hoye and R. B. Chitwood on the 19th day of February, 1917, and for the purpose of conveying the additional land described herein and not described in the deed to Hoye and Chitwood." Then follows the habendum clause of the deed.

The complaint alleges that appellee had refused to mine the coal on the forty acres of land leased from appellants and had refused to pay appellants the minimum royalty of $250 per year for the years 1918 and 1919.

The appellee answered, denying all the material allegations of the complaint, and asked that the complaint be dismissed. The lease and deeds above described were made exhibits to the complaint and answer. The decree recites that the parties come by their respective attorneys, and that the cause "is submitted to the court upon the exhibits attached to the pleadings, which were introduced in evidence, and the admission of the parties as to the deed to one acre; and the court being well and sufficiently advised in the premises, doth find the facts to be that, after the execution by the plaintiffs of the conditional deed conveyed to the defendants the right to use the surface of a certain one acre tract of land described in the deed for mining operations, which became and was the consideration for instrument executed by R. B. Chitwood and Jas. P. Hoye and Subiaco Coal Co., guaranteeing a minimum royalty of $250 per annum, that the defendants purchased from the plaintiffs an additional tract

of land, and plaintiffs executed and delivered to the defendants their warranty deed conveying four acres, which is admitted includes the acre mentioned in said conditional deed, for the consideration of $200 paid in cash."

The court declared the law to be that the deed conveying the four acres of land was controlling, and that under it the title to the land including the one acre conveyed by the first deed passed to appellee, and that it was thereby released from its agreement of guarantee to pay a minimum royalty of $250 per annum, which was the only consideration for the first deed of the day of February 19, 1917.

From the decree entered of record the plaintiffs, who are the appellants in this court, have duly prosecuted their appeal.

Anthony Hall, for appellant.

The last deed by appellants to appellee did not release the latter from the obligation of the first deed to pay a minimum royalty.

A deed must be construed according to the intention of the parties, as manifested by the language of the whole instrument, but where there is a repugnancy between the granting and habendum clauses, the former will control the latter. 98 Ark. 570; 64 Ark. 240; 93 Ark. 5. The stipulation in the second deed is part of the granting clause.

Pryor & Miles, for appellee.

Where a record in chancery court shows that the case was determined upon oral as well as written testimony, which oral testimony is not preserved, it is presumed that the court's finding is supported by such evidence. 92 Ark. 622; 83 Ark. 424; 98 Ark. 266.

The language used in a deed will be interpreted most strongly against the grantor. 111 Ark. 220; 53 Ark. 107. To arrive at the meaning of a deed, it is admissible to look to the construction placed on the deed by the parties themselves. 68 Ark. 544.

HART, J., (after stating the facts). In *Jackson* v. *Lady,* 140 Ark. 512, the court held that a deed must be so

construed that all of its parts may be harmonized and stand together, if the same can be done, and yet carry out the manifest intention of the parties. The court held further that, to ascertain the intention of the parties, not only must the contents of the deed as a whole be considered, but also the relation of the grantor to the property conveyed.

In the application of this well known rule of construction, we think the decision of the chancellor was wrong. Under the terms of the lease from appellants, appellee became entitled to sink a shaft and mine the coal on a certain forty-acre tract of land of appellants for a certain stipulated period. On the 19th day of February, 1917, appellants conveyed to the grantors of appellee one acre of land to establish a tipple to better mine the coal on said forty-acre tract. In the deed it was expressly stipulated that the object of the conveyance was to facilitate the opening of the coal mine and the conducting of the mining operation on the leased forty-acre tract and that, when the land ceased to be used for this purpose, the title should revert to the grantors.

It further provided that the conveyance only covered the surface of the earth and gave no title to the coal or minerals under the surface. On May 17, 1917, appellee and its grantors, Hoye and Chitwood, executed an instrument whereby they guaranteed to appellants a minimum royalty of $250 per annum, commencing January 1, 1918, until all the coal on a certain forty-acre tract is worked out from the shaft to be sunk on the adjoining forty acres.

The agreement also recites that it is made in consideration of a certain tract of land given to the grantors for tipple purposes. Under this clause it is insisted that this obligation became void when the deed of May 14, 1918, from appellants to appellee was executed. In making this contention, however, counsel have not given full effect to the entire deed conveying the 4.2 acres of land.

It is true that the latter deed includes the one-acre tract in the description of the 4.2 acre tract; but, immediately following the description, the deed recites that it is in addition to the former deed conveying the one-acre tract, and for the purpose of conveying the additional land described in the latter deed and not described in the former deed. Moreover, the deed is a deed in fee simple, and does not contain any clause whereby the land reverts to the grantor when the land ceases to be used for the purpose of opening up the mines and conducting mining operations on the leased premises.

So it will be seen by the latter deed that three additional acres of land are conveyed, and the title to the one-acre tract is granted in fee simple to appellee. There is nothing in the language of the instrument to indicate that it was the intention of the parties to cancel the guaranty agreement whereby the minimum royalty was fixed at $250 per annum. It is true that the guaranty obligation recites that it is made in consideration of the one-acre tract for tipple purposes; but it will be noted that the second deed, as above stated, grants the fee simple title to the one-acre tract as well as the additional three acres. There is no language in the deed, nor is there anything from the surrounding circumstances, that indicates that it was the intention of the parties to cancel the guaranty contract by the execution of the later deed.

On the contrary, when all three instruments are read and considered in the light of each other, we think that it was not the intention of the parties to cancel the guaranty agreement by the execution of the later deed conveying the 4.2 acres of land, and that the chancellor erred in so holding.

But it is insisted that the decree must be affirmed because it recites that the cause was heard on the pleadings and the attached exhibits and the admission of the parties as to the deed to the one-acre tract. There is no bill of exceptions, and the insistence is, that on this ac-

count there is a presumption that the admission of the parties as to the deed to the one-acre tract supports the finding and decree of the court. This would be true if the decree did not recite what the admission of the parties was. The decree specifically recites that the admission was that the warranty deed subsequently executed to the 4.2-acre tract also includes the one-acre tract mentioned in the first deed. It is well settled that when the decree itself contains a recital of the testimony, no bill of exceptions is necessary. *Baucum* v. *Waters,* 125 Ark. 305 and *Strode* v. *Holland,* Ante p. 122, and cases cited.

So in the present case, the record itself having recited what the admission as to the one-acre tract was, it was not necessary to bring the facts relating to the admission into the record by bill of exceptions. This being an equity case, the exhibits attached to the pleadings became a part of the record and might be considered as well as the recitation concerning the admission contained in the decree itself.

The decision of the chancellor was based upon the pleadings, the exhibits thereto, and the recital of the decree as to the admission of the parties that the deed to the 4.2 acre tract also included the one-acre tract.

Upon this state of the record the court erred in holding for appellee and in dismissing the complaint of appellants for want of equity.

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.

SMITH *v* STATE.

Opinion delivered October 17, 1921.

1. RAPE—ASSAULT—INSTRUCTION.—Where there was evidence, in a prosecution for assault with intent to rape, tending to prove that defendant was not guilty of a higher crime than a simple assault, it was error to refuse to give a requested instruction on the crime of simple assault.

2. RAPE—REPUTATION OF PROSECUTRIX.—It is only when the defendant in a prosecution for assault with intent to rape attacks the character for chastity of the prosecuting witness that the prossecution may introduce evidence of her reputation for chastity to discredit such testimony.

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

John Mays, for appellant.

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

The court did not commit any error in refusing to instruct the jury on the lower offenses embraced in the indictment. 49 Ark. 543; 36 Ark. 242; 54 Ark. 336; 13 Ark. 317; 93 Ark. 20; 99 Ark. 648; 120 Ark. 179.

There was no error in permitting the testimony of Mrs. Niel Phillips to be read to the jury. 58 Ark. 353; 90 Ark. 514; 83 Ark. 272; 16 S. W. 577.

There was no error in permitting the prosecuting witness to introduce testimony showing her good character and reputation for chastity. 22 R. C. L. Sec. 42, p. 1208, 1209.

HART, J. Huel Smith prosecutes this appeal to reverse a judgment of conviction against him for the crime of assault with intent to rape. Smith was indicted for the crime of assault with intent to rape, and was convicted of the crime, his punishment being fixed by the jury at a term of three years in the State penitentiary.

The first assignment of error is that the judgment should be reversed because the court refused to instruct the jury on the lower offenses embraced in the indictment.

The defendant was indicted for the crime of assault with intent to commit a rape, and the court fully and fairly instructed the jury on that phase of the case. The court, however, refused to instruct the jury on the crime of simple assault.

The prosecuting witness was between eighteen and nineteen years of age at the time the offense is charged to have been committed. According to her testimony, she was well acquainted with the defendant, and went buggy riding with him on the night in question. The defendant first put his arms around her against her will and rode in that position for some distance. She would scream for help when they passed houses, but failed to attract the attention of any one. Finally the defendant stopped the horse, wrapped the buggy lines around the whip, and told her that he intended to have intercourse with her. She resisted him with all her power. He took both of her hands in one of his, pressed her down on the buggy seat, struck her on the face and neck and forced her to yield to his embraces. She resisted him in every manner possible. The defendant then proceeded to drive on, and presently she dropped her handkerchief out of the buggy. She asked the defendant to get out of the buggy to get the handkerchief, and, when he did so, the prosecuting witness whipped up the horse and left him. The horse in turning a corner overturned the buggy. The prosecuting witness then scrambled out and went for assistance to a nearby house. In a short time the defendant came there and asked if she wanted to go home with him. She refused to go and telephoned for her relatives to come or send for her. She reported the fact of the assault as soon as she reached the house.

The defendant admitted that he had intercourse with the prosecuting witness on the night in question, but claimed that it was with her consent. He described in detail their conversation during the ride, and said that there was no resistance whatever on the part of the prosecuting witness.

Under this state of the record, we think the court erred in refusing to give the instruction. This is not a case where the undisputed evidence shows that the defendant

was guilty of the crime of assault with intent to rape or nothing, and the case does not come within the rule announced in *Rogers v. State,* 136 Ark. 161.

The jury were the judges of the credibility of the witnesses and the weight to be given to their testimony. According to the testimony of the prosecuting witness, the defendant first put his arms around her and held them there while they rode for some distance, although she screamed for help whenever they passed a house. The defendant did not deny putting his arms around the prosecuting witness, but said that she consented thereto. This action of the defendant, as testified to by the prosecuting witness, constituted a simple assault and would warrant the jury in finding him guilty of that offense if it should not believe the subsequent testimony of the prosecuting witness to the effect that the defendant had connection with her forcibly and against her will.

As we have already seen, the jury were the judges of the credibility of the witnesses and might have believed all, or a part of, the testimony of either witness. They might have believed that, under the testimony of the prosecuting witness and of the defendant himself, the latter was guilty of the crime of simple assault, and that he was not guilty of the graver offense. In any event, the defendant had the right to have his theory of the case submitted to the jury; for it cannot be said that the undisputed evidence showed that he was guilty of assault with intent to rape or nothing. *Allison v. State,* 74 Ark. 444; *Bruder* v *State,* 110 Ark. 402; and *Hankins* v. *State,* 103 Ark. 28.

It is next insisted that the judgment should be reversed because the trial court erred in permitting the State to introduce testimony tending to show the good character of the prosecuting witness for chastity, over his objections.

We think counsel for the defendant is correct in this contention. In a prosecution for assault with an intent

to rape, the character for chastity of the injured party may be impeached, not to justify or excuse the offense, but to raise a presumption of her consent. *Pleasant v. State,* 15 Ark. 624, and *Jackson v. State,* 92 Ark. 71. It is only when the accused attacks the chastity of the prosecuting witness by evidence of reputation for unchastity that the prosecution may introduce evidence of her reputation for chastity to discredit such testimony. Underhill on Criminal Evidence (2nd Ed.) § 418, p. 702.

In the present case the defendant did not introduce any evidence as to the reputation of the prosecuting witness for unchastity, or of illicit intercourse on her part. Hence the court erred in admitting the State to prove the reputation of the witness for chastity because her reputation in that respect had not been assailed by the defendant.

It is also insisted that the court erred in permitting to go to the jury the record of the testimony of an absent witness for the State on the examining trial of the defendant. We need not consider this assignment of error. The record shows that the witness was only temporarily ill, and the question will not likely arise on the retrial of the case.

For the errors in the opinion, the judgment must be reversed and the cause remanded for a new trial.

GRIFFITH v. HICKS.

Opinion delivered October 17, 1921.

1. ACCOUNT STATED—AGREEMENT OF PARTIES.—An account stated, under Missouri law, is an account settled between the debtor and creditor in which a sum of money or balance is agreed on and an acknowledgment by one in favor of the other of a balance or sum certain to be due and an express or implied promise to pay the sum by one to the other.
2. ACCOUNT STATED—AGREEMENT OF PARTIES.—To constitute an account stated, under Missouri law, the debtor and creditor must both agree to the correctness of the account, and, in addition

thereto, the debtor must agree to pay or satisfy the amount agreed upon, and the creditor must agree to accept the payment of the agreed sum in satisfaction of the account.

3. ACCOUNT STATED—PROOF.—An account stated, under the Missouri law, may be proved by evidence either direct or circumstantial, as any other fact may be proved, or if the party to whom the account is rendered retains it without objection for an unreasonable length of time, his so retaining it will justify the inference that he has approved it, and in such case other proof of his acceptance and agreement to pay is not required.

4. ACCOUNT STATED—CONCLUSIVENESS.—Where parties have had mutual dealings, and one renders to the other a statement purporting to set forth all the items of indebtedness on the one side and credit on the other, the account so rendered, if not objected to in a reasonable time, becomes an account stated, and cannot be impeached afterward, except for fraud or mistake.

5. ACCOUNT STATED—UNREASONABLE DELAY IN MAKING OBJECTION.—Where a party to whom a mutual account is rendered delays for more than 20 months before making objection to the other party, he cannot excuse his delay by showing that he thought he had made objection to a duly authorized agent of the other party, where such supposed agent had no authority to represent the other party.

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

John E. Miller and *C. E. Yingling,* for appellant.

An account stated is not of itself conclusive but is open to rebuttal by competent testimony. Jones, Commentaries on Evidence, Vol. 2, § 287.

Whether the balance contained in an account rendered was admitted by the debtor so as to make the account an account stated in a question of fact for the consideration of the jury. Vol. 1 R. C. L. p. 211, § 9.

The presumption of acquiescence in an account rendered arising from the fact that no objection thereto is made within a reasonable time is not conclusive, but only evidence of an admission, and is, therefore, subject to disproof. Vol. 1 R. C. L. p. 214, § 12; see also page 215, § 13 for rule on question of weight to be given subject under such circumstances, as well as 105 Iowa 488; 67 A. S. R. 306 and 80 Ark. 438. The trial court erred in

giving a peremptory instruction to find that the account had become an account stated, as the matter should have been left to the jury. See 80 Ark. 469; 120 Ark. 316; Vol. 1 C. J. p. 680, § 251, also p. 691 § 276, and p. 692 § 277.

During the time that appellee claims his various fees were accruing, without making any demand therefor, he borrowed money of the appellant, giving his note therefor. This in itself gives rise to the presumption that appellant was not at the time indebted to the appellee. 119 Minn. 441, Ann. Cas. 1914B p. 381.

J. N. Rachels, for appellee.

An itemized account, rendered by one and assented to by the other of the parties thereto, becomes an account stated, and as a new cause of action. 47 Ark. 541, 126 S. W. 757; 58 Mo. 83; 79 Mo. 77; 131 Fed. 688; 107 Fed. 881; 108 Fed. 726; 180 S. W. 19; 226 S. W. 610.

Assent may be given either expressly (verbally or in writing) or impliedly (by compliance or silent acquiescence). 47 Ark. 541; 65 Mo. 661; 129 S. W. 994; 166 S. W. 1126; 184 S. W. 951; 216 S. W. 1009; 21 Wall. 105; 17 Otto 325; 65 Pac. 84; 229 S. W. 833; 185 S. W. 786; 175 S. W. 1140.

When an account rendered has been assented to, the question of liability is one of law for the court, not one of fact for the jury. 47 Ark. 541; 80 Ark. 469; 19 Mo. App. 534, etc.

Whether an account rendered and not objected to within a reasonable time, and not assailed for fraud or mistake has become an account stated is a question of law, not one of fact. 80 Ark. 469 and other authorities cited above.

An account stated is final and unimpeachable, except for fraud, accident or mistake. 114 Ark. 312; 13 Ark. 609; 21 Ark. 421; 19 Ark. 648; 55 Ark. 155.

The doctrine of account stated applies to the relationship of attorney and client. 80 Ark. 469; 65 Pac. 84.

SMITH, J. This is a suit filed by appellee Hicks against appellant Griffith upon a statement of an account which is alleged to have become an account stated.

Hicks was a resident of this State until 1916, when he removed to St. Louis, where he has since resided. Griffith is also a resident of that city. Hicks was for many years the attorney in this State for Griffith, whose interests here were varied and valuable. The professional relation was mutually satisfactory, and the personal relation was close and cordial, as shown by the correspondence between the parties offered in evidence.

Griffith is shown to be a man of large affairs, and from time to time loaned Hicks considerable sums of money. One such loan was evidenced by a note dated February 23, 1913, for the sum of $1,781.25, due one year after date. This note was executed jointly by Hicks and one E. A. Robbins, of Searcy, Arkansas.

Finally an estrangement grew up between Hicks and Griffith, and on November 19, 1917, Hicks rendered Griffith what Hicks testified was a complete statement of the account between them, in which he embraced all the items of professional service for which charges had been made, and credited the account with payments received and also with the note signed by himself and Robbins. Griffith received the account the day after it was mailed. No objection of any kind to the account was made by him except as hereinafter stated.

Griffith saw Robbins in Searcy and demanded payment of the note, and Robbins communicated that fact to Hicks in July, 1919. When advised of this demand on Robbins, Hicks told Robbins that he would attend to the note, as that was an affair between himself and Griffith, This assurance satisfied Robins, and he gave the matter no further attention. Robbins died in August, 1919, and some months thereafter Griffith filed the note with the administrator of Robbins' estate for allowance and

classification. This proceeding was had in the probate court of White County, the county in which Robbins lived and in which the administration on his estate was pending.

On January 5, 1920, which was immediately after Hicks had been advised that the note had been filed as a claim against Robbins' estate, Hicks brought this suit. On January 20, 1920, Griffith filed an answer, denying liability for the items comprising Hicks' account. At the same time he filed a counterclaim and prayed judgment against Hicks.

In the direct examination of Griffith in the trial from which this appeal comes he was asked if he had talked with any one about the statement he had received from Hicks. He answered that shortly after he got the statement he had a talk with Mr. Cornwell, who was Hicks' law partner. This conversation occurred in Griffith's office, where Cornwell had come as the representative of Hicks to discuss a matter of business between Hicks and Griffith, but which had no relation to the items covered in the account which Hicks had mailed to Griffith. Griffith was asked: "What, if anything, did Cornwell represent to you about the contract; I mean about the statement, and about the amount due or claimed to be due Mr. Hicks?" An objection to this question was sustained. Griffith was further asked: "Did Cornwell come there to see you as the representative of Hicks?" And, also: "Did Cornwell state to you that he wanted to talk to you about the account which Hicks had rendered to you?" Objections were sustained to both these questions. Thereupon Griffith offered to show that "Mr. Cornwell, the law partner of Mr. Hicks, came to see Mr. Griffith about the account, and asked to talk to him about it, and at that time he denied owing Mr. Hicks anything on the items charged to him."

This offer of proof was by the court refused, and Griffith excepted.

Griffith gave testimony sufficient to raise an issue for the jury as to the correctness of Hicks' account, if the account was not in fact an account stated.

Hicks denied that Cornwell had any authority to represent or act for him in adjusting or settling his account against Griffith.

The court directed the jury to return a verdict in favor of Hicks, and this appeal is prosecuted to review that action.

The statement of the account was mailed and received in Missouri, and we must, therefore, look to the law of that State to determine whether the account became stated. The case of *Bloss* v. *Aurora Milling Co.*, 229 S.W. 833, is said to be the latest expression of an appellate court of that State on the question of an account stated. This decision is by the Springfield Court of Appeals, and, in defining an account stated, the court quotes from the case of *Powell* v. *Pacific R. R.*, 65 Mo. 658, the following language of the Supreme Court of that State: "An account settled between the debtor and creditor therein in which a sum of money or balance is agreed on and an acknowledgment by one in favor of the other of a balance or sum certain to be due and an express or implied promise to pay the sum by one to the other." Continuing, Cox, P. J., speaking for the court, said:

"To constitute an account stated, the debtor and creditor must both agree to the correctness of the account, and in addition thereto the debtor must agree to pay or satisfy the amount agreed upon and the creditor must agree to accept the payment of the agreed sum in satisfaction of the account.

"The agreement may be proven by evidence either direct or circumstantial as any other fact may be proven, or, if the party to whom the account is rendered retains it without objection for an unreasonable length of time, his so retaining it will justify the inference that he has approved it, and in such a case other proof of his

acceptance and agreement to pay is not required. *Kenneth Inv. Co.* v. *Bank,* 96 Mo. App. 125, 135; 70 S. W. 173; *Mo. Pacific Ry. Co.* v. *Coombs & Bro. Com. Co.,* 71 Mo. App. 299."

Under this test, the majority are of the opinion that the account rendered became an account stated for the following reasons.

Where parties have had mutual dealings, and one renders to the other a statement, purporting to set forth all the items of indebtedness on the one side and credit on the other, the account so rendered, if not objected to in a reasonable time, becomes an account stated, and cannot afterwards be impeached, except for fraud or mistake *Lawrence* v. *Ellsworth,* 41 Ark. 502, and *Dunavant* v. *Fields,* 68 Ark. 534.

The law requires an objection within a reasonable time. The retention of the account apparently beyond a reasonable time is open to explanation, and Griffith might have explained his waiting for a time by showing that he thought the law partner of Hicks was the latter's agent in the premises. The objection, however, must be something more than a mental operation on the part of the person receiving the account. The objection must be made to the party rendering the account, or his duly authorized agent. Hence Griffith could not excuse his delay of two years in failing to object to the account by showing that he thought he had made objection to a duly authorized agent of Hicks.

In determining what was a reasonable time within which to object, the court might permit Griffith to explain the delay by showing that he made objection to Hicks' law partner thinking he was Hicks' agent. He could not excuse himself indefinitely on this account. It was his duty to scertain the authority of Hicks' law partner in the premises within a reasonable time, and he could not retain the account for twenty months without objection and excuse his delay by showing that he thought he had objected to a duly authorized agent of Hicks. This would be to allow his mental attitude in

the premises to govern and would excuse the communication of his objection to the other party for an indefinite length of time. This is not the law. The objection must be made to the party rendering the account, or his duly authorized agent, within a reasonable time.

It is the opinion of the Chief Justice and the writer that the excluded testimony of Griffith should have been admitted; that the actual agency and authority of Cornwell is not of controlling importance. An account rendered becomes an account stated only by the admission of its correctness by the debtor. This admission may be made expressly or it may arise by implication from the circumstances of the case. But an account cannot become an account stated unless the debtor, expressly or by implication, admits its correctness. The proper inquiry, therefore, is, what did Griffith do? Was his conduct such as that it must be said that he has impliedly assented to the correctness of the account? The assent of the debtor is ordinarily implied from the length of time during which the account is retained by the debtor without objection made. The courts, therefore, hold that the debtor may show any fact or circumstance which repels the implication that he has assented to the correctness of the account.

So here we think the question of Griffith's assent was for the jury. In determining whether Griffith has, by implication, assented, we view the circumstances from his perspective, for it is his acquiescence or non-acquiescence that we seek to determine. Did he believe, and was it reasonable for him to believe, that, in his conversation with Cornwell, the law partner of Hicks, he had denied liability, it being borne in mind that Griffith supposed that Cornwell had been sent to him by Hicks to discuss the account, and that no further communication between Hicks and Griffith occurred after the receipt of the account through the mails and Griffith's repudiation of liability for any of the items covered by it in his conversation with Cornwell? Or, to state the proposition conversely, must we say, as a mat

ter of law, that, because of the lapse of time herein shown, Griffith must be held to have assented to the correctness of the account, notwithstanding his denial of liability to Cornwell and the absence of any further communication on the subject from Hicks? We think the question of Griffith's assent is one of fact which should have been submitted to the jury.

As has been said, Griffith gave testimony questioning the accuracy both of the charges and credits on Hicks' account; but if the account is, in fact, an account stated, these last questions pass out of the case.

As before stated, the majority are of the opinion that the account rendered became an account stated. The judgment is therefore affirmed.

OWENS v. STATE.

Opinion delivered October 17, 1921.

1. CRIMINAL LAW—REMARK OF JUDGE.—In a prosecution for assault with intent to kill, in which it was an important point in the inquiry as to the distance between parties when defendant began to shoot, a witness testified that defendant was something like fifteen feet from the boys when he began to shoot, and, upon objection to such testimony, the court directed him to give the indications and let the jury draw the conclusions, and the witness was then asked whether he examined the place as to the tracks of defendant, whereupon the court said: "If you found tracks there, it will be all right." *Held* not objectionable as an expression of opinion as to the weight of the testimony.
2. HOMICIDE—INSTRUCTION AS TO MALICE.— In a prosecution for assault with intent to kill, an instruction that "where no considerable provocation appears and a deadly weapon is used malice is implied," *held* not erroneous.
3. HOMICIDE—ASSAULT WITH INTENT TO KILL—INSTRUCTION.—Where the testimony in a prosecution for assault with intent to kill presented no issue as to the lesser grades of assault, it was not error to refuse an instruction upon such lower grades.

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

A. D. DuLaney and *John J. DuLaney,* for appellant.

The inferences to be drawn from the facts are for the jury. 91 Ark. 427.

Instruction No. 1 is abstractly correct, but the court should have defined murder. Instruction No. 3 should not have been given; there was no testimony to show that he shot with intent to kill. 141 Ark. 13; 84 Ark. 545. The intention to take life cannot be implied in a case of assault simply because a deadly weapon is used. 115 Ark. 572. Such intent must be proved. 34 Ark. 275; 54 Ark. 285. The court should have defined murder. 74 Ark. 451; 52 Ark. 571; 109 Ark. 423.

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

Instruction No. 1 given by the court is based on C. & M. Digest, § 2335, and is correct.

The law raises the presumption of malice from an unlawful attempt to take life. 82 Ark. 540; 96 Ark. 52.

If appellant desires a certain issue to be submitted to the jury, he should submit certain instructions. 110 Ark. 567; 109 Ark. 420; 129 Ark. 324.

SMITH, J. Appellant Owens was given a sentence of three years in the penitentiary upon a charge of assault with intent to kill, alleged to have been committed by shooting at one Jimmie McDowell.

The testimony on the part of the State showed that Owens and McDowell had cursed each other, following a conversation in regard to a check which Owens had given McDowell's father and which had not been paid on presentation at the bank on which it was drawn, and that between ten and eleven o'clock a few nights later McDowell and his brother met Owens in the road, that they spoke as they passed—thus showing their recognition of each other—and that when they had passed and were a short distance apart Owens commenced firing at them and fired his pistol three or four times in rapid succession. Owens was walking, and the McDowell

boys were riding, and when the firing commenced they spurred their horses and ran as fast as the horses could go down the road, but they testified they heard the bullets hit the ground around them.

Owens admitted firing the shots, but denied that he was shooting at the McDowell boys. He testified that just as the boys passed him he saw an opossum and commenced shooting at it.

The McDowell boys reported the incident to their father upon their arrival home. The sheriff was notified, and the testimony is that, in attempting to arrest Owens, an exchange of shots occurred between Owens and the sheriff, and Owens escaped. The following day Owens was arrested, and at this trial denied that he had shot at the sheriff.

G. W. McDowell, the father of the boys at whom Owens was accused of having shot, went to the scene of the alleged shooting, and there found some empty cartridges. He was asked, "State to the jury what you found." And answered, "He (Owens) was something like fifteen feet from the boys when he was doing the shooting." Objection was made; whereupon the court said, "Give the indications, Mr. McDowell, and let the jury draw the conclusions." The witness was then asked, "Did you examine the place as to the tracks of Will Owens?" In overruling an objection to this question, the court said, "If you found tracks there, it will be all right." The witness then answered: "There was his tracks where he stopped and turned around in the road, and it was something like fifteen feet from where these horses commenced jumping."

It is insisted that this answer of the witness, in connection with the ruling of the court, constituted an expression by the court upon the weight of the testimony and amounted to an expression of opinion by the court upon a disputed question of fact. The objection made to the testimony at the time it was given was that the question and answer assumed the tracks were made by Owens.

It is not denied that Owens made the tracks there, and the important point in the inquiry was to determine the distance from the place where the empty cartridges were found to the point where the stride of the horses increased, the purpose being, of course, to show the distance between the parties when the shooting commenced. It is undisputed that the horses jumped when the shooting began, and that they ran for some distance down the road. The court had, just immediately before this question was asked, admonished the witness himself to give the indications and let the jury draw the conclusions; and we think the remark of the court set out above is not open to the objection now made to it.

Over the defendant's objection the court gave an instruction reading as follows:

"You are instructed, if you find from the testimony in this case, beyond a reasonable doubt, that Will Owens shot at Jimmie McDowell with intent to kill him, because McDowell had cursed him or used abusive or threatening language, or because he was mad at him, you will convict defendant of assault to kill."

Objection to this instruction is made upon the ground that it is not predicated upon the testimony. This objection is well taken if we accept as undisputed the statement of Owens that he was not mad at McDowell, and had not cursed him, and did not shoot at him; but the testimony presents this issue of fact. The testimony of McDowell is sufficient to support a finding of the facts stated hypothetically in the instruction.

Another instruction given over the defendant's objection was numbered 4, and reads as follows: "You are instructed that, while it is necessary that you find the defendant had malice at the time of his shooting, you are further told, where no considerable provocation appears and a deadly weapon is used, malice is implied."

It is contended that it was not proper for the court to tell the jury that as a matter of law simply because a deadly weapon was used the defendant had malice and

the jury could imply it. It will be observed that the instruction is more comprehensive than the objection to it would indicate. The instruction does not say that malice is implied from the use of a deadly weapon, but that "where no considerable provocation appears and a deadly weapon is used, malice is implied.

However, the absence of that qualification under the issues here joined would not call for the reversal of the judgment. No provocation or justification was claimed. The defense was that Owens had not fired at McDowell, and the case went to the jury on that issue.

In the case of *Taylor* v. *State,* 82 Ark. 540, the court had before it for review an instruction very similar to the one here objected to. Mr. Justice RIDDICK, speaking for the court, said: "This instruction would be very objectionable if there were any circumstances that tended to justify or excuse the act of the defendant. To constitute the crime of assault with intent to kill, the assault must have been made with malice aforethought. But this instruction tells the jury that, if the defendant shot at Marsh with intent to kill him, they should convict him of the crime of assault with intent to kill, omitting any reference to malice. This would be unwise and prejudicial if there was anything to rebut the presumption of malice which arises from an assault with a deadly weapon with the intent to take life. If death had resulted from the act of the defendant, it is plain under our statute that the defendant would, as the evidence stands in the record, have been guilty of murder, for there is nothing in the evidence to justify or excuse the act. In a case of that kind the court does not have to submit the question to the jury of whether there was malice or not for the law raises it from the unexplained attempt to take life, as, under the facts in this case, if the jury found that the defendant shot at Marsh with intent to kill him, it was their duty to convict, and the instruction was correct. Kirby's Digest, sec. 1765."

It is finally insisted that the court erred in refusing to charge upon the lesser grades of assault included in the indictment. But we think that error was not thus committed, for the reason that the testimony presented no such issue. Appellant either shot at Jim McDowell or he shot at the opossum. If he shot at McDowell intending to kill him, he was guilty of an assault with intent to kill, although his aim was bad, and no physical injury was inflicted; if he shot at the opossum, he was not guilty of any grade of assault. This issue was properly submitted to the jury, and it was not error therefore to refuse to charge on the lesser grades of assault.

No error appearing, the judgment is affirmed.

DALLAS v. MOSELEY

Opinion delivered October 17, 1921.

1. FRAUDS—STATUTE OF—EMPLOYMENT OF AGENT TO SELL LANDS.—A contract for the employment of an agent to find a purchaser of land is not within the statute of frauds.
2. PLEADING—DEMURRER.—A demurrer to an answer relates back to the complaint.
3. BROKERS—DUTY TOWARD PRINCIPAL.—In an action by a principal against his agent to recover a sum received by the agent as part payment on the purchase price of certain land, an answer which admitted that the agent received such payment, but alleged that the sale was not consummated, and that it was agreed between the agent and the purchaser that such part payment should be retained by the agent as compensation for his trouble in case the sale was not consummated, was demurrable.
4. PRINCIPAL AND AGENT—ACCOUNTING.—It is the duty of an agent to account for money of his principal received by him.

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

A. Curl, for appellant.

Equity will enforce performance of a verbal contract for the purchase of land where the purchaser has taken possession thereunder, and made improvements. 1 Ark. 391; 63 Ark. 100; 109 Ark. 310.

Calvin T. Cotham, for appellee.

The first duty of an agent is loyalty to his principal. He must account for funds received by him for his principal. 21 R. C. L. 829, 832, 833; 27 Cyc. 849.

The defense of the statute of frauds cannot be raised by demurrer. 25 R. C. L. 23 Ark. 594. A contract employing an agent to sell land is not within the statute of frauds. 87 Ark. 221; 83 Ark. 202; 90 Ark. 301; 102 Ark. 377; 98 Ark. 10.

HUMPHRIES, J. This is an appeal from the judgment of the Garland Circuit Court rendered on the pleadings in the case. The court overruled the demurrer of appellant to the complaint, and sustained appellees' demurrer to appellant's answer. Appellant stood upon his answer, and, on his refusing to plead further, the court rendered a judgment against him for $200, which had been received by appellant as part payment on the purchase price for certain land.

The gist of the complaint is that appellee, owner of the south half of the west half of the southwest quarter of section 12, township 3 south, range 20 west, listed it with appellant, a real estate dealer, for sale at the price of $4500, $500 of which was to be paid in cash as part payment on the purchase price of said property to bind the trade, agreeing to pay appellant as a commission for effecting the sale the sum of $300; that pursuant to the agreement a sale was effected to a Mr. Wood, from Houston, Texas, who paid appellant $200 as part of the purchase price, for the use of the appellee, agreeing to pay the remainder of the purchase price as soon as he could move from Texas to Arkansas; that a week or two later appellant informed appellee that Wood, the prospective purchaser, declined to consummate the deal and pay the balance of the purchase price; that thereupon appellee requested appellant to pay him the sum of $200 which he had received as part of the purchase price for said land to bind the trade, but that appellant refused to pay said sum to him, wrongfully converting the same to his own use.

The gist of the answer was that Mr. Wood verbally agreed to purchase the property through appellant, the agent, from appellee for $4500; that Wood paid appellant $200 with the understanding and agreement between Wood and appellant that, if Wood failed to pay for the place and take it, the $200 was to be the compensation of appellant for trouble and expense incurred in the transaction; that Wood failed to pay the $4500, and that no sale was consummated, and for that reason appellant had not received the sum of $200, or any other amount, for the use and benefit of appellee. The answer also embraced a plea that the entire transaction was not in writing, and was therefore void under the statute of frauds.

The ground of demurrer to the complaint was that the facts stated therein did not constitute a cause of action.

The ground of the demurrer to the answer was that the facts stated therein did not constitute a defense to the allegations of the complaint.

Appellant first contends that the court erred in rendering judgment in favor of appellee against appellant because the alleged agreement between appellee and appellant in the complaint related to the sale of a piece of real estate and, not being in writing, was void under the statute of frauds. Appellant insists that nobody was bound by the alleged oral agreement, and for that reason no rights or liabilities in favor of or against either party could grow out of the agreement. We do not think the statute of frauds applicable to contracts for the sale of real estate by a broker to third parties for the owners of land.

This court said, in the case of *Kempner* v. *Gans*, 87 Ark. 221, that "a contract employing an agent to find a purchaser for lands is not within the statute of frauds." This doctrine has been re-announced and adhered to in later cases. *Forrester-Duncan Land Co.* v. *Evatt,* 90 Ark. 301; *Vaught* v. *Paddock,* 98 Ark. 10; *Barr* v. *Johnson,* 102 Ark. 377.

Appellant also contends that the court erred in overruling the demurrer to the complaint, and sustaining the demurrer to the answer.

The demurrer to the answer relates back to the complaint, and we find no sufficient denial of the allegations of the complaint to the effect that appellant was acting in the capacity of agent for appellee to sell the tract of land in question upon terms therein specified, and that the $200 sued for was received by appellant as part payment of the purchase price for the land by Wood. It is true the answer denies that the initial payment was made to appellant for the benefit of appellee, but this denial is limited by an explanation which does not negative the allegations in the complaint that it was received for appellee's benefit. The explanation is that, under and by virtue of side agreement between appellant, appellee's agent, and Wood, the purchaser, the $200, in the event the sale was not consummated by the payment of the balance of the purchase money, should be regarded as compensation of appellant for the trouble and expense incurred by him in the transaction. Appellee was not apprised of any such agreement nor a party to it. It could in nowise bind him.

The gravamen of the complaint was an allegation to the effect that an agency was created for the sale of lands. The sufficiency of the answer to the issues tendered must be determined by the rules governing principal and agent in contracts for the sale of lands.

It was alleged in the answer that the initial payment of $200 was received by appellant as a forfeit for his personal use by way of reimbursement if the sale was not consummated. It was not alleged that appellee knew anything about this arrangement or authorized it. Under the rules of principal and agent such an agreement was beyond the authority conferred by appellee on appellant.

Loyalty is one of the first duties an agent owes to his principal. An arrangement such as is pleaded in the

answer between the agent and the purchaser, without the knowledge and consent of appellee, could not be regarded as loyalty of the agent to the landowner.

The rule is well expressed in the text in Ruling Case Law, vol. 21, p. 828. It is said there: "In the exercise of good faith, skill and diligence, the agent is bound to keep his principal informed of all matters that may come to his knowledge concerning the principal's rights and interests. For example, if, after receiving instructions to sell property on certain specified terms, the agent learns that other and more advantageous terms can be obtained, it is his plain duty, and he is under every legal and moral obligation to communicate the facts to the principal, that he may act advisedly in the premises."

The following enunciation at page 829 of the same work is applicable: "The doctrine is familiar that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal."

The matter pleaded by way of defense to the allegations in the complaint was not and could not constitute a defense without full knowledge and consent of the appellee. Knowledge and consent on the part of the appellee was not pleaded. Under the pleadings as framed, therefore, the $200 received could have been received for no other purpose than the use and benefit of appellee. Under the allegations, it was not proper for appellant to appropriate the amount paid. It was his duty to account for it to his principal. It is the duty of an agent to account for money received by him for his principal. 21 R. C. L. p. 832.

The allegations in the answer not being sufficient to meet the issue tendered in the complaint, it was proper

to sustain a demurrer to the answer. We think the allegations of the complaint constituted a cause of action, and it was therefore proper to overrule the demurrer to the complaint.

No error having been committed by the court in its rulings on the demurrers, nor in the rendition of a judgment against appellant when he stood upon his answer and refused to plead further, the judgment is affirmed.

SHINN v. STATE.

Opinion delivered October 24, 1921.

1. CRIMINAL LAW—HARMLESS ERROR.—The error of admitting incompetent evidence of the contents of a letter was not prejudicial where the letter as proved contained nothing unfavorable to the defense.
2. WITNESS—IMPEACHMENT.—The accused in a criminal case may, for the purpose of testing his credibility, be questioned on cross-examination as to his having been a gambler and as to other offenses and immoralities.
3. WITNESSES—RECALL OF ACCUSED FOR CROSS-EXAMINATION.—It was within the trial court's discretion to permit the State to recall the accused for cross-examination after the defense had closed.
4. WITNESSES—CROSS-EXAMINATION OF WITNESS ON COLLATERAL MATTER.—The testimony of accused on cross-examination as to whether he had participated in another crime cannot be contradicted by other testimony, as it relates to a collateral matter.
5. CRIMINAL LAW—TESTIMONY INTRODUCED WITHOUT OBJECTION.—Where evidence was introduced by the State without objection, its introduction cannot be assigned as error on appeal.
6. CRIMINAL LAW—INVITED ERROR.—Where certain experiments were made by the jury at defendant's request, and he was given the opportunity to witness the experiments, he cannot complain because the experiments were conducted in his absence.

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

Hays & Ward, for appellant.

The defendant on cross examination was subjected to a character of cross examination not permissible in

the case of other witnesses which was highly prejudicial to his cause. 53 Ark. 387; 58 Ark. 473; 60 Ark. 450; 70 Ark. 107; 72 Ark. 427; 75 Ark. 548; 78 Ark. 284; 91 Ark. 555; 103 Ark. 28; 104 Ark. 162; 106 Ark. 160.

It was error to allow the State to recall defendant, after he had closed his case, for the purpose of contradicting him. The evidence could not have been introduced by the State to establish its case, and was collateral to the issue, hence could not be contradicted. 34 Ark. 480; 59 Ark. 431; 2 Ark. 409; 76 Ark. 366; 99 Ark. 604; 101 Ark. 147; 103 Ark. 119.

The tests made with the gun, alleged to have been used in killing deceased, upon empty shells to show the impression made by the plunger, were prejudicial, as the same impression would not have been made with a loaded shell. Tests should be made under identical conditions with the original as nearly as possible. 18 C. J. 810; 115 Ark. 101.

The tests made under direction of the court with the gun and shells, away from the court house in the absence of defendant, was equivalent to taking testimony in his absence. 108 Ark. 191; 131 Ark. 320; 51 Ark. 553. Defendant could not, even by his own acts, consent to such procedure. It also amounted to the taking of evidence in the absence of the trial judge, whose presence at all stages of the trial is essential. 74 Ark. 19; 71 Ark. 112; 88 Ark. 62; 104 Ark. 629.

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

The testimony of witness Burks, which appellant viciously attacks, if believed by the jury, would support the verdict and judgment. 36 Ark. 653; 32 Ark. 220. The jury was the judge of the credibility of the witness.

The testimony elicited from appellant on cross-examination was without any objection raised on his part. Where no objection is raised, its admission will not be reviewed on appeal. 130 Ark. 111; 101 Ark. 443; 99 Ark. 462; 129 Ark. 316. As appellant answered a number of the

questions propounded to him in the negative, he has no right to complain. A party cannot complain of the admission of evidence favorable to him. 52 Ark. 480; 118 Ark. 569. When a defendant in a criminal prosecution takes the witness stand in his own behalf, he places himself in the attitude of any other witness. 114 Ark. 239; 91 Ark. 555. A witness may be recalled for further cross-examination. 75 Ark. 574. The evidence so elicited was admissible for the purpose of reflecting upon the credibility of appellant. 138 Ark. 465; 139 Ark. 13.

The shotgun shells, fired without a load, in the court room and introduced in evidence, were so introduced at the request of both parties, and appellant cannot now complain of testimony offered by himself. 5 Ark. 41; 33 Ark. 180; 115 Ark. 392.

The further tests made with the gun and shells were at the request of appellant, and if there was error, it was invited by appellant and he has no right to complain. 108 Ark. 191. Not having requested the privilege of being present when the test was being made, it is too late now for him to complain. 86 Ark. 317.

The court could properly send its duly authorized officer with the jury without accompanying them himself, especially where this was done at appellant's request. 114 Ark. 245.

McCULLOCH, C. J. This is an appeal from a conviction of murder in the first degree, the punishment of appellant being fixed by the jury at life imprisonment.

The accusation against appellant is that he killed Lewis Vandergeten in Pope County on the night of November 27, 1920, by shooting him with a gun.

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

The killing occurred in a building called the "wash-house," at a coal mine about three miles from Russellville. On the night mentioned, the deceased and a crowd of other boys and men were engaged in playing craps in the wash-house at the coal mine, and about 11 o'clock

they were held up and robbed by three masked men. The three men walked into the wash-house by different doors, and one of them coming through the door at the north was armed with a shotgun. Deceased failed, when ordered, to put up his hands, and the man with the gun shot him, killing him instantly. The weapon used was a double barrel shotgun, and the empty shell was extracted and thrown on the floor at the spot where the shot was fired. One of the participants in the crap game who testified as a witness identified appellant as the man who fired the shot. The witness stated that he was well acquainted with appellant, and was standing in the crowd in the wash-house when the three robbers entered; that he saw enough of appellant's face to be able to recognize him and did recognize him as the man who fired the shot. Two other witnesses testified that the next morning after the killing appellant, apparently laboring under excitement, in speaking of the killing, said: "I done it. I might as well say I done it. I will be accused of it anyhow." That was, according to the testimony, before the appellant was arrested, and before any accusation was made against him. Appellant and his step-mother lived in about 300 yards of the wash-house. He had been to Russellville that night, and shortly before the killing he and two other young men drove out to the wash-house in a jitney, entered the house and participated in the game. Appellant left the house in a few minutes, and about fifteen or twenty minutes later the robbers entered and committed the crime. Appellant testified that when he left the wash-house he went home and remained there for about an hour and a half, and on his return to the wash-house ascertained that the crime had been committed, but that he was not a participant in the crime, and had no knowledge of it until he had returned to the wash-house. A double-barrel shotgun was found at the house occupied by appellant and his step-mother, and on examination it appeared that one of the barrels of the gun had been recently fired. Shells of the same size and make as the empty one found on the floor in the wash-house were

found at appellant's house. During the progress of the trial there were experiments made by firing from appellant's gun the same kind of shells, but these are matters which will be referred to later in discussing other assignments of error.

There was sufficient evidence to sustain the verdict. The credibility of the witnesses was a question for the jury to determine, and there was testimony adduced, both direct and circumstantial, which tended to establish appellant's guilt. There are other assignments of error which will be discussed in the order mentioned in the brief of counsel.

Objections were made to certain questions propounded to Mrs. Bettie Shinn on cross-examination and the exhibition to her of a letter said to have been received from appellant without introduction of the letter before the jury. Mrs. Shinn was asked whether or not she had corresponded with appellant while he was temporarily held in the penitentiary under the present charge. She answered in the affirmative, and the prosecuting attorney thereupon held up a letter and asked her if she had received that letter from appellant. There was a long colloquy then between counsel in the case, in which appellant's counsel objected to the introduction of any correspondence on the ground that it was not admissible because written from the penitentiary, and also on the ground that the letter itself should first be shown to the witness. The court permitted the question to be asked in the following form, and answered:

"Q. I will ask you if you got a letter from Shinn in which he stated this, 'You all know that I left home and come back through the same door, and that the lights were burning when I left and when I come back, and that I could not have took my gun or brought back any gun, as the lamp was lit when I come back, and the kind of pants I wore, so you will be asked all these, and that I slept on a couch in the north room, your room, and that the lights burned all night, and me and Luther got up and

fed and milked the cows, etc., in the morning.' Did you get a letter from him with a statement like that from him?

A. "Yes, sir."

Without determining whether or not the contents of the letter were properly brought to the attention of the jury, we are clearly of the opinion that there was no possible prejudice that could have resulted from this incident in the trial. There was nothing unfavorable to appellant's defense contained in the purported statement in the letter. It was written to his step-mother, with whom he was living at the time the killing occurred, and with whom he sustained, according to the testimony, the most cordial relations, and the statement does not tend to incriminate appellant in any way, so therefore there was no prejudice in its introduction.

It is next contended that there was error in permitting appellant to be cross-examined concerning his past conduct. Appellant was asked all sorts of questions about having been a gambler and about other offenses and immoralities. This was merely for the purpose of testing his credibility and was admissible as such. This court so decided in the case of *Hollingsworth* v. *State,* 53 Ark. 387. This was with regard to a witness other than the accused himself, but we have since then frequently held that the same rule applies to a defendant in a criminal prosecution when he takes the witness stand in his own behalf. *Ware* v. *State,* 91 Ark. 555; *Hunt* v. *State,* 114 Ark. 239; *Nelson* v. *State,* 139 Ark. 13.

After appellant closed his case, the State called several witnesses in rebuttal, among others one Everett Gray, who was asked about an alleged conversation between him and appellant in regard to another robbery. The witness stated that he had had such conversation, and no objection was made to that testimony. Objection, however, was made to the next question propounded to the witness, and the prosecuting attorney withdrew the question for the time. Thereupon, the State was permitted, over appellant's objection, to recall appellant himself for the purpose of asking him concerning his

statements to witness Gray. The objection was made in the following language: "The defense closed, and he is now asking questions in rebuttal—going to open the case in order to make rebuttal testimony. We object to it." The ground of appellant's objection was, in substance, that the case should not be reopened for the purpose of allowing appellant himself to be cross-examined. The court overruled the objection, and the prosecuting attorney was permitted to ask the witness if he had not requested Everett Gray to go to one Baker and get a gun and assist in robbing a certain crap game. The appellant replied that he did not make such a request. Witness Gray was then recalled and was examined and cross-examined concerning the alleged request made of him by appellant to participate in holding up another crap game. Appellant made no objection to the introduction of the testimony of Gray. The recall of appellant as a witness for further cross-examination was a matter in the discretion of the court, and it does not appear that the discretion was abused. It was competent for the State to ask appellant on cross-examination whether or not he had requested Baker to assist in robbing a crap game on another occasion, but the State was bound by appellant's answer, and, it being a collateral matter, the State could not introduce independent testimony concerning it. There was no objection, however, to the introduction of Gray's testimony, and therefore, appellant was in no attitude to complain of the rulings of the court in admitting it.

During the progress of the trial, certain experiments were made by the attorney for the State and one of the witnesses using the gun owned by appellant and empty shells similar to the one found on the floor of the washhouse. It appears that in these experiments the gun was snapped on the empty shells in the presence of the jury. There was no objection to the experiment being thus made in the presence of the jury, but counsel for appellant objected to the introduction of the impression made on the primer of the shells in the experiment, on

the ground that the shells being empty the impression would not be the same as on a loaded shell. A long colloquy between counsel resulted, and appellant's counsel finally withdrew the objection. Certainly, no error could be assigned under these circumstances, for there was no objection made to the experiment, and the objection made to the introduction of the shells was expressly withdrawn.

It appears that after the indictment of appellant by the grand jury the gun which he is said to have used and the empty shell found on the floor of the wash-house were preserved by the sheriff and were exhibited to the jury during the progress of the trial. Before the trial certain experiments had been made by a deputy sheriff and one of appellant's attorneys, Mr. Ward, and the result of these experiments in firing the gun at a target was offered in evidence, but the State objected on the ground that the shots had been fired by one of appellant's attorneys. Thereupon appellant requested that the jury be permitted to take the gun and shells similar to the one found in the wash-house and fire at a target. The attorney for the State agreed to this suggestion, and asked that the jury be allowed to go to the wash-house and fire the gun from the spot where the man who shot Vandergeten stood, but the court refused to send the jury to the wash-house. At the close of the trial appellant renewed his request for these experiments to be made by the jury, and the court ordered it to be done. The record contains the following statement made by the court:

"Gentlemen of the jury, the sheriff has procured here the shells, all shells just like the one that was in the gun, three other shells not of the same brand, but same size shot. Now I understand the jury wants to get a shave, and in the morning before you come to court I will have the sheriff bring these shells and these targets and the gun down to the hotel, and Mr. Worsham can take you out with a tape line, and I will give written instructions here as to the distances you can fire

these shots. I have stated here that you can fire three shots from a distance of 23 feet 7 inches, three from a distance of 21 feet and 9½ inches, three from a distance of 17 feet 8 inches, and three 15 feet and 7 inches. Let the man who shoots stand on a line at a distance indicated from the target. And nobody to go with the jury making any demonstration. You can bring these targets back into court, Mr. Deputy Sheriff. And, gentlemen, you will not talk about it yourself or comment at all, and I don't want you to let anybody go with you out where it is occurring. If anybody should undertake to follow you, just suggest to them that they must not go. Now you can number each shell; number the targets the same number of shells. No harm about that. Let the record show that the defendant was present when the targets and experiments were made."

This seems to have occurred late in the afternoon, and the record shows that on the following morning when court convened the following occurred:

Counsel for appellant stated: "We wish now to introduce the shells which were fired by the jury this morning by direction of the court yesterday, and also to identify the targets made by the jury with the shells. The jury has these targets. We want these introduced as evidence."

The Court: "The jury has the targets and the shells are here, and numbered. There is no need to identify them further. They will be considered in evidence now in the case, upon your motion."

Nothing further occurred concerning this incident, and there is nothing else in the record to indicate whether appellant was actually present when the experiments were made, though it is inferable from the recitals in the record that neither appellant nor his counsel were present when the experiments were made. It is contended now that the integrity of the trial was destroyed by permitting the jury to make these experiments outside of the court room and in the absence of the court and in the absence of appellant himself. It is.

however, affirmatively shown in the record that all that was done was at the specific request of appellant himself. He was given the opportunity to be present if he so desired, and the next morning, when the results of the experiments were brought in, counsel for appellant made the specific request that they be introduced to the jury for their consideration. The conduct of the court and jury was induced by the appellant himself, and this makes a case of invited error. If there was error committed, it was at appellant's own request, and he took advantage of all that was accomplished in that portion of the proceedings. Under those circumstances, appellant is in no attitude to complain. The constitutional right to have the tests made in his presence, and in the presence of the court, was expressly waived. *McVay* v. *State,* 104 Ark. 629; *Davidson* v. *State,* 108 Ark. 191; *Scruggs* v. *State,* 131 Ark. 320.

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

HART, J., (dissenting). Judge HUMPHREYS and myself think that the learned trial judge had the right idea of the law when he at first announced that the jury would not be permitted to go to the scene of the killing and experiment by shooting loaded shells in the shotgun charged to have been the one used by the defendant in the commission of the homicide, and that reversible error was committed by afterwards allowing them to make such experiments in the absence of the presiding judge.

Our Constitution guarantees that every person accused of a crime shall have a speedy and public trial and shall not be deprived of liberty or life without due process of law. These provisions imply that the trial shall be conducted in open court and under the protection of the court. The only power that gives efficacy to these constitutional guarantees is the trial court. The trial judge is not only an essential part of the court but he is the controlling part of the court.

This court has never before announced a principle of law from which it could be deduced that the trial judge

could be absent during the taking of evidence in a case where the life of a human being depends upon the issue.

It has been well said that his immediate presence tends to preserve the legal solemnity and security of the trial and upholds the majesty of the law. The guilty as well as the innocent are entitled to be tried according to law in the immediate presence of the trial court, and this cannot be done where evidence is taken by the jury in the absence of the court and at another place than where the court is authorized by law to be held. Heretofore the court has gone no further than to hold that the defendant might waive his constitutional right to be confronted by the State's witnesses and his statutory right to be present at the trial during the whole of its progress.

In *Davidson* v. *State,* 108 Ark. 191, the court held that the defendant might waive his personal presence when the verdict was returned.

It is true that in *McVay* v. *State,* 104 Ark. 629, the court held that the defendant might waive the fact that the trial judge, during the argument of counsel in a capital case, absented himself from the court for a few minutes where it was affirmatively shown that no misconduct occurred during such absence. The court, however, assigned as a reason for so holding that the argument of counsel might be waived altogether, and that, if the parties had the right to waive argument of the case, they might waive the presence of the court during the portion of the argument where it was affirmatively shown that no prejudice resulted to the defendant from such course.

No such reason exists for the presiding judge being absent while testimony was being taken. The defendant was indicted and tried for murder in the first degree. The jury returned a verdict of guilty of murder in the first degree and fixed the punishment of the defendant at life imprisonment in the State penitentiary.

Our statute provides that the jury shall, in all cases of murder on conviction of the accused, find by their

verdict whether he be guilty of murder in the first or second degree; and that if the accused confesses guilt the court shall empanel the jury and the degree of the crime shall be found by such jury.

In construing this statute this court has held that where a defendant pleaded guilty to an indictment for murder in the first degree it is reversible error to sentence him without ordering a jury to be impaneled to find the degree of murder. *Lancaster* v. *State*, 71 Ark. 100.

It will be noted that the statute provided that the jury shall find by their verdict whether the accused is guilty of murder in the first or second degree.

In *Capital Traction Co.* v. *Hof*, 174 U. S. p. 1, Mr. Justice Gray who delivered the opinion of the court, said:

"'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books."

It has been well said that one of the excellencies of a trial by jury is that the judge is always present at the time of the evidence given in it. Therefore, under our Constitution and laws, we think that the trial judge cannot be absent while evidence is being taken during the trial of an accused indicted for murder in the first degree.

The defendant charged with murder in the first degree must be tried in open court before the court, and not before the jury sent out by the judge to gather evidence while away from the court and away from the accused.

In *Ellerbee* v. *State of Mississippi,* 41 L. R. A. 569, Judge Whitfield, who delivered the opinion of the court, said:

"If this error were merely a technical one, not vital in its nature, we would not, for that alone, reverse the judgment. But the error here is of the gravest character. It goes to the very organization and constitution of the court trying the appellant on a charge of murder. So far as the lawful power of this court can be exerted, in affirming convictions for violations of the law of the land, it shall be exerted. And mere technical errors, without intrinsic merit, when we can, after a careful and thorough examination of the whole case, confidently say that the right result has been reached, that substantial justice has been done, and that, on a new trial, no other result could reasonably be arrived at, will not avail here for reversal, in civil or criminal cases. But when the defendant has been, as here, denied a right secured to him by the Constitution and the laws of the land, in a matter going to the very constitution of the court trying him, we are compelled to reverse the case. In cases the interests of society, the stability of the laws, the due administration of justice, demand a reversal. Disregard of fundamental right in the case of the guiltiest defendant, his conviction in violation of settled constitutional and legal safeguards, intended for the protection of all, are not things which affect the particular defendant in a given case alone, but, in their disastrous and far-reaching consequences, involve, in future trials, the innocent and guilty alike, subvert justice, and disorganize society. Guilt should be punished certainly, and condignly, most assuredly; but guilt must be manifested in accordance with the law of the land. Else some day the innocent, who are sometimes called to answer

at the bar of their country, may come to find themselves involved in a common ruin, deprived of the legal trial necessary to the vindication of their innocence."

The constitutional provision that the accused must be confronted by the State's witnesses and the statutory provision that the defendant must be present at the trial are provisions for the benefit of the accused and we have held that he may waive them.

On the other hand, the provision of the Constitution that the accused is not to be deprived of his life or liberty without due process of law involves the whole public, and neither he nor the State may waive it. The difference is vital. One is for the benefit of the accused, and the other is for the benefit of society. A jury may not convict an accused unless the law and the evidence warrants the conviction. The jury is the judge of the evidence, and the court is the judge of the law. Therefore, it is necessary that both the presiding judge and the jury be present whenever any evidence in the case is taken.

HOT SPRINGS SAVINGS, TRUST & GUARANTY CO. v. SUMPTER.

Opinion delivered October 24, 1921.

1. MORTGAGE FORECLOSURE—BOND HAVING THE EFFECT OF JUDGMENT.—Where a purchaser at a mortgage foreclosure sale bid the full amount of the mortgage indebtedness and executed a bond for the purchase money, upon which default was made, the bond had the force and effect of a judgment, under Crawford & Moses' Digest, § 4306.

2. MORTGAGES—SATISFACTION OF BOND HAVING EFFECT OF JUDGMENT.—Where the plaintiff in a mortgage foreclosure suit procured an execution to be issued on a bond given by a purchaser at such sale and purchased the mortgaged land for a sum less than the mortgage indebtedness, this operated as a satisfaction of the bond only *pro tanto*.

3. MORTGAGES—MERGER OF LEGAL AND EQUITABLE ESTATES.—Where a purchaser at a mortgage foreclosure sale of an equitable estate in land bid the full amount of the mortgage indebtedness and executed a bond for the purchase price signed by himself

and by the owner of the legal title, and upon default thereon the plaintiff in the foreclosure suit purchased the land at execution sale, he acquired both the legal and the equitable title thereto.

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

C. C. Sparks, C. T. Cotham, and *Martin, Wooton & Martin,* for appellant.

1. All questions presented in the case were decided by the Supreme Court on appeal from the decree of the chancery court, except the regularity of the execution sales. 140 Ark. 91.

2. All questions regarding the regularity and validity of the execution sales were presented to the chancery court by bill of review, wherein the various transactions which had occurred prior to that time were alleged, including the foreclosure proceedings, appeal, return of the mandate, appointment of a commissioner, sale of the lot to Wm. Sumpter, execution of bond, default in payment thereof, issuance and return of original and alias executions, purchase of the property by appellant, and specifically attacking the validity of the execution sales. On the dismissal of the bill of review for want of equity, without appeal therefrom, these matters became *res judicatae.*

3. Appellant, after the remand of the case, having by substituted complaint brought suit in ejectment, alleging ownership, right to possession, muniments of title, etc., it was the duty of appellees to set forth exceptions to the documentary evidence relied on by appellant, to which they objected, setting out the objections specifically. C. & M. Dig. § 3693. A general denial that a plaintiff in ejectment is the legal owner of the land is not sufficient. 107 Ark. 374. Courts of law take no cognizance of equitable estates, but deal only in legal titles. 9 R. C. L. pp. 840-841-842.

4. When the bond executed by Wm. Sumpter was unpaid at maturity, either of two remedies was available to appellant, *i. e.* to leave the foreclosure sale set aside

and a resale with judgment against Sumpter and his sureties for any deficiency, or to have execution on the bond, which had the force and effect of a judgment. C. & M. Dig. §§ 4304-6.

When appellant elected to take out execution on the bond, the mortgage judgment and lien merged. 23 Cyc. 1475. Its purchase of lot 1 under execution on a judgment effective against all of the appellees' property was a purchase of the entire interest in lot 1, and the same conclusion must be reached, whether the sale was made under the statutory or mortgage judgment. 1 Pick. 351; 11 Am. Dec. 188; 14 Ala. 476; 48 Am. Dec. 105; 17 Pick. 137; 2 Jones Equity, 475; 2 Jones on Mortgages § 1229; 3 Pomeroy Equity Juris § 1204 (note); 50 L. R. A. 714, note 717-718 with collected cases; 151 Ohio, 84; 45 Am. Dec. 562; 101 Tex. 86; 130 Am. St. Rep. 824; 41 Ill. 31; 89 Am. Dec. 370; Freeman on Executions, 335.

5. The sum of $10,000 bid by the appellant for lot one, block 112, at the first execution sale, should be credited upon the judgment as a payment thereon *pro tanto*.

R. G. Davies, for appellees.

1. An equitable title will not support an action in ejectment. 105 Ark. 119; 98 Ark. 30. Plaintiff in ejectment must recover on the strength of his own title. A tenant may attorn to one who has secured the landlord's title, but such title must have been secured before such attornment. 31 Ark. 431; C. & M. Dig. § 6557; 74 Ark. 12.

2. The old judgment against Nannie E. Sumpter in the mortgage foreclosure proceeding was fully paid off and satisfied by the first sale which brought the full amount of the judgment, was confirmed, and the bond given and approved. 10 Standard Procedure, pp. 21, 31; 13 Ark. 503; 11 Smed. & M. 458; 49 Am. Dec. 68; 6 Yerg. 246; 3 *Id.* 297; 75 Va. 757, 774; 25 Ark. 124; *Id.* 606; 20 *Id.* 68; 14 *Id.* 595; 10 Smed. & M. 414; 4 How. U. S. Sup. Ct. 4; 11 L. Ed. 850; 35 W. Va. 375; 14 Ark. 568; 94 Va. 700; 27 S. E. 467; 8 Gratt. 179-209; 30 W. Va. 760; 5 S. E. 442.

The authorities cited by appellant have reference to sales under execution issued on the original mortgage debt or vendor's lien, whereas the sale to Wm. Sumpter was not made under execution, but by the chancery court, through its commissioner.

The sale under the execution issued on the bond judgment was an independent proceeding—a sale of Wm. Sumpter's interest and not Nannie E. Sumpter's.

There was no merger. 25 Ark. 277; 31 *Id.* 436; 54 *Id.* 457-8.

3. The old judgment decree in the foreclosure proceedings was satisfied by the execution of a bond which was never quashed. The judgment bond was satisfied by appellant's bid of $10,000 for Wm. Sumpter's equity in lot one. Mrs. Ida M. Sumpter, his widow and sole devisee, is entitled to the amount bid by appellant, and also the rents. 27 Ark. 98; 7 *Id.* 430; *Id.* 28; 71 *Id.* 318 31 *Id.* 252; 55 *Id.* 286; 29 *Id.* 270; 58 *Id.* 252-268. See also Freeman on Executions, 131; Jones on Mortgages §1249; 54 Ark. 457.

C. T. Cotham, C. C. Sparks and *Martin, Wooten & Martin,* for appellant, in reply.

The widow of Wm. Sumpter had no dower, vested or inchoate, in lot one. He had no deed or other legal title to it, nor was he seized of an estate of inheritance. C. &. M. Dig. § 3514. The proceeding was for the purpose of subjecting lot one to payment of the purchase price; and, even if it had been held by him by commissioner's deed, no dotal rights attached. *Id.* § 3518; 29 Ark. 591; 126 *Id.* 315; 98 *Id.* 118.

McCULLOCH, C. J. Mrs. Nannie E. Sumpter, one of the appellees, was the owner of certain real estate in the city of Hot Springs, including a lot described as lot 1 in block 112, known as the Sumpter House property, and she mortgaged it to appellant to secure an indebtedness of $14,000, evidenced by promissory note.

Appellant obtained a decree of the chancery court of Garland county foreclosing the mortgage, the in-

debtedness at that time, including accumulated interest and costs, being the aggregate sum of $17,100, and the property was ordered to be sold by a commissioner of the court. At the sale by the commissioner, William Sumpter became the purchaser of lot 1, block 112, for $17,100, the full amount of the decree, and executed a bond for the purchase price with Mrs. Nannie E. Sumpter and O. H. Sumpter as sureties. The sale was duly reported to the court and was confirmed, and the commissioner was ordered to execute a deed to William Sumpter, the purchaser, but he failed to pay any part of the purchase price, and the deed has never been executed.

In this state of the matter appellant caused an execution to be issued on the bond, which, under the statute (Crawford & Moses' Digest, § 4306), had the force and effect of a judgment. The execution was levied on lot 1, block 112, as well as other property of William Sumpter and also of Mrs. Nannie E. Sumpter. Lot 1 in block 112 was sold first; and appellant became the purchaser for the sum of $10,000. Later other property of William Sumpter and Mrs. Nannie E. Sumpter was sold under the execution for various sums. After the time for redemption from the execution sales had expired, the sheriff made deeds to appellant, who then instituted an action in the chancery court of Garland county, alleging that it was in possession of the Sumpter House property under its said purchase, but that appellees, Mrs. Nannie E. Sumpter and O. H. Sumpter, were interfering with its said possession by threatening to oust its tenants, and also alleging that the possession of the other property purchased by appellant under execution sales was wrongfully withheld by said appellee. The chancery court confirmed the various sales under execution and granted the relief prayed for by appellant, but on appeal to this court the decree was reversed and the cause remanded with directions to transfer the cause to the circuit court for further proceedings. We held, in substance, that the

chancery court had no authority to confirm the sales of real estate made by the sheriff under execution; that the present appellant had rightfully obtained possession of the Sumpter House property by the attornment of Mrs. Sumpter's tenant, but that appellant was not entitled to the relief in a court of equity by injunction to protect its possession against trespasses remediable at law, and that, as to the property other than the Sumpter House property, the action was merely one to recover possession, and that the remedy was complete at law. *Sumpter* v. *Hot Springs Savings, Trust & Guaranty Co.*, 140 Ark. 91. Upon the remand of the cause, it was transferred to the circuit court, and there was a trial before the court sitting as a jury, which resulted in a judgment in favor of appellees. The circuit court decided that appellant had, by its purchase of the Sumpter House property at the execution sale, acquired only the equitable title of William Sumpter, and was entitled to convert it into a legal title by paying the purchase price bid by William Sumpter and securing a deed from the commissioner of the chancery court. The court also held that the purchase by appellant of the Sumpter House property constituted a satisfaction of the judgmen on which all of the execution sales were based, and that the sales of the remainder of the property were void for that reason. The effect of the circuit court's decision was to hold that appellant, by its purchase of the Sumpter House property for the sum of $10,000, merely acquired the right of William Sumpter to complete his purchase by paying the amount of the original bid and that this extinguished the judgment. We are of the opinion that the decision is based upon an erroneous conception of the effect of the purchase by appellant. Counsel for appellees defend the rulings of the court on the doctrine announced by this court that a sale of mortgaged real estate under a judgment for the debt secured only operates as a sale of the equity of redemption. *Rice* v. *Wilburn*, 31 Ark. 109; *Whitmore* v. *Tatum*, 54 Ark. 457.

It is by no means certain that there is an analogy between the case of a sale under execution for a mortgage debt and one where there has been a decree of foreclosure, and the sale, as in this case, is on an execution issued on a statutory bond for the purchase price having the force and effect of a judgment. But, treating the analogy as complete, it does not follow that the trial court was correct in holding that in this case appellant only acquired an equitable title and its purchase at the sale extinguished the judgment. The original mortgage lien held by appellant was merged into the decree of foreclosure, and, when the purchaser at the sale executed the statutory bond for the purchase price, there arose in appellant's favor two remedies—one to have the sale set aside and the property resold, or to proceed, as was done, to enforce the remedy under the bond. It was a case of a person having two remedies, but entitled to only one satisfaction. There could, however, be no satisfaction short of a payment of the entire debt, the obligation of the bond being for that amount. Appellant was entitled to receive the full amount of its debt, whether it came through he channel of the purchase under the chancery sale, or the execution sale, and the amount of the bid at the execution sale served only as a diminution *pro tanto* of the total debt, and only to that extent did it satisfy the judgment. *Whitmore v. Tatum, supra.*

The effect of appellant's purchase of the property was precisely the same as if the purchase had been made by another person. The amount of the bid at the execution sale was, in either event, to be credited on appellant's debt, and another purchaser at the sale would have had the right to convert William Sumpter's equitable title into a legal one merely by paying the remainder of the debt. Upon no theory can a sale for a less sum than the full amount of the debt be held to be an extinguishment or satisfaction of appellant's original debt.

There is still another reason why the court was in error in holding that all that appellant acquired by its purchase at the execution sale was the right to perfect William Sumpter's bid by paying the full amount of the purchase price. The execution ran not only against William Sumpter but against Nannie E. Sumpter, the holder of the legal title, and since the sale carried the interest of both parties, the equitable title was merged in the legal title. Appellant therefore acquired a complete legal title under the execution sale. This view of the matter also disposes of the contention of appellees on the cross-appeal of William Sumpter's widow that the cause should have been transferred to equity for the purpose of awarding dower in the Sumpter House property and damages for the detention. The legal title being complete in appellants, William Sumpter's widow was not entitled to dower nor to possession of the property. It was decided on the former appeal, and the evidence is undisputed, that appellant was rightfully in possession of the Sumpter House property, and the only question left open for further determination was the validity of the execution sales as to the other property. That issue was tried by the court below, and, according to the undisputed evidence, the sales were regular and valid.

Another issue to be tried on the transfer of the case to the law court was the question of damages for interfering by trespass with appellant's possession, but there is no evidence in the case of any injury.

The facts being undisputed, it is the duty of the court to render a judgment in favor of appellant for possession of all of the property in suit other than the Sumpter House property (appellant being already in possession of that property), so the judgment will be reversed, and the cause remanded with directions to the circuit court to enter a judgment to that effect.

EX PARTE GRAHAM.

Opinion delivered October 24, 1921.

1. BAIL—SURRENDER.—Where an accused person out on bail was actually surrendered by his sureties to the proper officer and was accepted by the latter without requiring a delivery of a copy of the bail bond, such surrender constitutes a substantial compliance with the statute, so as to effect the release of the sureties from further liability.
2. BAIL—AUTHORITY TO REDUCE.—Under Crawford & Moses' Dig. § 2938 a committing magistrate who has fixed the amount of accused's bail has no authority subsequently to reduce the amount of the bail.
3. BAIL—AUTHORITY TO TAKE.—Crawford & Moses' Dig. § 2938, providing that, "the defendant, after commitment and before commencement of the next term of the court having jurisdiction to try the offense, may be admitted to bail in the sum fixed by the committing magistrate by such magistrate," etc., was repealed by the later act (Crawford & Moses' Dig., § 2951) authorizing the sheriff to take bail in such cases.

Certiorari to Nevada Chancery Court; *James D. Shaver,* Chancellor; affirmed.

J. O. A. Bush, for petitioner.

J. S. Utley, Attorney General, for respondent.

McCULLOCH, C. J. Appellant brings up for review, by writ of certiorari, the record in proceedings before the chancellor where bail was sought. The prayer of the petition below was denied on the face of the record without the introduction of testimony. So we must test the correctness of the chancellor's ruling by the facts appearing upon the face of the record.

Petitioner was arrested in Nevada County on a charge of felony, and was carried before a justice of the peace, who held an examining trial on August 19, 1921, and committed petitioner to await the action of the grand jury at the next regular term of the Nevada Circuit Court, to be held in January, 1922.

The magistrate fixed bail in the sum of $2,000, which was given before that officer, and petitioner was released from custody. Subsequently the sureties on

the bail bond surrendered petitioner to the sheriff of the county, who took him into custody and still holds him in the county jail. The surrender was made without delivering to the sheriff a certified copy of the bail bond, but it is recited in the response of the sheriff in the present proceedings that the bond had been lost by the committing magistrate. Nothing else appears in the record in regard to the failure to furnish a copy of the bond.

On September 16, 1921, there appeared before the committing magistrate, according to the record of that officer now before us, the attorney for petitioner and the deputy prosecuting attorney of the county, and an order was entered reducing petitioner's bail to the sum of $1,500, reciting that this reduction was agreed upon between the two attorneys. It is also recited in the order that a bail bond was then presented to the committing magistrate and approved. The sheriff, according to his response in this case, declined to approve the bond on the ground that the sureties were insolvent and petitioner is still in jail.

The first contention of counsel is that the surrender of custody of petitioner to the sheriff was not made in accordance with the statute in that a certified copy of the bond was not furnished, and that for that reason the surrender was illegal, and the first bond is still in force, which entitles petitioner to be discharged from custody. The statute provides that "the bail may surrender the defendant, or the defendant may surrender himself, to the jailer of the county in which the offense was committed; but the surrender must be accompanied by a certified copy of the bail-bond to be delivered to the jailer." Crawford & Moses' Digest, § 2961. The two succeeding sections provide that "the bail may obtain from the officer having in his custody the bail-bond or recognizance a certified copy thereof, and thereupon, at any place in the State, arrest the defendant," or that "the bail may arrest the defendant without such certified copy." The recital of

the sheriff's response is that the bail-bond was lost, but this did not deprive the sureties of the right to surrender the accused into the custody of the sheriff. According to the express language of the statute, the sureties had the right to make the arrest without a copy of the bail-bond and surrender the accused to the sheriff, and the furnishing of bond was only for the protection of that officer. Only substantial compliance with the statute is required, and the actual surrender of the person of the accused to the proper officer, and the acceptance by that officer, even without a delivery of a copy of the bond, constitutes substantial compliance with the statute, so as to effectuate the release of the sureties from further liability. *Sternberg* v. *State*, 42 Ark. 127; *Hester* v. *State*, 145 Ark. 347. This disposes of the petitioner's claim to the right to be discharged under the first bond.

It is next contended that the committing magistrate was the proper officer to approve the second bond, and that petitioner should be discharged under that bond, notwithstanding the refusal of the sheriff to approve the bond. There is no question raised about the validity of the order of the committing magistrate reducing the amount of the bail subsequent to his original order fixing the amount. The order reducing the bail was made upon agreement between the deputy prosecuting attorney and counsel for the accused, and the refusal of the sheriff to approve the bond was not based on the reduction of the amount. The real controversy on this feature of the case relates to the question which of the officers was authorized, under the statute, to approve the bond tendered after the accused was taken into custody when surrendered to the sheriff on his former bail bond. The ground of the sheriff's refusal was, as before stated, that the sureties were insolvent, and there is no attempt in the present proceedings to show that the sheriff's refusal was arbitrary, or without justification, if he was authorized by statute to approve or disapprove the bond.

Section 2937 of Crawford & Moses' Digest, which was section 60 of the Criminal Code, reads as follows:

"If the defendant is committed to jail, the magistrate shall make out a written order of commitment, signed by him, which shall be delivered to the jailer by the peace officer who executed the order of commitment. If the offense is bailable, the magistrate must fix the sum for which bail is to be given, and, if sufficient bail is offered, take the same and discharge the defendant. If, however, sufficient bail is not offered, the sum in which bail is required must be stated in the order of commitment."

It is clear from this section that a bond offered at the time of the commitment is to be approved by the committing magistrate, but that, if bail is not offered at that time, the amount thereof shall be fixed and stated in the order of commitment. Section 61 of the Criminal Code reads as follows:

"The defendant, after commitment, and before the commencement of the next term of the court having jurisdiction to try the offense, may be admitted to bail in the sum fixed by the committing magistrate, by such magistrate, or by the judge of the probate court; but, after the commencement of the term of the court, he can only be admitted to bail by the court or the judge thereof."

Mr. Gantt in digesting this section of the Code erroneously substituted the words, "or the circuit court, or the judge thereof, in vacation," in the place of the words, "or by the judge of the probate court." Gantt's Digest of 1874, § 1715. This error has been brought forward in all of the later digests. Crawford & Moses' Digest, § 2938. Doubtless the error occurred inadvertently by reason of the fact that when the Digest of 1874 was compiled probate jurisdiction had been transferred to the circuit court, and in all instances where the statute referred to the probate court the digester changed it to read "circuit court." The change was made in the section now under consideration upon

the theory that the change in probate jurisdiction called for a change in the wording of this section. The change, however, was inappropriate from the fact that the authority conferred by this section on the judge of the probate court to approve bail was a ministerial and not a judicial act, and if it had been judicial it could not, under the Constitution, have been conferred upon the probate court. The question then arises whether this statute should be construed to give authority to the committing magistrate, or the probate judge, after commitment of a prisoner, to change the amount of bail as originally fixed by the committing magistrate, or whether it merely conferred authority to accept and approve bail in the amount originally fixed by the committing magistrate. We are of the opinion that this section only conferred authority to accept bail in the amount originally fixed. It provided, in express terms, that at any time "after commitment and before the commencement of the next term of the court" the accused may be admitted to bail "in the sum fixed by the committing magistrate, by such magistrate, or by the judge of the probate court." If it was intended to allow the committing magistrate to change the amount of bail, it would not have been necessary to put in the words "in the sum fixed by the committing magistrate." The use of these words negatives the idea that the magistrate should have the authority to reduce the amount of bail. Besides the same expression which confers authority on the committing magistrate to admit to bail applies with equal force to the judge of the probate court, and it is not conceivable that the framers of the statute meant to confer such authority on that officer.

Section 2940 Crawford & Moses' Digest was section 78 of the Criminal Code and reads as follows:

"The sheriff arresting a person under a warrant or other process, in which it shall appear that the person is to be admitted to bail in a specified sum, may take the bail and discharge the person from actual custody.

A sheriff taking bail shall be officially responsible for the sufficiency of the bail, as in taking bail in civil actions."

In the case of *Pinson* v. *State*, 28 Ark. 397, the question arose whether or not the sheriff had authority to accept bail of a person in his custody under indictment where the amount of bail was fixed by order of the circuit court and the prisoner had not been arrested by the sheriff under bench warrant. The contention of the sureties against whom liability on the bond was sought was that the sheriff had no authority to accept the bond because he had not made the arrest, though the accused was in his custody. The court decided that the sheriff who had the accused in custody, regardless of the manner of acquiring custody, had authority to accept bail in the amount fixed by the court. Shortly after that decision was rendered, the Legislature enacted a statute which was approved November 12, 1875, and now digested as § 2951, Crawford & Moses' Digest, which reads as follows:

"When a sheriff shall commit to the common jail of his county any prisoner, under a bench warrant, in a bailable case, when the amount of bail has been fixed by the circuit judge, and when he shall so commit, under a warrant from a magistrate who has fixed the amount of bail, it shall be lawful for said sheriff to take the bail and discharge the prisoner in the same manner as he could have done before the said commitment."

This statute makes clear the authority of the sheriff, after commitment, to accept bail in the amount fixed, either by the circuit court, on a bench warrant, or by a committing magistrate in the order of commitment. The use of the concluding words of this section shows that the purpose of the lawmakers was to make clear the authority of the sheriff to accept a bond after commitment the same as he had theretofore been expressly authorized to do in case of making an arrest under a bench warrant containing an order fixing the amount of bail. This statute expressed in clear terms

what this court had in substance decided in *Pinson* v. *State, supra,* to be the effect of section 78 of the Criminal Code, but it was the last expression of the legislative will and must control in all instances where doubt arises. We are of the opinion that the enactment of this section displaced all other authority for accepting bail after commitment and, by implication, repealed section 61 (Crawford & Moses' Digest, § 2938), which gave authority to the committing magistrate or the judge of the probate court to accept bail after commitment. It is a statute covering the whole subject of accepting bail after commitment, and therefore must be deemed to have entirely supplanted the other section conferring such authority on other officers. Our conclusion, therefore, is that the sheriff was the proper officer to approve the bond; and, since his approval has not been obtained, the chancellor was correct in his order refusing to discharge the petitioner from sustody.

The writ of certiorari is therefore quashed, and the order of the chancellor affirmed.

HART, J., (dissenting). The court has held that § 2951 of Crawford & Moses' Digest repeals § 2938 of the Digest by implication, and from this holding I respectfully dissent.

Secs. 2937, 2938, 2943, 2944, and 2955 of Crawford & Moses' Digest are sections of the Criminal Code, which was adopted in 1869.

Sec. 2943 provides that admission to bail is an order from a competent court, or magistrate, that the defendant be discharged from actual custody on bail.

Sec. 2944 provides that the taking of bail consists in the acceptance by a competent court, magistrate, or officer of the undertaking of sufficient bail for the appearance of the defendant, etc.

Sec. 2937 provides that if the defendant is committed to jail the magistrate shall make a written order of commitment. It provides further that if the offense

is bailable, the magistrate must fix the sum for which bail is to be given, and, if sufficient bail is offered, take the same and discharge the defendant. The concluding sentence of the section is that if sufficient bail is not offered, the sum in which bail is required must be stated in the order of the commitment.

Sec. 2955 provides that if the defendant is committed to jail and the application for bail is made to a magistrate, or judge, it must be by a written petition.

Sec. 2938, which was § 61 of the Code, provides how the defendant may be admitted to bail after commitment. In plain terms it says that the defendant, after commitment, and before the next terms of the court having jurisdiction to try the offense, may be admitted to bail in the sum fixed by the committing magistrate. This part of the section is too plain for construction, and means that the defendant may be admitted to bail in the sum fixed by the committing magistrate which § 2937 requires to be stated in the commitment.

Now, who is to admit the defendant to bail in the sum fixed by the committing magistrate? This is shown by the succeeding language of the section which provides that it shall be done by such magistrate, meaning the committing magistrate, or the circuit (probate) court, or judge in vacation. I cannot see any reason for holding that these provisions of the Code are repealed by implication by § 2951. of the Digest. The only purpose of this section is to give the sheriff power to take bail in the amount fixed by the court in the warrant of commitment. The committing magistrate still has the power conferred upon him by § 2938. There is no invincible repugnancy between the twe sections. Because the power is also given to the sheriff to take bail is no reason why it should be taken away from the committing magistrate. Of course the Legislature might have done so, but it is sufficient to say it has not done so.

Conferring the power upon the sheriff to take bail after commitment is not inconsistent with the committing magistrate having such power. Therefore, there can be no repeal by implication.

There was no such taking up of the whole subject anew by the Legislature as to indicate that the several provisions of the Code above referred to were intended to be repealed by the enactment of § 2951.

The record shows that the defendant applied to the committing magistrate under § 2938, and was admitted to bail by such magistrate. Therefore, the sheriff should have discharged him. He might have under § 2951 applied to the sheriff to take bail in the sum stated by the magistrate in his order of commitment, but he elected to apply to the committing magistrate.

For these reasons Judge SMITH and myself dissent.

NIXON v. ALLEN.

HOPPER v. BRIGHT.

Opinion delivered October 24, 1921.

1. STATUTES—EFFECT OF PARTIAL INVALIDITY.—Where a statute attempts to accomplish two or more objects, and is void as to one of them, it may still be complete and valid as to the other objects; but if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion.

2. STATUTES—PARTIAL INVALIDITY.—Where the provisions of a statute are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature would not have passed the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.

3. STATUTES—TITLE OF ACT.—While the title of an act is not controlling, it is proper to be considered in determining the meaning of the law-makers.

3a. STATUTES—CONSTRUCTION.—It is the duty of the court to construe all the words of a statute so as to give them, if possible, some sensible meaning.

4. STATUTES—PARTIAL INVALIDITY.—Acts 1921, No. 264, § 28, "An act to provide for more efficient county government for Pulaski County," provides that if any section, subsection, sentence or phrase in the act shall be held unconstitutional, such decisions shall not affect the validity of the remaining portions of the act, and declares that the Legislature would have passed the remainder of the act. *Held* that the Legislature meant that if any section, subsection, sentence or phrase in the act should be found unconstitutional and could be eliminated without destroying the integrity of the act as a whole, and leaving an effectual act for a complete and more efficient system of government for Pulaski County, then its purpose was to enact such residual portion of the act.
5. JUDGES—ACT CREATING TWO COUNTY JUDGES.—Acts 1921, No. 264, § 1, providing that there shall be two county judges for Pulaski County, is void as in conflict with § 28, Art. 7, of the Constitution, providing that the county court shall be held by one judge.
6. COUNTIES—BOARD TO FIX SALARIES OF OFFICERS AND CLERKS.—Acts 1921, No. 264, § 8, creating a board to fix the salaries of county officers and the salaries and number of their clerks and employees, is invalid as a delegation of legislative power.
7. STATUTES—PARTIAL INVALIDITY.—Acts 1921, No. 264, relating to the county government of Pulaski County, being invalid as to §§ 1 and 8, is void *in toto;* the various provisions of the act being connected together.

Appeal from Pulaski Chancery Court; *Robert L. Rogers,* Special Chancellor; affirmed.

Emerson, Donham & Shepherd and *Carmichael & Brooks,* for appellant Nixon and appellee Bright.

1. The act is separable. There are ten distinct provisions of the act set out in the title thereto. It is always proper to look to the title of an act to determine its meaning. 138 Ark. 387; 124 Ark. 473. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. 111 Ark. 108; 46 Ark. 329; 37 Ark. 356; 53 Ark. 490; 64 Ark. 555; 63 Ark. 576; 126 Ark. 263; 138 Ark. 386.

2. The Legislature had the power to declare the act separable. 129 Ark. 548; 138 Ark. 556; 139 Ark. 160; 139 Ark. 577.

3. None of the provisions of the act is void, unless it be the section providing for the two county judges is unconstitutional, and, if so, the act being severable, the remainder would stand in full force. However, this provision does not contravene § 28, art. 7 of the Constitution, nor does this section limit the number of county judges to one. 60 Ark. 343. It means that only one judge can hold the county court, which is to say that the judges do not sit *en banc*. Sec. 8 of the act, which creates a board for allowing additional deputies, etc., is not a delegation by the Legislature of the power to legislate. The same authority has been approved numerous times in levee districts, etc., wherein the board is authorized to employ clerks and fix their salaries. As to powers delegated to a board, see 96 Ark. 419.

4. The act is not subject to referendum. 104 Ark. 583; 104 Ark. 510; 103 Ark. 48; 105 Ark. 380; 110 Ark. 528; 106 Ark. 63; 117 Ark. 474; 106 Ark. 504; 139 Ark. 178; 117 Ark. 266; 133 Ark. 380.

J. S. Utley, Attorney General; *Poe, Gannaway & Poe* and *J. C. Marshall,* for appellee Allen and appellant Hopper.

The act is unconstitutional in that it creates an additional county and probate court and a common pleas court, and provides for an additional judge to hold these courts. Const. art 7, § § 28, 29; 60 Ark. 343.

It is unconstitutional also in that it provides for a board which shall have power to fix the number of deputies and their compensation, contingent expenses and allowances of the county officers. The Legislature alone has this power, and cannot delegate it to another. Const. Art. 16, Sec. 4; 89 Ark. 456; 40 Ark. 100; Throop on Public Offices, § 500. There is no analogy between county offices, controlled by the Constitution, and levee boards, etc., not controlled by the Constitution.

The act is void in a number of particulars, and these void sections are so inter-related that they invalidate the whole act. 138 Ark. 381; 13 Ark. 763; 49 Ark. 110;

75 Ark. 542; 55 L. R. A. 740; 2 L. R. A. (N. S.) 653. This is true, even though the act contains a provision to the contrary, as the dominant feature of the act is unconstitutional. 129 Ark. 549; 6 R. C. L. 123; 65 Wash. 156; 144 Ark. 38.

The act is referable. 133 Ark. 380; Acts 1911, p. 582.

WOOD, J. These appeals are from decrees rendered by R. L. Rogers, special chancellor, declaring void act No. 264 of the Acts of 1921. The title of the act is: "An Act to provide For More Efficient County Government for Pulaski County: For Two County Judges: For Separating the Offices of Sheriff and Collector; For a County Comptroller; For a County Purchasing Agent; For Chief Deputies; For County Officers; For a Board for Approving Additional Deputies; For Fixing the Salaries of County Officers and of their Deputies; For a Court of Common Pleas; For Fixing the Court Costs in the Circuit and Chancery Courts; and for Other Purposes."

Section 1 provides that there shall be two county judges for Pulaski County; one designated as county judge and the other probate judge.

Section 2 provides that the Governor shall appoint the probate judge, who shall hold office until his successor is elected and qualified.

Sections 3, 4 and 5 confer power upon the county judge, by and with the advice and consent of the grand jury, to appoint a county comptroller and a county purchasing agent. These several sections prescribe the duties and qualifications respectively of the comptroller and the purchasing agent. The comptroller's "term of office" is made concurrent with that of the county judge appointing him. He takes an oath of office and is required to furnish a bond in the sum of $25,000 for the faithful performance of his duties. He prepares a county budget, makes monthly reports of the county finances, expenses and obligations. He keeps a record of county property and checks the emoluments of county

and township officers, making an annual audit of the taxes of the county, and, among other things, is "to perform any service that may be required of him by the county judge or by the grand jury," and the county court is prohibited from considering any claim until it has first been presented to the comptroller for his approval or disapproval.

Sec. 6 makes offices of sheriff and collector separate and distinct, and provides that at the next general election a sheriff and collector shall be elected. It provides for bonds for these respective officers, and provides that, until January 1, 1923, the sheriff shall continue to perform the duties and receive the same compensation as he is now performing and receiving as sheriff and collector.

Sec. 7 provides for deputies for the county officers and a head clerk in the collector's office. The chief deputy in the sheriff's and collector's office and the head clerk in the collector's office to receive the same salary as is now provided by law.

By § 8 the three circuit judges, the chancellor and the county judge "shall constitute a board for allowing additional deputies to the county officers and fixing their compensation," but this board "shall not have authority to decrease the present deputies and clerical force, either in number or compensation, and the contingent expenses and allowances of the officers as now provided by law, without the concurrence of the quorum court, but they shall have authority to increase the compensation of the present force, contingent expenses and allowances of the officers as now provided by law; they may also create additional contingent expenses and allowances for the various officers. The county judge shall be chairman of the board. On written petition of any county officer for an additional deputy or deputies, additional contingent expenses and allowances, the board shall have a public hearing and

shall grant or refuse the petition as the public interest may require. Any petition granted by said board shall be allowed and ordered paid by the county court."

Sec. 9 prescribed certain duties of the county treasurer.

Sec. 10 provides that § § 1043 and 1017 of Crawford & Moses' Digest shall not apply to Pulaski County, and that section 1042 shall not apply in so far as it requires the collector to visit the voting places of the county to collect taxes.

Sec. 11 prescribes certain duties of the county officers, except the collector, with reference to the filing of reports of the funds and emoluments collected by them and making settlements.

Sec. 12 provides that § 10 of act 145 of the Acts of 1917, approved February 28, 1917, shall not apply to the offices of county judge, probate judge, comptroller, purchasing agent, or sheriff.

Sec. 13 provides penalties for failure to comply with the provisions of the act.

Sec. 14 designates the salaries which the county officers and their deputies shall receive, and, after specifying the amounts, it is provided that "the collector shall, in addition to his salary, be allowed to retain as part of the emoluments of his office all fees and costs for the collection of delinquent taxes, as now provided by law."

Sec. 15 provides "that the court costs for each action, suit or proceeding in the circuit and chancery courts which shall be paid in advance by the party instituting such action or proceeding, shall be as follows: In the circuit court, for each appeal from an inferior court, $7.50; all other actions or proceedings $10.00. In the chancery court, for each divorce suit, and each *ex parte* proceeding, $10.00; for all other suits or proceedings, $15.00." Out of the clerk's costs in the circuit and chancery courts the sum of fifty cents shall be paid into a library fund to be kept by the clerk of the chancery court, and expended by him, under the direction of

the chancellor, in providing and maintaining a law library for the use of the judges, county officers and practicing attorneys. The various courts are given the power to tax and adjust the cost between litigants in all cases.

Sec. 16 creates a court of common pleas to be held quarterly by the county judge.

Secs. 17 to 26, inclusive, define the jurisdiction of the court and the duties of the clerk and sheriff in connection therewith, and prescribe rules of practice governing same.

Sec. 21 is as follows: "The judge of the probate court shall be judge of the court of common pleas."

Sec. 27 provides for an additional contingent expense to be allowed the sheriff in case of riots, uprisings and emergencies, the application to be made to and approved by either of the judges of the board mentioned in section 8, which, upon such allowance and approval, "shall be allowed and ordered paid by the county court out of any available funds of the county."

Sec. 28 is as follows: "If any section, sub-section, sentence or phrase in this act shall be held unconstitutional, such decisions shall not affect the validity of the remaining portions of the act. The Legislature hereby declares that it would have passed the remainder of said act, and each and every part thereof, irrespective of such unconstitutional part."

By the concluding section 29 the law is "made supplemental to existing laws, and shall not operate to repeal any existing laws except to the extent that it may conflict with this act, which shall take effect and be in force from and after its passage."

1. We will discuss the act in the order presented in the brief of learned counsel for appellants. They ask first: Is the act severable? This court, in the case of *Oliver* v. *Southern Trust Co.*, 138 Ark. 381, 386, 387, announced the general rule upon the subject by quoting at length from Cooley's Constitutional Limitations, 6th

Ed. p. 210. A portion of that quotation is as follows: "If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." See also *Davis* v. *State,* 126 Ark. 260-63; *Snetzer* v. *Gregg,* 129 Ark. 542; *Skipper* v. *Street Imp. Dist. No.* 1, 144 Ark. 38-44.

The purpose of this act, as expressed in the first sentence of its title, is: "To provide for more efficient county government for Pulaski County." After thus declaring the purpose, the title enumerates the various particular methods by which the "more efficient government" is to be effected. The act, as shown by its title as well as the subject-matter of its various sections, was intended to be, and is, if valid, a comprehensive and complete plan of government for the county of Pulaski. So many of the sections of the act are interrelated and dependent upon each other, we are convinced that, if the Legislature had known in advance that several of the more important sections would be eliminated because of their unconstitutionality, it would not have enacted the remaining portions of the act. For some of the provisions of this act were already the law. To illustrate, this act fixes the salary of the county assessor at $4,000, and that was his salary when the act was passed. Likewise it fixes the salary of the collector at the same as now provided by law. The act under review provides that the county judge, with the advice and consent of the grand jury, shall appoint

a county comptroller. The county judge, with the advice and consent of the grand jury, had the power when this act was passed to select and appoint an auditor.

We mention these simply as illustrations, and there may be others, to show that the purpose of the Legislature by the act under review was to enact a complete scheme for the government of the county, which was to stand or fall as a whole, and which could not be separated into parts. This is undoubtedly the correct conclusion if the intention of the law-makers is to be gathered alone from a consideration of the title and the subject-matter contained in the various sections of the act, and without regard to section 28. The title of the act should be paraphrased and construed as if it read: "We intend by this act to provide for more efficient government for Pulaski County in the following particulars." Then, after enumerating the particulars that were to be embraced in the law, it concludes: "And for other purposes." The concluding clause, "and for other purposes," means that any other purposes not enumerated, but found in the body of the act, would be purposes of a like nature with those already mentioned to effectuate or complete the system of government proposed. While the title of the act is not controlling, it is proper to consider it in determining the meaning of the law-makers. *School Dist.* v. *Howell,* 124 Ark. 475: *Oliver* v. *Southern Trust Co., supra.*

2. Counsel for appellants, in the second place, argue that "the Legislature had the power to declare the act severable," and that it has done so by section 28, which we here again set out:

"If any section, sub-section, sentence or phrase in this act shall be held unconstitutional, such decisions shall not affect the validity of the remaining portions of the act. The Legislature hereby declares that it would have passed the remainder of said act, and each and every part thereof, irrespective of such unconstitutional part."

In several of our cases, we have recognized the doctrine that where statutes are worded in a manner to justify it the Legislature may express its will that the provisions of such statute declared by the court to be valid shall stand, notwithstanding other provisions in the same statute may be declared unconstitutional, and that the courts will respect and carry out such legislative declaration. *Snetzer* v. *Gregg, supra; Sallee* v. *Dalton,* 138 Ark. 549; *Milwee* v. *Tribble,* 139 Ark. 574.

We need not decide, and do not decide, whether it was in the power of the Legislature, by the sweeping language used in section 28, to validate each and every part of this act which might constitute a valid law when standing alone and disconnected from such other parts as might be found unconstitutional. We do not believe that the Legislature intended by the language of the 28th section to declare that it would have passed each and every part of the act, even though several of its outstanding provisions were unconstitutional and stricken out. For the act, as we have seen, was intended as a whole to provide a complete and more efficient system of county government. If such strict and literal meaning is given to the language of section 28, then the Legislature "doth protest too much, methinks." For, if such were its meaning, it has impeached itself for doing, as we have shown in certain particulars the vain and nonsensical thing of enacting or re-enacting laws already existing and covering precisely the same subject matter. Would the enactment of such laws provide for a more efficient government for Pulaski County? Certainly not.

It is our duty to construe all the words of the statute so as to give them, if possible, some sensible meaning. Therefore, we conclude that the Legislature by the broad language used in § 28 meant that "if any section, sub-section, sentence or phrase" in the act were found unconstitutional and could be eliminated without destroying the integrity of the act as a whole and leav-

ing an effectual act for a complete and more efficient system of government for Pulaski County, then its purpose was to enact such residual portions of the act.

3. This brings us to the question: "Is any part of the act unconstitutional?"

Sec. 28 of article 7 of our Constitution is as follows: "The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. The county court shall be held by one judge, except in cases otherwise herein provided." The exception has reference to the quorum court.

The first section of the act under review providing that there shall be two county judges for Pulaski County, "one to be designated county judge" and the other "probate judge," clearly contravenes the above provision of the Constitution. Under the Constitution there can not be more than one county judge. The limitation is found in the numeral "one" in the clause, "The county court shall be held by one judge," and likewise in the very nature of the jurisdiction of such court and the functions of its presiding judge. *Martin* v. *State,* 60 Ark. 343. The county judge is the *governor,* so to speak, in the affairs of the county in the matters over which the county courts are given exclusive jurisdiction. He is given supreme or exclusive original authority over the matters enumerated in the Constitution, and such authority, in the very nature of the case, must be exercised by one presiding and controlling genius. There is no room under the Constitution for a division of authority and responsibility in the office of county judge. The idea that there can be two county judges, either one of whom could preside over the county court, would be incompatible with the intention of the framers of the Constitution in conferring jurisdiction and power upon

such court and its judge. The functions of this office in its control over taxes, roads, bridges, and other matters of local concern and internal improvement, are indivisible and can only be exercised by one person.

To avoid cross purposes and inextricable confusion in the government of the affairs of the county enumerated in article 7, sec. 28 of the Constitution, supreme or exclusive original authority is lodged in one functionary—the county judge. It may be well to note here some of the incongruities of this act that forcibly illustrate the hopeless muddle into which the government of the affairs of the county would be plunged, grounded upon the notion that they can be administered by two county judges. The act provides for two county judges and furnishes no method for determining which of these judges shall hold the court. It provides that the governor shall appoint a probate judge, but there cannot be any vacancy in the office of the probate judge as long as there is a county judge who must, *ex officio,* fill it. If the Governor in advance of the next general election could appoint a probate judge, after that time only the county judge, and not the probate, could be elected, and who would have the power then to say which one of the county judges should preside over the county court and which over the probate court? The act suggests no method for determining.

Sec. 16 of the act creates a court of common pleas to be held by the "county judge," while section 21 provides that "the judge of the probate court shall be the judge of the court of common pleas." Sec. 32 of article 7 of our Constitution provides that the General Assembly may authorize the judge of the county court to hold a court of common pleas. Sec. 21 of the act under review, conferring power upon the judge of the probate court to perform that function, is therefore void; and if this section were stricken out and section 16 allowed to stand, and the section creating the two county judges were also allowed to stand, then which one of these judges would hold the court of common pleas? If alternately, when and how?

Sec. 3 gives the county judge the power to appoint a county comptroller. Section 5 gives the county judge the power to appoint a purchasing agent. Section 8 makes the county judge the chairman of the county board, and section 15 gives the common pleas court power to tax and adjust cost between litigants in all cases before that court. If there were two county judges, which one of them is to perform these several and various functions? Who, under the act, has the power to determine which one of the county judges shall do so? The act is silent on this subject. If there could be two county judges, both must be elected, and elected as county judges at the same time, and both must have equal authority and perform the same functions under the act.

Now, who in this mix-up would have the power to say which one of the county judges should exercise the several functions imposed upon the county judge in various sections of this act? Could the two county judges voluntarily settle these matters between themselves, or, in the event they should not agree concerning these things, where is the tribunal to settle the difference between them and to have these important duties performed? The act furnishes no answer, and none could be given. It is manifest from the foregoing that it is wholly beyond the power of the Legislature to create two county judges.

Another salient provision in this plan of county government is contained in section 8. That section provides that the three circuit judges, the chancellor, and the county judge shall constitute a board. To that board is given power to allow additional deputies to county officers and to fix their compensation, and, with the concurrence of the quorum court, to decrease the number of deputies and clerical force and their compensation as well as the contingent expenses and allowances of the officers as now provided by law. To this board is given the authority, without the concurrence of the quorum court, to increase the compensation of the present officers, contingent expenses and

allowances of the officers, as now provided by law, and also to create additional expenses and allowances for the various officers. On written petition of any officer for additional deputies, contingent expenses and allowances, the board shall have a public hearing and refuse or grant the petition as the public interests may require. Any petition granted by such board "shall be allowed and ordered paid by the county court.' Sec. 14 of the act provides a complete schedule of salaries for the various officers of the county and their chief deputies and for the comptroller and the purchasing agent.

Article 16, section 4, of our Constitution provides: "The General Assembly shall fix the salaries and fees of all officers in the State, and no greater salary or fee than that fixed by law shall be paid to any officer, employee, or other person, or at any rate other than par value; and the number and salaries of the clerks and employees of the different departments of the State shall be fixed by law." By article 19, sec. 23 of our Constitution "no officer of any county shall receive directly or indirectly for salary, fees and perquisites more than $5,000 per annum and all above this sum shall be paid into the county treasury."

It will be observed that the board created by section 8, with the concurrence of the quorum court, has the power to decrease the number as well as the compensation of the deputies of the officers, which in section 14 of the same act are designated and their annual salaries fixed at a specified amount. The board also has the power to decrease, with the concurrence of the quorum court, expenses and allowances of officers as now provided by law, and, without the concurrence of the quorum court, this board is given the power "to increase the compensation of the present force," which would include the chief deputies, and also the contingent expenses and allowances of the various officers as now provided by law; and also may create additional contingent expenses and allowances for all

the various officers. The power to fix the salaries and fees of all officers in the State, and the number of their clerks and employees and their salaries, is a function, which, within the limits of the Constitution, is lodged in the supreme law-making power of the State—the Legislature. *Cain* v. *Woodruff County,* 89 Ark. 456; *Humphrey* v. *Sadler,* 40 Ark. 100; Throop on Public Officers, § 500. The General Assembly cannot delegate this legislative power to any individual, officer, or board.

We conclude, therefore, that section 8 of this act is repugnant to article 16, section 4 of our Constitution. Article 16, section 4, together with article 19, section 23, were intended by the framers of our organic law to forestall, if possible, any extortion, extravagance, or corruption on the part of those entrusted with the administration of public office, and to promote the general welfare by protecting the people from exorbitant taxation in order to meet the necessary burdens of government. A critical analysis of the various provisions of this act will disclose that sections 1 and 8 touch at some angle nearly all of the other provisions of the act except those embodied in the two last sections. Sections 1 and 8 are to this act as is the hub to a wheel or the foundation pillars to a building. Since these two sections fall under the condemnation of the Constitution, they must be removed from the act, and thereby the whole fabric of the county government built up by the framers of this law necessarily falls to pieces. We need not pursue the subject further. The decrees of the special chancellor are in all things correct, and they are therefore affirmed.

COHN v. CHAPMAN.

Opinion delivered October 24, 1921.

1. TRIAL—INSTRUCTIONS—SPECIFIC OBJECTION.—Where an instruction, fairly construed, submitted an issue to the jury, if a party conceived that it was faulty in assuming a fact not established by the pleadings or the testimony, he should have directed the court's attention to it specifically.

2. EVIDENCE—VARYING WRITTEN CONTRACT BY PAROL—WAIVER OF OBJECTION.—Where the pleadings raised an issue as to whether there was an oral warranty as to the soundness of a horse, in a sale witnessed by a writing, and the testimony sustaining this issue was introduced without objection, appellant will be held to have waived the objection.

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

Trimble & Trimble and *John W. Newman,* for appellant.

Oral evidence of a warranty is inadmissible when a complete written instrument evidences a sale. 80 Ark. 508; *Federal Truck Motors Co.* v. *Thompson,* 149 Ark. 664.

Cooper Thweatt, for appellee.

There was no error in the instruction of the court on the subject of warranty as to the first horse that died. 124 Ark. 31. The objection to the instruction should have been specific. 134 Ark. 218; 78 Ark. 327; 110 Ark. 118; 115 Ark. 118; 111 Ark. 196; 73 Ark. 594; 87 Ark. 607; 98 Ark. 88; 9 Encyclopedia of Evidence, p. 366; 22 C. J. 1295. Notice of the breach was not necessary. 53 Ark. 159.

WOOD, J. The appellant instituted this action against the appellee to recover judgment on an instrument executed February 28, 1918, and due November 1, 1918. The first part of the instrument was a regular promissory note in the sum of $200 given as the consideration of the purchase price for a certain brown mare. The latter part reserved title in the seller to the animal until the purchase price was paid, and contained other provisions evidencing the contract of sale. The appellee answered admitting the execution of the "note" and set up by way of counterclaim that the "note" was a part of the purchase price of $400 for two horses that the appellee had bought from the appellant; that $200 had previously been paid by check; that before any of the purchase price was paid or the "note" executed the appellee directed appellant's at-

tention to the fact that one of the horses appeared sick; that appellant verbally warranted that the horses were sound. The appellee alleged that he relied upon the warranty and accepted the horses and gave his check and note for the purchase price. He further alleged that one of the horses at the time was diseased and unsound, and died in less than twenty-four hours thereafter, to the damage of appellee in the sum of $200. Appellee further alleged that in April of that same year he purchased of the appellant a horse for which he paid the sum of $150, and that before appellee accepted the horse appellant warranted the same to be sound in every way; that the horse was not sound and died in about seven days after the purchase; that appellee was damaged in the sum of $150 by reason of the death of this horse. He prayed judgment on his cross-complaint in the sum of $350 and asked that the judgment offset the note held by appellant in the sum of $200 and that appellee have judgment over against the appellant in the sum of $150.

The appellant answered the cross-complaint and denied all of its allegations; denied that the horse for which the note was given was unsound or diseased; denied that he warranted the same to be in good condition. He alleged that the horse for which the "note" was given was worth $200, and that the appellee was present, examined the horse and was satisfied with same and made no complaint until after the "note" in suit became due. He also denied that he warranted the second horse purchased by appellee from appellant in April of the same year for which the appellee paid $150. He alleged that this second horse was sound, and that the appellee was present, examined the horse, and made no complaint of same until after the institution of the suit. Appellant prayed that the counterclaim of appellee against him be dismissed, and that he have judgment as prayed in his complaint.

The testimony of the appellant was to the effect that he sold appelle horses, and that appellee was due

him the sum of $200 on the purchase price as evidenced by appellee's "note," the instrument upon which the cause of action is based. He stated that not a word was said at the time about the unsoundness of one of the horses. Appellant guaranteed the horses to be serviceable and sound on delivery. He stated that Chapman knew as much about a horse as appellant; knew a good horse from a bad one; that when the horses were taken from appellant's stables they were all right; that in about three weeks, or maybe longer, the appellee came back and told the appellant that one of the horses had died. Appellant told the appellee that he was sorry to hear of the loss of the horse, and then sold him another horse (worth $250) for $150, so that he would lose $100 on the price of that horse; that the appellee agreed to this and gave the appellant a check for $150 and seemed satisfied. Appellant heard no more from the appellee until the note became due and the appellee refused to pay the same. The appellant stated that he would not sell unsound horses; that he had a man paid especially to look after his barn. Appellant "had the reputation of selling the best mules and horses in the country." The appellant did not owe the appellee anything because when he delivered the horses to him they were sound. When the appellee came back and told appellant that he had lost one of the horses, appellant agreed to let him have a $250 horse for $150. Nothing was said at the time about this horse not looking right. The appellee gave appellant a check for $150 for the last horse, which was in settlement of the whole matter between them, and appellee said that he was satisfied. The testimony of the appellant was corroborated by another witness who was in the employ of the appellant at the time and was present when the sales were made. The appellant guaranteed that the horses were serviceable and sound at the time they were delivered, and so far as witness knew they were sound. When appellee bought the last horse of appellant, the purchase price

was $250, and appellant agreed to let appellee have the same for $150 and appellee was perfectly satisfied.

The testimony of the appellee tended to sustain the allegation of his counterclaim. He stated that on the day of the first purchase he went away to St. Louis and was gone about a week, and upon his return one of the horses was dead. He notified the appellant to that effect, and appellant stated that he would get appellee another horse. The matter drifted along for some time, and appellant called the appellee over the telephone, stating that he had a horse that would match. Appellee then went to see appellant to get another horse and reminded appellant that he was to get appellee a horse to take back in the place of the one that had died. Whereupon the appellant replied that he had to have $150 on the horse that he then proposed to let appellee have. He stated that he would make appellee a special price of $150. Appellee had to have the horse, and appellant said he would guarantee it absolutely. Appellee then took the horse home, and it died in about a week. Appellee thought that he notified appellant, but did not know whether it was immediately after this last horse died or not. The appellant wrote the appellee when the note was due, and also called him over the telephone and asked why the note was not paid. Appellee told appellant he had guaranteed the horses, and that they were both dead, and that appellee was willing to lose one if appellant would lose the other. Appellant replied that appellee would have to pay the note. Appellee then testified that at the time of the sales appellant guaranteed the horses; that he told the appellee at the time he purchased the last horse that if it died it was his (appellant's) loss, and that it was upon these representations and guaranty that appellee took the horses. Another witness on behalf of the appellee testified, tending to corroborate the testimony of the appellee to the effect that the appellant at the time of the sale of the horses in February guaranteed the same to be absolutely sound.

The court instructed the jury in part as follows: "The plaintiff alleges, in rebuttal of the rights of the defendant to recover on the counterclaim, that, in the sale of the third horse, that in that transaction certain concessions of price amounting to the sum of $100 were allowed in the sale of this horse, by which all liability by reason of any differences of any liabilities that might arise in the sale of the two horses made on the 28th day of February should be eliminated; and that it was agreeable and acceptable and satisfactory to the defendant in this case. This the defendant denies, but claims that the sale was made to him in the direct course of business, and on a guaranteed price of $150. The question for you to decide here first is, what was the warranty as between these two parties? If you find from the evidence that plaintiff's contention is true, as to his warranty of the horses only, as to the soundness at the time of delivery, and found the horses sound when he delivered them to him, then the defendant must fail on his cross-complaint. If you find from the evidence that plaintiff warranted the horses as to not only the soundness of them at the time of delivery but a reasonable time thereafter, and the horses were not sound, and died from the result of a disease they were then infected with, then the defendant would be entitled to recover on his cross-complaint." The court told the jury that the burden was upon the appellee to establish the allegations of his cross-complaint.

The appellant objected generally to each of the instructions of the court, and he complains here that the instructions set out above assume that the plaintiff (appellant) admitted liability on the warranty of the first horse, when in fact the plaintiff (appellant) in his reply and in his testimony denies that there was any such warranty. No specific objection was made to the language of the instruction of which appellant here complains. The instruction, when considered as a whole, is not open to the objection which appellant urges. When the latter part of the instruction is read, it is clear that

the court did not intend by the language of the first part (to which appellant now objects) to assume that there was no issue before the jury as to the liability of the appellant on the alleged warranty of the soundness of the first horse. On the contrary, the instruction, fairly construed, submits to the jury the issue as to whether or not the appellant was liable on any warranty as to the soundness of the horses at the time of their delivery and for a reasonable time thereafter. If appellant conceived that the instruction was faulty in assuming a fact not raised by the pleadings or the testimony, he should have specifically directed the attention of the court to it. *Wright* v. *Midland Valley Ry. Co.*, 111 Ark. 196.

The appellant and his corroborating witness testified that the appellant did warrant that the horses were sound at the time of the delivery, and the appellee testified in effect that the appellant absolutely guaranteed the horse, and, if it died within a reasonable time, it was to be appellant's loss, and not appellee's. The jury might have found from the testimony that the horses in controversy were sold by the appellant and bought by the appellee in the ordinary course of business. The testimony of appellant himself showed that he was engaged in the business of buying and selling horses, and prided himself on the reputation he had acquired of "selling the best mules and horses in this country." The appellee's testimony tended to prove that he did not agree to pay appellant the sum of $250 as a purchase price of the last horse, and that he paid appellant $150 in cash, and that appellant allowed appellee $100 in settlement of his claim on the warranty of the horse that died. The appellee testified that such "was not the deal and trade." He paid appellant $150 as the straight-out purchase price; that appellant cut down the price on account of appellee's having purchased three horses.

But again, if the appellant conceived that there was nothing to warrant the submission of the issue as to

whether the last purchase was "made in the direct course of business," he should by specific objection have called the court's attention to this phraseology of the instruction. The pleadings raised the issue as to whether or not there was an oral warranty as to the soundness of the horses, and the testimony on behalf of the appellee sustaining this issue was introduced without objection. The appellant is, therefore, not in an attitude to complain because the court submitted such issue to the jury. Indeed, appellant himself adduced testimony and presented prayers for instructions on that issue, which prayers were modified and given. The appellant here, for the first time, urges the objection that the testimony and instructions of the court submitted the issue of an oral warranty contrary to the writing which evidenced the contract of sale between the parties. By not raising this issue in the court below, he must be held to have waived it, and the contention that an oral warranty has been engrafted on a written contract of sale cannot avail for a reversal of the judgment by this court. *Frauenthal* v. *Bridgeman*, 50 Ark. 348; 22 Corpus Juris, p. 1295.

There is no error in the rulings of the court. The judgment is therefore affirmed.

SMITH v. STATE.

Opinion delivered October 24, 1921.

SODOMY—SUFFICIENCY OF INDICTMENT.—An indictment for sodomy which charges that defendant, in the county and on a day named, unlawfully, feloniously and diabolically and by force, disregarding the laws of nature, in and upon one Dixie Smith, a female person, did make an assault upon and did then and there unlawfully, feloniously and diabolically carnally know and abuse her, etc., *held* sufficient.

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

David Partain and *G. L. Grant*, for appellant.

The indictment was bad, and the demurrer should have been sustained. 81 Pac. 680 (Cal.); 35 Cal. 675; 127 Cal. 99; 59 Pac. 836; 29 Texas 44; 94 Am. Dec. 251.

The motion in arrest of judgment should have been sustained.

The court erred in admitting evidence relative to the commission of the offense by using the tongue.

The prosecuting witness being herself guilty, it would be necessary for her to be corroborated before defendant could be convicted. 186 Pac. 388 (Cal.); 36 Cyc. 505 C; 111 Ark. 299.

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

Indictment charging sodomy is sufficient, without setting forth in detail the manner in which it was committed. 23 Standard Encyclopedia of Procedure, pp. 962, 963; 9 Standard Encyclopedia of Procedure, 1157; 8 R. C. L. sec. 364, p. 333.

There was no error in admitting testimony as to the manner in which the offense was committed. Sodomy may be committed by the mouth or otherwise than *per anus.* 71 S. E. 135; 136 Ga. 158; 46 S. E. 876-881, 882; 1 Wharton Cr. Law, (10th Ed.), sec. 579; Clark, Criminal Law (2nd. Ed.) 367.

There was no request of the court to give an instruction relative to whether or not the prosecuting witness was an accomplice of the defendant. 89 Ark. 300; 95 Ark. 593; 101 Ark. 513; 102 Ark. 588.

WOOD, J. The appellant was convicted under an indictment, which is as follows:

"The grand jury of Sebastian County, Greenwood District thereof, in the name and by the authority of the State of Arkansas, accuse the defendant, C. V. Smith, of the crime of sodomy, committed as follows, to-wit: The said defendant, in the county, district and State aforesaid, on the 13th day of March, 1921, unlawfully, feloniously and diabolically and by force, disregarding the laws of nature, in and upon one Dixie Smith, a fe-

male person, did make an assault upon and did then and there unlawfully, feloniously and diabolically carnally know and abuse her, the said Dixie Smith, against the peace and dignity of the State of Arkansas." Was the indictment sufficient?

Section 2746 of Crawford & Moses' Digest provides: "Every person convicted of sodomy, or buggery, shall be imprisoned in the penitentiary for a period not less than five nor more than twenty-one years."

In the absence of a more specific statutory definition as to the ingredients of the offense, we must look to the common law for such particulars.

Mr. Bishop says: "Not alone to protect the public morals, but for other reasons also, sodomy—called sometimes buggery, sometimes the offense against nature, and sometimes the horrible crime not fit to be named among Christians, being a carnal copulation by human beings with each other against nature, or with a beast—is, though committed in secret, highly criminal." 1 Bishop's Criminal Law, page 308, § 503; also 2 Bishop's Criminal Law, § 1191.

And in 8 R. C. L., § 364, page 333, it is said: "The crime of sodomy, broadly and comprehensively speaking, consists of unnatural sexual relations between persons of the same sex, or with beasts, or between persons of different sex, but in an unnatural manner." (Citing cases.)

The Supreme Court of New York, in *Lambertson* v. *People,* 5 Parker's Criminal Reports, page 200, held valid an indictment precisely similar, in essential averments, to the one now under review. The court said: "The words usual in indictments for the offense of which the defendant was convicted and which were omitted in this case are not words of this character. The indictment contains all the words of art required. * * * For all that the pleader should have stated in charging the offense is expressly alleged, or, by necessary implication, included in what is alleged, in the indictment in question."

"An indictment or information charging sodomy, or the infamous crime against nature, naming it, with a designated person or animal, is sufficient without setting forth in detail the manner in which it was committed. It is unnecessary to lay the *carnaliter cognovit* in the indictment, in order to specify whether defendant was agent or pathic. A charge substantially in the language of the statute is, as a rule, sufficient, even though the offense is not specifically defined by the statute. An indictment charging an attempt to commit the infamous crime against nature is sufficient without an averment of a particular act constituting the attempt." 23 Standard Encyclopedia of Procedure, page 962. Cases are cited in a note in support of the text.

We conclude therefore that the indictment is valid.

The only other question presented is whether or not the evidence is sufficient to sustain the verdict. The evidence is revolting in detail, and it could therefore serve no good purpose to set it forth. The prosecutrix was the wife of the appellant, and, while he stoutly denies the charge and vigorously contradicts her testimony, we nevertheless find that her testimony tends to support the verdict.

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

GOOCH v. STATE.

Opinion delivered October 24, 1921.

1. CONTINUANCE—SUFFICIENCY OF APPLICATION.—A motion for continuance on the ground that it was necessary for the defendant to secure depositions from witnesses residing elsewhere is insufficient where it fails to disclose the names of the witnesses or what their testimony would be.
2. CONTINUANCE—SUFFICIENCY OF APPLICATION.—A motion for continuance on the ground that an agreement had been reached between the attorney for the State and the attorney for the defendant to continue the case for the term was insufficient where it was not sworn to, and no proof was offered to show that the prosecuting attorney had agreed to continue the case.

3. CRIMINAL LAW—EVIDENCE—ALIBI.—Where the defendant sought to establish an alibi as a defense by proving that he was in jail in another State at the time of the alleged theft, proof that a person of another name was in such jail at the time alleged was insufficient, there being no testimony that defendant was known by the other name.

4. CRIMINAL LAW—EXCLUSION OF EVIDENCE—PREJUDICE.—Where the trial court excluded the answer of a witness, and the record does not show what the answer of the witness would have been, the question whether the court erred in such case will not be considered on appeal.

5. CRIMINAL LAW—NECESSITY OF MOTION FOR NEW TRIAL.—An exception to the exclusion of testimony or to the refusal to give an instruction will not be considered on appeal where it is not brought forward in the motion for a new trial.

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

E. M. Ditman, for appellant.

1. The denial of appellant's motion for a continuance, after a continuance had been agreed upon between the prosecuting attorney and counsel for the defendant, to enable the defendant to obtain depositions from witnesses in Tulsa, Oklahoma, and after counsel for the State and for the defendant appeared before the court and agreed to continue the cause until the next term, was a manifest abuse of discretion.

2. In indictments for larceny the allegation of ownership is material, and must be proved by sufficient evidence as alleged, or the conviction cannot stand. 91 Ark. 1; 99 *Id.* 121. Ray wholly failed to identify the car as his, and there was no other testimony identifying it as his. Ray's testimony shows he bought his car in 1920, whereas the bill of sale introduced by the State shows that the car in question was a 1921 model.

3. The refusal to grant the motion for new trial on account of new evidence, that of the city jailer at Tulsa, and of Mrs. Herring, which would have shown that defendant was in the Tulsa jail at the time the car was stolen, was manifest error.

4. The court erred in refusing to charge the jury at defendant's request that a bill of sale for goods is a valid defense, if such bill of sale was obtained in good faith, and for a valuable consideration. 96 Ark. 148; 28 *Id.* 126.

5. It was error to refuse to permit the prosecuting attorney to testify at the trial as to the agreement to continue the case.

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

1. There was no error in refusing the motion for continuance. There was no verification, no supporting affidavit, no showing of diligence, nor what the expected evidence would be,—in fact no compliance with the statute in any respect. C. & M. Dig. §§ 3130, 1270.

2. The evidence sustains the verdict.

3. The motion for new trial was properly refused. The affidavits of the city jailer of Tulsa and of Mrs. Herring in no wise sustain defendant's claim that he was in jail at Tulsa at the time the car was stolen. No showing that Herring and Gooch, the defendant, were the same person. Moreover the motion for new trial lacks the essentials which must be set out, where the ground therefor is newly discovered evidence. 2 Ark 33; 85 *Id.* 179.

4. Appellant did not in his motion for new trial assign as error the refusal to give instruction 7, the instruction with reference to a bill of sale, and he therefore cannot urge such refusal as error on appeal. 2 R. C. L. 100, § 72.

5. Appellant made no effort to show what the prosecuting attorney would have testified. He will not be heard now to complain. 88 Ark. 562; 87 *Id.* 123; 133 *Id.* 599.

HART, J. J. A. Gooch prosecutes this appeal to reverse a judgment of conviction against him for the crime of grand larceny charged to have been committed by stealing a Ford touring car in the city of Ft. Smith, Arkansas.

The first assignment of error is, that the trial court erred in refusing to grant the defendant's motion for a continuance. The court did not abuse its discretion in overruling the motion for a continuance. One ground of the motion is that it was necessary for the defendant to secure depositions from witnesses residing in Tulsa, Oklahoma. The application failed to disclose the names of the witnesses whose testimony was desired, or what their testimony would be. There was nothing in the motion showing that the expected evidence was material.

Another ground of the motion was that an agreement had been reached between the attorney for the State and the attorney for the defendant to continue the case until the October, 1921, term of the court. The motion was not sworn to as required by the statute, and no proof was offered to show that the prosecuting attorney had agreed to continue the case for the term. Motions for a continuance are largely in the discretion of the trial court, and this court will not overrule the discretion of the trial court unless there is in the record an application coming substantially within the statute. C. & M. Dig. §1270; *State Life Ins. Co.* v. *Ford,* 101 Ark. 513; and *Richie* v. *State,* 85 Ark. 413.

It is next earnestly insisted that the evidence is not sufficient to warrant the verdict. According to the evidence for the State, a Ford touring car, worth something over $500, was stolen from O. B. Ray, about the 20th of April, 1921, in Ft. Smith, Sebastian County, Ark. Ray had parked the car in the business district of Ft. Smith, and when he came for it sometime afterwards he found that it had been stolen. He went to Ft. Worth, Texas, and identified a car which had been taken from the possession of the defendant about the 18th day of May, 1921, as his car. The number which had originally been on the car had been chiseled off since it had been stolen, and another number had been substituted. Ray asked the defendant where he had gotten the car, and the defendant replied that he had swapped for it. Ray

was not sure at first that the car belonged to him, and told the defendant that he would give him some days to prove his innocence in the matter. When Ray returned to Ft. Smith, his wife asked him if he saw a certain mark on the wheel. Ray told her that he had not thought about the mark when he examined the car. He then remembered about the mark and then went back to Ft. Worth to examine the car again. He found the mark on the wheel, and identified the car by that and by its general appearance. The officer, who arrested the defendant, said that the latter told him that he had bought the car on the streets of Ft. Worth from a party unknown to him. The officer examined the car and found that the Ford engine number had been removed and another number had been put in its place. The officer had had about nine years' experience in matters of this kind, and knew that the number on the car had been tampered with. The Ford factory put figures on its engines that any one can tell are its figures if one studies them. The number on the car in question had been filed off and replaced by another number. The defendant said that he had paid $400 for the car. He was searched when arrested and twenty-five or thirty-five cents were found on him. The defendant exhibited a bill of sale for the car and the consideration recited in it was $475. The date of the transfer was the 16th day of May, 1921.

Another witness for the State testified that he saw a young man, who looked very much like the defendant, drive off a Ford roadster from the streets of Ft. Smith on the night that Ray's car was stolen. He saw the young man drive the car away from the place where it was parked on North Tenth Street in the city of Ft. Smith, on the night of the 20th of April, 1921. The witness stated further that he believed that he would be willing to go far enough to say that it was the defendant who drove the Ford roadster off on the occasion in question.

The defendant denied that he had stolen the car, and said that he was in jail at Tulsa, Oklahoma, on the night the car is charged to have been stolen. He testified that, as soon as he got out of jail, he went to Ft. Worth, Texas, and bought the car from an unknown man there. He denied that he had anything whatever to do with stealing the car.

The testimony on the part of the State was sufficient to warrant the jury in returning a verdict of guilty. According to the testimony of Ray, a Ford car belonging to him was stolen on the night of the 20th of April, 1921, from a street in Ft. Smith where he had parked it. About the 18th day of May, 1921, the car was found in the possession of the defendant at Ft. Worth, Texas. Ray identified the car by its general appearance and by a peculiar mark on the wheel. The defendant told Ray that he had swapped for the car. He told the officer, who arrested him, that he had bought it. He denied that he was in Ft. Smith at any time during the month of April, 1921. Other evidence showed that the engine number placed on the car by the manufacturer had been chiseled off and replaced by another.

Another witness testified that he saw him get into a Ford car in the city of Ft. Smith on the night of the 20th of April, 1921, and drive off. This evidence, if believed by the jury, warranted a verdict of guilty.

Another assignment of error is that the trial court erred in refusing to grant the defendant a new trial on account of newly discovered evidence. In support of his motion, the defendant filed what purports to be the deposition of the city jailer of Tulsa, Oklahoma, to the effect that E. W. Herring was placed in jail by him on April 10, 1921, and kept there until he was released on May 1, 1921. He also filed with it the deposition of Mrs. Alice Herring to the effect that she had a son by the name of E. W. Herring, twenty-two years of age, and that his left leg was shorter and smaller than his right leg, and that his foot was deformed; and that this

son was in jail in the city of Tulsa from April 10, 1921, to May 1, 1921. The court did not abuse its discretion in refusing to grant a new trial on account of the evidence referred to.

The defendant was a witness for himself, and testified that his name was J. A. Gooch. When arrested, he had what purported to be a bill of sale to the Ford car in question to himself, and in that he was named as J. A. Gooch. It is true that he had a deformed foot, and testified that he had been in jail in Tulsa, Oklahoma, in April 1921. This did not, however, identify him as being the E. W. Herring testified to by Mrs. Alice Herring and the jailer at Tulsa as being in the jail there. The defendant knew whether or not he and E. W. Herring were the same person. If so, he should have informed the court of that fact in order to show the materiality of the newly discovered evidence. If the defendant and E. W. Herring were not the same person, the offered evidence had no bearing whatever on the case. If E. W. Herring and J. A. Gooch were different persons, the fact that E. W. Herring was in jail in Tulsa, Oklahoma, during the month of April, 1921, would shed no light on the question of whether J. A. Gooch was also there at that time.

It is true the record shows that E. W. Herring had a deformed foot in like manner as the defendant; but, as above stated, the defendant knew whether or not E. W. Herring and himself were the same person, and should have informed the court of that fact, in order to show the materiality of the admitted evidence. Not having done so, the presumption is that they were not the same person, and the court did not abuse its discretion in refusing to grant the defendant a new trial on the ground of newly discovered evidence.

It is also insisted that the judgment should be reversed because the court refused to permit the prosecuting attorney to testify that he had made an agreement with counsel for the defendant to take depositions in the case in the city of Tulsa, Oklahoma. An objection to this question was sustained.

In the first place, it may be said that the record does not show what the answer of the witness would have been, and the question whether the court erred in such a case will not be considered on appeal, where it does not appear that any prejudice to the defendant resulted from the refusal to allow the witness to answer the questions. *Jackson* v. *State,* 101 Ark. 473, and *Jones* v. *State,* 101 Ark. 439.

Moreover, the action of the court in this respect was not made one of the grounds of the defendant's motion for a new trial. An exception to the admission of the testimony which is not brought forward in the motion for a new trial will not be considered on appeal. *Ince* v. *State,* 77 Ark. 418, and *Eno* v. *State,* 91 Ark. 441, and cases cited.

Finally, it is insisted that the court erred in not giving a certain instruction asked by the defendant. The action of the court in refusing to give the instruction was not made one of the defendant's grounds for a new trial. Alleged error in refusing to give an instruction is not before the court on appeal, if not brought in the motion for a new trial. *Stallings* v. *Bradshaw,* 137 Ark. 34.

After a careful examination of the record, we find no reversible error in it, and the judgment will be affirmed.

JONES v. PATTON.

Opinion delivered October 24, 1921.

1. JUDGMENT—CONCLUSIVENESS AGAINST THIRD PARTIES.—Where, in a controversy between the widow and the executor of a testator in the circuit court on appeal from the probate court, the court found that the widow had received more than her share of the property, and directed the executor to retain possession of and to rent the testator's land, and so pay the widow no further money until the heirs had received their proportion that had been paid to the widow, the heirs, not being parties, were not bound by such judgment.
2. EXECUTORS AND ADMINISTRATORS—RIGHT OF EXECUTOR TO POSSESSION OF LAND.—An executor, having no right to possession of his testator's land under the will, has no right to retain possession as against the heirs where the testator left no debts.

3. PARTITION—RIGHT OF PURCHASER TO POSSESSION.—As against an executor wrongfully in possession of his testator's land, a purchaser of the land at a sale in a partition suit brought by the testator's heirs is entitled to possession.

4. PARTITION—PARTIES.—An executor, having under the will no right to possession of the testator's land, is not a necessary party to a suit by the heirs for partition.

Appeal from Van Buren Chancery Court; *B. F. McMahan,* Chancellor; affirmed.

E. G. Mitchell, for appellant.

M. P. Hatchett, for appellee.

The powers of an executor are derived from the will. 34 Ark. 462; sec. 139, C. & M. Dig. Lands and tenements in the hands of an executor shall be assets for the payment of the debts of the testator (C. & M. Dig. § 152), but only when the personal property is insufficient to pay such debts. 114 Ark. 1. Unless for the payment of debts, the administrator cannot even take possession of the real property. 136 Ark. 95; 49 Ark. 87; 46 Ark. 373.

The heirs of Cruse, not being parties to the suit, are not bound by the judgment affecting the title to the lands in controversy. They are, however, indispensable parties where relief is asked which will affect the title. 34 Ark. 391; 41 Ark. 88.

A delay of 20 years is unreasonable, and the lands can not now be claimed by the administrator for the payment of debts. 37 Ark. 155; 46 Ark. 373; 47 Ark. 470. The chancery court had power to partition the lands. C. & M. Dig. § 8090; 83 Ark. 554.

If it be conceded that the judgment in partition was obtained by fraud on the part of the heirs, it is good on collateral attack. 71 Ark. 480; 107 Ark. 41.

SMITH, J. This cause was heard in the court below on an agreed statement of facts, the essential provisions of which are as follows: S. A. Cruse died testate in January, 1899, seized of the land in controversy. He left surviving a woman to whom he had been married in due form of law in this State, and several children by a

former wife. Letters testamentary issued to J. E. Scanlan, who had been named executor in the will. Scanlan collected the rents from the lands until 1904, and turned them over to Mary Cruse as widow. It is reflected in the agreed statement of facts that the executor suspected that Cruse had a living wife at the time of his marriage to Mary Cruse; but this suspicion proved to be groundless. A controversy arose between the widow and the executor over one of the settlements of the executor, and there was an appeal from the order and judgment of the probate court thereon. This appeal was heard at the September term, 1904, of the circuit court, when a judgment to the following effect was entered. The court found that the widow had received all personal property of the estate and the proceeds of all the rents up to and including the year 1903; that the widow owned a separate homestead at the time of the death of her husband, and was not therefore entitled to the rents on the homestead of her husband. The court directed the executor to retain possession of the land and to loan all rents thereafter collected until legal demand therefor was made upon him by the heirs of Cruse, and that "no further money shall be paid to the said widow until the heirs receive their proportion that has been paid to the widow, it being ordered by the court that the widow in this case is entitled only to her dower of one-third of the proceeds of said estate from the death of the said S. A. Cruse." The agreed statement of facts further recites that said lands were never needed to pay debts of the said S. A. Cruse, and that the said executor claims only the right to control said lands in so far as he may legally do so by virtue of his executorship and said order of the circuit court. That the lands were sold to S. K. Patton June 28, 1919, for partition under the decree of the court in a suit between the heirs of Cruse brought for that purpose. This partition suit was brought in the chancery court, the sale was regularly confirmed, and the commissioner, under the orders of the court, executed a

deed to Patton. It was further stipulated that the partition proceedings were regular, except that Scanlan was not made a party. The widow was dead at the time of the partition suit, and there was no widow or minor heirs in possession of said lands when partitioned, and the proceeds of the sale of said lands for partition were distributed to the heirs of S. A. Cruse, who were parties to the partition suit.

Patton brought this suit at law to recover the lands against the executor, who defended his right of possession by setting up the judgment of the circuit court set out in the agreed statement of facts. On the defendant's motion the cause was transferred to equity, where there was a decree in favor of plaintiff for the lands, from which is this appeal.

There was no decree for the rents, the cause being continued for the taking of testimony on that issue.

Appellant insists, for the reversal of the decree of the court below, that there was a final binding judgment of the circuit court rendered upon the appeal from the judgment of the probate court, which judgment he was and is bound to obey; yet he cannot obey that judgment if he is required to surrender possession as directed by the decree of the chancery court.

In answer to this contention, it may be said that there were no debts, and the law gave the executor no right to control the possession of the land. The executor was not a party to the partition proceeding; but there was no reason why he should have been. Neither under the will nor under the statute did the executor have a right to the possession of the land.

There was nothing in the judgment of the circuit court which could postpone the heirs from taking possession of the land. They were not parties to the litigation between the widow and the executor, and were therefore not bound by it. Moreover, we find nothing in the judgment itself which would have postponed the right of entry of the heirs. Evidently the names and addresses

of the heirs were not known when the circuit court rendered its judgment, and because of the lack of this knowledge the executor had paid to the widow all the rents and had delivered to her all the personal property. To make amends for this, the circuit court directed the executor to collect rents thereafter for the account of the heirs until a sum had been collected sufficient to equalize them under the law with the widow. The judgment recognized the rights of the heirs to the rents from the lands and the executor was ordered to retain possession for the purpose of collecting the rents for the benefit of these heirs.

Since then the widow has died, and the land was sold for partition in a suit brought by the heirs for that purpose; and we perceive no reason why the purchaser at that sale should not be awarded possession of the land. This was the decree of the court below, and it is therefore affirmed.

PREWITT v. STATE.

Opinion delivered October 24, 1921.

1. CRIMINAL LAW—FAILURE TO DEFINE REASONABLE DOUBT.—A defendant who has not asked a correct instruction defining reasonable doubt is in no position to ask for a reversal for a failure to define that term.

2. CRIMINAL LAW—CREDIBILITY OF WITNESS—INSTRUCTION.—An instruction in a criminal case that if the jury believe that any witness has wilfully sworn falsely to any material fact in the case they may reject his whole testimony, or may reject that which they find to be false and accept the remainder, is erroneous in so far as it authorizes the jury to reject any testimony which they believe to be true.

3. CRIMINAL LAW—EVIDENCE—CONVERSATION BETWEEN THIRD PERSONS.—Where the defendant in a prosecution for murder sought to establish the plea of self defense, and testified to the effect that an altercation grew out of a misunderstanding on deceased's part as to what the defendant had said to his wife about deceased's mother, which was repeated by his wife to deceased's

mother, it was competent to prove what defendant's wife said to deceased's mother as tending to corroborate defendant's testimony in regard to his conversation with deceased; no one else having heard the latter conversation.

4. CRIMINAL LAW—EVIDENCE — APPEARANCE OF ACCUSED.— Where, after the killing, defendant went to a physician's office and requested him to go to deceased's relief, testimony of the physician as to the defendant's appearance at that time was incompetent.

5. CRIMINAL LAW—EVIDENCE.—It was error in a murder case, to exclude testimony of a witness, who saw defendant immediately after the killing, that the expression on defendant's face at that time indicated no anger or resentment, but only fright and fear.

6. HOMICIDE—ARGUMENTATIVE INSTRUCTION—SINGLING OUT FACTS.— An instruction in a murder case that, in deciding the situation of the parties, the jury should take into account "their threats, if any, and their relative strength and power, because, in a contest between a powerful individual and a weaker, the necessity of taking life in self defense will be more apparent and easily discoverable," was properly refused as being argumentative and as singling out the particular circumstances named.

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

Arthur Johnson and *Williamson & Williamson,* for appellant.

1. The verdict is not supported by the evidence. This court is committed against the scintilla rule, and the rule calling for a refusal of a new trial where there was any evidence whatever, however weak, to support the verdict. 34 Ark. 632; 85 *Id.* 360-362; 97 *Id.* 156, 159; 56 *Id.* 8, 17; 49 *Id.* 364.

2. Any declaration of law which will permit a conviction of murder in the second degree without proof of malice is reversible error. 141 Ark. 57; 82 *Id.* 545. No killing can be murder unless done with malice. 35 Ark. 585; 141 *Id.* 63. It must be proved by substantial evidence and beyond a reasonable doubt. The State cannot rely upon inferences or conclusions to establish malice. 100 Ark. 354; 71 *Id.* 460; 49 *Id.* 364; 96 *Id.* 52; 119 *Id.* 85; 69 *Id.* 189; 76 *Id.* 515; 141 *Id.* 57; *Id.* 11, 12; 38 *Id.* 221. Implied malice can only arise where no considerable provocation appears, or where all the circumstances of the

killing manifest an abandoned and wicked disposition. C. & M. Dig. § 2341; 34 Ark. 640; 17 Cyc. 754; *Id.* 817; 100 Ark. 354. Express malice, see C. &. M. Dig. § 2340. Must be proved. 66 Ark. 646; 9 Am. & Eng. Enc. of L. 587; 1 Bishop, Crim. Law § 868; 1 McClain, Crim. Law § 340; 73 Ark. 315, 319; 110 *Id.* 402; 75 *Id.* 142; 74 *Id.* 262.

3. The absence of any motive for the killing save that of self defense alone, is a strong circumstance in favor of innocence which must be considered if justice is to be done. 93 Ark. 323; 109 *Id.* 391; 138 *Id.* 517; 71 *Id.* 117.

4. Proof of what the conversation was between appellant's wife and the mother of deceased, which led to the difficulty between appellant and deceased, was relevant and material to appellant's defense, and it was reversible error to exclude Mrs. Harding's testimony. 1 Wharton on Evidence, §§ 20, 21; 49 Ark. 542; 58*Id.* 233; 241; 71 *Id.* 112, 117; 43 *Id.* 99; 114 *Id.* 275; 109 *Id.* 391; 29 *Id.* 262; 14 *Id.* 555, 561; 43 *Id.* 99, 104.

It was likewise error to exclude the testimony of the witness Spyker concerning the appearance of the appellant immediately following the shooting, and also the testimony of Dr. Hutchinson on that point.

5. The court erred in excluding testimony offered to show the actual character and disposition of the deceased. Wigmore on Evidence, §§ 52, 53, 1908-1986; 3 *Id.* pp. 2627, 2629, 2630, 2644, 2645-46; 29 Ark. 262-263; 34 *Id.* 372; 47 *Id.* 187; 69 *Id.* 149; 72 *Id.* 439; 79 *Id.* 601; 82 *Id.* 597; 85 *Id.* 381; 108 *Id.* 129; 100 *Id.* 564; 115 *Id.* 501; 98 *Id.* 430; 95 *Id.* 241; *Carr* v. *State,* 147 Ark. 524; 132 *Id.* 504.

6. Instructions 1 and 3, to the effect that the burden was on the State to prove every material allegation of the indictment beyond a reasonable doubt, etc., undoubtedly stated the law, and should have been given. 109 Ark. 516. It constitutes reversible error to omit a definition of reasonable doubt, in charging the jury. 69 Ark. 449. Instructions 10 and 17 on the issue of self defense

is in accordance with the law as declared by this court in *Palmore* v. *State,* 29 Ark. 267. Also instruction 12, to the effect that if the fatal shot was fired under the belief, although a mistaken belief, that it was necessary in order to protect himself from serious bodily harm, defendant should be acquitted, was the law as declared by this court. 131 Ark. 538. Instruction 16 as to the purpose for which proof was admitted as to the reputation of deceased, should have been given. 85 Ark. 380.

7. The court erred in its charge to the jury in giving § 2374, C. & M. Digest, in part only. 85 Ark. 48; 13 *Id* 360; 54 *Id.* 588; 55 *Id.* 397.

Instructions on the subject of justifiable homicide which are not qualified so as to show the right of the accused to act upon the circumstances as they appeared to him, as a reasonable person, are erroneous. 67 Ark. 594, 599. Instruction No. 9, given by the court, amounted to a peremptory instruction to convict, the effect of it being to tell the jury to disregard all the evidence save the actual fact of the shooting. 85 Ark. 52; 67 *Id.* 599. Correct instructions given at appellant's request, did not cure the error. 55 Ark. 393; 57 *Id.* 203; 59 *Id.* 52; 85 *Id.* 52; *Id.* 214, 217; 93 *Id.* 564, 573.

8. No definition of murder in the second degree, with instruction thereon, was given. 38 Ark. 221.

On appeal from the order, *nunc pro tunc,* correcting the record:

The proceeding to correct the record was material to the appellant, and he was entitled to be present at the time in person. The court ought to have continued the hearing on the motion on account of his illness, and to proceed in his absence was reversible error. 143 Ark. 543; 103 *Id.* 4; 21 *Id.* 226; 35 *Id.* 118; *Id.* 588; 50 *Id.* 499.

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

1. The evidence supports the verdict. Malice, an essential element of murder in the second degree, may be either express or implied. C. & M. Digest, § 2340. Ac-

tual intent to take life is not a necessary element in the crime. 55 Ark. 556. There was no legal provocation for the killing. Abusive words will never justify taking human life. 70 Ark. 272; 77 *Id.* 464; 131 *Id.* 487. Motive for the killing was clearly shown.

2. Mrs. Harding's testimony was not admissible. The alleged conversation between Mrs. Hastings and appellant's wife was not in his presence, and it is not claimed that any threats by either deceased or appellant towards the other were communicated by that conversation.

3. The testimony as to appellant's appearance after the shooting was not competent.

4. There was no error in refusing to permit witnesses to testify as to their personal knowledge relative to the character of the deceased. Reputation was the proper inquiry, and whether it was known to the accused. 1 Greenleaf on Ev. § 14, p. 42; Underhill on Ev. §§ 324, 325; 1 Wharton, Crim. Ev., 246; 29 Ark. 248; 100 *Id.* 561; *Trotter* v. *State,* 148 Ark. 466.

5. We do not think the instructions 4 and 20, to the refusal of which the appellant objects, gave a clear definition of a reasonable doubt. The court is not required to instruct as to reasonable doubt on its own motion. 86 Ark. 456.

It is not obligatory upon the court to instruct upon the credibility of witnesses. 109 Ark. 383.

Instructions 10 and 17 were properly refused, as they omitted the necessary element that the accused must have thought the killing necessary in order to protect his own life or to save himself from great bodily harm. 93 Ark. 409. Moreover instruction 17 was not applicable to the testimony in the case. Appellant's objections to instructions were general. He should have made specific objections. 101 Ark. 95.

SMITH, J. Appellant was tried under an indictment charging him with the crime of murder in the first de-

gree, alleged to have been committed by shooting one Morris Hastings. He was convicted of murder in the second degree, and given a sentence of ten years in the penitentiary, and has appealed.

The facts in regard to the killing are substantially as follows: The appellant, who will hereinafter be referred to as the defendant, and Hastings, who will be referred to as the deceased, had always been on friendly terms and had frequently hunted together. Defendant was thirty-eight years old, and at the time of the killing was under treatment by a physician for hernia, and was a much smaller man than deceased, who was twenty-three years old, six feet tall, and of athletic build. The killing occurred about nine o'clock Thursday morning, February 17, 1921, in the little town of Grady, in Lincoln County, where both parties had lived for a number of years.

According to defendant, he had bought a bird dog the day before, in payment of which he had given a check on his local bank, and, not being certain that he had enough money in the bank to pay the check, he had gotten $25 from his bookkeeper that morning and was hurrying to reach the bank before the check was presented for payment. On the way to the bank and while near the depot, he met deceased and told him that he had just bought a stud pup, whereupon deceased said, "I have been looking for you, you son-of-a-bitch; you had better be thinking about your neck instead of dogs." Defendant asked, "What is the matter, Morris?" when, according to defendant, deceased "said something about what my wife told his mother." According to defendant, he assured deceased there was some mistake, that he had said nothing desrespectful about his mother, and that if she had taken offense at anything he had said he would be glad to explain or apologize. The deceased did not accept the explanation and grew more angry as the discussion progressed, and, after frequently cursing defendant in angry tones and with violent language, finally said, "I am going to stamp your God

damn guts through your eyes," and as he said this deceased lunged at defendant and put his hand in his pocket; whereupon defendant jumped back a step or two, drew his pistol and fired twice in rapid succession. Deceased fell between the rails of the railway track with a bullet through his heart, from which he died in a very short time.

Witnesses saw the parties standing together and knew that a violent quarrel was in progress, but the testimony shows that defendant made only one gesture—that with his hands—during the conversation; while deceased was seen to shake his finger in defendant's face. A witness named Bittinger, who saw the beginning of the occurrence, heard deceased apply indecent epithets and threats to defendant, and supposed defendant would slap deceased, but when defendant failed to resent what was said, witness passed on and left the parties to their discussion. During all this time defendant had in one hand the bills which he had started to deposit in the bank. Immediately upon firing the shots, defendant went to the bank and deposited his money. He then went directly to the office of Dr. Hutchinson, whom he requested to go at once to the relief of deceased, making the statement at the time that he had been compelled to shoot him.

Defendant undertook to account for the possession of the pistol by stating that his store had been recently burglarized and a large quantity of goods stolen. He admitted that he had a pistol in his store and another in his residence. There was testimony on the part of the State that deceased fell at the place where he had been standing, thus indicating that he had not advanced on defendant; and it was shown that deceased's clothing was not powder burned, and that he was unarmed when he was killed.

It was shown that the evening before the killing deceased was talking about what defendant had said about his mother, something defendant's wife had told

his mother. Deceased told Dr. Hutchinson that he had been compelled to call a doctor to see his mother on account of her excitement over what defendant's wife had told her, and that he would see defendant the following morning, and that if he did not apologize he would beat him up so that the whole town would know he had been whipped. Dr. Hutchinson undertook to pacify deceased, but met with no success in his attempt. Dr. Hutchinson communicated this fact to defendant that night, and defendant said he thought he could adjust the matter.

The court allowed defendant to state fully everything deceased said when they met in regard to the insulting language used by defendant towards deceased's mother, but excluded the testimony of a Mrs. Harding, who was present when the conversation between Mrs. Prewitt and Mrs. Hastings occurred and by whom they offered to prove what the conversation was. Mrs. Harding would have testified, had she been permitted to do so, that she heard the conversation, and that Mrs. Prewitt repeated to Mrs. Hastings a remark of defendant about how often he saw Mrs. Hastings on the street and how spry and youthful she appeared to be, and that the remark was a facetious compliment on Mrs. Hasting's youthful appearance, and that there was nothing in the remark susceptible of a construction derogatory to Mrs. Hastings' character. Upon reflection, Mrs. Hastings gave the remark a sinister interpretation, and became excited and ill over it, and repeated the remark to her son, giving, in its repetition, the interpretation she then placed on it.

Defendant was not allowed to show by Dr. Hutchinson what his personal appearance and demeanor was when he arrived at the doctor's office; and exceptions were saved to that ruling.

The State called L. P. Spyker as a witness, who testified that he was the station agent at Grady, and was about ten feet inside his office and about twenty feet from the scene of the killing when the firing commenced, and that he immediately went to a window

looking out on the scene of the killing. He described the relative situation of the parties, and, on his cross-examination, was asked this question: "When you looked out and saw Mr. Prewitt standing there, please describe to the jury what kind of expression was on his face at that time, as best you can." The prosecuting attorney objected to the question as being a mere conclusion of the witness, and the court sustained the objection and remarked at the time that "nothing could be determined from that testimony." Counsel for defendant then said: "We want to show from the expression on his face that there was no anger shown on his face at that time." The court remarked: "I don't think that is admissible, and it will be denied." Thereupon counsel stated that "the defendant offers to prove by this witness, on cross-examination, that there was nothing whatever in the expression on the face of the defendant immediately after the shooting to indicate the slighest anger or resentment, and that defendant's expression at that time reflected only fright and fear."

Numerous errors are assigned for the reversal of the judgment, the first of which is that the jury was not sworn to try the cause. After the adjournment of the term at which the trial was had the record was amended by a *nunc pro tunc* order to show that the jury was sworn; and it is now insisted that this order was made upon an insufficient showing. As the judgment is to be reversed, we do not stop to consider this question.

A great many other assignments of error are discussed in the briefs relating to alleged errors in the admission and exclusion of testimony and in giving and refusing instructions. We dispose of these questions generally by saying that we find no error in the record now before us except as hereinafter pointed out.

It does appear that the court gave no instruction defining reasonable doubt, although, in instruction num-

bered 7 given by the court, the jury was told to acquit the defendant if, upon the whole case, they had a reasonable doubt of his guilt.

The defendant asked instructions numbered 4 and 20 on the subject of reasonable doubt; but neither of those instructions undertoook to define that term, and, the court having told the jury to acquit if there was a reasonable doubt of defendant's guilt, no error was committed in refusing to multiply instructions to that effect. The defendant should have asked a correct instruction defining reasonable doubt, in which event only would he be in position to ask a reversal for a failure to define that term. *Lackey* v. *State,* 67 Ark. 416, 421; *Mabry* v. *State,* 80 Ark. 345, 349; *Hobbs* v. *State,* 86 Ark. 360, 361; *Horton* v. *Jackson,* 87 Ark. 528, 530; *Bradshaw* v. *State,* 95 Ark. 409, 411; *Holmes* v. *Bluff City Lumber Co.,* 97 Ark. 180, 188; *Hays* v. *State,* 129 Ark. 325; *Gunter* v. *Williams,* 137 Ark. 530, 537.

It also appears that the court gave no instruction on the question of the credibility of the witnesses. The defendant did ask an instruction on this subject, but the one asked was not a correct declaration of the law. It concluded with the statement that "and, if you believe that any witness has wilfully given false testimony as to any material fact in the case, you may reject the entire testimony of said witness, or you may reject that which you find to be false and accept the remainder."

In the case of *Taylor* v. *State,* 82 Ark. 540, an in struction of identical purport and of similar phraseology was reviewed and condemned by the court. Mr. Justice RIDDICK, speaking for the court, said: "This in effect tells the jury that if a witness has wilfully sworn falsely to any material fact, the jury may disregard his entire testimony, even though they should believe part of it to be true. But the jury has no right to reject any material testimony they may believe to be true. If a witness testified to a wilful falsehood in

reference to a material fact, the jury should take that into consideration in weighing other portions of his testimony; and, if they conclude that none of his testimony is worthy of belief, they should reject it; but they have no right to reject any truthful statement simply because the witness has told a falsehood about something else. It may happen that a witness, because he wishes to shield himself or for some other reason, may fail to tell the whole truth, may be guilty of a wilful misrepresentation as to his own interest in or connection with the crime, and yet, as to other facts throwing light on the crime, he may give evidence of the greatest importance. The jury, after being satisfied that he has sworn falsely as to any material matter, should scrutinize his other statements with great caution before accepting them as true; but, when once they become convinced that he has told the truth, they should not reject it. * * *" Other later cases to the same effect are: *Griffin* v. *State,* 141 Ark. 46; *Johnson* v. *State,* 127 Ark. 524; *Johnson* v. *State,* 120 Ark. 202.

As the defendant did not ask a correct instruction on this subject, he is in no position to complain of the failure of the court to charge on that subject.

We are of the opinion that the court should have admitted the testimony of Mrs. Harding. The conversation which she would have detailed occurred only eighteen hours before the killing and was, without question, the cause of it; and we are of the opinion that the jury should have been allowed to know what the trouble was all about. It is true neither defendant nor deceased was then present, but the conversation was repeated to deceased by his mother shortly after it occurred, and the truth in regard to it as each party understood it may have probative value in ascertaining the motives of the respective parties. Testimony went to the jury, and properly so, that deceased was much incensed at what he thought was an offensive statement reflecting on his mother's virtue. Defendant was permitted to testify that he told deceased he had cast no

reflection on his mother, that he would be glad to explain and to apologize if deceased desired an apology. There was no witness to corroborate defendant, as no one heard the conversation between him and deceased.

The jury may not have believed defendant's statement. Had they believed his statement, it would have tended to show that defendant had no desire to kill deceased nor motive for doing so.

In the very recent case of *Avey* v. *State,* 149 Ark. 642, we held that proof of a motive for the killing was not a collateral matter. We there said: "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." See also *Appleton* v. *State,* 61 Ark. 590; *Carr* v. *State,* 43 Ark. 99; *Scott* v. *State,* 109 Ark. 391; *Phillips* v. *State,* 62 Ark. 119; *Carroll* v. *State,* 45 Ark. 539; *Chapline* v. *State,* 79 Ark. 444.

Had the testimony of Mrs. Harding been admitted, the testimony of defendant concerning his explanation to deceased and his attempt to conciliate him might have appeared more probable to the jury, and, if believed, might have led the jury to the conclusion that defendant was doing everything in his power, consistent with his safety, to avoid the difficulty. At least it had probative value tending to that effect.

We think the court properly excluded the testimony of Dr. Hutchinson about defendant's appearance when he appeared at the office of the witness. Too much time had intervened between the time of the killing and that conversation. Opportunity had then been afforded for reflection and dissimulation.

But we think the testimony of Spyker should have been admitted. He was asked about defendant's ap-

pearance at the very time of the killing—while the smoking pistol was in defendant's hand. The witness should have been allowed to describe to the jury the expression on the face of defendant at the time as best he could as he was requested to do in the question which the court refused to permit him to answer.

In Vol. 3 of Wigmore on Evidence, § 1974, that learned writer says: "The Opinion rule is often sought to be applied to forbid compendious descriptions of the *appearances externally indicating internal states*—for example, whether a person 'looked' sick or sad or angry. There is no more reason in this class of cases than in the preceding one for the Opinion rule to exclude the testimony. The exclusionary rulings perhaps here abound particularly in absurdities and quibbles—highly fit for cynical amusement, were not the names of Justice and Truth involved in their consideration. One may wonder how long these solemn farces will be perpetuated in our law.

In the note to the text quoted many cases are cited in which various courts have held that it is competent for a witness to describe one's personal appearance, as, for instance, that he was angry, sick, excited, etc. See also Vol. 2 Wharton's Criminal Evidence, § 922; 3 Chamberlayne, Modern Law of Evidence, § 1934; 16 C. J. p. 753, § 1545; *Miller* v. *State,* 94 Ark. 538; *Decker* v. *State,* 85 Ark. 64; *Fort* v. *State,* 52 Ark. 180.

The defendant's right to kill depended on the necessity so to do as the circumstances then appeared to him, and proper instructions on that subject were given to the jury. Did the defendant believe that the threats of great bodily harm which had just been angrily made were about to be executed? Was the threatened injury impending and about to fall? And did defendant fire the fatal shots because of this fear and to save himself from the threatened fate; or did he fire the shots maliciously? In the one case, he had the right to fire; in

the other, he did not. We think the testimony as to defendant's appearance at the time he fired the shots has probative value in passing on that question.

Appellant requested an instruction numbered 17, which told the jury that, in deciding the true situation of the parties at the time their respective feelings and intentions, the jury should take into account "their threats, if any, and their relative strength and power, because, in a contest between a powerful individual and a weaker, the necessity of taking life in self-defense will be more apparent and easily discoverable." It is very earnestly insisted that this instruction was proper, and that prejudicial error was committed in refusing it.

We do not agree with counsel in this contention. The instruction was argumentative in form. It was, of course, proper for the jury to consider the circumstances there recited; but this court has said in many cases that it is not good practice to single out and specially direct the attention of the jury to particular circumstances, thereby appearing to emphasize the circumstances named. The jury should be directed to consider all the circumstances established by the testimony, and this was fully and clearly done in a number of instructions given by the court, several of which were given at the request of the defendant.

We think there is no other error in the record; but the judgment must be reversed for the errors indicated. It is so ordered.

McCULLOCH, C. J., (dissenting). It is undisputed that up to the fatal encounter between appellant and Hastings they had been good friends, and that the cause of the ill feeling between them which resulted in the encounter was the anger and resentment aroused in the mind of Hastings by the report that appellant had made an insulting remark about his mother. It appears from the testimony that this report was unfounded, and that appellant had not, in fact, made an insulting remark about Mrs. Hastings. It is also undisputed that Hastings

was the aggressor in the encounter, but there is a conflict as to the extent of his conduct, whether it was sufficient to justify appellant in firing the fatal shot.

It was competent to show, and the court permitted the greatest latitude in proving, all of the previous conduct of both parties, for the purpose of showing their state of mind. Appellant was allowed to show that he had not made any unfavorable remark about Mrs. Hastings, and he was allowed to show by the statements and alleged threats of Hastings that the latter was intensely angry and resentful about what he had heard was appellant's remark about his mother. I am wholly unable to understand upon what theory it is admissible to prove the conversation between Mrs. Prewitt and Mrs. Hastings. It was a conversation wholly between third parties, neither of the parties to the fatal encounter being present, and it could only have presented a matter entirely collateral to the main issue. It had no bearing whatever on the conduct, or motives, or state of mind, of either of the parties to the encounter. Moreover, it could have had no beneficial effect upon plaintiff's defense, unless the jury had seen fit to try the case on the issue as to whether or not Mrs. Prewitt or Mrs. Hastings was at fault. It was unimportant whether the report to Hastings about what appellant had said about his mother was true or false, for, as before stated, it is undisputed that Hastings had been aroused to a high pitch of anger toward appellant by the report of the remark made by Prewitt about Mrs. Hastings. It could not have helped appellant's case to show that Hastings' anger was without cause, and it certainly was not competent to show this by a conversation between two other persons, even though these persons were the mother and wife, respectively, of Hastings and appellant.

The other ground of the reversal is that the court erred in refusing to allow appellant to prove by witness Spyker that immediately after the shooting the witness saw nothing about appellant to "indicate the slightest anger or resentment, and that the defendant's expression

at that time reflected only fright and fear." It seems to me that this is merely an attempt to prove a conclusion by the witness, and not to prove facts upon which the jury might draw an inference or conclusion. The authorities holding such testimony as competent put it on the ground that the witness should be permitted to state his conclusion after stating the facts upon which the conclusion is based; that is to say, where the witness states that the face of the party was flushed or pallid or that the eye-balls were inflamed, or any other fact that would indicate the state of mind of the party, the witness may then state his own conclusion, based upon those facts, but it seems to me to be a mere conclusion for a witness, without giving the facts, to state what the expression on the face of the party indicated. Anger and fright are emotions which generally manifest themselves on the human countenance by physical evidences, about which any witness may testify, but it is purely an opinion or conclusion for a witness to state that these emotions existed without stating the facts constituting physical evidence of those emotions. I believe that none of the authorities, save Professor Wigmore, go to the extent that the court has gone in this case, and the intemperate statement of that learned author in the opinion of the majority is, to my mind, not at all convincing.

But, even if this testimony of witness Spyker was competent, it only tended to show the mental attitude of appellant at the time of the shooting, and could only have been considered by the jury in determining whether or not there was malice. The jury found on sufficient evidence and upon proper instructions that the killing was unnecessary, and if this testimony had been admitted, and the jury had accepted it as a true indication of appellant's feelings at the time, it could only have had a ligitimate tendency to alter the verdict with respect to the degree of the homicide. It seems to me, therefore, that, even if the testimony is competent, it ought only to call for a reduction of the degree of the judgment to a

conviction for manslaughter. I am unwilling, however, to say that the court erred in either particular in its ruling on the admissibility of testimony.

GUERIN v. STATE.

Opinion delivered October 24, 1921.

1. INTOXICATING LIQUORS—MANUFACTURE.—Evidence held to sustain a conviction of manufacturing or being interested in the manufacture of intoxicating liquors.
2. INTOXICATING LIQUORS—INSTRUCTION AS TO BEING INTERESTED IN MANUFACTURE.— An objection to an instruction as inaptly defining what it would take to constitute an interest in the manufacture of intoxicating liquors should be specific.
3. CRIMINAL LAW—PROOF OF VENUE.—Proof of the venue of a crime alleged to have been committed within seven miles east of Hot Springs, the county seat of Garland County, was sufficient, as the court knows judicially that the east boundary of that county is more than seven miles from Hot Springs.
4. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—It was not error to refuse a new trial for newly discovered evidence that was either incompetent as being hearsay, or was cumulative.

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

Geo. P. Whittington, for appellant.

The evidence was not sufficient to warrant the submission of the question of guilt or innocence to the jury. 57 Ark. 461.

The venue of the crime was not proved. 54 Ark. 371.

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

The proof was amply sufficient to sustain the verdict. 135 Ark. 117; 136 Ark. 385.

Instruction No. 6 was correct, it was based on section 6160, C. & M. Digest.

The evidence was sufficient to prove the venue. 62 Ark. 497; 68 Ark. 336; 73 Ark. 484.

The motion for new trial on account of newly discovered evidence was properly overruled; sufficient diligence not being shown. 85 Ark. 33; 103 Ark. 589; 133 Ark. 169; 78 Ark. 324; 130 Ark. 365.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Garland Circuit Court for the crime of manufacturing and being interested in the manufacture of intoxicating liquors, and as a punishment therefor was adjudged to serve a term of one year in the State penitentiary. An appeal from the judgment has been duly prosecuted to this court, and a reversal is sought upon the grounds:

First: That the evidence is insufficient to support the verdict;

Second: That instruction No. 6 given by the court was erroneous;

Third: That the venue was not established; and,

Fourth: That a new trial should have been granted upon newly discovered evidence.

(1). Appellant owned a farm known as the Guerin place, not over seven miles east of Hot Springs, and perhaps nearer. He also owned a place on the Pleasant Valley road, known as the Nichols place, back of the Essex Park.

Appellant and his wife separated and he went to Atlantic City to visit his sister. He returned to Hot Springs in October, 1920, and while there conveyed the farm on Pleasant Valley road to his wife. He testified that he also gave her the Guerin place, east of Hot Springs, but made no deed to her. Mrs. Guerin and her children resided a part of the time on the mountain place and a part of the time on the Guerin place, and when there had a young man and a Miss Baldwin living with her. These young people subsequently married and remained most of the time on the Guerin place. Appellant and his father resided on the Nichols place. While at or near Hot Springs, appellant made occasional visits

to the Guerin place to see his family. He made another trip to Atlantic City, returning about December 21st. From that time until his arrest, in January, 1921, he visited his family about once a week, going late in the afternoon and returning about 9 o'clock p. m. on these occasions. He contributed towards the support of his family during the time. Near about Christmas Roy Stegall, Federal prohibition enforcement officer, searched the Guerin place, found a small amount of red whiskey, but no still, on the farm. Appellant was there at the time. On Sunday towards the latter part of January the sheriff and his deputies, with Stegall, made a search of the Guerin house and farm and found a still in a hollow or ravine 150 yards from, and in sight of, the house. They found ten or fifteen gallons of whiskey and a dozen barrels of mash at the still; also several hundred pounds of sugar, kegs, etc., in the barn, about one hundred yards from the still. Mrs. Guerin and family left the house soon after the arrival of the officers, presumably in company with Will Smith.

Mrs. Harris, who lived across the creek from the Guerin place, testified that two or three weeks before the seizure and confiscation of the still twelve of her pigs had died from drinking the slop and eating the mash at the still; that she sent appellant word by Will Smith that the pigs had died from the effect of drinking the slop and eating the mash, and demanded pay for them; that after insistence on her part appellant paid her $8 for them and promised to put a fence around the still.

On the night of January 22nd appellant and a companion by the name of Wilcox were arrested in Hot Springs, and a bottle of whiskey and two hundred pounds of sugar were found in appellant's car.

Appellant testified that when he made the second trip to Atlantic City Will Smith applied to him to rent the Guerin place; that he told him to see his wife, and supposed that she had rented it to him. He denied any

knowledge of or connection with the still or the manufacturing of liquor. He admitted making frequent visits to see his family, and that he was in the barn at times, but denied seeing any kegs or sugar in the barn. He testified that he paid Mrs. Harris for the pigs to keep down any trouble, and told Will Smith that if whiskey was being manufactured on the place he wanted him to quit, that he didn't care to get into trouble. He further testified that the whiskey and sugar found in his automobile on the night of his arrest belonged to Wilcox; that he had loaned the automobile to Wilcox several hours before his arrest.

We think there is substantial evidence in this record tending to show that appellant was manufacturing or interested in the manufacture of intoxicating liquors on the Guerin farm.

(2) Instruction No. 6, of which appellant complains, is as follows:

"There is an additional instruction that I overlooked instructing the jury; that part of the indictment that charges him with being interested in the manufacture and making or being interested in it, if he was interested in it, that is if it was on his property and he knew it or got some profit out of it he would be guilty under the indictment, regardless of whether he was present at the time of its being made; but, on the other hand, if the place was in charge of his wife and he had nothing to do with it and had no interest in the manufacture of whiskey, then he would not be guilty."

This instruction was given orally, and inaptly explained "an interest in the manufacture of whiskey." But when read as a whole it is quite clear that the court meant to tell the jury that before appellant could be convicted the evidence must show that he was interested in the manufacture of whiskey. The latter part of the instruction makes it clear, because the jury are distinctly

told that "if the place was in charge of his wife, and he had nothing to do with it, and had no interest in the manufacture of whiskey, then he would not be guilty.'

The inapt expression defining what it would take to constitute an interest in the manufacture of intoxicating liquor is the character of error that should have been taken advantage of by a specific objection. If the court's attention had been called to the fact that the meaning of the instruction was beclouded by the language used, it is quite apparent the court would have corrected the language so as to clearly express the intended meaning. Prejudicial error was not committed in giving the instruction.

(3). The venue was sufficiently established by the evidence. The farm was located by the witnesses as from four and a half to seven miles east of Hot Springs. The jury were warranted therefore in finding that the farm upon which the still was located was within seven miles of Hot Springs, and the court will take judicial knowledge that the east line of Garland county is more than seven miles from Hot Springs. *Forehand* v. *State*, 53 Ark. 46.

(4). Newly discovered evidence was made the ground of appellant's motion for a new trial, and the evidence, in substance, was that appellant was seldom seen upon the Guerin farm from October, 1920, until the time of his arrest in January; that the still was set on the farm in October, 1920, during the absence of appellant in the east; that Will Smith had stated to the witnesses named in the motion that the still belonged to him, and that appellant was not interested in it or in the manufacture of intoxicating liquors.

We cannot agree with learned counsel that it clearly appears that the trial court abused its discretion in refusing to grant a new trial on account of newly discovered evidence. The facts set out in the motion for a new trial consist largely in hearsay evidence of Will Smith.

This evidence was inadmissible had a new trial been granted. The other facts set out in the motion are largely cumulative.

No error appearing, the judgment is affirmed.

SKILES v. STATE.

Opinion delivered October 31, 1921.

1. ANIMALS—STOCK LAW DISTRICT—ELECTION.—Where a special act creating a stock-law district provided that the act should not be in force until approved by a majority of the electors, and that the election commissioners should file with the county clerk a certificate showing the result of the election, in a prosecution for permitting stock to run at large in violation of the act, it was not competent for defendant to prove by parol evidence that the election was not held as prescribed by the statute, as the certificate of the election commissioners is the best evidence of the adoption of the law by the voter, and is not subject to collateral attack.
2. ANIMALS—STOCK LAW DISTRICT—BOUNDARY FENCE.—Under special act No. 657 of 1919 creating a stock-law district in Randolph County, the operation of the district is not made to depend upon the construction of a boundary fence.
3. EVIDENCE—JUDICIAL NOTICE OF SPECIAL STATUTE.—The adoption of the terms of a special statute by an election of the people is a matter of which the court takes judicial notice.
4. EVIDENCE—JUDICIAL NOTICE OF MUNICIPAL ORDINANCE.—The court cannot take judicial notice of the ordinances of a municipal corporation.

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

Pope & Bowers, for appellant.

Act 657 of 1919 is not in effect, and the penal provisions thereof could not be violated for two reasons: first, the fence required to be built before the taking effect of the act has never been built; second, no election was ever held as provided by sec. 44 of the act.

The burden was on the State to allege and prove that the fence had been built. A proviso in the enacting clause of a statute must be negatived in the indictment,

and such negative allegation sustained by proof. 77 Ark. 139. Must also be construed in connection with the section of which it is made a part. Lewis & Sutherland Stat. Con., sec. 352. The provision in this case, relating to the building of the fence, means that the creation of the district is held in abeyance until such fence is built.

The order of the county judge calling the election and the election itself were void. Such order is subject to collateral attack. 143 Ark. 465.

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

Appellant is in no position to complain that certain documents desired by him were not produced in evidence, since his motion therefor was never presented to the court, and no ruling had thereon; neither was it assigned as error in the motion for new trial. 138 Ark. 613. The record proper and what purports to be the bill of exceptions are in conflict. Where such conflict appears the presumption is in favor of the record. 1 Ark. 349; 9 Ark. 133; 17 Ark. 332; 23 Ark. 131; 24 Ark. 499; 83 Ark. 517; 108 Ark. 191. Defendant did not offer any testimoney in his behalf, and a verdict was properly directed against him.

McCULLOCH, C. J. The appellant was indicted and convicted of the offense of allowing stock to run at large in a stock-law district in Randolph County.

The statute creating the district (Act No. 657 of the Session of 1919) is a special act creating the district in Randolph County, but providing that the district shall not be put into operation unless approved by a majority of the legal voters in the territory at a special election ordered by the county court upon petition of 125 voters in the district. The statute provides that, if a petition signed by 125 electors of the district be filed in the office of the county clerk of Randolph County, the judge shall call an election in the district to determine whether "a majority of the legal voters in said district are in favor of this act," and that the

election shall be held at the place or places in the district named in the petition and on the date fixed in the order made by the county judge. The details and method of conducting the election are prescribed in the statute. The election commissioners of the county are required to canvass the returns, and, within ten days after the election, to file in the office of the county clerk a certificate showing the result of the election. It is provided that "if a majority of the legal voters of said district voting in said election shall vote for no fence or stock law, as hereinbefore set forth, then this act shall be in force."

It was conceded by appellant in the trial of the case that he had permitted his stock to run at large inside the boundaries of the district, but he sought to prove, as a defense, that the election was not held as prescribed by the statute, and that the boundary fence had not been constructed in accordance with the terms of the statute. The court excluded the offered testimony, and, nothing else being offered in defense, the court charged the jury peremptorily to return a verdict finding appellant guilty.

The court was correct in refusing to admit testimony concerning the election to be held putting the law into operation in the territory mentioned. The certificate of the election commissioners is the best evidence of the adoption of the law by the voters of the district, and, if regular on its face, is not subject to collateral attack in a prosecution for violation of the terms of the statute. Any other view of the matter would prevent an enforcement of the law, and the guilt or innocence of the accused would depend upon the degree of proof as to the validity of the election. A criminal prosecution under the statute could, in other words, be converted into a contest over the election. There was no offer to prove that no certificate was filed by the election commissioners nor that the election, according to the certificate, was irregular.

The other defense offered by appellant is equally untenable. The statute does not make the operation of the district depend, as a condition precedent, upon the construction of a boundary fence. In this respect the statute is quite different from the general statute authorizing the creation of stock-law districts, as construed by this court in *Hill* v. *Gibson,* 107 Ark. 130. The general statute provides that it shall be unlawful for any owner to permit stock to run at large in a district formed thereunder "after any fencing district has been enclosed by a good and lawful fence." Crawford & Moses' Digest, § 4684. The special statute now under consideration contains no such condition, but it declares unconditionally that it shall be unlawful for any owner of stock or cattle to permit such animals to run at large beyond the limits of his own land in the district, and that any person, firm or corporation who shall knowingly permit any such animal to run at large within said territory shall be guilty of a misdemeanor.

Our conclusion is therefore that there was no valid defense offered, and, according to the undisputed evidence, appellant was guilty of a violation of the statute.

The court was correct in its ruling, and the judgment is affirmed.

OPINION ON REHEARING.

McCULLOCH, C. J. Counsel for appellant contend now, as they did on the original hearing here, that the judgment is unsupported by sufficient testimony, in that the State failed to prove that the stock law enacted by the Legislature had been put into operation by vote of the people as prescribed by that statute. We overlooked that contention and failed to discuss it in the original opinion.

Our conclusion on this subject is that the adoption of the terms of the statute by an election of the people is a matter of which the court should take notice judicially. It is a law in operation in a locality which was within the jurisdiction of the court, and the court should take cognizance of it without the necessity of it being

brought to the attention of the court by proof. *Kansas City Southern Ry. Co.* v. *State,* 90 Ark. 343; *Cazort* v. *State,* 130 Ark. 453. This is unlike the ordinances of a municipal coropration, which must be proved, and of which the court cannot take judicial notice. *Strickland* v. *Little Rock,* 68 Ark. 483.

Such ordinances are enacted by sub-agencies of government, and are unlike the adoption or putting into operation of enactments of the Legislature. The matter of the adoption of the statute was one of public record, of which all persons were compelled to take notice, and the court should likewise know judicially whether or not the statute is in operation. Of course, the trial court could, and we assume that it did, make its knowledge real by an ascertainment through proper channels whether or not there had been an election. It is not contended here that there is no certificate of the election commissioners on file evidencing the fact that an election was held. This view of the matter gives certainty to the enforcement of the law, and does not leave to mere chance the proof of the facts to show whether or not the law is in force. The court should determine from its knowledge acquired from taking notice of the certificate of the election commissioners that there had been an election, and that the district was *de facto* in operation. On the other hand, it was the right of the accused to show to the court that no such certificate had been filed. But, as we stated in the original opinion, it was not proper to permit the appellant to attack the validity of the district collaterally.

For these reasons rehearing will be denied.

HICKEY v. STATE.

Opinion delivered October 31, 1921.

BAIL—RELIEF FROM FORFEITURE.—Under Crawford & Moses' Digest § 2974, providing that "if, before judgment is entered against the bail, the defendant is surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in

the bail bond," a discretion is lodged in the trial court to determine whether or not the sum mentioned in the bond, or any part thereof, shall be remitted, and, while this discretion should be fairly exercised upon the facts of a given case, the mere fact that the principal in the bond has been surrendered into custody by the bail does not entitle the bail, as matter of right, to a remission of the penalty of the bond.

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

James Seaborn Holt, for appellant.

The court erred in refusing to set aside the forfeiture on the bond, and thereby abused its discretion granted under the act. Crawford & Moses' Digest, Sec. 2974; 3 Amer. & Eng. Ency. of Law, (2nd Ed.) p. 724; 176 Fed. 672; 20 A. & E. Ann. Cas. p. 1255; 9 A. & E. Ency. of Law, (2nd Ed.) p. 473.

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

The decision of the trial court upon the facts is, in legal effect, the equivalent of the verdict of a jury and is not subject to review upon this appeal. 48 S. E. 604; 59 Southern 718.

The forfeiture of the bail bond was strictly within the provisions of the statute; and there was no abuse of discretion. Crawford & Moses' Digest, § 2974; 25 Ark. 315; 3 R. C. L. p. 65.

The power of the court to declare a forfeiture is not questioned.

McCULLOCH, C. J. Appellant became bail for one Hagan, who was under indictment in the circuit court of Sebastian County, Fort Smith District, on the charge of felony, and when the principal failed to appear the court declared a forfeiture on the bond. Thereafter, during the term, the principal was taken into custody through the efforts of appellant and lodged in jail awaiting trial under the indictment.

This is a summary proceeding on the bond, and appellant pleads the right of discharge from liability on the ground that he was not at fault and was instru-

mental in returning the principal to custody after the forfeiture. A statute on this subject reads as follows:

"If, before judgment is entered against the bail, the defendant is surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail-bond." Crawford & Moses' Digest, § 2974.

The answer of appellant contains the following:

"That, immediately upon learning that the defendant, Verda Hagan, had not appeared at the date set for her trial, this defendant immediately endeavored to locate her, and finally did locate her in the city of San Antonio, in the State of Texas, at a cost to himself of $175, and returned her from said city to the city of Fort Smith, where he delivered and surrendered her to the jailer of Sebastian County for the Fort Smith District, on the 31st day of March, 1920, and during the same term of court at which her case was set for trial, and that she has remained in jail ever since said date; that two terms of this court have intervened since March, 1920, and that no trial has been had."

The matter was heard by the court upon the pleadings, without introduction of testimony, and the court proceeded to render judgment against appellant for the amount of the bond.

It is conceded that under the statute it is a matter of discretion with the court whether or not the penalty of the bond, or any part thereof, shall be remitted, but the contention is that, on the facts recited in the answer, the refusal of the court to remit any part of the bond constituted an abuse of discretion. The statute plainly lodges a discretion in the trial court to determine whether or not the sum mentioned in the bond, or any part thereof, shall be remitted, and this discretion should be fairly exercised upon the facts of a given case. The mere fact that the principal in the bond has been surrendered into custody by the bail does not entitle the bail, as a matter of right, to a remission of the penalty of the bond. 6 Corpus Juris 1053.

The substance of the answer is nothing more than that appellant, at his own expense, returned the principal in the bond to custody, and, as before stated, this does not necessarily call for a remission of the penalty. It devolved upon appellant to establish facts to justify favorable action in the exercise of the discretion authorized by the statute, and, even if the facts set forth in the answer are accepted as true, that does not necessarily show an abuse of the court's discretion.

The judgment is affirmed.

PAYNE v. ORTON.

Opinion delivered October 31, 1921.

1. APPEAL AND ERROR—HARMLESS ERROR.—In an action against a carrier for injury to goods in shipment, an instruction that the carrier was an insurer against all losses or damage "except those which arise from an act of God, of the public enemy, of public authority, of the shipper, or from the inherent nature of the goods shipped" is not prejudicial to the carrier, though there was no evidence tending to show that any loss or damage was due to the act of a public enemy or of public authority.
2. CARRIERS—BURDEN OF PROVING EXEMPTIONS.—The burden of proving exemptions of a carrier from liability as an insurer of freight rests upon the carrier claiming the same.
3. CARRIERS—RECITAL OF BILL OF LADING.— A recital in a bill of lading that certain cotton was received in apparent good order is *prima facie* evidence of that fact.
4. CARRIERS—DAMAGE TO FREIGHT—LIABILITY.—An instruction to the effect that if the cotton alleged to have been injured in transit was in bad condition when received by the carrier, and if that bad condition was the cause of the damaged condition when the cotton arrived at destination, the jury should find for defendant, was properly modified by inserting the word "sole" before "cause", as the carrier is liable where the damage results from negligence of the carrier concurring with the act of God or some other cause.
5. CARRIERS—NEGLIGENCE—ISSUES.—It was not error to refuse to permit a carrier, when sued for negligence in the transportation of cotton, to prove that unusual conditions existed which made it impossible to ship the cotton expeditiously where no such issue was raised by the pleadings.

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

June R. Morrell and *James B. McDonough,* for appellant.

1. The verdict was not sustained by sufficient evidence. That rain of ten hours' duration on each of four days during which the cotton stood, ends of bales up, on the platform of the carrier, was not sufficient to rot it within twelve days, is a matter of which the courts should take judicial knowledge. 125 S. W. (Ark.) 428; 185 S. W. 768; 17 Am. & Eng. Enc. of L. 909-911; 16 Cyc. 854 *et seq.*; 3 Ark. 66.

That cotton ginned damp and baled damp will heat and become damaged is a physical fact of which the courts will take judicial knowledge. 35 Ark. 169; 37 *Id.* 219; 60 *Id.* 409.

2. Instruction 2 erred in leaving to the jury to determine the meaning of public authority.

3. The evidence does not warrant the placing of the burden of proof as to damage from the inherent nature of the cotton upon the defendant, and an instruction on the burden of proof having that effect was erroneous. Fed. Cas. No. 2691, 3 Cliff. 184; 1 Michie on Carriers, § 1003 and cases cited.

4. A bill of lading which recited that a shipment of cotton was received in apparent good order does not warrant an instruction fixing definite liability upon the carrier as having received the cotton in good order. 1 Michie on Carriers, § 1058 and cases cited.

5. The court erred in modifying instruction 4 requested by the defendant so as to make it read "sole" cause, etc., and in refusing to give instruction 5 requested. The jury ought to have been told that plaintiff could not recover damage resulting from the wet, rotted or damaged condition in which it was received. 1 Michie on Carriers, § 1003.

Johnson & Shaver, for appellee.

1. In this case the evidence will be given its strongest probative force in favor of the plaintiff, the appellee, and in testing its legal sufficiency that view of the evidence will be taken which is most favorable to the plaintiff. 123 Ark. 619; 192 S. W. (Ark.) 182; 110 Ark. 182; 113 *Id.* 471; 194 S. W. (Ark.) 497; 129 Ark. 280; 131 *Id.* 593.

2. Instruction 2 is a correct declaration of law approved by this court. 117 Ark. 455; 100 *Id.* 269; 99 *Id.* 363; 118 *Id.* 398, 400.

3. A common carrier is an insurer of goods received by it for immediate shipment, and the burden of proof is upon it to show that loss or damage thereto was not caused by its negligence. 26 Ark. 3; 34 *Id.* 383; 35 *Id.* 402; 39 *Id.* 148; 50 *Id.* 397; 100 *Id.* 37; 47 *Id.* 97; 69 *Id.* 150; 85 *Id.* 562. Its liability as an insurer begins when it receives the goods for immediate shipment. 60 Ark. 333; 79 *Id.* 353; 89 *Id.* 178; 60 *Id.* 465; 46 *Id.* 222; 77 *Id.* 482; 111 *Id.* 550.

McCULLOCH, C. J. The plaintiff, H. H. Orton, shipped 75 bales of cotton from Ashdown to Texarkana over the line of the Kansas City Southern Railway Company, then operated under government control. The cotton was delivered to the agent at Ashdown by plaintiff in separate lots on January 3 and January 5, 1920, and bills of lading were issued to plaintiff by the agent on those days. The first lot of cotton reached Texarkana and was delivered to the consignee on January 8, 1920, in undamaged condition, but the remainder of the cotton did not reach Texarkana until January 17 and 19, respectively, and, according to the evidence adduced in the case, it was, when delivered to the consignee, in damaged condition.

It is alleged in the complaint, and the testimony tends to show, that the cotton was in good condition when delivered to the carrier, and that the condition was so noted on the bills of lading, but that when it reached destination it was wet, partly rotted and had

to be "reconditioned," according to the terms used by the witnesses, which means that the damaged portion had to be picked off and the cotton re-baled. According to the evidence of plaintiff, there was a total loss of 4247 pounds, of the market value of 26 1-2 cents per pound, making a total damage of $1125.45.

The answer of defendant contains a denial of all the allegations of the complaint with respect to negligence on the part of those operating the railroad, and also with respect to the damaged condition of the cotton, and alleges that the damage was due entirely to the condition the cotton was in at the time it was delivered to the carrier.

The trial resulted in a verdict in favor of plaintiff for the sum above named, as shown by plaintiff's testimony. It is earnestly contended that the evidence is insufficient to sustain the verdict.

There is a conflict in the evidence, but it is sufficient to sustain the verdict either way as to the extent of the damage to the cotton and the cause of the damage, whether resulting entirely from the condition it was in when delivered to the carrier or from the delay in transportation. The plaintiff himself and other witnesses testified that the cotton was not wet nor in bad condition otherwise when delivered to the carrier, but that when received at Texarkana it was wet at the ends and rotten, and that a considerable quantity, aggregating 4247 pounds, had to be picked off and the remainder re-baled. There was also testimony showing that the cotton was shipped in open cars and was exposed to rain and snow which fell in unusual quantities and continuously during the period of delay in transportation. On the other hand, witnesses introduced by defendant testified that the cotton was very wet and in damaged condition when it was delivered to the carrier. There being a conflict in the testimony on all of the issues, we are not at liberty to disturb the findings of the jury.

The court gave instructions requested by plaintiff, and also gave a number of instructions requested by defendant, but refused to give three of the instructions requested by defendant, one of which was a peremptory instruction. The court also modified some of the instructions requested by defendant. Assignments of error are made in regard to each of the rulings of the court in giving, refusing or modifying instructions. The second instruction requested by plaintiff reads as follows:

"You are instructed that the defendant is in effect an insurer of all goods received for immediate shipment against all losses, or damage, except those which arise from an act of God, of the public enemy, of public authority, of the shipper, or from the inherent nature of the goods shipped, and the burden of proving that the loss or damage arose from any of these excepted acts rests upon the defendant, and said defendant is still liable for any loss or damage arising from any of said excepted acts if the loss or damage would not have occurred if there had been no negligence on the part of the defendant or his employees."

The criticism now made of this instruction is that it should have defined the term "public authority" or omitted the term from the instruction, and that likewise the reference to "the public enemy" should have been omitted for the reason that there was no evidence tending to show that the damage resulted from that cause. It is not possible that prejudice resulted to defendant from the inclusion of these terms in the instruction or in the failure of the court to give a definition of what constituted "public authority." It is true that there is no evidence at all that the damage resulted either by the act of the public enemy or any public or governmental authority, but, inasmuch as these conditions would only have operated as an exoneration of defendant from liability, there was no error in referring to them in the instruction, even though there was no evidence to justify it. These conditions were stated as

exemptions or exonerations from liability, and, if the terms had any controlling influence with the jury, they could only have been for the benefit of the defendant in submitting to the jury a defense about which there was no testimony.

Again, it is urged that this instruction is erroneous in placing on defendant the burden of proof as to the exemptions from liability. It is a correct statement of law to say that the burden of proving exemptions from liability as an insurer rests upon the carrier claiming such exemptions. *St. L. I. M. & S. Ry. Co.* v. *Pape,* 100 Ark. 269; *J. L. C. & E. R. R. Co.* v. *Dunavant,* 117 Ark. 455. But the contention is that the instruction placed the burden on defendant to prove that the cotton was in undamaged condition at the time it was delivered to the carrier. Such is not, however, the effect of the instruction, for it deals with the question of loss or damage occurring while the cotton was in the possession of the carrier for transportation, and correctly states the law to be that the burden is upon the carrier to prove that such damage resulted from some of the causes mentioned which exempted it from liability.

Instruction No. 3, given at the request of plaintiff, told the jury that the notation on the bill of lading showing that the cotton was received in apparent good order made out a *prima facie* case, and this was correct.

The court gave instruction No. 4, requested by defendant, after modifying it by inserting the italicized word "*sole,*" and the same reads as follows:

"If the cotton in question at the time of its delivery to the carrier was damp or otherwise in bad condition, and if that bad or wet condition, if it existed at the time, was due to excessive rains or moisture, or other causes, or to exposure before same was delivered to the carrier, and if that bad condition of the cotton, if it existed, was the *sole* cause of the damaged condition of the cotton when it arrived at Texarkana, if it was then in a bad condition, then the jury must find for the defendant."

A similar modification was made in another instruction requested by defendant on the same subject. It is contended that the modification was erroneous, but we are of the opinion that it brought the instruction into line with decisions of this court in regard to the liability of a carrier in case of concurring causes of damage; that is to say, where the damage results from negligence of the carrier concurring with the act of God or some other cause, it makes the carrier liable. *C. R. I. & P. Ry. Co.* v. *Miles,* 92 Ark. 573; *St. L. I. M. & S. Ry. Co.* v. *Hudgins Produce Co.,* 118 Ark. 398.

Finally, it is urged that the court erred in refusing to give instruction No. 5, which reads as follows:

"If the cotton was in a damp, wet or bad condition, as suggested in the last instruction, at the time of its delivery to the carrier, and if that bad or damp or wet condition, if it existed, in part caused the damage to the cotton, and if the carrier failed to transport said cotton to Texarkana within a reasonable time, and if such failure also in part caused damage to said cotton, and if the carrier at the time of receiving the cotton did not have knowledge of the wet or damaged condition of the cotton, if it existed, then it will be the duty of the jury to ascertain the amount of damage, if any, due to the wet or damaged condition of the cotton at the time of its delivery to the carrier, and also the amount of damages, if any, due to the failure of the carrier properly to transport and deliver the cotton. If the jury find that the total damage is, therefore, due in part to the nature and condition of the cotton, and if the same was wet or damaged at the time of its delivery, and if that wet or damaged condition was unknown to the carrier, and if, in addition to that damage, if such existed, the carrier by failure to transport also caused damage, the jury will ascertain the amount of damage due to each cause, and in that event will find for the plaintiff only the damage done to the cotton arising from the fault of the carrier, if said fault existed."

This instruction, it is argued here, has the effect of expressing the view that the carrier was not liable for damage resulting prior to its acceptance of the cotton for shipment. Such, however, is not the necessary meaning of the instruction, and the court was correct in refusing to give it. The instruction was in line with No. 4, requested by defendant, and they were both erroneous as requested. The court corrected the error in No. 4 by a modification, but did not attempt to correct No. 5. It was manifestly too long and involved in its statement to be corrected merely by the insertion of a word, as was done in No. 4. The instruction is open to the objection that it could be, and doubtless would have been, understood to mean that if the damage was caused by the negligence of the defendant concurring with the condition the cotton was in at that time, there would be no liability on the part of the carrier. As we have already seen from the authorities cited, such is not the law. If the defendant had asked an instruction telling the jury that the carrier was not liable for damage to the cotton occurring before delivery to the carrier, but was only liable for damage which resulted after delivery, such instruction should have been given, but that is not the effect of instruction No. 5; at least it was susceptible to another interpretation, and the court properly refused to give it.

It is also contended that the court erred in refusing to permit defendant to prove that unusual conditions existed which made it impossible to procure cars for more expeditious transportation of cotton. The pleadings raised no such issue, even if it be held that a carrier can, after accepting a commodity for immediate transportation and issuing a bill of lading, excuse itself on such a plea.

There are other assignments of error which we do not deem to be of sufficient importance to discuss.

The judgment is affirmed.

AMERICAN INSURANCE UNION v. MANES.

Opinion delivered October 31, 1921.

1. INSURANCE—WAGER CONTRACT.—An agreement between plaintiff and his father-in-law that the latter should become a member of a benefit society, and that plaintiff should be the beneficiary and should pay the assessments and all other expenses necessary to obtain and maintain the membership, is a wager contract and void in its inception.
2. INSURANCE—WAGER CONTRACT.—Only the insurer can take advantage of the ineligibility of the beneficiary in a benefit certificate or policy of insurance.
3. INSURANCE—WAGER CONTRACT—WHO MAY QUESTION.—Though a benefit certificate was void as being a wager contract, and not binding upon the society which issued it, a society which subsequently entered into a contract to perform the original contract of insurance cannot question its validity.

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

Basil Baker, for appellant.

The application upon which the policy was issued was a wagering contract, and against public policy. 98 Ark. 52; 222 S. W. 1067; 132 Ark. 458; 119 Ark. 498.

The act of 1917, p. 2091, does not apply to mutual benefit associations not having a lodge system; neither is it retroactive. *Mutual Benefit Association* v. *Keller,* 148 Ark. 361; 226 S. W. 525; 2 Joyce on Insurance, Secs. 1066 to 1071, inclusive; 104 U. S. 775-778, with Rose's notes thereon; Ann. Cas. 1917C, p. 155; 14 R. C. L. 905 to 919, inclusive.

W. F. Reeves, for appellee.

The application upon which the policy was issued was written by the agent of the company, with full knowledge of the relationship, and the company is now estopped from denying liability. 64 Hun (N. Y.) 534; 19 N. Y. Suppl. 432; 25 Cyc. 711-712 and cases cited.

The appellant having, without question, assumed the contract in all particulars, and by rider thereto at-

tached, to carry out the provisions thereof, is bound by the original contract. 28 S. C. 431; 6 S. E. 286; 32 Ark. 346; 36 Ark. 248; 42 Ark. 500.

McCULLOCH, C. J. This is an action instituted on a life insurance policy or certificate of membership issued by the Home Protective Association, a domestic corporation, to Jesse Welborn, the plaintiff, J. H. Manes, being named as beneficiary. Welborn lived nearly four years after the policy was issued, and all of the premiums or assessments were paid up to his death. During his lifetime the defendant, American Insurance Union, a foreign corporation, entered into a contract with the Home Protective Association, whereby it took over all the memberships of the latter association and assumed its obligations to its members, and issued to Welborn a certificate in the form of a rider to the original benefit certificate, certifying that the obligations of the original insurer were assumed by defendant.

Defendant denies liability on the ground that plaintiff, the specified beneficiary in the certificate, had no insurable interest in the life of Welborn, and that the certificate constituted a wager contract and unenforceable on grounds of public policy. This is the sole defense offered in the case. According to the evidence adduced, plaintiff was the son-in-law of Welborn at the time the latter became a member of the Home Protective Association, and was not dependent in anywise on Welborn. Welborn was solicited to join the association, and declined, but stated that he was willing for any of his children to take a policy on his life. Thereupon the agent of the Home Protective Association procured an application from Welborn, and plaintiff was present and signed Welborn's name to the application. It was agreed in advance between Welborn and plaintiff that the latter should pay the assessments and all other expenses necessary to obtain and maintain the membership. This evidence establishes the fact that the contract was, under our decisions, a wager contract, and

void in its inception. *Langford* v. *National Life & Acc. Ins. Co.,* 116 Ark. 527; *Cotton* v. *Mutual Aid Union,* 132 Ark. 458; *Home Mutual Benefit Assn.* v. *Keller,* 148 Ark. 361.

In *Langford* v. *National Life & Acc. Ins. Co., supra,* we held that "a person may take out insurance on his own life, and name any one that he pleases as beneficiary," even though the beneficiary has no insurable interest at the time the policy is taken out; but that "an agreement between the assured and the beneficiary, having no insurable interest, to the effect that the latter shall pay the premiums, and that the policy shall be taken out in his name, * * * * and shall be assigned to the person having no insurable interest," will render the policy void as a wagering contract.

The above declaration of the law is applicable to the present policy in its inception.

However, it has been ruled by this court, in line with the weight of authority, that only the insurer can take advantage of the ineligibility of the beneficiary in such a certificate or policy of insurance. *Johnson* v. *Knights of Honor,* 53 Ark. 255; *Longer* v. *Carter,* 102 Ark. 72. Defendant is not the original insurer, but entered into a contract to perform the original contract of insurance entered into between Welborn and the Home Protective Association. This contract contains some of the elements of one for re-insurance, in which both the original beneficiary and the insurer are interested. The contract with defendant is, in other words, one to pay the amount of the policy according to its terms, and constitutes an absolute obligation on the part of defendant which precludes inquiry as to the validity of the original contract, which the original insurer alone could question. There is great diversity among the authorities on the various phases of liability or nonliability under a wager contract, and no case similar to the one at bar has been brought to our attention; but we think that the rule that only the insurer can take advantage of the fact that the policy is invalid applies

with full force to the defendant in the present case, who, having obligated itself to perform the contract, is in no attitude to take advantage of a defense which the original insurer alone could have asserted.

For these reasons the judgment was correct upon the undisputed facts, and the same will be affirmed. It is so ordered.

HART, J., (concurring). I do not think that this case is controlled by the rule announced in *Home Mutual Benefit Association* v. *Keller,* 148 Ark. 361. There the policy did not show the relationship between the parties. Here it does. The difference is vital.

In the application Jesse Welborn, the insured, designated the relationship between himself and J. H. Manes, the beneficiary, as father-in-law and son-in-law. The company conducted a co-operative mutual life insurance business. By his application Welborn made a proposition to become a member of the association upon the distinct understanding that J. H. Manes should receive the insurance in the event of his death while a member. The application is a part of the policy. The association received the proposition, and it was accepted by the directors of the association, and a certificate of membership was given to Welborn. Thereafter the association accepted the dues for a period of more than four years until the death of Welborn.

There was no misrepresentation and no mistake. This is no case of waiver by an unauthorized agent. It was the act of the association itself, and it ought to be estopped to say that the acceptance was upon a condition utterly at variance with the proposition for membership, and one which would render the certificate wholly inoperative as regards the express intent of the insured. The association had a right to make a contract with Welborn to become a member and to designate his son-in-law as the beneficiary, provided the latter had a pecuniary interest or expectation in his life. *Home Mutual Benefit Association* v. *Keller, supra.*

The act of the association under the circumstances must be held to have constituted an agreement between itself and Welborn that Manes had an insurable interest in his life and, having received his dues under this presumption, it cannot now introduce proof to show that Manes had no insurable interest in his life. *Smith* v. *People's Mutual Benefit Society,* 64 Hun. (N. Y.) 534.

Therefore, I concur in the judgment.

WILLIAMS *v.* WILLIAMS.

Opinion delivered October 31, 1921.

DIVORCE AND ALIMONY—REPEAL OF STATUTE.—Crawford & Moses' Dig. §§ 3508-3510, relating to the allowance of alimony, were not expressly or impliedly repealed by § 3511, *Id.*, relating to the division of property upon granting divorces.

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

Pope & Bowers, for appellant.

The chancery court was without jurisdiction to order the payment of alimony. Sec. 3511, C. & M. Digest, repealed prior provisions in our law in regard to alimony (sec. 9, chap. 51, Revised Statutes), so far as they affected the rights of the wife who obtained the divorce. 64 Ark. 519; 87 Ark. 175; 101 Ark. 522; 121 Ark. 64. In 88 Ark. 302, the court recognized the Revised Statutes as still being in force to grant alimony to the wife where the husband was granted the divorce, but the decision is not out of harmony with the above-cited cases, wherein the wife was granted the divorce.

Where the wife has sufficient means to support herself in the rank of life to which she belongs, no alimony can be allowed. 29 N. E. 826.

Boyce & Mack, for appellee.

The alimony allowed to appellee was very reasonable under the circumstances. 19 C. J. pars. 578, 590, 594.

Secs. 3508, 3509, 3510, C. & M. Digest, were not repealed by sec. 3511, as they do not relate to the same subject, and the authorities cited by appellant do not sustain his case.

Alimony is incidental to a suit for divorce, and properly allowed by the courts. Ann. Cas. 1912 A, p. 893; 88 Ark. 307; 1 R. C. L. "Alimony," Sec. 15.

WOOD, J. This action was instituted by the appellee against the appellant for divorce and permanent alimony. The appellee alleged that she and the appellant were married in August, 1901, and lived together until February, 1919; that during their married life she had been a faithful and dutiful wife and gave the appellant no cause to desert her; that in February, 1919, appellant, without reasonable cause, wilfully deserted the appellee and has continuously absented himself from her since that time, and had not since his desertion contributed anything toward her support and maintenance. She prayed for absolute divorce, costs and attorney's fees, and a reasonable amount of alimony.

The appellant answered, and did not deny the allegations of the complaint as to the desertion and only contested the appellee's claim for alimony. He set out in detail allegations as to his own financial condition and hers, and prayed that the complaint be dismissed, in so far as it asked judgment against him for the support and maintenance of the appellee.

Upon the testimony adduced, the court made the following findings: "That the plaintiff and defendant were lawfully married in Wright County, Missouri, on the 25th day of August, 1901, and lived together as husband and wife continuously thereafter until on or about the 16th day of February, 1919; that on the 16th day of February, 1919, the defendant wilfully and without cause deserted the plaintiff, and ever since said time has continuously and without cause absented himself from the plaintiff and has not lived with her as his wife The court further finds that the plaintiff and the de-

fendants moved to Jackson County, Arkansas, in the month of September, 1913, and lived together and resided continuously in said county until February, 1919, at which time the defendant left Jackson County and went to Randolph County, Arkansas, and that the plaintiff has resided continuously in Jackson County from September, 1913, up to the filing of this suit. The court further finds that the defendant is without property, but from the time he deserted plaintiff he was receiving a salary of $150 per month up to October, 1920, as a bookkeeper, at which time his salary was reduced to $100 per month; that the defendant has formerly for a number of years received a salary as public school superintendent and a teacher in the public schools of from $2,000 to $2,400 per year; that he is forty years of age; physically strong and in good health and is capable of earning a salary of $1,800 to $2,400 per year, The court further finds that the plaintiff is without property except the sum of $800 in money which she has saved and a library consisting mostly of school text books of the value of about $500; that she is now earning a salary of $85 per month as a teacher in the public schools during the school term; that she is now past the age of forty-one years and has probably attained her greatest earning capacity, and that the defendant should contribute something from his earnings for her support and maintenance."

Upon these findings the court entered a decree of absolute divorce in favor of the appellee and awarding her alimony in the sum of $30 to be paid monthly. From that part of the decree awarding the appellee alimony is this appeal.

As to whether the appellant was financially able to pay to the appellee the sum of $30 per month for her support and maintenance was purely a question of fact. It could serve no useful purpose to set out and discuss the testimony bearing upon this issue in detail. We are convinced that the finding of the chancellor on this

issue of fact is not clearly against the preponderance of the evidence. On the contrary, the preponderance of the evidence sustains the finding of the chancery court.

Counsel for appellant contend that §§ 3508, 3509, and 3510 of Crawford & Moses' Digest have been repealed by the act of March 28, 1893, p. 176 (§ 3511, C. & M. Digest). Sections 3508, 3509 and 3510 contain provisions relating to the allowance of alimony, the care and maintenance of children, and the enforcement of the court's decree for alimony. These sections are taken from the Revised Statutes. The act of March 28, 1893, relates to an entirely different subject, and, although it contains a clause repealing all laws and parts of laws in conflict therewith, the sections above quoted concerning alimony are not in conflict with it. The act of March 28, 1893, relates entirely to the disposition and division of property upon a final judgment of absolute divorce granted to the husband or the wife, as the case may be. The act provides that where the divorce is granted the wife "the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife * * * * shall be entitled to one-third of the husband's personal property absolutely, and one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific proprety, both real and personal, to which such wife is entitled." The concluding portion of the act relates to the sale and disposition of the property according to their respective rights under the act where the property is not susceptible of division and providing that the decree of the court making the division shall be a bar to all claims of the wife to dower in the lands and personalty of the husband.

In *Beene* v. *Beene,* 64 Ark, 518, we said: "As to the question of alimony, that is settled by statute, sec. 2517 of Sand. & Hill's Digest, (corresponding to sec. 3511 of Crawford & Moses' Digest). The Legislature seems to have enacted the statute (act of March 28, 1893) for the purpose of putting an end to all after-con troversies as to dower rights and to settle the matter when a divorce is granted dissolving the marital bonds. Hence the allowance to the divorced wife who is entitled at all, is exactly or substantially the same as would be her dower interest in case of the death of her husband; that is to say, one-third for life of all real estate of which he has been seized of an estate of inheritance at any time during the marriage, except such as she has relinquished in due form." While the court in the opinion in the above case spoke of the amount allowed the divorced wife as "alimony," it is obvious from the division that was made of the property by the decree of the lower court that that court designated the amounts allowed as "alimony," and this court inaptly referred to the allowance made as "alimony." But it was clearly not the purpose of the court, by the use of the above language, to intimate that the sections of the revised statutes concerning alimony above had been repealed by the act of March 28, 1893, (sec 2517, S & H Digest; sec. 3511, C. & M. Digest). No such issue was raised in the above case, and hence could not have been properly decided. Nor do the later cases of *Shirey* v. *Shirey,* 87 Ark. 175; *Leonard* v. *Leonard,* 101 Ark. 522; *Crosser* v. *Crosser,* 121 Ark. 64, (upon which appellant also relies) hold that the provisions of the law concerning alimony have been repealed by the act of March 28, 1893. On the contrary, our decisions show that there is a clear distinction between alimony and the statutory disposition of property made to the respective spouses under the provisions of the act of March 28, 1893. (sec. 3511, C. & M. Digest). See *Pryor* v. *Pryor,* 88 Ark. 307.

The latter act was not intended as a substitute, nor does it expressly repeal the former provisions concerning alimony, nor are these provisions impliedly repealed by anything contained in the act of March 28, 1893. "Alimony is not a sum of money, nor a specific proportion of the husband's estate, given absolutely to the wife, but it is a continuous allotment of sums payable at regular intervals for her support from year to year. And it continues only during the joint lives of the parties, or when there is a divorce from the bonds of matrimony until the wife marries again." *Brown* v. *Brown,* 38 Ark. 328; *Kurtz* v. *Kurtz,* 38 Ark. 119; *Pryor* v. *Pryor, supra.* That part of the act of March 28, 1893, under review here, has reference peculiarly to an allowance made in favor of a divorced wife out of the property of her husband in lieu of the unrelinquished dower rights that she would have had therein in case of the death of her husband, the divorce in her favor in such cases being treated as tantamount to his death. In other words, he is civilly dead to her when, without any fault on her part, he wilfully deserts and abandons her for the statutory period, and she, by reason of such abandonment, has obtained a decree of absolute divorce. See *Beene* v. *Beene, supra.* In such cases the act of March 28, 1893 (sec. 3511, C. & M. Dig.) makes provision for her in the nature of dower, giving her an interest absolute in the personal property of her husband and one-third for life of all the lands of which he was seized of an estate of inheritance during the marriage. In determining whether or not the court shall grant alimony, and, if so, the amount thereof, the court may take into consideration the property that comes to the wife by the above statutory provision, but it was never the design of the lawmakers, in the enactment of the above statute, to do away with the ancient and inherent common-law jurisdiction of chancery courts over the subject of alimony, which jurisdiction is brought into our Revised Statutes and is preserved and digested under the sections, *supra,* concerning alimony. *Reynolds*

v. *Reynolds,* 68 W. Va. 15; Ann. Cases, 1912-A 889; *Stewart* v. *Stewart,* 27 W. Va. 167; *Carr* v. *Carr,* 22 Gratt. (Va.) 168; 1 R. C. L. 877-878, Secs. 15, 16, 17.

The decree is in all things correct, and it is therefore affirmed.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN *v.* SIMMONS.

Opinion delivered October 31, 1921.

1. INSURANCE—ESTOPPEL TO DENY PAYMENT OF ASSESSMENT.—Where the local secretary of a benefit society adopted the plan of collecting the monthly benefit assessments from its members by drawing a draft each month for such assessments and neglected one month to draw a draft for that month's assessment until the following month, when he remitted to the society the full amount due for both months, the society will be estopped to claim a forfeiture for nonpayment of such monthly dues, though the constitution and by-laws of the society provide that the policy shall be void unless such installments shall be paid on or before the tenth, and that the local secretary is the agent of the insured.
2. INSURANCE—ESTOPPEL BY EFFORTS AT REINSTATEMENT.—Where the insured had paid premiums due on the policy through the insurer's local secretary, she is not estopped because under a misapprehension she made efforts at reinstatement.

Appeal from Woodruff Circuit Court, Northern District; *J. M. Jackson,* Judge; affirmed.

E. M. Carl Lee, and *C. H. Moses,* for appellant.

1. It was error to exclude the testimony of the physician touching the condition of Mrs. Simmons' health a few days prior to her application for reinstatement. In her application she expressly waived the right to claim privilege disqualifying the physician from testifying. 103 Ark. 201; 133 *Id.* 411.

2. The court erred in directing the verdict for the plaintiff. There is no similarity between this case and the *Bates* case, 144 Ark. 345, and the *Newsom* case, 142 Ark. 132, differs materially from this in that there was nothing in the constitution and by-laws of that order

stating whose agent the local clerk was, whereas by the constitution and by-laws of this order the local secretary is the agent of the insured. 133 Ark. 441; 130 *Id.* 12; 135 *Id.* 65; 104 *Id.* 538; 80 *Id.* 419; 145 *Id.* 313; 1 Bacon on Benefit Societies, § 80; C. & M. Digest, § 6076; *Id.* § 6095. The insured and beneficiary are chargeable with notice of the provisions of the constitution and by-laws, one provision of which was that the liability of the household and its guests should not be satisfied until the remittance should actually be in the hands of the Eminent Secretary. 104 Ark. 538; 136 *Id.* 355; 142 *Id.* 145; 1 Bacon on Benefit Societies, § 81; 11 R. C. L. § 17, p. 1198.

Appellee is bound by the application of the insured for reinstatement regardless of forfeiture. If deceased did not acknowledge the local secretary to be her agent in transmitting payments, and admitted that she was delinquent, and thereby suspended, there was a dispute between the insurance company and insured relative to her suspension for non-payment of dues, and this would have supported a compromise and settlement between the parties. 74 Ark. 270; 99 *Id.* 588; 43 *Id.* 172; 105 *Id.* 638; 68 *Id.* 82; 14 S. W. 769.

R. M. Hutchins, for appellee.

1. There was no forfeiture under the covenant of insurance, and the court properly directed the verdict in favor of the plaintiff. 142 Ark. 132; 144 *Id.* 345; *Illinois Bankers Life Association* v. *Dowdy,* 149 Ark. 72; *W. O. W.* v. *Kay,* 148 Ark. 562. The issue in this case and in the *Newsom* case, 142 Ark. 132, is identical in the two cases, no substantial difference in the material facts. The dues of the insured, correctly speaking, were paid in advance, and it was the duty of the society to see to the proper application of the money so paid or deposited. 48 N.Y. Supp. 649; 151 Ill. 254; 37 N. E. 882; 29 Cyc. 177. Appellant is estopped to set up the neglect of its agent, the local secretary, in bar of recovery by appellee.

2. The alleged application for re-instatement cannot be an issue here. It is not known who signed it, and

the insurer cannot take advantage of the false statement of its agent in respect thereto. 14 R. C. L. 1174. The agent's knowledge of the facts to which he certified is imputed to his superiors. It is estopped to deny liability. 122 Iowa 260; 98 N. W. 105; 121 Iowa 528; 63 L. R. A. 603; 29 Cyc. 187; *Id.* 194.

3. The testimony of the physician was properly excluded.

WOOD, J. This is an action brought by the appellee against the appellant to recover on an insurance policy insuring the life of Seddie L. Simmons, in which policy the appellee was named as the beneficiary. The appellant is a fraternal benefit society and a corporation authorized to and doing business in this State. The appellee set up the policy, and alleged that the insured died on March 21, 1918; that at the time of her death all the premiums due on the policy had been paid; that appellee had complied with all the conditions of the policy. The appellant defended on the ground that the insured had failed to pay the monthly installment due for the month of December, 1917. The facts on this issue are substantially as follows:

I. J. Stacey was president of the Bank of Augusta and Trust Company. He testified that he was the Worthy Secretary of the Local Household, being one of the subordinate and constituent lodges of the appellant, whose Eminent Household was located at Atlanta, Georgia. Witness countersigned the policy issued to Seddie L. Simmons on July 26, 1915. He had been local secretary since that time. Mrs. Simmons died March 21, 1918. The witness, as local secretary, adopted the following plan for the collection of monthly premiums: During the first years he presented monthly receipts to the Augusta Mercantile Company, and it paid the installments. Later on Mr. Simmons opened an account at the Bank of Augusta, and witness made a check each month on Simmons' account, making the same payable to Columbia Woodmen, specifying the amount of the monthly dues in dollars and cents and signing Sim-

mons' name, by witness, and marked on the check what month the dues were being collected for. During the life of the policy the premiums were paid in the above manner. During the month of December, 1917, witness was away sick and didn't make a check for that month. The witness instructed the cashier of the bank to make the monthly remittance, and for some cause he neglected to check on Simmons' account for the dues for that month. On January 14, 1918, witness remitted the December, 1917, and the January, 1918, dues for Mrs. Simmons in a check for $2.60 covering these months, which the appellant accepted. Witness also drew a check for $1.30 for the February dues and a check for $1.30 for the March dues, both of which were accepted by the appellant. On October 31, 1918, he received a check from the Eminent Household payable to the order of the appellee in the sum of $4.33 with instructions to deliver same to the appellee. At the time witness forgot to forward the monthly premium on Mrs. Seddie L. Simmons' policy, there was in the Bank of Augusta the sum of $539 subject to witness' draft for the payment of the premiums on the policy of Mrs. Simmons. Witness further testified that it was his duty as Worthy Secretary to collect the dues from the members of the Worthy Household, the local lodge, and forward the same to the Eminent Household.

The appellee testified that from July 26, 1915, to February of 1916 he presented receipts to the Augusta Mercantile Company and got the money necessary to pay the premiums on his wife's policy, and from the fall of 1916 to March 21, 1918, the day of his wife's death, Stacy, the local Worthy Secretary, checked on witness' account at the bank. Stacy asked witness if he could pay the premiums on his wife's policy in that manner, and witness told him that it was all right. Between December 1 and December 10, 1917, witness had the sum of $539 in the bank on which Stacy could draw to pay the premiums.

The application of the insured and the constitution and by-laws of the society expressly constitute a part of the contract of insurance. In the application the insured agreed, among other things, as follows:

"If I neglect to pay all installments and dues on or before same become due, this shall render my covenant null, void and of no effect, and all my rights and benefits thereunder to myself or beneficiaries, shall be forfeited thereby without notice, and all payments made thereon by me shall be forfeited by liquidation. * * * I understand that no agent, officer or member can alter the requirements of the society in any way."

Among other provisions in the constitution are the following:

"All installments are due and payable to the Worthy Secretary on the first day of the month, and, when not paid on or before the tenth, the worthy guest shall thereby stand suspended, and his covenant shall be null and void. No agent, deputy, worthy secretary or any other person shall have the power to in any wise alter or change the above provisions nor any of the rules or regulations of the fraternity."

"Every beneficiary guest who shall fail to pay the beneficiary installment and the general expense and field fund installment on or before noon of the tenth day of the month, shall, by the fact of such non-payment, or any such non-payment, become and be suspended, and during such suspension the beneficiary covenant shall be null and void, and shall remain so absolutely until reinstated by compliance with the prescribed conditions, and during suspension a guest shall be without rights of any kind whatever in this fraternity."

The constitution and by-laws contain these further provisions: "The Worthy Secretary shall keep records, attend to the correspondence, accounts, literature, and the general labors of the Household; keep minutes of the Feasts, and shall notify the Household and Eminent Household of all guests in arrears. * * * * * He shall receive and receipt for all money due the House-

hold, turn the same over at once to the Banker; attest all orders drawn on the Banker. * * * * He shall make reports, post all notices required by the officers of the Eminent Household. He shall remit all funds due the Eminent Household to the Eminent Secretary, by postoffice or express money order or New York Exchange, payable to the order of the Eminent Banker (personal checks not acceptable), on or before the 12th of each month, and make full and complete reports as required by the Eminent Household. * * * * The Worthy Secretary shall not make representation or waivers by the authority not delegated to him, or to the Household under the Constitution and Laws of the Fraternity, and no act exceeding the power thereby conferred or in conflict therewith shall be binding upon the Eminent Household. The Worthy Secretary is the agent of the guest of the Household."

Another provision reads in part, "No agent, deputy, Worthy Secretary or any other person, shall have the power to in any wise alter or change the above provision, nor any of the rules or regulations of the fraternity." And further, "The Worthy Secretary of each Household shall remit on or before the 12th day of each month to the Eminent Secretary, * * * * all funds derived from the installments last levied, and arrearages, together with the full report, showing also the name of every guest not in good standing. The liability of the Household and its guests shall not be satisfied until the remittance shall be actually in the possession of the Eminent Secretary. Without notice, the Worthy Secretary shall, on or before the 12th day of each month, forward full report as above, and the required installments from each guest."

Another provision reads as follows: "The liability of the Eminent Household of Columbian Woodmen for payment of benefits in the event of death or total disability of a guest shall not accrue nor exist on any cove-

nant unless all conditions thereof, as recited and referred to therein, and in this constitution and by-laws, be fully complied with."

On the back of the policy is an endorsement admonishing the Worthy Secretary to "pay on the first of the month. Insure your loved ones against loss by accident lapse, as your failure to pay on or before the tenth of the month will render this covenant void. Hence be watchful."

Upon the above facts the appellant prayed the court to instruct the jury to return a verdict in its favor, which the court refused, to which ruling appellant duly excepted. The court thereupon instructed the jury to return a verdict in favor of the appellee, to which ruling appellant also duly excepted. The jury returned a verdict in favor of the appellee in the sum of $840.80 with interest. Judgment was rendered in the appellee's favor for that sum, from which is this appeal.

In the case of *Sovereign Camp Woodmen of the World* v. *Newsom,* 142 Ark. 132-145, we said: "It appears from the undisputed facts of this record that money was on deposit in the Bank of Portland for the purpose of paying the assessments of Newsom at the time when they became due under the laws of appellant. The laws of the order nowhere prescribe the method which the clerk should pursue in collecting the assessments. That was left entirely with him, and he adopted the method of collecting same, as we have shown, by draft, with his receipt attached, on the bank where the money was deposited to pay the same. He also adopted (for his own convenience, not Newsom's) the custom of making his remittance and report after the fifth of each month. It occurs to us that the case is precisely the same in legal effect as if Newsom had tendered to the agent of the appellant, duly authorized to collect monthly assessments, the amount of such assessment at the time the same was due, and that the agent failed or refused, for some reason, no matter what, to receive the same and report to his principal, as was his

duty to do on the fifth of each month. * * * *

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

And on rehearing, at page 158, we said: "This doctrine of equitable estoppel is as applicable to fraternal societies as to old line companies. Now here there was something more than a single act of the local clerk in not collecting the dues of Newsom on or before the first of each month. The clerk through a period of years had adopted the method set forth in the original opinion which was clearly calculated to induce the belief upon the part of Newsom that his dues had been paid according to the method adopted by the local clerk for collecting the dues and reporting the same, and that the society had accepted such payments and would, therefore, not insist upon a forfeiture because of the failure of the clerk to comply, in this respect, with its laws and constitution. This conduct of appellant's agent under the authorities above cited clearly estops appellant from denying that the March dues were paid as required."

The facts in the case at bar are similar in all essential particulars concerning the payment of dues to the case of *Soverign Camp W. O. W.* v. *Newsom, supra.* The cases cannot be distinguished in principle on the facts. We do not care to travel over the same ground on the questions of payment and estoppel as were covered in the Newsom case. See also *Soverign Camp W. O. W.* v. *Key,* 148 Ark. 562; *Illinois Bankers Life Assn.* v. *Dowdy,* 149 Ark. 72; and *Security Life Ins. Co.* v. *Bates,* 144 Ark. 345.

Appellant contends that there is a clear distinction between the facts of this case and those of the Newsom case in that the constitution and by-laws of the appel-

lant in the case at bar contain this provision: "The Worthy Secretary is the agent of the guest of the Household;" whereas no such provision was found in the constitution and by-laws under review in the Newsom case. But in the Newsom case we quoted with approval from *Supreme Lodge K. of H.* v. *Davis,* 26 Colo., 252, holding as follows: "In a mutual benevolent order composed of a supreme lodge and subordinate lodges, an officer of a subordinate lodge charged with the duty of notifying the members of assessments made by the supreme lodge for the purpose of paying insurance certificates of deceased members, and of collecting and forwarding to the supreme lodge such assessments, is an agent of the supreme lodge, *notwithstanding a rule or by-law of the order recites that such officer in collecting or forwarding assessments shall be the agent of the members of the subordinate lodge,* and the supreme lodge is charged with all knowledge possessed by the agent in making the collection."

The recital in the constitution and by-laws of the appellant that "the worthy secretary is the agent of the guest of the Household" can only mean that such secretary is the agent of the guest of the Household in those matters wherein he could perform some act or discharge some duty for the individual member or guest. The provision clearly could not relieve the local Household of the duties it had to perform as the agent or the representative of the Eminent Household. The local lodge as well as the Eminent Household could only act through its own agent in the matters of the countersigning of policies, the collecting of premiums, making reports as to the standing of members to the Eminent Household, posting notices, remitting dues, and various other duties prescribed for the worthy secretary in the constitution and by-laws of the order. The worthy secretary could not be the agent of both the insurer and the insured concerning matters wherein there might be a conflict in their respective interests. Here the uncontroverted facts show that, so far as Mrs. Simmons is con-

cerned, her dues were paid. She had met all the requirements of the contract according to the methods which the appellant had adopted for collecting the installments. When the local secretary failed to send in the installments and make the correct report as to the payment of her monthly dues, in these particulars he was representing the appellants, and could not at the same time be representing Mrs. Simmons.

Having paid the installments and thus preserved her rights under the policy, she would not be estopped by any misapprehension that she may have had as to her standing and the efforts toward reinstatement growing out of such misapprehension. Therefore, as the insured was never in fact in arrears, the issue of invalid reinstatement raised by the appellant cannot avail. Under the uncontroverted facts it has no place in the case. The judgment is in all things correct, and it is therefore affirmed.

McCulloch, C. J., and Smith, J., dissenting.

Missouri & North Arkansas Railroad Company v. Chapman.

Opinion delivered October 31, 1921.

1. Eminent domain—remedy of landowner—limitation.—Where a corporation authorized by law to appropriate land to its use has entered upon and appropriated land for its use, without condemnation, the owner's statutory remedy to sue for damages (Crawford & Moses' Dig., § 3930) is exclusive, and such action would be barred when an action to recover the land would be barred.
2. Eminent domain—remedy of owner—limitation.—Under Crawford & Moses' Dig., § 3930, the owner of land taken by a railroad for right of way has a right to bring suit for damages at any time within the period of seven years after the land was taken.
3. Eminent domain—statute construed.—Under Crawford & Moses' Dig., § 3930, providing in effect that the owner of property taken by a corporation authorized to appropriate it for its use may bring suit for damages for such taking within the statutory period, the word "owner" may be construed to apply to every person having an interest in the property taken, including tenants for life and lessees for years.

4. EMINENT DOMAIN—DAMAGES FOR TAKING.—In an action by landowners to recover for the taking of their land by a railroad company, the value of the land should be proved as of the time of the filing of the suit, instead of the date when the land was taken.

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

STATEMENT OF FACTS.

Appellees filed their suit in the circuit court against appellant to recover damages for the appropriation of a part of their land for a railroad right-of-way.

Mrs. R. D. Chapman owned block 34, in the town of Kensett, White County, Ark. Mrs. Chapman died on February 22, 1904, while living on the block above referred to with her family. At the time of her death she was survived by her husband, J. H. Chapman, and appellees, who were their children and sole heirs at law. Two of the children, viz: Charles Chapman and William Chapman, were adults when the land was appropriated by the railroad for a right-of-way.

On the 6th day of February, 1908, J. H. Chapman, the father of appellees, executed a right-of-way deed to the Missouri & North Arkansas Railroad Company, conveying to it a strip of land 100 feet in width across said block above mentioned for a right-of-way for its railroad. The railroad company then took possession and constructed its railroad across said strip of land. It has operated its railroad across said strip of land ever since, and has not paid the appellees any compensation for said right-of-way. J. H. Chapman, the father of appellees and the husband of Mrs. R. D. Chapman, deceased, remained in possession of said land, except the strip conveyed to the railroad for a right-of-way, until his death, which occurred in July, 1918. The present suit was filed on December 29, 1919.

The jury returned a verdict in favor of appellees, and the case is here on appeal.

Shouse & Rowland, for appellant.

1. It was error to try the case and charge the jury upon the theory that appellees' damages were to be measured upon the value of the lands at the time of the trial, and to exclude testimony offered by appellant as to the value of the lands in the year 1908, when it was taken.

2. Appellees' cause of action accrued when the railroad company entered upon the land in 1908, under the deed from their father. 45 Ark. 252; 67 *Id.* 84.

3. In assessing the damages it must be determined from the market value of the land at the time it was taken. 10 R. C. L. § 183, p. 214; 20 Corpus Juris § 262 p. 826 citing 49 Ark. 381; 15 Neb. 231; 18 N. W. 51; 98 Fed. 789, 790; 67 Ark. 84; 129 Ala. 577; 29 So. 985.

Brundidge & Neelly, for appellees.

1. Until the death of appellees' father, who had an estate by the curtesy in the property, the possession of the appellant under its deed from him was not hostile, but permissive. 42 Ark. 361; 1 R. C. L. 758; 71 N. Y. Rep. 192. There was no entry here without right so as to set the statute of limitation to running from the date of entry; neither did the railway company elect to proceed under the right of eminent domain and bring both the life tenant and the remaindermen into court in one action.

The property was a part of the homestead of appellee, hence the statute of limitations did not begin to run until the youngest child became of age. 53 Ark. 400.

2. Appellees were not entitled to possession until after the death of their father, the life tenant, and the value of the land at the time they were entitled to possess it is the correct date from which to measure their damages. There was no error in permitting witnesses to testify as to present market value of the property. The question as to who are competent to give testimony as to the value of land taken and to give their opinions thereon, is one of which is left largely to the discretion of the trial court. 103 Ark. 409; 88 Ark. 132.

Hart, J. (after stating the facts). Appellant filed a plea of the statute of limitations, and claims that Charles

Chapman and William Chapman, who were adults at the time their father executed the right-of-way deed and the railroad company took possession of the land for a right-of-way, are barred by the seven-year statute of limitations. The railway company entered into possession of the land under its right-of-way deed in 1908, and the present suit was not filed until in December, 1919.

Sec. 3930 of Crawford & Moses' Digest provides that whenever any corporation, authorized by law to appropriate private property for its use, shall have entered upon and appropriated any property, the owner of the property shall have the right to bring an action against such corporation for damages for such appropriation at any time before an action at law or in equity for the recovery of the property so taken, or compensation therefor, would be barred by the statute of limitations.

In construing this statute, the court has held that it supersedes the common-law remedies afforded the owner, and that the statutory remedy for damages is exclusive. *McKennon* v. *St. L. I. M. & So. Ry. Co.*, 69 Ark. 104. The statute fixes the time for bringing the action at any time before the action at law or in equity for recovery of the property so taken, or compensation therefor, would be barred by the statute of limitations.

At common law the owner would have had the right to have brought his suit at any time before the company had acquired the right to the property taken by adverse possession for the statutory period of seven years. *Organ* v. *Memphis & Little Rock Rd. Co.*, 51 Ark. 235. Thus it will be seen that under the statute the owners of the land had a right to bring suit for compensation for the land taken by the railroad company for its right-of-way at any time within the period of seven years after the land was taken.

In a case note to 2 A. L. R. at p. 786, it is said that the word, "owner" as used in statutes relating to con-

demnation proceedings, may be construed to apply to every person having any interest in the property taken.

Again, it is said that it embraces not only the owner of the fee, but a tenant for life and the lessee for years and any other persons who have an interest in the property which will be affected by the condemnation. This is in accord with our own decisions relating to the question.

As we have already seen, before the passage of the statute giving the landowner a remedy to sue for compensation, he might resort to his common-law remedy for damages. In *Bentonville R. R.* v. *Baker,* 45 Ark. 252, the owners sued under the common law to recover damages for the taking of their land by a railroad company for a right-of-way. The court held that a tenant for life and the remainderman may each recover compensation for the injury he sustains by the construction of a railroad over his land. The court said, however, that the remainderman can only recover such damages as affect his expectant estate. In that case the life tenant and owners of the inheritance joined in an action against the railroad company to recover damages for constructing its railroad across their land, and each was allowed to recover. The remainderman could not have brought suit unless his cause of action had accrued; and where a cause of action has once accrued, the remedy must be pursued within the time given by the statute, or else the bar of the statute will attach.

This is in accord with the general rule that persons holding distinct interests in the same tract of land may proceed jointly to recover damages or compensation for its taking under the law of eminent domain. 15 Cyc. 1003; Lewis on Eminent Domain, 3 Ed. Vol. 2, §§ 716 and 976.

This is especially true under our Constitution, which provides that no property shall be appropriated under the right of eminent domain until compensation shall be first made to the owner. Compensation precedes the ap-

propriation, and it was the evident intention of the framers of the Constitution to require compensation to be made to all persons interested in the land.

It follows that the court erred in holding that Charles and William Chapman were not barred of recovery under the seven-year statute of limitations, and for that error the judgment in their favor will be reversed; and, inasmuch as the testimony with regard to the statute of limitations running against them is undisputed, their cause of action will be dismissed.

It is next contended by counsel for appellant that the value of the land should have been found by the jury as of the date when it was originally appropriated by the railroad company, and not of the date when this suit was brought.

We do not agree with counsel in this contention. In *Newgass* v. *Railway Company,* 54 Ark. 140, condemnation proceedings were instituted by the railway company for the assessment of damages for the right-of-way of its railroad previously built without license across land belonging to Newgass. The court held that the value of the land taken for the right-of-way should be estimated as of the time the petition was filed. The court said:

"As the filing of the petition is the attempt to assert the right of condemnation, and subsequent delay is without fault of either party, it seems fair to each alike that the assessment should be made with reference to value as of that date."

As we have already seen, where the railroad does not institute condemnation proceedings, the statute gives the landowner the right to sue for compensation, and the court has held that the statutory remedy thus given the landowner is exclusive. Hence the action by the landowner should be viewed in the same light as a condemnation proceeding, which the law allows the property owner to commence, because the corporation has not done so.

Our Constitution provides that no property shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money, or first secured to him by a deposit of money. The railroad company could not acquire any rights or fix any liability as between itself and the landowner by wrongfully taking possession of the land.

The appellees remained the owners of the property until proceedings were taken to enforce their claim for the value of the property taken. Therefore, the compensation to be paid the owner when he brings suit under the statute should be determined under the same rule as though the railroad company itself had begun condemnation proceedings at the date of the beginning of this action. Such a rule prevents confusion of rights and remedies and affords a definite and invariable rule for the assessment of damages. Such a rule prevents the railroad company from reaping any reward for its own wrongful action. Otherwise it might take possession of the property and build its road across it without first making full compensation to the owner, and then wait for the owner to sue because it might reap an advantage by not bringing the suit itself.

It follows that the court did not err in holding that the value of the property should be proved as of the time of the filing of the suit, instead of the date the property was actually appropriated by the railroad company.

The result of our views is that the judgment in favor of Charles Chapman and William Chapman will be reversed, and their cause of action dismissed.

The judgment as to the other appellees will be affirmed.

WOODSON v. McLAUGHLIN.

Opinion delivered October 31, 1921.

1. MASTER AND SERVANT—RELATION OF LANDLORD AND SHARE CROPPER.—Where a landlord employed one as a share cropper to cultivate and gather a crop for one-half of it, this constituted the relation of landlord and laborer, and not that of landlord and tenant.

2. MASTER AND SERVANT—DISCHARGE—SURRENDER OF PREMISES.—Where, as part of the contract price for cultivating and gathering a crop, the share-cropper was furnished a house, he had no interest in the premises, and when his contract of employment was terminated by his discharge, it was his duty to vacate the premises, regardless of whether the discharge was rightful or not.

3. MASTER AND SERVANT—WRONGFUL DISCHARGE—DAMAGES.—Where a land owner, having contracted with another to allow him to cultivate his farm on the shares for a year, orders him off the farm before the end of the year, and refuses to let him gather the crop, the share-cropper can maintain an action at once against the land owner and recover as damages the value of such cropping contract, but not any injury done to his person or that of his wife.

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

STATEMENT OF FACTS.

J. F. Woodson and Mrs. Mollie Woodson, his wife, brought this action in the circuit court against C. L. McLaughlin and M. W. Davis, and for cause of action states that said defendants wrongfully, maliciously, and forcibly compelled them to remove from a tenant house on the farm of McLaughlin which they were occupying while gathering a crop on said farm.

J. F. Woodson was a witness for himself. According to his testimony, in 1919 he was a share cropper on the farm of McLaughlin. McLaughlin furnished Woodson the land and a tenant house to live in while he cultivated and gathered the crop, and Woodson was to receive one-half of the crop in payment for his services in making and gathering it. Woodson was delayed in gathering his cotton on account of the excessive rains in the fall of the year. McLaughlin asked Woodson to move out of the house in which he lived so that he might roll it to another part of the farm. Woodson refused to do this. McLaughlin hired M. W. Davis, his co-defendant, to move the house for him, and, under the directions of McLaughlin, he first tore the kitchen away from the main part of the house and rolled it some distance away. This left large cracks in the dwelling house. It commen-

ced to rain and snow and by reason of the open places left in the wall the rain and snow beat into the main dwelling house and caused Mrs. Woodson to become ill. Woodson and his wife then moved out of the house and brought this suit for damages.

The circuit court directed a verdict in favor of the defendants, and from the judgment rendered the plaintiffs have appealed.

Geo. M. Heard and *Jno. D. Shackleford,* for appellants.

The court erred in peremptorily instructing a verdict for defendants. 126 Ark. 31.

The contract was for the cultivation of land on shares, defendant to have exclusive possession and to pay plaintiff certain portions of the crop as rent, which created the relation of landlord and tenant. 70 Ark. 79. Title to the crop was in the tenant. 54 Ark. 346; 30 Ark. 359.

When landlord and tenant are tenants in common. 54 Ark. 349; 32 Ark. 436.

When the relation between the owner and tenant constitutes master and servant. 54 Ark. 349; 25 Ark. 327; 32 Ark. 436; 34 Ark. 687.

Tenant may for injury to person or goods in wrongful eviction, recover damages. 64 Ark. 453.

Appellee was guilty of assault and battery. 2nd Am. & Eng. Ency. p. 953; 115 Ark. 461; 106 Ark. 4; and he should respond in damages. 2nd Am. & Eng. Ency. p. 992; 75 Ark. 232; 64 Ark. 613.

Landlord cannot take possession by force against the will of the tenant. 55 Ark. 360. But he may take possession peaceably. 32 Vt. 82.

Hendricks & Snodgress, for appellees.

Appellant was not a tenant. 79 Ark. 430; 34 Ark. 139; 34 Ark. 687; 32 Ark. 436; 48 Ark. 264; 54 Ark. 346; 70 Ark. 601; 16 Am. Rep. 780; 34 Ark. 179; 73 N. C. 320; 73 N. C. 384; 34 Ark. 687; 10 C. B. N. S. 227; 151 Pa. 351; 17 L. R. A. 213; 24 Atl. 1062.

In such case an action for damages will not lie for forcible eviction. 132 Ga. 323; 16 Ann. Cas. 723; 3 Moore & S. 790; 44 Ill. App. 19; 17 Times L. R. 362; 1 Irish Jur. 313; 6 Scott, L. R. 301.

He may eject the servant without process of law. 1 Irish Jur. N. S. 313; 1 Cal. 450; 6 Scott, L. R. 369, or without notice to quit. 4 El. & Bl. 347; 1 Jur. N. S. 303; 24 L. J. Q. B. N. S. 54.

An action for trespass will not lie against the master for breaking and entering premises. 10 C. B. N. S. 227; 7 Jur. N. S. 948; 30 L. J. C. P. N. S. 253; 3 Frost & F. 49; 151 Pa. 351; 17 L. R. A. 213; 24 Atl. 1062.

Servant is not entitled to time to remove his goods. 10 Barn & C. 721.

HART, J. (after stating the facts). The decision the court was right. According to the plaintiff's own testimony, J. F. Woodson was a share cropper on McLaughlin's farm. He was to cultivate and gather the crop for one-half of it, and McLaughlin allowed him to occupy a tenant house on the farm in order to cultivate and gather the crop. This constituted the relation of landlord and laborer, and not that of landlord and tenant. *Bourland* v. *McKnight*, 79 Ark. 427.

It appears from Woodson's own testimony that the title to the crop was to remain in McLaughlin until the latter divided it and gave the former his share. This is exemplified by that portion of Woodson's testimony where he speaks of picking some of the cotton and turning it over to McLaughlin. McLaughlin, after taking out certain supplies which he had furnished Woodson, would then turn over Woodson's share of the crop to him. It appears that the occupation of the house by Woodson was merely ancillary to his employment. His occupation was merely in the character of share cropper, and he had no interest whatever in the premises. Woodson's possession of the house was that of McLaughlin, and was a part of the contract price for the services performed by him. When his contract was

terminated by McLaughlin discharging him, his rights in the premises were extinguished, and it was his duty to get out.

The general rule is that a person who occupies the premises of his employer as a part of his compensation is in possession as a servant and not as a tenant. On the termination of his employment, his right to occupy the premises ceases.

The complaint does not allege a violation of the contract of hiring on the part of McLaughlin, but it alleges a trespass. Hence in this case it does not make any difference whether the discharge of Woodson by McLaughlin was lawful or not. It is sufficient that McLaughlin discharged him. *Bowman* v. *Bradley,* (Penn.) 17 L. R. A. 213, and *Lane* v. *Au Sable Electric Co.,* 147 N. W. (Mich.) 546 Ann. Cas. 1916-C, p. 1108, and case note.

If Woodson was wrongfully discharged, his remedy was to sue McLaughlin for a breach of contract. Where one, having contracted with another to allow him to cultivate his farm on the shares for a year, orders him off the farm before the end of the year, and refuses to let him gather the crop, the cropper may maintain an action at once against the land owner and recover as damages the value of such cropping contract. *Jewett* v. *Brooks,* 134 Mass. 505, and *Tignor* v. *Toney,* (Tex.) 35 S. W. 881. In such cases the damages, like the contract of hiring, are entire and accrue on the day when the contract is repudiated. They are measured by the value of the contract on which the cropper is deprived, and not by any injury done his person, or that of his wife.

It follows that the judgment must be affirmed.

GIBBS v. BATES.

Opinion delivered October 31, 1921.

1. QUIETING TITLE—JURISDICTION.—The jurisdiction of equity to quiet title, independently of statute, can be invoked by a plaintiff holding under a legal title only when he is in possession, the remedy at law being otherwise adequate.

2. EQUITY—WANT OF JURISDICTION—DISMISSAL OF ACTION.— Where neither the original bill nor the cross-bill set up matters cognizable in equity, the chancery court properly dismissed the complaint for want of equity.

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

STATEMENT OF FACTS.

Eva E. Gibbs brought this suit in equity against Nora L. Bates to quiet her title to a tract of land comprising 67 acres more or less in St. Francis County, Ark. In her complaint she alleges that she is the legal owner and in possession of the land. Her complaint further states that Nora L. Bates makes an adverse claim to the land, the nature and character of which is unknown to the plaintiff.

Nora L. Bates filed an answer in which she denied that Eva E. Gibbs was in possession of the land, and averred that she was herself in possession of the land. The defendant claimed title by adverse possession, and asked to be discharged from the action.

The record shows that the defendant had been in possession of the land in question for more than fifteen years, claiming and holding the same adversely to all persons.

The chancellor found for the defendant, and it was decreed that the complaint of the plaintiff should be dismissed for want of equity.

To reverse that decree the plaintiff has duly prosecuted this appeal.

Otis Gilleylen and *Carmichael & Brooks,* for appellant.

Appellee's claim of adverse possession is inconsistent with her previous claim to a life estate in the land, which she based on the ground that she was infant when she relinquished her dower to appellant, which deed was voidable. 57 Ark. 632. Possession of a life tenant does not become adverse to the reversioner until after the death of the life tenant. 126 Ark. 1. She ac-

quired no right by paying taxes, which is an obligation imposed upon the life tenant. 128 Ark. 605. The former suit was one for unlawful detainer, therefore her plea of *res judicata* is untenable. 104 Ark. 322; 123 Ark. 156.

Appellant was entitled to the relief sought. C. & M. Dig. §§ 8362 and 8369; 87 Ark. 494.

The attempt of the infant wife to convey her homestead is not void, but voidable, and the contract being good on its face, she must disaffirm her contract within a reasonable time after arriving at full age.

The action was not prematurely brought, nor the appeal prematurely taken.

Mann & Mann, for appellee.

Appellant was not in possession of the land and not entitled to relief under § 8362 C. & M. Dig. Inasmuch as the allegation of possession was not sustained by the evidence, the cause of action must fail. 74 Ark. 383; 56 Ark. 391; 44 Ark. 436; 72 Ark. 256. Appellant having failed to establish her right to equitable relief, the court was without jurisdiction, and properly dismissed the complaint for want of equity. 56 Ark. 93.

Appellee's possession of the land was adverse to appellant. The answer filed by appellee to the previous suit denied the title of appellant to the property in suit, and was a disaffirmance by her of the deed executed during her minority, putting into effect the statute of limitations. 22 Cyc. p. 554; 90 Ark. 367.

HART, J. (after stating the facts). Equity jurisdiction to quiet title, independent of statute, can only be invoked by a plaintiff in possession holding the legal title. The reason is where the title is a purely legal one, and some one else is in possession, the remedy at law is plain, adequate and complete, and an action of ejectment cannot be maintained under the guise of a bill in chancery. In such a case the party in possession has a constitutional right to a trial by jury. *Pearman* v. *Pearman,* 144 Ark. 528, and cases cited.

So, too, under our statute any person claiming to own land that is in the actual possession of himself, or those claiming under him, may have his title to such land confirmed and quieted in the manner provided by the act. Crawford & Moses' Digest, §§ 8362 and 8383.

In the present case the plaintiff claims under a legal title, and the defendant is in possession of the land claiming to hold adversely to the plaintiff and to all other persons. The plaintiff claiming under a legal title and the defendant being in possession, the plaintiff had a full and complete remedy at law, and chancery had no jurisdiction in the premises.

It is true that the defendant filed an answer setting up title in herself by adverse possession, but she did this by way of defense to the plaintiff's action, and did not ask affirmative relief for herself. Of course, where the defendant files a cross-bill founded on matters clearly cognizable in equity, this supplies any defect in jurisdiction and places the court in possession of the whole cause and imposes upon it the duty of granting relief to the party entitled to it. The original bill and cross-bill then became but one cause, and a court of chancery takes jurisdiction where allegation of the cross-bill supply the defects of the original bill. *Pearman* v. *Pearman, supra,* and cases cited.

It follows that, neither the original bill nor the answer having set up matters cognizable in equity, the chancery court was right in dismissing the complaint for want of equity, and the decree will be affirmed.

McLAUGHLIN v. MORRIS.

Opinion delivered October 31, 1921.

1. TAXATION—DESCRIPTION OF LAND SOLD.—A tax sale of land described as the undivided one-third of a certain quarter section is void.
2. GUARDIAN AND WARD—PURCHASE OF WARD'S LAND BY GUARDIAN.—Where a guardian purchased this ward's land from one who had purchased it at tax sale, his purchase will be held to be for the benefit of his wards.

3. ADVERSE POSSESSION—TRUST RELATION.—Persons standing *in loco parentis* to minor children are prohibited from acquiring title adverse to such children.
4. PARTITION—PURCHASE BY GUARDIAN AD LITEM.—A guardian *ad litem* of infant defendants in a partition suit may not purchase the interest of such defendants.
5. VENDOR AND PURCHASER—NOTICE OF CHAIN OF TITLE.—A purchaser of land is required to take notice of an infirmity appearing in the chain of his title.

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

Will G. Ackers, for appellant McLaughlin.

Trimble & Trimble, for appellant Robinson.

Oscar E. Williams, for appellees.

The tax deed upon which appellants base their title is void for indefiniteness of description. 94 Ark. 306, 126 S. W. 830; 77 Ark. 321; 92 S. W. 1124; Kirby's Digest §§ 6976, 7024. 7083 and 7085; 79 Ark. 442; 50 *Id.* 689.

One who stands in a fiduciary or a *quasi* fiduciary capacity toward another cannot purchase the property of his *cestui que trust.* 33 Ark. 575; 30 Ark. 44; 54 *Id.* 627; 16 S. W. 1052; 13 L. R. A. 490; 23 Ark. 622; 49 *Id.* 243; 4 S. W. 776; 112 Ark. 389; 55 *Id.* 85; 61 *Id.* 575; 73 *Id.* 575; 75 *Id.* 184; 78 *Id.* 111; 89 *Id.* 178; 95 *Id.* 434; 96 *Id.* 573.

An order decreeing attorney's fees and costs as a lien against infants' lands is void and may be attacked collaterally. 47 Ark. 86; 75 *Id.* 34; 76 *Id.* 146; 105 *Id.* 439.

Rosie Johnson and J. A. B. McCrary are not barred by laches or limitations. Kirby's Digest, § § 5056, 5057; 55 Ark. 85; 87 *Id.* 238.

Appellants are chargeable with notice of the defect in the chain of title. 35 Ark. 100; 205 S. W. 113; 39 Cyc. 60.

SMITH, J. Prior to 1880 Wash Ballard and his two brothers owned the southeast quarter of section 33, township 1 north, range 10 west. Wash Ballard died, and M. C. Armstrong was appointed guardian of the minor children. On May 11, 1891, Armstrong filed a final settlement of his guardianship of John Ballard,

the oldest of the children, who had then come of age; but it does not appear that he ever made final settlement of his guardianship of the three younger children. In 1884 Armstrong, as guardian, filed a suit for the partition of the land owned by the Ballard brothers, and in the decree rendered in that cause a tract of land on the east side of the southeast quarter, containing 55.35 acres, was apportioned to the Wash Ballard children.

On June 12, 1893, there was a sale of a tract of land, described as "Und. 1-3 southeast quarter section 33 * * * ," for the taxes of 1892. This sale was made to J. D. Shulte, who assigned his certificate of purchase to W. P. Fletcher, who, upon the expiration of the period of redemption, received a tax deed therefor. On December 21, 1896, Fletcher conveyed an undivided half of the undivided third southeast quarter section 33 to Julia Cleveland, Irene Ellis and Emanuel Ballard. Jeff Cleveland paid the purchase price to Fletcher and had the deed made to Julia, his wife, and to Irene Ellis, who was Julia's niece and a minor, and to Emanuel Ballard, a brother of his wife, who was also a minor. Julia Cleveland was a daughter of Wash Ballard by his first wife, and on her death she was survived by two sons, whose names are Ben and Grover. On December 16, 1898, Fletcher conveyed to Armstrong an undivided half of an undivided 1-3 southeast quarter of section 33. Armstrong had been in possession of the land as guardian of the minor children, and after the deeds from Fletcher were executed Armstrong and Cleveland shared the possession jointly.

The testimony shows that at the time of the execution of the deed from Fletcher to Cleveland, Emanuel Ballard was a minor and on his death was survived by an only child, a girl known as Rosie Johnson, who was also known as Fannie Ballard, and who was born December 20, 1898. On of the questions of fact in the case is the identity of Fannie Ballard and Rosie Johnson, and, if the same person, whether she was the only child of Emanuel Ballard. Without reviewing here the testi-

mony on this issue, we affirm the finding of the court below that Rosie Johnson is Fannie Ballard, and was the only child of her father, Emanuel Ballard. Rosie Johnson's mother probably had other children after the death of Emanuel; but that is unimportant, as the inheritable blood was on the part of the father, and not that of the mother.

After the death of Emanuel Ballard in 1899 Julia Cleveland took Emanuel's daughter Rosie, then an infant a year old, into her home as a member of the family, where Rosie lived until her marriage in 1913. Irene Ellis, another niece of Julia Cleveland, was also taken into Julia's home as a member of her family and reared by her. Irene Ellis was one of the three grantees in the deed from Fletcher dated December 21, 1896. Irene Ellis was the daughter of a child of Wash Ballard by his first wife, and Irene's ancester took no interest in the lands because Wash Ballard had conveyed his interest in the quarter section to his children by his second wife.

Susan Ballard intermarried with one J. W. McCreary. Susan died in 1894, and was survived by only one child, a son named J. A. B. McCreary, who was born May 30, 1894, and was therefore just twenty-two years old when this suit was brought. Rosie Johnson became of age December 20, 1916, the day before this suit was filed. It does not appear that, at the death of Emanuel Ballard and Susan McCreary, Armstrong, their guardian, had made final settlement of the guardianship or had been discharged by the probate court.

In 1901 Armstrong sued Jeff Cleveland and Julia, his wife, and Irene Ellis and Fannie Ballard for partition. Fannie Ballard was about three years old at that time, and Irene Ellis was also a minor. J. C. Boyd, an attorney, was appointed guardian *ad litem* to represent these minors. Boyd also represented Julia and Jeff Cleveland, and was allowed a fee of fifty dollars by the court, which was declared a lien on the land. Partition of the land was made in kind, and the north half was

given to Armstrong and the south half to Julia Cleveland and the other defendants. The fee allowed Boyd was not paid, and he caused an execution to be issued on the judgment, and in January, 1906, the south half was sold under this execution, and Boyd himself became the purchaser. Later, after obtaining the sheriff's deed, Boyd executed a quitclaim deed to Jeff Cleveland for the land thus purchased for the recited consideration of one dollar. Jeff and Julia Cleveland died, and their children, Ben and Grover, executed a quitclaim deed to their interest in the land to W. H. McLaughlin and to J. P. Kerby.

In the partition suit between Armstrong and Cleveland *et al.*, Armstrong was represented by George Sibley and the firm of Trimble & Robinson, attorneys, and a fee was allowed these attorneys, which was fixed as a lien on the north half, this being the land assigned their clients, the heirs of Armstrong, who had died before the final decree was entered. This fee was not paid, and at a sale under an execution which issued on this judgment T. C. Trimble, Jr., who was not then a member of the firm of Trimble & Robinson, became the purchaser, and, by mesne conveyances from T. C. Trimble, Jr., this north half was conveyed to J. H. Robinson.

This suit was brought by Rosie Johnson and her mother, Mollie Morris, and by J. A. B. McCreary and his father, J. W. McCreary. Ben and Grover Cleveland were made parties defendant, but they made no defense. The other defendants, W. H. McLaughlin and J. P. Kerby and J. H. Robinson, have a paper title which has its origin in the tax sale to Fletcher; and they say that this title, if not good originally, has been made so by possession of Armstrong and Cleveland, who lived on the land until a short time before the institution of this suit; and that the plaintiffs are barred by limitation.

Pending this litigation E. D. Kidder obtained from Rosie Johnson a quitclaim deed for her undivided interest; but that deed was canceled in the final decree which was rendered November 15, 1920. This decree

recites that Kidder prayed, and was granted, an appeal; but his appeal was never perfected. The transcript herein was filed May 10, 1921, at which time McLaughlin and Robinson prayed an appeal, which was granted by the clerk of this court. Not having perfected his appeal, we need not now review the action of the court in canceling Kidder's deed. Section 2135, C. & M. Digest; *Damon* v. *Hammonds,* 73 Ark. 608.

The court found that the plaintiffs Rosie Johnson and J. A. B. McCreary are each the owner of an undivided one-third of the land sued for; and that the defendant J. H. Robinson is the owner of an undivided third in the north half of said land; and that the defendants W. H. McLaughlin and J. P. Kerby are the owners of an undivided one-third of the south half of said land, each owning an undivided one-sixth interest.

The tax deed to Fletcher was void. The description employed in the tax sale and in the deed made pursuant thereto is identical with the description which the court held to be bad in the case of *King* v. *Booth,* 94 Ark. 306, except that in that case the description was "Und. 2/6," while here the description is Und. 1/3." We will not repeat here the reasoning of the court in that case distinguishing it from the earlier case of *Payne* v. *Danley,* 18 Ark. 441. Moreover, it may here be said that the description now under review was bad because it appears that in 1884 this quarter section was actually partitioned in a suit brought by Armstrong, as guardian, for that purpose, and therefore the interest of the Wash Ballard heirs was not an "undivided" interest.

The big question in the case is whether or not a trust relation existed on the part of Armstrong and Cleveland and his wife which prevented them from acquiring the title to the land in suit. After a careful consideration of the testimony we have concluded that the finding of the court below, that there was a trust relation, is not contrary to the preponderance of the testimony.

Armstrong was the administrator of Wash Ballard's estate; and he was guardian of Emanuel Ballard, the father of Rosie Johnson; and was also the guardian of J. A. B. McCreary's mother. As administrator and as guardian he took possession of the land, and remained continuously in its possession until the time of its partition in the suit brought by him for that purpose. It appears that he was removed as administrator for mismanagement of the estate; but it is not shown that he ever made a final settlement of his guardianship or received his discharge; and, in the absence of that showing, his purchase from Fletcher must be held to be for the benefit of his wards. *Sconyers* v. *Sconyers,* 141 Ark. 256; *Holloway* v. *Eagle,* 135 Ark. 206; *Sorrels* v. *Childers,* 129 Ark. 149; *Hawkins* v. *Reeves,* 112 Ark. 389; *Waldstein* v. *Barnett,* 112 Ark. 141; *Haynes* v. *Montgomery,* 96 Ark. 573; *Eagle* v. *Terrell,* 95 Ark. 434; *Burel* v. *Baker,* 89 Ark. 168; *Reeder* v. *Meredith,* 78 Ark. 111; *Montgomery* v. *Black,* 75 Ark. 185; *Thweatt* v. *Freeman,* 73 Ark. 575; *Thomas* v. *Sypert,* 61 Ark. 575; *Gibson* v. *Herriott,* 55 Ark. 85; *Hindman* v. *O'Connor,* 54 Ark. 633; *Clements* v. *Cates,* 49 Ark. 242.

Cleveland and his wife are in no better circumstances as regards their title. Cleveland took the deed from Fletcher to his wife and to Irene Ellis and to Emanuel Ballard. Julia was a child by Wash Ballard's first marriage, and Irene Ellis was the daughter of another child by Wash Ballard's first wife; and Emanuel Ballard was Julia Cleveland's brother. Irene and Emanuel were at the time both minors, and both were then living with Julia Cleveland as members of her family. Upon Emanuel Ballard's death, Julia took Rosie, his infant daughter, into her home, where she lived as a member of Julia's family until her marriage in 1913.

Julia and her husband Jeff thereafter stood *in loco parentis* to the infant child of Emanuel, as they had to Emanuel himself at the time of the execution of the deed from Fletcher. It is true that, in the deed to them from

Fletcher made in 1896, they had Emanuel named as grantee, along with Julia Cleveland and Irene Ellis; but Emanuel was then a minor and his brother-in-law and sister, Jeff and Julia, could not thus acquire an interest in the land adverse to him. See cases cited above on the inability of Armstrong to purchase.

The testimony as to Emanuel Ballard's age at the time of his death in 1899 is conflicting; and the contention is made that as he died in 1899 the statute of limitations has since run against his heir, Rosie Johnson. This is not true because the trust relation on the part of Julia and Jeff continued down at least until the time of Rosie's marriage in 1913, until which time she had lived on the land with her uncle and aunt, and the bar of the statute could not have fallen between that date and December 21, 1916, the date of the institution of this suit.

As to J. A. B. McCreary, there can be no question of limitation in any event, as he was born May 30, 1894, and his mother died that year, and Fletcher did not obtain the tax deed under which his adversaries claim title for more than a year thereafter, and he became of age May 30, 1915, which was only a little more than a year before this suit was brought.

Among the numerous other objections to the decree of the court below, it is insisted that the will of Wash Ballard was invalid as against his children by his first wife, because they were not mentioned therein. Such appears to be the fact.

It is also insisted that the deed from Wash Ballard to his children by his second wife is void because of the indefinite description, and, if not void for that reason, that it was void because it undertook to convey a particular part of a quarter section, containing sixty acres, when the interest then owned by Ballard was an undivided third.

Neither of these objections to this deed appears to be well taken. The deed from Wash Ballard conveyed a tract of land in shape of a parallelogram off the east side;

and, while it does appear that Wash Ballard did not then own that land in severalty, it does appear that when the partition was made the grantees in that deed were given substantially that land, the difference being that they were given only 55.35 acres, but that land lay within the boundaries of the sixty-acre tract. It is this 55.35-acre tract which forms the subject-matter of this litigation, and that land was embraced in the tract described in the deed from Wash Ballard. We do not know what showing was made in the suit for partition brought by Armstrong back in 1884; but we do know that the land now in litigation was assigned to Armstrong's wards; and we also know that this land was included in Wash Ballard's deed, although that deed conveyed about five acres more land than was assigned to Armstrong's wards.

It is insisted that, as Rosie Johnson, or Fannie Ballard, was a party to the partition decree in the suit of Armstrong *et al.* v. Cleveland *et al.* (and such is the fact), her title passed by operation thereof in the following manner. The court allowed J. C. Boyd a fee of $50 for his services in that case; and as the fee was not paid an execution issued and the whole half interest there assigned to the defendants in that case was sold, at which sale Boyd became the purchaser. Later Boyd received a sheriff's deed, and thereafter conveyed to Cleveland, whose heirs, upon the death of their ancestor, conveyed to McLaughlin and to Kerby. But the sale to Boyd was void for the reason that he was the guardian *ad litem* of the infant defendants; and by sec. 8115, C. & M. Digest, it is provided that persons standing in that relation may not purchase at a partition sale.

It is said that McLaughlin had no notice of the infirmity in the sale. He makes no showing to that effect, although he alleges the fact so to be in his answer. But this infirmity appears in the chain of his title, and he is therefore affected with notice of it. *Star Lime & Zinc Mining Co.* v. *Arkansas National Bank,* 146 Ark. 246; *Madden* v. *Suddarth,* 144 Ark. 79.

The purchasers claiming title through T. C. Trimble, Jr., acquired no title, for the reason that Trimble himself acquired none in buying in the Armstrong title, for, as we have herein shown, Armstrong was a trustee, and as such held the title.

Upon a consideration of the whole case we are of opinion that the decree of the court below is correct, and it is therefore affirmed.

BROWN v. PEOPLE'S BANK OF SEARCY.

Opinion delivered October 31, 1921.

HOMESTEAD—ABANDONMENT.—Where a debtor left his homestead for five years, and acquired another home in another town, and continuously offered his former homestead for sale, a finding that he had abandoned the former homestead will be sustained.

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

Emmet Vaughan, for appellant.

Creditors have no lien upon a homestead for the satisfaction of their debts, and they are not concerned in its sale or transfer, whether fraudulent or otherwise. 43 Ark. 429; 33 Ark. 454; 52 Ark. 101; 52 Ark. 493; 56 Ark. 156; 56 Ark. 253; 57 Ark. 242; 66 Ark. 382; 65 Ark. 373; 70 Ark. 69.

A homestead will not be considered abandoned on account of the owner removing from it temporarily, when it is his intention to return to it. 38 Ark. 539; 37 Ark. 283; 55 Ark. 55; 56 Ark. 621; 219 S. W. 30. An effort to sell a homestead does not show an abandoment. *Spurlock* v. *Gaikens,* 146 Ark. 50.

Brundidge & Neelly, for appellee.

If, at the time of the removal, there is no present or constant and abiding intention to return and preserve the homestead character, then such removal will constitute an abandonment of the homestead. 137 Ark. 240; 134 Ark. 202; 13 R. C. L. p. 659. It has been five years since appellant left his home, and he has not returned there yet.

SMITH, J. On the 18th day of January, 1916, the People's Bank of Searcy recovered a judgment against H. L. Brown in the sum of $4,500. An execution issued on said judgment and was levied on lots 10, 11 and 12, in block 30, of the city of Searcy. Sometime prior to the issuance of the execution, Brown had moved from his home on the above-described lots to Des Arc, and had rented his home to one McCain. He claimed the property as exempt, and that claim was sustained by this court in the case of *People's Bank of Searcy v. Brown,* 136 Ark. 517. The opinion in that case was delivered May 6th, 1918.

On September 3, 1918, another execution was issued and levied on the above-described property, but the property was erroneously described in the sheriff's return, in the notice of sale, and in the certificate of purchase, as being lots 10, 11 and 12, in block 27, although the levy was actually made on the lots belonging to Brown.

The bank brought suit in equity, in which the facts above recited were alleged. It was further alleged that on October 29, 1918, Brown had pretended to convey the lots to W. M. Bell, but that no consideration had passed from Bell to Brown, and that said conveyance had been made to hinder and delay the bank in the collection of its judgment. That Brown was insolvent, and Bell was holding the title for Brown's benefit.

There was a prayer that the sheriff's return and certificate of purchase be corrected to read block 30, instead of block 27, and that the deed to Bell be canceled.

In his answer Brown denied the allegation stated, and alleged the fact to be that said lots had at all times been his homestead until the sale thereof to Bell. This answer was adopted by Bell as his own.

The court found the fact to be as alleged in the bank's complaint, and made a specific finding that Brown had abandoned his homestead, and that the con-

veyance to Bell was in fraud of his creditors. The court canceled the deed to Bell and ordered the property sold, and this appeal is from that decree.

The examination and the cross-examination of Bell makes it reasonably certain that the deed to him was without consideration; and, in support of the validity of the deed, it is chiefly insisted that, as it was a conveyance of a homestead, no creditor had the right to complain.

The controlling question in the case is whether there had been an abandonment of the homestead prior to the levy of the execution; and we have concluded, upon a careful consideration of the testimony, that the finding of the court that there had been an abandonment is not clearly against the preponderance of the evidence.

The testimony upon which that finding was made is to the following effect: Brown left Searcy in 1915, and did not thereafter at any time reside in Searcy. After leaving Searcy, he immediately and continuously offered the lots for sale. On his direct examination as a witness Brown testified that before his sale to Bell he had already bought a home in the town of Des Arc. On his cross-examination he stated that his wife had bought the home, and that after his sale to Bell, and out of the proceeds of that sale, he had paid his wife back the money she had paid for the Des Arc home. But, as has been said, the examination of Bell and his answers to questions as to the amount paid by him, where he obtained the money, and how he paid it, makes it reasonably certain that Bell paid Brown no money, and that the deed to him was not *bona fide*. Brown explained his action in buying the home from his wife, after she had bought it and paid for it and had taken the deed in her own name, by saying that he found it unpleasant to live in a home owned by his wife.

It is true, as is insisted by counsel for Brown, that Brown's offer of his home for sale did not, of itself, constitute an abandonment thereof, and it is also true that his own testimony shows he had no such intention; but we think the facts stated herein, with the inferences

reasonably deducible therefrom, warranted the court in rejecting this statement and support the finding that he had in fact abandoned the Searcy home, and that it thereupon became subject to sale in satisfaction of the judgment against him. This being true, it follows that the conveyance of it, made in fraud of creditors, was properly set aside. Decree affirmed.

HEYDEN v. KENNEDY.

Opinion delivered October 31, 1921.

CHAMPERTY—WHO MAY SET UP.—Where an oil and gas lease stipulated that if no well was completed within one year from the date of the lease the lease should be void unless the lessee should pay an annual rental after the expiration of the first year, it is no defense to a suit by the lessor to cancel the lease for failure to complete a well or to pay the annual rental that the lessor has made a champertous agreement with a third person to develop the oil and gas under the land, as the cause of action does not rest upon the alleged champertous agreement.

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

Sam M. Wassell, for appellants.

The contract between Westmoreland and these plaintiffs on behalf of Straughan was one for champerty and maintenance, against public policy, and, notwithstanding the original lessee was not a party to it, surely a court of conscience ought not to lend aid to its enforcement as against the lessee or his assignee. 44 Ark. 473; C. & M. Digest § 1432; 86 Ark. 130; 2 Pomeroy, Eq. Jur. § 874, p. 1805; 2 Vest Sr. 125; 1 Pomeroy, Eq. Jur. 4 Ed. § 397; *Id.* § 398; 27 Cyc. 724; 225 S. W. 345; 129 Ark. 43; 175 N. W. 812; 46 App. D. C. 246; 205 S. W. (Tenn.) 320; 264 Fed. 474; 2 Pomeroy, Eq. Jur. 4 Ed. § 936; *Id.* § 1276; 11 A. L. R. 704, *et seq.;* 211 S. W. 152, 154; 98 Ark. 575; 77 Ark. 444; 169 Fed. 259; 34 Md. 407; 65 Atl. 129.

Tompkins, McRae & Tompkins, for appellees.

Appellant is an outside party, in no wise a party to or connected with the alleged champertous contract. That he may not complain of the contract, even if champertous, is settled. 35 L. R. A. (N. S.) 512 and cases cited in note; 117 U. S. 582; 137 Ill. 652; 69 Iowa 296; 112 Ga. 480; 60 Ark. 221; 92 N. W. 230; 14 L. R. A. 785; 44 L. R. A. 285.

SMITH, J. The case of *Epperson* v. *Helbron,* 145 Ark. 566, appears to have been brought as a test case to determine whether the lease therein sought to be canceled, as well as numerous other similar leases, had been forfeited because of the lessees' failure to develop the oil and gas fields as contemplated by the leases. These leases were for a term of years and stipulated for a division of the oil and gas which might be found. There was a stipulation in all these leases that, if no well was completed within one year from the date of the lease, the lease should be void unless the lessee should pay a stipulated rental annually after the expiration of the first year. The rental had not been so paid, and we held in the case cited that, upon the failure to pay in advance, the lease became void, although it was not provided in the lease that the rent should be paid in advance, distinguishing, in this respect, between exploration contracts for oil and gas and the ordinary leases for mere use and occupancy of land.

These leases were made to H. H. Givan, and among other lessors were S. W. Kennedy and Lizzie E. Kennedy, his wife. Kennedy's lease was dated November 29, 1918; the first year was out November 29, 1919, and notice of forfeiture was given by Kennedy on April 19, 1920.

It appears that in March, 1920, Kennedy and numerous other persons who had given Givan leases were solicited by one Westmoreland, on behalf of M. H. Straughan, to execute new leases to Straughan. These leases provided that the lessor should bring suit to cancel the lease previously given to Givan, and that the

expense of the lawsuit should be paid by Straughan, and that Straughan would make a payment of 75 cents for each acre covered by the lease within thirty days after the Givan lease had been declared forfeited by the court in which the suit to cancel had been brought.

The explanation of these contracts with Straughan is that, after obtaining leases, Givan would neither pay rentals nor develop the land, and that Straughan was willing to lease and develop the land, but was not willing to do so until the validity of the Givan leases had been determined.

About sixty persons, who had given leases to Givan, signed contracts with Straughan as set out above at the solicitation of Westmoreland, and about a month later suit was filed to cancel each of the Givan leases, the suit of appellee being among that number. After the institution of these suits, Givan assigned certain of these leases to the appellant Heyden.

There was an agreed statement of facts in which it was stipulated as follows:

"That on the land of R. O. Westmoreland there has been erected a derrick by Givan for the purpose of drilling for oil. That said derrick was erected by Givan after the lease referred to and completed before the forfeiture was declared. But no further work was done towards drilling a well after September 1, 1919, and no well was drilled nor ore mined on the land within the year mentioned in the lease, and no effort has been made since to drill a well on said land of plaintiff.

"That R. O. Westmoreland is one of about fifty plaintiffs bringing suit to cancel leases given to Givan and is the same R. O. Westmoreland who entered into a contract with M. H. Straughan to secure the bringing of suits, and the leases to Straughan.

"That no demand was made by the plaintiffs for these rentals at any time. No notice was given that plaintiffs would demand renewals in advance.

"That at the time of said suit no oil or gas had been discovered in Nevada County.

"That no rentals were tendered until after the bringing of this suit, and such tender was then refused."

The court found, from the pleadings and exhibits and the agreed statement of facts, that "neither defendant H. H. Givan, nor any one for him, began a well upon said land (Kennedy's land) within the time limited in said lease, and that he wholly failed to pay the rentals therein, and that on the 19th day of April, 1920, plaintiffs notified the defendant H. H. Givan that no well had been commenced, and no payment of rental made, that said lease was void."

The court declared the law to be that, as no well was completed upon said land, the payment of rentals to prevent the forfeiture of said lease should have been made in advance, and that, as no such payment was made, said lease was void as far as the same applied to the lands now claimed by the defendants Given *et al.,* and that said lease should be canceled and set aside.

The court thereupon adjudged the lease from Kennedy to Givan to be void and canceled it, and this appeal is from that decree.

For the reversal of this decree it is insisted that the contract, of which Straughan was the beneficiary, was one for champerty and maintenance and was therefore contrary to public policy and void, and that the court should not, for that reason, lend aid to its enforcement, and that the suit of Kennedy should not therefore be entertained by the courts of this State, and a nonsuit should be ordered.

A similar contention was made in the case of *Prosky* v. *Clark,* which was decided by the Supreme Court of Nevada (32 Nev. 441, 109 Pac. 793). This is a well-considered case, and the opinion was based upon the consideration of numerous authorities there cited. The court held (to quote the syllabus): "A nonsuit cannot be granted in an action brought to recover possession of a contract interest in mining claims, because the owner of the interest had made a champertous assign-

ment of a portion of such interest to one who joined in the action, since defendants cannot take advantage of the champerty, and, even though the partial assignment might be void, it will not defeat all right of recovery against defendants." This case is annotated in 35 L. R. A. (N. S.) 512, where the editor's note reads as follows: "It is the general rule that a third person may not take advantage of champerty as against the original owner of the cause of action. This is upon the theory that the cause of action does not in any way rest or depend upon the champertous agreement." A very large number of cases are cited in support of this note, and, among others, is the case of *Burnes* v. *Scott*, 117 U. S. 582, where it was held that the making of a champertous, and therefore under the law of the State void and illegal, contract for the prosecution of a suit to collect a promissory note cannot be set up in bar of a recovery on the note. In the opinion by JUSTICE WOOD it was said that the conclusion just stated was reached both upon reason and weight of authority, and that only two cases—and both of them by the Supreme Court of Wisconsin—had been found holding to the contrary.

So, we conclude here that, whether the contract between Kennedy and Straughan be champertous and void or not, that fact cannot be set up in bar of the right of Kennedy to sue on a cause of action to which the alleged champertous contract relates, for the reason that his cause of action does not in any way rest or depend upon his contract with Straughan.

Decree affirmed.

GRAHAM v. STATE.

Opinion delivered October 31, 1921.

1. INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE.—Evidence held to sustain conviction of manufacturing intoxicating liquors.
2. INTOXICATING LIQUOR—EVIDENCE.—In a prosecution for manufacturing intoxicating liquor, testimony that the mash would make a hog drunk was admissible to prove that it was intoxicating.

3. CRIMINAL LAW—OPINION AS EVIDENCE.—In a prosecution for manufacturing intoxicating liquor, the testimony of a witness as to having made a diligent search of an island, and that he did not think it possible that three men could have been hidden on it, was admissible to overcome defendant's testimony that upon pistol shot three men, presumably the guilty parties, were seen leaving the island.
4. CRIMINAL LAW—VENUE—INSTRUCTION.—An instruction in a prosecution for manufacturing intoxicating liquors that if the offense was committed partly in the county of the venue and partly in an adjoining county, the court would have jurisdiction, *held* proper.
5. INTOXICATING LIQUORS—MANUFACTURE—EVIDENCE.—Proof that defendant manufactured an intoxicating mash which had not been distilled will sustain a prosecution for manufacturing intoxicating liquor.

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

Cravens, Oglesby & Cravens, for appellant.

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

SMITH, J. Appellant was convicted in the Greenwood District of Sebastian County under an indictment which charged that he "did manufacture and was unlawfully and feloniously interested in the manufacture of ardent, vinous, malt, spirituous, fermented, alcoholic and intoxicating liquors," and has appealed. For the reversal of the judgment, he assigns numerous errors in the admission of testimony and errors in giving and refusing instructions.

The testimony established the fact that a still had been in successful operation on an island in the Arkansas River, and that the island was in Crawford County. Clawson and some other officers made a search of the island for the still, and found it. Before crossing over on the island, they found a barrel sunk down in the ground, covered over with brush. A tow sack was there, which had been used as a strainer, and which contained some of the mash and hops similar to that in the barrel. It does not appear through what processes the mash

had gone, but the mash had fermented, and Clawson, who testified that he was familiar with the processes of manufacturing intoxicating liquors, stated that the liquor in the mash was intoxicating. He stated that it would make a hog drunk, and exceptions were saved to the admission of that testimony.

On crossing the river the officers found, in the boiler of the still, a mash identical with that found in the hidden barrel, and the testimony shows that whiskey had been very recently distilled, as the boiler was hot. The evidence on the part of the State is to the further effect that appellant and a party of men with him were seen coming almost directly from the still; that one of them had a large milk can which gave off an odor just like that given off by the mash found in the barrel; and that appellant and those with him, as soon as they landed from boats on the Sebastian County side of the river, started at once with the milk can directly towards the barrel, and that when they got to the road which runs to the river within a short distance of the barrel and saw the tracks made by the searching party they stopped and held a consultation, after which one Jackson, a member of appellant's party, went on by near the barrel to the pump, and after pumping a few strokes stopped and looked around, after which he returned to his waiting companions, and they again, after a short consultation, went back to the river bank and sat upon a log, and when the searching party went up to where appellant's party was and informed them that the mash had been found, and that they were looking for the still, Carson, one of the appellant's companions, jumped in one of the boats and was only restrained from leaving when the constable drew his pistol.

We think this testimony sufficiently connects appellant with the crime there being committed to support the jury's verdict of guilty.

Numerous assignments of error relate to the admission of testimony in regard to the things found on the island and around the hidden barrel, and the conduct of

appellant's companions while being observed by the officers. But this testimony was all competent to show that the crime of manufacturing intoxicating liquors was being committed, and that it was an operation in which appellant and his companions were alike concerned.

Appellant accounted for the peculiar odor of the milk can he and his companions were carrying by stating that it had been used for carrying fish-bait, and his companions corroborated that statement.

No error was committed in permitting Clawson to testify that the mash would have made a hog drunk. This was but an emphatic way of stating that the mash was intoxicating. He had testified that he was familiar with the mash used in making whiskey, and that the mash found was intoxicating, and to say that it would make a hog drunk was tantamount to saying that it was highly intoxicating, a comparison which it was not improper for him to make.

Clawson was permitted to testify over appellant's objection that a diligent search of the island was made, and that he did not think it possible for three men to have been hidden on the island while the searching party were there without being discovered. The significance of this testimony is that appellant attempted to show that when a member of the searching party fired his gun twice—thus giving the signal agreed upon to other members of the searching party that the still had been found—three men were seen leaving the island, the inference to be drawn from the testimony being, of course, that these escaping men were the guilty parties. Clawson's testimony was competent to rebut this inference, and it was proper for him to state how thorough the search of the island had been.

The instructions in the case were those usually given in prosecutions of this kind, except one numbered 3, dealing with the question of venue, which reads as follows:

"If you believe from the evidence that the offense, if any, was committed partly in Sebastian County, Arkansas, and partly in Crawford County, Arkansas, or the acts or effects thereof requisite to the consummation of the offense occurred in both counties, the court tells you that this court would have jurisdiction of the offense committed, if any."

No error was committed in giving this instruction. Appellant was not indicted for manufacturing whiskey, but for manufacturing intoxicating liquor, and the testimony on the part of the State was to the effect that the mash found in Sebastian County, where the venue was laid in the indictment, was intoxicating. The subsequent process of distillation may have been necessary to improve its palatability, or to make the mash into whiskey; but if the mash was intoxicating, as Clawson stated it was, then its manufacture was unlawful, although it had not become whiskey, as the inhibition of the statute is against the manufacture of "any alcoholic, vinous, malt, spirituous, or fermented liquors, or any compound or preparation thereof commonly called tonics, bitters, or medicated liquors, within the State of Arkansas." Act No. 30, Acts 1915, p. 98.

This feature of the case is similar to the question considered in the case of *Foshee* v. *State,* 149 Ark. 559. There an instruction told the jury that when the beer or mash had been made in the process of distillation of whiskey, it will be declared an intoxicating liquor, even before it passes through the process of distillation. In condemning this instruction, we there said:

"The instruction given by the court in each case set out above was predicated upon the idea that when the liquid commonly called beer was produced in the process of the distillation of whiskey it will be judicially said that the liquor 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 spirits or fermented liquor within the meaning of the statute prohibiting the distillation of spirits 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 spirits or fermented liquor was a question for the jury. The instruction given took that question from the jury and was erroneous."

See, also, *Robertson* v. *State,* 148 Ark. 585; *Marsh* v. *State,* 146 Ark. 77; *Patterson* v. *State,* 140 Ark. 236.

The court did not assume in the instant case that the mash or beer found in Sebastian County was in fact intoxicating, and the jury passed upon that question of fact.

The court did refuse to give an instruction numbered 4, asked by appellant, which told the jury that they "could not convict the defendant unless you further find the defendant did, in Greenwood District of Sebastian County, convert said mash into an alcoholic liquor." This instruction was properly refused, because it leaves out of account the question of the intoxicating character of the mash itself, which, as appears from the case just quoted from, was a question of fact for the jury where the distillation had not taken place.

No error appears, and the judgment is affirmed.

COTTON v. CHANDLER.

Opinion delivered October 31, 1921.

LANDLORD AND TENANT—LIEN OF LABORER.—Where a landowner employed a share-cropper to raise a crop on land, and made advances to him to be repaid out of his share of the crop, the landowner's right to a lien for such advances is superior to the rights of third persons who assisted the share-cropper in making the crop under an agreement with the latter that they should receive one-third of the latter's crop.

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

E. H. Timmons, for appellants.

Appellants assert their right to a lien on the cotton by virtue of having performed labor in the production thereof. C. & M. Digest, § 6848. The relation of landlord and tenant did not exist between the parties to this suit. 46 Ark. 254. The agreed statement of facts shows that Chandler, overseer of the farm, vested with power to control the farm as also to contract with and control laborers engaged in cultivating it, and that these laborers had no interest in the land. 55 Ark. 389; Black's Law Dict., 2 Ed., "Overseer;" *Id.* "Cropper;" 71 N. C. 7.

James B. Gray, for appellees.

A landlord's lien for rent and supplies furnished is superior to a laborer's lien for work done in the crop. C. & M. Digest, §§ 6809, 6891.

SMITH, J. Appellants brought suit by attachment in a justice court to enforce a laborer's lien on three bales of cotton in the possession of appellees, Chandler and Redwine and George Cotton, to enforce a demand of $149.50 alleged to be due appellants for labor performed by them in the production of said cotton. There was a trial by the justice and a finding and judgment for the plaintiffs for the amount sued for.

There was an appeal to the circuit court, where the cause was heard on the following agreed statement of facts:

"It is hereby agreed that K. R. Chandler is a tenant in common with N. W. Redwine with regard to the product of the Redwine farm in Lonoke County, Arkansas, by virtue of an agreement between the said Redwine and K. R. Chandler, that they were to have equal shares of the product of said farm during the year of 1920, and the farm was to be worked by croppers who were to receive one-half of the cotton raised on said farm as a remuneration for labor performed in the production of said crop. It is further agreed between the

said Redwine and Chandler that Chandler was to be the overseer of said farm and vested with the authority to contract with croppers to work the land for a consideration of one-half of the cotton produced by the labor of said croppers.

"It is also agreed that K. R. Chandler and George Cotton entered into a contract whereby it was agreed that the said George Cotton was to cultivate about 80 acres of said land in cotton, and that the said George Cotton was to receive one-half of the crop of cotton raised on said 80 acres of land as a consideration for labor performed by him in the production of said crop of cotton, and it was also agreed and understood by and between the said K. R. Chandler and George Cotton that one Carl Cotton and one Earl Cotton were to assist the said George Cotton, and that they were to receive one-third of George Cotton's one-half of the cotton as a consideration for labor performed by them in the production of said crop of cotton.

"It is also agreed that K. R. Chandler advanced George Cotton a credit of $1,035 upon the condition that the said credit was to be paid out of the proceeds of George Cotton's share of the crop, and, after accounting for all the products raised on the farm of the defendants for 1920, there remains due and unpaid $17.53 to K. R. Chandler on supplies and money furnished the defendant George Cotton."

The court below found against appellants, and a judgment for a sum of money erroneously rendered against them. Since the transcript was lodged in this court, this judgment has been corrected to show that no judgment for money was in fact rendered against appellants, and that the judgment of the court was simply a dismissal of the suit to enforce a laborer's lien. This correction of the judgment below does not dispose of the appeal, as the real question in the case is whether appellants have a laborer's lien which should be enforced against the cotton attached by them.

Redwine was not made a party by appellants in the justice's court; but he appears to have been made a party on his own motion, and this was a proper action to have taken; at any rate, it was not one which prejudices appellants.

The contract between Chandler and Redwine, as shown by the agreed statement of facts, constituted them partners in their farming operations. The contract embodied in the agreed statement of facts between Chandler and Redwine and Cotton and Cotton's sons—these appellants—is of a tripartite character, the effect of which was to constitute George Cotton and both his sons as share-croppers of their landlords,—Chandler and Redwine. As to the crop grown on this eighty-acre tract of land, the three Cottons were share-croppers, and the landlord had a lien on the entire crop for advances made necessary to make it. The sons of Cotton did not elect to make a separate trade with the landlord, which, of course, they might have done, whereby they would have been liable only for such advances as might have been made them individually. On the contrary, they cultivated the land under a contract which their father had made with the landlord, and that contract was one under which the landlord had the right to make advances upon the security of the lien given Chandler and Redwine by law as landlord.

No question is made about the advances to George Cotton being necessary to enable him to make the crop, and the judgment of the court below is therefore affirmed.

LEEHY v. FULLERTON.

Opinion delivered October 31, 1921.

1. LANDLORD AND TENANT—FORFEITURE OF LEASE.—A lessor may disaffirm a lease contract and regain possession of the land if the lessee, either in words or by equivalent acts, has repudiated or abandoned the contract, even though the lease does not provide for a forfeiture upon failure to comply with its terms.

2. LANDLORD AND TENANT—FORFEITURE OF LEASE.—Where a contract of lease provided that the lessee should prepare and execute a certain lease and he failed and refused to execute it, the lessor was entitled to treat the contract as abandoned and bring unlawful detainer for the land.
3. TRIAL—AMBIGUOUS INSTRUCTION—GENERAL OBJECTION.—A general objection is insufficient to call attention to an ambiguity in an instruction.
4. APPEAL AND ERROR—INVITED ERROR.—One cannot complain of an erroneous instruction given at his adversary's request when he requested an instruction containing the same error.
5. TRIAL—INSTRUCTION—NECESSITY OF REQUEST.—Appellant cannot complain of the trial court's failure to give a certain instruction, in the absence of any request therefor.

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

Brundidge & Neelly, for appellant.

Where the contract contains no provision for forfeiture of the lease, the tenancy cannot be terminated by breach of covenant by the lessee. 134 Ark. 21; 135 Ark. 536.

There being no provision for forfeiture, appellant's peremptory instruction should have been given. 100 Ark. 567.

Instruction No. 1 was erroneous in that it left out of consideration whether or not there was a proviso in the contract for forfeiture in the event the same was breached by defendant, and the further fact of whether or not appellant was prevented from planting all the berries called for by the agreement, on account of weather conditions.

John E. Miller and *C. E. Yingling*, for appellee.

This suit was not based on appellant's failure to comply with a written contract, but his failure to comply with an oral agreement. His was a tenancy at sufferance. 24 Cyc. p. 1401.

Appellant did not plead any special contract or circumstances to defeat appellee's right of possession, nor was he required to assume the burden of proof in this

respect, and he should not now be heard to complain that the jury decided these issues against him. 36 Ark. 518.

Appellant repudiated the contract by refusing to plant the required amount of berries, and the appellee therefore had the right to rescind. 41 Ark. 532; 22 Ark. 258; 97 Ark. 541; 24 Cyc p. 1417.

Appellant in failing to plant the required crop thereby refused to pay rent. This, with his refusal to quit possession, was ground for an action of unlawful detainer. 57 Ark. 301; 97 Ark. 541.

Appellant's peremptory instruction was properly refused.

Instruction No. 1 was properly given, it stating the law of the case as found in 36 Ark. 518 and 41 Ark. 532.

HUMPHREYS, J. Appellee instituted suit against appellant in the White Circuit Court to recover the possession of forty acres of land, alleged to be unlawfully detained by appellant, on account of his failure and refusal to enter into a written lease in accordance with an oral agreement entered into between said parties.

Appellant filed an answer denying that he failed and refused to enter into a written lease for the land in accordance with the oral agreement, but alleged that on the contrary he had reduced the agreement to writing, and that it had not been executed because appellee refused to sign it; that, pursuant to the oral understanding, he had entered into possession of the premises and carried out all the terms of the lease until interrupted by a demand for possession of the premises and the institution of this suit by appellee.

The cause was submitted upon the pleadings, evidence and instructions of the court, which resulted in a finding and judgment in favor of appellee for the possession of the land.

It was agreed between the parties that a written lease should be executed to the effect that appellant should plant as much as he could of a certain block of six acres in strawberries in the spring of 1920, should

cultivate four acres of strawberries already growing on the land, and should cultivate the balance of the land in corn; that appellee should receive one-fourth of the proceeds derived from the berries and one-third of the corn for the use of the land. Appellant took possession of the land and planted about an acre and a half of berries in the spring of 1920 and worked out the four acre tract, when appellee demanded possession of the lands and instituted this suit.

The evidence is conflicting as to whose duty it was to prepare the written lease. Appellant prepared a written lease and left it at the McRae State Bank for appellee to sign. The lease provided for the balance of the berries to be planted in the spring of 1921, and appellee refused to read or sign it because it provided that the strawberries should be planted in the spring of 1921 instead of 1920. The evidence is also in conflict as to whether appellee planted all the strawberries he could have planted in the spring of 1920 under the prevailing weather conditions.

When the evidence was concluded, appellant requested a peremptory instruction, on the ground that the right of eviction did not exist in favor of the lessor in the absence of a clause in the contract providing for a forfeiture upon failure to comply with the terms of the lease, and it is now insisted that the court committed reversible error in refusing to give appellant's peremptory request. This contention is not sound, for it is well settled that a lessor may disaffirm a lease contract and regain possession of the land if the lessee, either in words or by equivalent acts, had repudiated or abandoned the contract. *Buckner* v. *Warren*, 41 Ark. 532. The doctrine announced in the case cited was approved in the later case of *Lindsey* v. *Bloodworth*, 97 Ark. 541. In the latter case the court took occasion to say: "The other allegations of the complaint show that the appellant had violated the obligations of his contract with appellee in such manner as to evince an intention on his (appellant's) part not to pay the rents

as stipulated for, and, in fact, to abandon the contract. The complaint is crude, but, taken as a whole, it certainly states facts to show that appellant had wholly abandoned the contract which created the tenancy, and that his holding thereafter was unlawful."

The evidence in the instant case, as stated above, was in conflict as to whether appellant abandoned his contract by failing and refusing to prepare and execute a lease requiring him to plant as many strawberries as he could in the spring of 1920 on a certain six-acre block in the forty-acre tract. If he did so fail and refuse, it amounted to a repudiation of his contract, and an action in unlawful detainer would lie. For this reason it was proper to refuse appellant's peremptory request.

Appellant insists that the court erred in giving appellee's instruction No. 1, which is as follows:

"You are instructed that if you find from the testimony in this case that the defendant failed or refused to comply with the terms of the contract for the lease of the lands mentioned in this action through no fault of the plaintiff or her agent, then the plaintiff had the right to rescind said contract and to treat the same as at an end, and your verdict will be for the plaintiff."

The insistence is that the instruction authorized a rescission of the contract for a mere breach thereof. The instruction is ambiguous in that it is doubtful whether it was intended to relate to the failure and refusal of appellant to execute a written contract or a failure and refusal to plant as many strawberries as he could on the six-acre block of ground in the forty-acre tract. The attention of the court was not called to this ambiguity existing in the instruction by specific objection. The objection interposed to it was general. But, even if inherently wrong, appellant waived the error by requesting an instruction upon the same issue. The court gave appellant's request No. 2, which contained a proviso submitting the identical issue to the jury.

The provision is as follows: "Provided, you find that the defendant complied with the terms of the contract for the lease of the land."

Appellant's last insistence for reversal is that an error was committed by the court in failing to tell the jury that a suit in unlawful detainer would not lie for a partial breach. It is true that a lessor cannot evict a lessee from the leased premises unless the lessee has repudiated the contract by word or act, but appellant never raised this question below. No request was made by appellant submitting the issue of the effect of a partial breach to the jury. The case was tried and submitted upon the issues of whether appellant had failed and refused to execute a written contract in accordance with the parol agreement, and whether he failed to plant all the strawberries he could in the spring of 1920 on the six-acre block in the forty-acre tract.

No error appearing, the judgment is affirmed.

HARMON v. STATE.

Opinion delivered October 31, 1921.

1. CONTINUANCE—ABSENCE OF WITNESS.—It was not error to refuse a continuance upon account of the absence of a witness who was without the jurisdiction of the court and not amenable to its process, in the absence of a showing that his attendance could be procured within a reasonable time.
2. CONTINUANCE—SICKNESS OF WITNESS.— A motion for continuance on account of the absence of a witness alleged to be sick was properly denied where it was not substantially shown that the witness was sick or that her attendance could be procured at the next or at any subsequent term of the court.
3. CONTINUANCE—CUMULATIVE TESTIMONY.—Refusal of a continuance for the absence of witnesses was proper where their testimony would have been cumulative.

Appeal from Sharp Circuit Court, Northern District; *D. H. Coleman,* Judge; affirmed.

Geo. T. Humphries, for appellant.

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

There was no error in the verdict of the jury. The evidence was amply sufficient. 135 Ark. 117; 136 Ark. 385.

The court did not err in refusing a continuance due diligence not being shown. 121 Ark. 17; 123 Ark. 561; 103 Ark. 509; 62 Ark. 543; 125 Ark. 269.

A continuance will not be granted for the purpose of procuring evidence that is purely cumulative. 79 Ark. 594; 82 Ark. 203; 86 Ark. 317; 100 Ark. 149; 120 Ark. 562.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Sharp Circuit Court for the crime of robbery, and as a punishment therefor was sentenced to serve a term of five years in the State penitentiary. An appeal has been duly prosecuted to this court from the judgment of conviction.

Appellant's only insistence for reversal is that the court erred in denying his motion for a continuance. The identity of the appellant as the person who committed the robbery, and whether he was present, or was elsewhere, when the robbery was committed, were vital issues in the case. Among other marks of identity, the witnesses for the State identified appellant by a red beard of several days' growth. The evidence adduced in behalf of the appellant tended to show that he had been shaved on the evening of the day before the robbery. The State's evidence tended to show that appellant committed the robbery at about 8:30 p. m. on March 25, 1921. The evidence adduced in appellant's behalf tended to show that at that particular time he was at or near Franklin, a distance of from eight to twelve miles from the home of Andy McConnell, upon whom and in whose house the robbery was committed.

Appellant requested a continuance in order that he might obtain the evidence of Preston Jennings, who, if present, would testify that he shaved appellant close all over the face on the evening of the day before the robbery, and that he might obtain the evidence of Cleffie Majors, who would testify, if present, that she

saw appellant in her home at 8 o'clock on the night of the robbery, about nine miles from where the robbery was committed.

It was stated in the motion for a continuance that a subpoena had been issued for Preston Jennings, directed to the sheriff of Izard County, which was the residence of said witness, but that the subpoena had been returned unserved; that the witness was absent from the State of Arkansas temporarily and would return in a very short time. It was also stated in the motion that a subpoena was issued and served upon Cleffie Majors, who was not in attendance on the court, because, according to appellant's understanding, she was physically unable to be present.

The record reflects that appellant and four other witnesses testified that appellant was shaved on Thursday evening March 24, 1921, and that appellant and three other witnesses testified, in substance, the same as the alleged testimony of the absent witnesses, in support of appellant's alibi.

Appellant's motion for a continuance was insufficient in that it failed to show where his witness Preston Jennings had gone or when he would return. Appellant should have made a showing that he could procure the attendance of the witness within a reasonable time, it appearing on the face of the motion that the witness was out of the jurisdiction of the court and not amenable to its process. *C. R. I. & P. Ry. Co.* v. *Harris,* 103 Ark. 509; *James* v. *State,* 125 Ark. 269.

The motion was also insufficient in that it failed to substantially show that Cleffie Majors was sick and unable to attend court, or that her attendance could be procured at the next or any subsequent terms of the court.

The court was justified in denying the motion for a continuance upon these grounds, as well as upon the ground that the testimony of the absent witnesses was cumulative.

No error appearing, the judgment is affirmed.

CARSON v. ROAD IMPROVEMENT DISTRICT NO. 2.

Opinion delivered November 7, 1921.

HIGHWAYS—ROAD IMPROVEMENT DISTRICT—ALTERATION OF PLANS. —Where the commissioners of a road improvement district were required by statute (1 Road Laws 1919, p. 174) to file "its plans, specifications and estimates" with the county clerk, and the specifications so filed provided that the engineer should have the power, with the approval of the board, to alter the plans and specifications, *held* (1) that the power of the engineer to alter the plans and specifications was limited to immaterial changes; (2) that a change of the method of surfacing the road from the application of a light asphaltic oil with a cover of sand to the application of a heavier asphaltic oil with a crushed stone binder, involving an additional expense of $13,000 in a contract for an improvement to cost $300,000, was not material.

Appeal from Craighead Chancery Court, Western District; *Archer Wheatley,* Chancellor; reversed in part.

Arthur L. Adams, for appellant.

Act 97, Acts 1919, does not authorize any change in plans and specifications, nor does the amendatory act of 1921 (Act 423, Acts 1921) enlarge the power of the board or the engineer. Sec. 27 of this latter act constitutes no part of the plans and specifications.

The word "plans" as used, necessarily means "plans and specifications" and is not limited to the narrower sense as outlined in 72 N. W. 550 and 18 N. W. 85.

Commissioners have no authority except that expressly given or necessarily implied by the terms of the act. 120 Ark. 212; 110 Ark. 417; 94 Ark. 49; 94 Ark. 82. See also, case note in L. R. A. 1918-B 1004, 1010.

The proposed change is a material variation from the original plans, both as to the kind of material used and the expense thereof. 105 Ark. 65. Federal aid authorities can not, as a condition of the donation, alter the plans and specifications, when neither the commissioners nor the county court can do so.

Basil Baker and *Horace Sloan,* for appellee.

In the absence of statutory prohibition against alterations in the plans of an improvement district, the dis-

trict possesses authority to make minor changes as a necessary incident to its power to make plans and specifications. 4 McQuillin on Municipal Corp. § 1921; 226 Fed. 372; 55 Ark. 148; 119 Ark. 271; 143 Ark. 297. An even greater change in plans of a district was that involved in 135 Ark. 104, where the court held that the change was not prohibited by statute.

The act creating this district expressly confers the power and authority to make minor changes and modifications of the plans. Paragraphs 24 to 29 inclusive.

The change in plans adds less than 5% to the total cost of the improvement and cannot be regarded as anything but a minor change.

In passing Act 291, Acts 1919, the Legislature expressly ratified the provisions in the plans and specifications for alterations and extra work, etc. Sec. 3 thereof shows that there was no intention to affect any of the proceedings under Act 97, Acts 1919, creating the district. The Legislature has no power to repeal a curative or validating act after third parties have acquired rights relying thereon. 6 R. C. L. p. 361, Sec. 357; 215 U. S. 417; 160 Wis. 659.

If the subsequent act of 1921 (Act 423) be construed as affecting the construction contract by eliminating the provisions for alterations, or of depriving the district of power to pay for the additional costs of construction out of taxes collected, it is unconstitutional. 16 Wall. 314; 105 U. S. 278; 3 Ark. 285; 103 U. S. 358 and other cases cited by appellee. This act is void because in conflict with § 22, art. 5, Constitution.

The power expressly granted to the district to take necessary action to secure federal aid necessarily implies power to make reasonable changes necessary to secure such aid.

If the added costs due to the alteration are paid out of the federal aid funds, a taxpayer of the district, in the absence of a showing of detriment to the improvement, is in no position to object. 5 Alaska 338; 111 U. S. 701.

McCULLOCH, C. J. Appellant was the plaintiff below, and sought to enjoin the commissioners of appellee district from altering the plans and specifications, as approved by the county court, for the construction of the improvement and from proceeding to construct the improvement according to the altered plans and specifications.

The district was created under Act 97 of the session of 1919 (Road Acts 1919, vol. 1, page 174), which provides that, as soon as the board of commissioners "shall have formed its plans and secured an estimate of the cost of the aforesaid improvement, it shall file a copy of its plans and specifications and estimates with the county clerk of Craighead County;" that the plans "shall be accompanied by a map showing in a general way the location of the highway to be constructed," and that, upon the filing of said plans, the clerk shall give notice that all parties interested will be heard on the question of the adoption of the plans. The statute is silent as to the authority of the board of commissioners to alter the plan after approved by the county court.

The commissioners filed the plans, which specified in detail the method of improving the road, and the specifications contained a provision that the engineer should have the power, with the approval of the board, to alter the plans and specifications.

The county court, on hearing the matter, approved the plans and specifications as a whole. These plans and specifications provided a method of surfacing the road with an application of light asphaltic oil and a cover of sand, spread for the purpose of absorbing the surplus oil. Subsequently the plans were changed at the suggestion of the State Highway Commissioner that, in order to secure federal aid, it was necessary to change the specifications with reference to the surfacing, and to provide for a heavier and better material. So the commissioners changed the plans and specifications

to provide for the application of a heavier asphaltic oil and the use of crushed stone as a binder instead of a covering of sand. It appears from the record that this change was necessary in order to conform to the requirements of the United States Bureau of Public Roads before aid from that department could be secured. It is shown by the agreed statement of facts that this change involved an additional cost of about $13,000, the contract for the entire improvement costing approximately $300,000. The road to be improved was 12.27 miles in length with 4.62 miles of laterals, and the surface yardage to be treated aggregated 116,980 square yards. The amount of federal aid expected to be obtained is $25,000. A contract was made by the board of commissioners for the construction of the improvement in accordance with the altered plans and specifications, and the contractor was made a party defendant to this suit.

The case was tried on the pleadings and exhibits and an agreed statement of facts, and the court rendered a final decree dismissing the complaint in so far as it concerned the prayer for an injunction to restrain the commissioners from constructing the improvement in accordance with the altered plans and specifications, but granted an injunction against the commissioners, restraining them from paying the additional cost under the altered plans and specifications out of the funds of the district "derived from present levies of taxes on the assessment of benefits or funds derived from borrowing money." Both parties have appealed.

The fact that the suggestion for a change of plans came from the federal bureau or from the State Highway Commissioner is without controlling force in this controversy. If the board of commissioners was without authority to change the plans, they could not justify their action by showing that it was done at the direction of any other State or Federal agency, or for the laudable purpose of securing Federal aid. The limits of the

authority of the board of commissioners must be tested by the statute. The statute contains no express provision on this subject, but authority is conferred in absolute terms to construct the improvement, and there is a direction that plans and specifications shall be prepared in advance and submitted to the county court for approval.

We need not decide what the powers of the board would be with reference to material changes in the plans, but we think that authority is not wanting for making immaterial changes. It is not conceivable that the lawmakers meant to restrict the powers of the board, after having once adopted plans, in making immaterial changes from time to time. The plans filed with the county court contained an express provision for such changes, and a fair interpretation of the language used shows that only immaterial changes were in contemplation. The case turns, then, on the question whether or not these changes made by the board of commissioners constituted substantial or merely slight and immaterial changes in comparison with the magnitude of the whole work.

We think that the changes were not material, and in reaching this conclusion we are influenced by previous decisions of this court, notably the case of *Hout* v. *Harvey,* 135 Ark. 104, where we held that a change in the construction of a road from a width of 12 feet of gravel 5 inches deep, with a gravel coat of asphalt treatment 1 inch deep, to a road 14 feet wide gravel 7½ inches deep, was not a material change. In that case the original cost was $176,717, and the change involved an increase of $52,231.49 in the cost. The change in the present instance is no more material than that made in the case just cited.

The conclusion thus reached on this issue settles all the questions necessarily involved in the case, for if the change made was an immaterial one, and the commissioners had power to make it, the chancery court was

correct in refusing to restrain the board of commissioners from proceeding under the altered plans and specifications, but erred in restraining the commissioners from paying for the added cost out of the funds of the district derived from borrowing money or from levying assessments. Of course, the Federal aid to be obtained will amount to more than the additional cost, but it is said that, inasmuch as that aid will not be forthcoming until the completion of the improvement, it is a substantial inconvenience for the commissioners not to be allowed to proceed with the use of the district funds in paying for the improvement. We do not see that the question of Federal aid enters into this controversy in any respect, but, if the commissioners had the authority to make the change, it follows necessarily that the court was wrong in restraining them from paying for the improvement out of the funds of the district, provided the total cost of the improvement, including the additional cost arising from the change in the plans, does not exceed the benefits. It is unnecessary to discuss the effect of subsequent statutes undertaking to approve the plans and sepecifications, or amending the original statute.

The decree is affirmed on the appeal of the plaintiff, but on the appeal of the defendants it is reversed, and the cause remanded with directions to dismiss the complaint for want of equity.

LINGO v. SWICORD.

Opinion delivered November 7, 1921.

1. PROCESS—DEFENDANTS IN DIFFERENT COUNTIES.—Under Crawford & Moses' Dig., § 1178, service of process, in a transitory action, cannot be had on a defendant in a county other than that of his residence, except where there is a service in the county where the action is instituted on a co-defendant who is jointly liable.
2. BILLS AND NOTES—JOINT LIABILITY.— Indorsers of a note are not jointly liable with the maker.

3. BILLS AND NOTES—LIABILITY OF PAYEE.—The payee of a note who has indorsed it to another is liable only to such indorsee or to subsequent holders of the note.
4. BILLS AND NOTES—RIGHTS OF ACCOMMODATION INDORSER.—One who indorsed a note for the maker's accommodation and pays the note, does not thereby become a purchaser, nor be entitled to hold the payee liable on his indorsement.
5. APPEARANCE—TAKING APPEAL.—The taking of an appeal by one who was not properly served with process operates as an entry of appearance.

Appeal from Randolph Chancery Court; *L. F. Reeder,* Chancellor; reversed.

W. E. Beloate and *W. M. Ponder,* for appellants.

There was no proper service upon Osburn and Lingo. 144 Ark. 473.

Swicord was a joint maker and liable for the entire amount. 80 Ark. 285.

Plaintiffs were not co-sureties nor entitled to contributions from each other, but were liable to each other in the absence of a special agreement. 94 Ark. 333.

Smith and *Gibson,* and *Schoonover & Jackson,* for appellee.

McCULLOCH, C. J. Appellee instituted this action in the chancery court of Randolph County against one Dillport and the appellants, Tom Lingo and D. H. Osburn, and appellants were served with process in Lawrence County, where they reside. A decree by default was rendered in favor of appellee and against all of the defendants, and the two appellants subsequently prosecuted an appeal. Dillport has not appealed. It appears from the record that the decree was rendered by the court upon the complaint and exhibits.

It is alleged in the complaint that on September 5, 1919, Dillport executed and delivered to appellant Lingo his promissory note for the sum of $175, payable October 5, 1920, and that on September 27, 1919, appellee indorsed the note, as an accommodation for Dillport, and that Dillport executed a chattel mortgage to appellee to secure him against loss. The complaint

further alleges that appellant Osburn was also an indorser on the note. The complaint contains the further allegation that Lingo assigned and indorsed the note, before maturity, to the Lawrence County Bank, and that later appellee paid the note in full, and that the Lawrence County Bank transferred the note to appellee. The prayer is for foreclosure of the chattel mortgage and decree over and against defendants for the balance paid by appellee in satisfaction of the note.

The mortgaged chattels were sold under order of the court during the pendency of the action, and the proceeds applied on the satisfaction of the debt to appellee, and the court rendered final decree against Dillport and appellants for the remainder.

The note is exhibited, and shows blank indorsements by appellee and Lingo and Osburn in the order mentioned.

Under the statutes of this State, service cannot, in a transitory action, be had on a defendant in a county other than that of his residence, except where there is service in the county where the action is instituted on a co-defendant who is jointly liable. Crawford & Moses' Digest, § 1178; *Hoyt* v. *Ross,* 144 Ark. 473. If there be liability at all on the part of either of the appellants to appellee, it is not a joint liability with Dillport, the maker of the note.

According to the allegations of the complaint, there was no liability at all on the part of appellant Lingo. He was payee in the note, and his indorsement, regardless of the position of his name on the instrument, could only have had the effect of transferring the note to the Lawrence County Bank. He was liable only on that indorsement to his assignee or to subsequent holders of the note. Appellee did not become a subsequent holder of the note by paying it; the payment was by reason of his liability as an indorser, and he did not become the purchaser of the note. Neither was the liability of appellant Osburn, if there existed any liability at all, a joint one with Dillport.

According to the pleadings in the case, appellee was not a holder of the note by purchase, and had no right of action against appellant Osburn as a joint maker.

The decree is therefore reversed, and the cause remanded for further proceedings, the appeal operating as an entry of appearance by appellant. *Southern Bldg. & Loan Assn.* v. *Hallum,* 59 Ark. 583. It is ordered.

FREEMAN *v.* STATE.

Opinion delivered November 7, 1921.

1. CONTINUANCE—REQUISITES OF MOTION.— A motion for continuance on account of the absence of a witness, though verified, will not be sufficient in a criminal case where it fails to state that the affiant himself believes that the facts to which the witness, if present, would testify are true.
2. CONTINUANCE—ABSENT WITNESS.— A motion for continuance on account of the absence of a witness beyond the jurisdiction of the court should show how the attendance of the witness could be had at the next term of court.
3. CRIMINAL LAW—HARMLESS ERROR.— One convicted of murder in the second degree cannot contend on appeal that if he was guilty of any offense it was murder in the first degree, and therefore that the verdict was not supported by the evidence.
4. CRIMINAL LAW—NECESSITY OF MOTION FOR NEW TRIAL.—The admission of testimony not assigned as error in the motion for new trial will not be considered on appeal.
5. CRIMINAL LAW—NECESSITY OF OBJECTION.—Admission of testimony not objected to at the time it was offered cannot be assigned as error on appeal.
6. HOMICIDE—DYING DECLARATIONS.—Circumstances *held* to show that at the time deceased made certain statements he was conscious that death was impending and that he had no hope of recovery.
7. CRIMINAL LAW—EVIDENCE.—It was competent in a murder case to permit the sheriff to testify as to finding an automatic pistol and some shells in the cell occupied by defendant.

Appeal from Union Circuit Court; *C. W. Smith,* Judge; affirmed.

Mahony & Yocum, for appellant.

The court erred in refusing a continuance on the ground that the evidence of the absent witnesses was material to his defense. 91 Ark. 497.

There was error in admitting the alleged dying declarations of the deceased. 81 Ark. 417.

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

The court was correct in overruling defendant's motion for a continuance. C. & M. Digest, § 3130; *Id.* 1270; 2 Ark. 34; 101 Ark. 514; Kirby's Digest, § 6173; 124 Ark. 599; 15 Ark. 252; 103 Ark. 509; 62 Ark. 543; 125 Ark. 269; 101 Ark. 513. The testimony of the absent witnesses was cumulative. 79 Ark. 594; 82 Ark. 203; 86 Ark. 317; 100 Ark. 149; 120 Ark. 562.

There was no error in the verdict of the jury. 68 Ark. 310; 37 Ark. 433; 133 Ark. 373; *Webb* v. *State,* ms. op. (Ark.); 135 Ark. 117; 136 Ark. 385.

The State did not take an unfair advantage of defendant. 32 Ark. 220; 36 Ark. 653.

There was no error in admitting the proof of the dying declarations of deceased. 130 Ark. 11. Admissibility of dying declarations is for the court, their credibility for the jury. 125 Ark. 209; 104 Ark. 162.

WOOD, J. The appellant was indicted on July 19, 1921, for the crime of murder in the first degree in the killing of one T. B. McCain. He was tried on the 26th day of July, 1921, and convicted of murder in the second degree. The defendant filed a motion for continuance, in which he set up that "he was a stranger in the community without friends and without funds and had not had an opportunity to prepare his case for trial; that, being confined in jail and being a stranger, he did not know the names of certain witnesses who could and would give testimony material to his case; that the witnesses are strangers in the community; that upon the proper investigation their identity can be established and their attendance had at court; that the driver of a service car is a material witness in this case, but that the defendant does not know his name, but can find said

witness if an opportunity is given him; that this witness, if present, would testify that he took the defendant prior to the time of the alleged killing from the neighborhood where the deceased is alleged to have been killed and drove defendant over to the rooming house of Dr. Tutt about two miles distant and left him there; that the defendant is informed and believes that Blondie Gordon would testify, if present, that he saw the defendant leave the valley where the deceased is alleged to have been shot and killed an hour or longer prior to the time the shooting is said to have occurred; that the defendant was not anywhere near or about the premises where the deceased is said to have been shot and killed; that the deceased was alleged to have been killed something like an hour after the defendant went to the home of Dr. Tutt; that witness is a resident of Breckenridge, Texas, and the defendant, if given time, can procure his attendance, or take his deposition; that the evidence of the car driver and the evidence of Blondie Gordon is material to the issue in the case; that the defendant cannot make the proof by any other witnesses at this time known to the defendant; that there are other witnesses who could testify to the same facts, but the names of same are unknown to him."

The court overruled the motion for a continuance, and this is assigned as error in one of the grounds of appellant's motion for a new trial. The motion for continuance was duly verified, but it will be observed it does not state that the affiant himself believed that the facts which he states the witness, if present, would testify to, were true. This was necessary. Secs. 1270, 3130, Crawford & Moses' Digest; *Burris* v. *Wise,* 2 Ark. 33, 40; *State Life Insurance Co.* v. *Ford,* 101 Ark. 514. Moreover, the motion states that one of the absent witnesses whose presence was desired was a resident of the State of Texas, and therefore beyond the jurisdiction of the court. The motion does not set up facts showing how the attendance of this witness could be had at the next term of court. It was not an abuse

of the court's discretion to overrule the motion for continuance on account of the absence of this witness. *C. R. I. & P. Ry. Co.* v. *Harris,* 103 Ark. 509; *Hamilton* v. *State,* 62 Ark. 543; *James* v. *State,* 125 Ark. 269.

The appellant also contends that if he was guilty of any offense it was murder in the first degree, and that the verdict is therefore contrary to the law and the evidence. There was testimony to warrant the jury in returning a verdict against the appellant for murder in the first degree. The appellant is not in an attitude to complain because the jury found him guilty of a lesser degree of homicide when the testimony would have justified their finding him guilty of a higher degree. *Webb* v. *State,* ante p. 75; *McGough* v. *State,* 113 Ark. 301; *Bruce* v. *State,* 68 Ark. 310; *Allen* v. *State,* 37 Ark. 433.

The appellant proved by the sheriff of the county that some one tried to get him to put a prisoner charged with grand larceny in the same cell with appellant in order that a confession from the appellant might be obtained; that the sheriff refused the request, telling the party that he would not believe anything that the person accused of grand larceny would say. The appellant complains here because he says that the above testimony shows an attempt on the part of the State to take an unfair advantage of appellant. The above testimony was elicited by the appellant himself. Furthermore, it does not show or tend to show that any unfair advantage was attempted to be taken of the appellant by the State. It was not shown who the party was that made the request of the sheriff, and certainly there is nothing in this testimony to connect the prosecuting attorney or any one representing the State with an effort to procure a confession from the appellant. Moreover, the appellant did not make the complaint he here presents as one of the grounds of his motion for a new trial. There is nothing in this upon which to predicate error in the rulings of the trial court.

Appellant next contends that the court erred in permitting one witness, a negro by the name of Hodge, who was accused of robbery and who was in jail at the same time with appellant, to testify that he heard appellant acknowledge to one Slim that he (appellant) had killed McCain. No objection was made to this testimony at the time it was offered, and the ruling of the court in permitting it is not assigned as error in appellant's motion for a new trial. So there is nothing in this contention upon which error can be predicated.

The appellant argues that the court erred in permitting witnesses C. A. McCain, J. D. Williams and A. H. Lewis, to testify to statements made by the deceased after he was shot. C. A. McCain, the brother of the deceased, testified concerning this that he saw his brother after he was shot when he was being taken from the automobile to the hospital. His brother lived about twenty minutes after he got to the sanitarium. He stated that he supposed his brother realized that he was going to die. Witness said to his brother: "Who killed you, Tal?" and his brother replied, "The man who lives behind the barber shop shot me." The witness further testified that his brother T. B. McCain "couldn't talk loud, but he talked well enough to let you know he knew he was going to die." The witness was then asked who lived behind the barber shop, and stated that it was Blackey Freeman, the appellant.

Witness Williams testified that he was about the first one to get to McCain after he was shot. McCain told those who were at his side soon after he was shot that the man running around the building after shooting him was Blackey Freeman. Some one remarked that McCain was not hurt much, and witness tore his clothes back and saw that he was shot with buckshot. Then McCain remarked that he was in pain, and wanted to get to a sanitarium, and called for his brother.

Witness Lewis testified that he drove the car in which T. B. McCain was taken to the sanitarium. He was asked, "What if any statement did McCain make

to you as to who killed him?'' and answered, ''When he was coming along through the pine thicket, some men were hanging on the side of the car, and I told them to get off. One of them had a flash light, and as I looked back over the side I says, 'T. B., who shot you?' and he said, 'The man at the back of the barber shop—the man with the white hat.' '' The witness further stated that McCain told witness that the man who shot him lived ''to the back of the barber shop,'' that the man had on a light shirt and a pair of khaki pants, and said, ''For God's sake, don't let him get away.'' This witness stated that McCain lived about twenty or twenty-five minutes after he got to the sanitarium; that his clothes were open, and witness saw the blood oozing out of the holes made by the shot.

The appellant did not save any objection to the above testimony at the time it was offered. Therefore, the cause could not be reversed on the assignment of error in the ruling of the court in permitting this testimony to go to the jury. See *Lisko* v. *Uhren,* 130 Ark. 111. Furthermore, even if proper objection had been made to this testimony at the time it was given, the court did not err in allowing it to go to the jury. The fact that T. B. McCain died within eighteen or twenty minutes after he was wounded, having been shot by fifteen or eighteen buckshot in his side or stomach, and that he talked loud enough to let his brother know that he, T. B. McCain, knew that he was going to die; that his person was exposed so that he could see his wounds; that the blood was flowing from these wounds, and that in response to a question as to who killed him he replied naming the appellant, are all circumstances which justified the court in holding that the testimony was competent. These circumstances certainly tended to prove that McCain at the time he made the declarations was conscious that death was impending, and that he had no hope of recovery. *Rhea* v. *State,* 104 Ark. 162, 176, and cases there cited.

It is next insisted by counsel for appellant that the court erred in permitting witness Jack Davis to testify on cross-examination, over the objection of appellant, that Bill May conducted a rooming house and dance hall; that the house had quite a few women in it. Witness stated that he was living there at the time with his wife. He was asked if most of the women living there were not lewd women and replied, "I can't say—it is a dance hall." He stated that he moved away a day or two after the trouble. There was nothing in this testimony prejudicial to appellant.

It is next urged that the court erred in permitting the sheriff to testify relative to finding an automatic pistol and some shells in the cell occupied by the appellant under the cover of the bed where the appellant slept. The sheriff further testified that he did not know how the shells got there; that the appellant said he didn't know anything about them. Two of the appellant's friends had visited him that day. The witness, upon the information he received, searched the cell and found the gun. The appellant objected to the above testimony unless the State would make the witness its own witness, which the State did. The appellant, therefore, is not in an attitude to complain of the ruling of the court, even if the testimony were incompetent, but the testimony was clearly competent. Although a weak circumstance, it was one which the jury had the right to consider in passing on the credibility of appellant as a witness in his own behalf.

It is last contended that there is no testimony to sustain the verdict. It could serve no useful purpose to set out and discuss the testimony in detail bearing upon this issue. What we have already set out in the way of the dying declarations of McCain was competent evidence, and this, together with the other facts adduced, was amply sufficient to sustain the verdict.

The judgment is therefore correct, and it is affirmed.

WOODALL v. STATE.

Opinion delivered November 7, 1921.

1. HOMICIDE—INSANITY—INSTRUCTION.—Where the defense in a murder case was that defendant was temporarily insane at the time of the killing, an instruction that in determining whether defendant was insane at the time of the killing the jury may consider all his acts at the time, before and since the killing, and his appearance and actions during the trial.
2. HOMICIDE—INSANITY—BURDEN OF PROOF.—It was not error in a murder case to instruct the jury that the burden of showing insanity is upon the defendant, and that, unless this has been done by a preponderance of the evidence, the defense must fail.

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

J. N. Rachels, for appellant.

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

HART, J. This is the second appeal in this case. On the former appeal the defendant was convicted of murder in the second degree, and his punishment was fixed by the jury at twenty years in the State penitentiary. The judgment of conviction was reversed because the court erred in instructing the jury. *Woodall* v. *State,* 159 Ark. 33.

On the 28th day of July, 1921, the defendant was again tried, and the jury returned a verdict of murder in the second degree, but fixed his punishment at eight years in the State penitentiary. To reverse that judgment, the defendant has duly prosecuted an appeal to this court.

The evidence for the State, briefly stated, is that early in the morning on the 18th day of September, 1920, the defendant, Lee Woodall, drove a wagon very rapidly to the home of a neighbor, S. P. Rudisill. Mr. Rudisill was feeding his stock and, immediately after the parties had spoken to each other, Woodall commenced shooting at Rudisill, and shot at him about twelve

times. Several of the bullets struck Rudisill, and he died from the effects of his wounds several hours later on the same day.

The defendant pleaded insanity. The evidence advanced in his favor tends to show that he thought Rudisill was trying to poison his stock and to injure his family in various ways; that he brooded over these imaginary wrongs until he became temporarily insane, and while in that condition killed Rudisill.

The first assignment of error is that the judgment should be reversed because the court gave instruction No. 5 over the objection of counsel for the defendant. The instruction is as follows:

"In deciding the question as to whether the defendant was insane or sane at the time of the killing in this case, you are instructed that the burden to show insanity is upon the defendant, and unless this has been done by a preponderance of the evidence then this defense must fail, and you may also consider all his acts at the time, before and since the killing, as such acts and conduct may have been shown by the testimony, and you also have the right to consider the defendant's appearance and actions during the trial as a circumstance in determining his sanity at the time of the killing."

It is first insisted that the instruction is erroneous because the latter part of it tells the jury that it might consider the defendant's appearance and conduct during the trial as a circumstance in determining his insanity at the time of the killing.

Counsel for the defendant contends that, inasmuch as it was not claimed that the defendant was permanently insane, his acts and conduct at the time of the trial could not be considered by the jury in determining whether he was temporarily insane at the time of the killing.

We cannot agree with counsel in this contention. A similar instruction was approved in the case of *Diggs* v. *State,* 126 Ark. 455. In that case instructions

were given on the question of temporary insanity, or insanity at the time of the killing. The court specifically told the jury that, in determining whether or not the defendant was of sound or unsound mind at the time of the killing, they might consider his mental capacity up to the present time. This testimony was introduced, not for the purpose of showing that the defendant was sane or insane at the time of the trial, but as shedding light on the question of whether he was insane at the time the killing occurred. His conduct and bearing at the trial might shed much or little light, or none at all, as to the mental condition of the defendant at the time of the killing. However, his conduct and bearing at the trial were proper matters for the jury to consider in determining the defendant's mental condition at the time of the killing. His mental attitude at the trial might tend to show whether or not he was easily excited or likely to brood over imaginary wrongs to the extent of becoming temporarily insane. Underhill on Criminal Evidence, (2 Ed.) § 160, and *Reed* v. *State,* 102 Ark. 525.

Again the instruction tells the jury that the burden of showing insanity is upon the defendant, and that, unless this has been done by a preponderance of the evidence, the defense must fail. This part of the instruction is not subject to the vice of an instruction on the question of alibi in *Haskins* v. *State,* 148 Ark. 351. In that case the court told the jury that if, after a careful consideration of all of the testimony in support of the alibi, the whereabouts of the defendant were unexplained at the time the crime was committed, then it should not consider any testimony in support of the alibi.

We held that the instruction as given invaded the province of the jury. The court erred in telling the jury that it could not consider the testimony on the question of the alibi if the defendant failed to establish that defense. The defendant had only to raise in the minds of the jury a reasonable doubt of his guilt from all the evidence in the case, and in determining his

guilt or innocence the jury might consider the evidence on the question of an alibi, although such evidence was not sufficient to maintain that defense.

The instruction in the present case, however, does not go to that extent. It correctly tells the jury that the burden of proof was upon the defendant to show insanity, and that, unless he established that defense by a preponderance of the evidence, it must fail. By this was meant that the defense of insanity must fail if insanity was not established by a preponderance of the evidence. The instruction, however, did not tell the jury that the evidence could not be considered if the defense of insanity was not established. The burden is on the State to prove beyond a reasonable doubt that the defendant committed the crime for which he is charged, and the law presumes every man to be sane. The reason for the latter presumption is, that sanity is the normal condition of mankind. *Casat* v. *State,* 40 Ark. 511; *Scruggs* v. *State,* 131 Ark. 320, and *Bell* v. *State,* 120 Ark. 530.

Therefore the court did not err in giving instruction No. 5 at the request of the State. Objections are made to other instructions given by the court, but we do not deem it necessary to set them out. We have carefully examined them, and, while the form of some of them might be improved, yet the instructions, as a whole, fully and fairly presented to the jury the respective theories of the State and of the defendant.

The defendant relied for an acquittal upon his plea of temporary insanity or insanity at the time of the killing. The court gave full instructions on this phase of the case and upon the question of reasonable doubt.

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

BASKINS v. UNITED MINE WORKERS OF AMERICA.

Opinion delivered November 7, 1921.

1. PARTIES—UNINCORPORATED ASSOCIATION.—An unincorporated association cannot, in the absence of a statute authorizing it, be sued by its society or company name, but all the members must be made parties, since such bodies, in the absence of statute, have no legal entity distinct from that of their members.
2. PARTIES—UNINCORPORATED ASSOCIATION.—A suit at law against an unincorporated association by name cannot be sustained under Crawford & Moses' Dig., § 1098, providing that "where the question is one of a common interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all."
3. ASSOCIATIONS—SERVICE ON AGENT.—Where an association cannot be sued in its society name, service of summons on one of its agents is insufficient to bring it into court.
4. PARTIES—UNINCORPORATED ASSOCIATION.—Crawford & Moses' Dig., chap. 175, authorizing trade unions to adopt a label and to proceed by suit to enjoin the unauthorized use thereof, does not authorize a suit against an unincorporated association by name.

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

STATEMENT OF FACTS.

Appellants sued appellee, United Mine Workers of America, an unincorporated association, to recover damages for the negligent killing of John Baskins. Mrs. John Baskins sued for herself, and as next friend of Allie Baskins, Buster Baskins, Gladys Baskins, Victor Baskins, and Kirby Baskins, minors.

According to the allegations of the complaint she is the widow of John Baskins, deceased, and the other appellants are their minor children. United Mine Workers of America is an unincorporated association of coal miners, and its headquarters are situated in Indianapolis in the State of Indiana. It is divided into thirty districts, and has numerous local unions located in different States of the United States. The local unions are part of the particular district branch having jurisdiction of the

territory in which the local unions are situated. Every member of any other local union and district is a member of the United Mine Workers of America and subject to its constitution and by-laws. The membership of the United Mine Workers of America exceeds four hundred thousand miners, most of whom are employed by the various union mines.

District 21 of the United Mine Workers of America is a branch organization, and has jurisdiction over all union mines and miners in the States of Arkansas, Oklahoma and Texas. John P. White was president of the United Mine Workers of America during the year 1914. John Wilkerson was president during that year of district 21 of the United Mine Workers of America. Certain other persons are named in the complaint as officers of the United Mine Workers of America with their residence in the town of Midland, Ark.

The complaint further alleges that in 1914 the United Mine Workers of America ordered and promulgated a strike of all union miners employed by the Prairie Creek Coal Mining Company, and that while said strike was in progress John Baskins was employed by said Coal Mining Company as one of the caretakers of its mine; that while so employed on the 22nd day of July, 1914, he was taken by union miners who were members of the United Mine Workers of America to a lonely cabin and shot to death, by one of the guards who had him in charge, together with other non-union miners. Appellants allege that they were dependent on the said John Baskins for support and education, and prayed judgment in the sum of $100,000 damages.

The suit was filed in the circuit court on the 24th day of March, 1920. Summons was issued against the United Mine Workers of America and service of summons was had by the sheriff's delivering a copy of it to John Wilkerson, president of district 21 of the United Mine Workers of America.

A motion to quash service was filed. The motion states that the United Mine Workers of America is a

voluntary unincorporated association, and is not engaged in any kind of business. It is composed of about 500,000 individuals who labor for themselves in the coal mines throughout the United States and Canada. The association was organized for the mutual betterment of its members and to obtain better working conditions for them.

The court found that the defendant, the United Mine Workers of America, was a voluntary unincorporated association, and was named in its society name as defendant in the action; that said association can neither sue nor be sued under its society name under the laws of the State of Arkansas, and service of summons cannot be had upon it by serving the same upon Wilkerson, the president of the district No. 21 of the United Mine Workers of America. It was therefore adjudged that the service of summons and the return of the sheriff be quashed and vacated.

From the judgment rendered appellants have duly prosecuted an appeal to this court.

J. E. London, for appellant.

1. The United Mine Workers may be sued as an association under our code. Crawford & Moses' Digest, § 1098; 101 Ark. 172; 97 Wash. 282; 30 Nev. 270; 95 Pac. 354; 138 Fed. 769; 23 Wyo. 352; 149 Fed. 913; 150 *Id.* 517; 57 U. S. 288; 81 Pac. 1069; 85 N. E. 897; 200 Mass. 110; 189 *Id.* 294; 107 N. Y. Supp. 303; 227 N. Y., 1; 85 Fed. 252; 28 Utah 495; 160 Ill. 282.

The code provision merely applies the long-standing rule in equity cases arising at common law.

2. The United Mine Workers of America may be held to respond in damages for the death of the husband and father of plaintiffs in this case. 235 Fed. 1; 149 *Id.* 913; 150 *Id.* 517; 263 *Id.* 147, 152; 265 *Id.* 397; 120 *Id.* 102; 150 *Id.* 155; 208 *Id.* 335; 236 *Id.* 964.

Webb Covington for appellee.

1. Appellees being a voluntary unincorporated association, cannot, in the absence of a specific statute authorizing suit against it, be sued in its association name

for the torts of its membership. 180 Fed. 896; 129 U. S. 426; 171 Fed. 636; 72 *Id.* 695; 83 *Id.* 912; 2 L. R. A. (N. S.) 788; 102 N. W. 725; 22 Enc. P. & P. § 242; 54 N. W. 188; 79 S. W. 139; 74 Mich. 269; 20 Atl. 942; 31 S. W. 91; 54 Tex. 476; 22 Ohio St. 168; 52 Ga. 352; 97 Pa. St. 498; 150 Fed. 155, 182; 102 N. W. 725; 7 Neb. 246; 66 *Id.* 252; 140 Ark. 124.

Section 1098, C. & M. Digest, does not admit of the construction placed on it by counsel for appellants. This State has adopted by statute the chancery rule applied in England and in equity procedure, but this rule has not been extended to actions at law. It has been almost uniformly held that in a proceeding in equity against certain members as representatives of an association composed of a large number of members, a number may be made parties defendant as representatives of the class, but in such cases it was held that the association could not be proceeded against in its association name. (1901) Am. Cas. 426; 70 L. J. K. B. (N. S.) 905; 85 Law Times (N. S.) 147; 17 Times L. R. 698.

2. If the United Mine Workers of America be held to be a legal entity and subject to suit, the service, nevertheless, in this case is insufficient. District No. 21 of the United Mine Workers was not joined as a defendant. Wilkerson, its president, was not an officer of the United Mine Workers of America nor its agent.

HART, J. (after stating the facts). The judgment of the circuit court was correct. There is no principle better settled than that an unincorporated association cannot, in the absence of a statute authorizing it, be sued in tis society or company name, but all the members must be made parties, since such bodies have, in the absence of statute, no legal entity distince from that of their members. 5 C. J. 1369; *Karges Furniture Co.* v. *Amalgamated Woodworkers' Local Union* (Ind.) 2 L. R. A. (N. S.) 788; *St. Paul Typothetae* v. *St. Paul Bookbinders' Union* (Minn.) 3 Ann. Cas. 695. The common-law rule is recognized and followed by an unbroken

line of authorities from many States which are cited in a case note to 3 Ann. Cas. at p. 699. The common-law rule was recognized by this court in *Lewelling* v. *M. W. W. Underwriters,* 140 Ark. 124. In that case there was a statute providing for suits against certain insurance associations under their society name.

This is an action at law, and the equity doctrine of virtual representation has no application. There is within the power of a court of equity to name as defendants in certain classes of cases a few individuals who are in fact the representatives of a large class having a common interest or a common right—a class too large to be brought into court by a service on the individuals composing the class. See 20 R. C. L. p. 672; 5 C. J. p. 1371, and case note to Ann. Cas. 1913-C at p. 655, and Pomeroy's Code Remedies (4 Ed.) par. 285-291.

It is the contention of counsel for appellants that § 1089 of Crawford & Moeses' Digest applies to both legal and equitable actions since no limitation is contained in its language. On the other hand, it is the contention of counsel for appellee that the section of the statute is a re-enactment of the rule which already prevailed in equity, and is to be given a construction which will make it identical with the pre-existing equity doctrine. We need not decide this question for the reason that there was no attempt to comply with the statute. The section reads as follows: "Where the question is one of a common interest of many persons, or where the parties are numerous, and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all."

No attempt was made by appellants to sue certain persons as defendants who were in fact the representatives of a large class having a common interest. The suit was against the association itself by its society name. It is true, service was had upon the president of the district union in whose territory the tort is alleged to have been committed, but the president was not sued as an individual, or as the president of the district union. The

United Mine Workers of America was sued by its society name, and this, as we have already seen, could not be done, in the absence of a statute authorizing it. If the United Mine Workers of America could not be sued by its society name, service of summons on one of its agents is insufficient for the purpose of bringing the association into court, in the absence of a statute authorizing it. If appellants had sued certain individual members of the association as the representatives of all the class, then the application of the section of the statute just quoted to legal as well as equitable actions would be involved, but our statute does not authorize the bringing of actions against unincorporated associations in their common name.

In *Curators of Central College* v. *Bird,* 148 Ark. 323, the court held that a suit cannot be maintained by the curators of a college where they are not named as individuals or not alleged to be a corporation. The complaint in this case alleged that certain named persons are officers of the union, but they are not sued as individuals or as representatives of a class. The United Mine Workers of America is sued by its society or common name.

Again it is insisted that the judgment should be reversed because the suit is authorized under chapter 175 of Crawford & Moses' Digest relating to Trade Unions. We do not think that this chapter of the digest has any application under the facts of the present case. It provides that labor unions may adopt a label and may proceed by a suit to enjoin the unauthorized use, display, and sale of any imitation thereof. Statutes of this sort, being in derogation of the common law, are strictly construed and the prescribed method of procedure can only be followed in the action designated in the statute. The present action does not come within the class mentioned in chapter 175 of Crawford & Moses' Digest.

The result of our views is that the judgment of the circuit court was correct, and must be affirmed.

HUGHES v. GARRETT.

Opinion delivered November 7, 1921.

1. SET-OFF AND COUNTERCLAIM—AGAINST INSOLVENT BANK.—Where a bank becomes insolvent, a depositor who is indebted to the bank may set off the amount of his deposit in an action by the receiver or assignee to recover on the indebtedness due to the bank.
2. BANKS AND BANKING—INSOLVENCY—SET-OFF.—Where a bank becomes insolvent, a depositor indebted to the bank may set off the amount of his deposit in an action by the receiver or assignee to recover the indebtedness due the bank.
3. SET-OFF AND COUNTERCLAIM—BY ONE OF SEVERAL DEFENDANTS.—A debt due from a sole plaintiff to one of several defendants may be pleaded under our statute as a set-off by the defendant to whom such debt is due.

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

STATEMENT OF FACTS.

On November 16, 1920, appellee instituted this action against appellants to recover the sum of $150 alleged to be due and payable to appellee on the joint promissory note of appellants.

On September 8, 1919, S. T. Hughes executed his note, with M. T. Rundle as security, for the sum of $150 due and payable to the First National Bank of Judsonia, six months after date. The bank became insolvent, and a receiver was appointed to take charge of its assets and wind up its affairs. S. T. Hughes had on general deposit in the bank, at the time the receiver was appointed, the sum of $410.10. He also owed the bank three other notes besides the one sued on. Two of these notes were for small amounts, and the third one was for the sum of $1290.

Hughes directed the first receiver of the bank to pay the note sued on out of the general deposit owed him by the bank. The receiver failed to apply the general deposit of Hughes to the payment of the note sued on. Subsequently Robert D. Garrett was appointed receiver, and he refused to make the application. He applied the

amount of the general deposit due Hughes towards the payment of other notes which Hughes owed the bank, either as principal or surety.

The court directed the jury to return a verdict in favor of appellee, and to reverse the judgment rendered appellants have prosecuted this appeal.

John E. Miller and *C. E. Yingling,* for appellants.

Appellant had the right to offset any amount that he might owe the bank with the amount that the bank owed him. 98 Ark. 294. The fact that the bank is in the hands of a receiver does not alter the rule. 146 U. S. 499; 2 Bolles on Banking p. 858; 138 Ark. 38; 3 R. C. L. p. 686, Sec. 317. He had the right to demand that his deposit be applied on this note instead of others. 213 S. W. 737; 91 Ark. 465. He made such demand.

By failing to make the application of appellant's funds to the payment of the note in suit, the surety was thereby released from liability. 5 Ark. 298; 114 Ark. 170; 3 R. C. L. 596.

Brundidge & Neelly, for appellee.

Appellant made no request that the amount of his deposit in the bank, or so much as was necessary, be applied to the note in suit.

The money deposited by Hughes was a general deposit, not a special one, and when so deposited became the property of the bank absolutely, and Hughes had no right to direct the application of it. 124 Ark. 536 and cases cited. Where there is no specific application of the fund directed, the bank may apply it to any indebtedness due it. 3 R. C. L. 588.

The indebtedness of Hughes and Rundle was a joint one. There was no such mutuality of claims between Rundle and the bank as would give the receiver the right to set-off Hughes' deposit against this note. 3 R. C. L. p. 591.

HART, J. (after stating the facts). The judgment of the circuit court was wrong. At the time the bank failed it had made no appropriation whatever of the amount of the general deposit of Hughes towards the payment of

any of his notes due the bank. When the receiver was appointed, Hughes directed him to apply the amount due him on general deposit by the bank to the payment of the note sued on first, and the balance to the payment of other indebtedness. The receiver had no right to refuse to make the appropriation as directed.

This court has held that, the relation between a bank and a general depositor being that of debtor and creditor, if the bank becomes insolvent, a depositor who is also indebted to the bank may set off the amount of his deposit in an action by the receiver or assignee to recover on the indebtedness due the bank. *Funk* v. *Young,* 138 Ark. 38, and *Steelman* v. *Atchley,* 98 Ark. 294.

As we have already seen, the record in this case shows that the bank did not appropriate the deposit of Hughes to the payment of any indebtedness due the bank until after Hughes had directed it to be applied to the payment of the note sued on.

It is true that the note sued on was signed by Hughes and Rundle as his sureties. It is well settled in this State that a debt due from a sole plaintiff to one of several defendants may be pleaded under our statute as a set-off by the defendant to whom such debt is due. *Burton* v. *Blytheville Realty Co.,* 108 Ark. 411, and *Rush* v. *Citizens' National Bank,* 114 Ark. 170, and cases cited.

It follows from the facts stated that Hughes had a right to set-off against the note sued on his individual indebtedness to the bank, and the court erred in directing the jury to find a verdict for appellee.

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

WELDON v. STATE.

Opinion delivered November 7, 1921.

1. CONTEMPT—POWER OF COURTS.—By the common law, a court may punish as for contempt insults offered to the person of the judge in consequence of his judicial acts, though offered on a day when court was not in session and at a place where court could not legally be held.
2. CONTEMPT—CONSTRUCTIVE CONTEMPTS.—Const. 1874, art. 7, § 26, providing that "the General Assembly shall have power to regulate by law the punishment of contempts not committed in the presence or hearing of the courts, or in disobedience to process," and Crawford & Moses' Dig., § 1485, providing that punishment for contempt not so committed "shall in no case exceed the sum of $50 nor the imprisonment ten days", have no application to contempts committed by offering physical violence to the person of the judge at a time and place when the court was not in session, if designed to influence, intimidate or control the action of the judge in the subsequent trial of a case, as such acts would be considered as done constructively in the presence of the court.

Certiorari to Garland Circuit Court; *W. B. Sorrels,* Judge, on exchange; affirmed.

Thos. S. Downey and *Harry H. Myers,* for appellant.

The alleged contempt was not committed in the presence of the court. A judge alone does not constitute a court. 8 A. & E. Enc. Law (2nd Ed.) 22; 22 Neb. 280. A court is an official assembly, legally met together for the transaction of judicial business. 79 Ind. 376; 87 Ala. 330. Indignities offered to a judge in vacation, when not engaged in judicial business, and without reference to his official conduct, are not punishable for contempt. 9 Ark. 258.

Section 1484, C. & M. Digest, has reference to acts occurring within the presence of the court, or having reference to its processes.

Even if guilty of contempt, the punishment is excessive and unreasonable. Sec. 1485, C. & M. Digest.

The fact that the defendant was notified by citation is conclusive that the act complained of was one commit-

ted without the presence of the court. Sec. 1496, C. & M. Digest, and the punishment to be assessed is provided by § 1485, C. & M. Digest.

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

The assault was occasioned by litigation then pending before the court and was such contempt that the court was authorized, under the law to punish petitioner summarily. 9 Ark. 259; 139 N. C. 95; 2 L. R. A. (N. S.) 603. Contemptuous conduct toward a court while in discharge of a judicial duty is not limited to acts committed in the presence of the court, but includes insolent conduct during the intermission of court. 105 Iowa 7; 75 N. W. 685; 21 Fed. 772; 6 R. C. L. Sec. 5, p. 492 and notes. The punishment meted out in this case was not limited by § 1485, C. & M. Digest, as contended by petitioner. A similar punishment was sustained by this court for intimidating a litigant which act of intimidation was not in the presence of the court. 123 Ark. 341.

SMITH, J. This proceeding grew out of the following citation which issued out of the Garland Circuit Court:

"Whereas, on the 4th day of July, 1921, Charlie Weldon, in the County of Garland and State of Arkansas, made an assault on the person of the Hon. Scott Wood, judge of this court, and whereas said assault was without provocation and was prompted by malice by the acts of said judge in the performance of his judicial duties in a case pending in this court wherein the State of Arkansas is plaintiff and Charlie Weldon and others are defendants, and said assault was made with the intent to intimidate said judge and deter him from the performance of his duties in the trial of said case; it is therefore ordered that an attachment of contempt of court be issued for the said Charlie Weldon, and that he be requested to appear at the next regular day of the present term of said court on the 13th day of July, 1921, and show cause if any he have why he should not be punished for said contempt."

An agreement of exchange of courts was made between the judge of the Garland Circuit Court and W. B. Sorrels, judge of the Eleventh Circuit, and the matter was heard on the return day of the citation before the last-named officer. The case coming on for hearing, defendant Weldon, who will hereinafter be referred to as the petitioner, was found guilty as charged, and his punishment fixed at imprisonment in jail for three months and a fine of $500. Petitioner has by certiorari brought before us the record of the court below for review.

Judge Wood testified that the court over which he presided had taken a recess from the Saturday before the 4th of July to the 13th of that month, and that he spent the 4th at a bathing place called Arbordale Springs, eight miles from Hot Springs, the county seat; and that, as he came from the water, and was standing outside a dressing booth waiting to get in, he noticed petitioner walking toward him, and as petitioner came up he said to witness, "You are a smart guy," and struck at the judge. The judge said, "What is the matter with you? You are crazy; you are a fool." Petitioner said, "Did you hear what he called me?" The judge denied having called petitioner any name. The judge testified that he said to petitioner, "I know what you are doing this for; you think you can bully somebody," or "you are doing it because I did in my official capacity have to try you."

The petitioner used vulgar language toward the judge and called him some names, and asked, "What have you got it in for me for? What have I done to you?" but never denied that he was acting for the purpose of which the judge accused him, and made no response to the statement of the judge. The judge and the petitioner struck at each other, then clinched, but were separated without either having inflicted any bodily harm on the other. The judge further testified that he had only seen the petitioner in court, and had never before had any conversation or communication with him. He stated that petitioner had been indicted in his court for manufacturing intoxicating liquors, but an agreement

had been made between petitioner and the prosecuting attorney that the charge should not be tried until a similar charge had been disposed of in the Federal court. Petitioner was convicted in the Federal court, but that conviction was reversed in the Federal Court of Appeals. Whereupon petitioner was put on trial in the Garland Circuit Court. There was a mistrial, and, in dismissing the jury, Judge Wood, who had presided, made the remark that the case would be set for another day and tried until a verdict was reached.

Petitioner testified that he spoke to the judge civilly, who responded by saying, "Hello, mooner," meaning thereby to call him a "moonshiner," and that this offensive epithet of the judge caused the difficulty which then ensued.

Each of these witnesses was corroborated in several material respects, but, without further reciting the testimony, we announce the conclusion that the finding of the trial court is supported by the testimony. *Ex parte Winn,* 105 Ark. 193.

It is insisted that the judgment of the court below must be quashed and the proceeding dismissed because the incident herein set out occurred on a day when the court was not in session, and at a place where a session of the court could not be legally held, and further that, as the conduct complained of did not take place in the actual presence of the court, the punishment imposed is without authority of law, and is, in any event, in excess of that permitted by the law.

It is true that the incident complained of did not occur on a day when the Garland Circuit Court was in session (*Light* v. *Self,* 138 Ark. 221), although it did occur before the adjournment of the court for the term. It is also true that the incident occurred at a place where court could not be legally held (*Mell* v. *State,* 133 Ark. 197). But are these facts conclusive of the question presented on this appeal?

Section 1484, C. & M. Digest, provides that every court of record "shall have power to punish as for crim-

inal contempts persons guilty of the following acts," and there follows in five paragraphs an enumeration of acts declared to constitute contempt of court.

This section is taken from section 37, chapter 43, of the Revised Statutes of Arkansas; and no change appears to have been made in it except that as approved (February 28, 1838) it read: "Every court of record shall have power to punish as for criminal contempts persons guilty of the following acts, and no others," and thereafter follow the five paragraphs as they now appear in section 1184, C. & M. Digest.

The words, "and no others," have been eliminated from the statute. This was done by Josiah Gould in the digest of the statutes prepared by him in 1858, and in a note to the section where this omission first occurs the digester has the following explanation: "The words, 'and no others,' are stricken out as not binding on the courts. See *State* v. *Morrill,* 16 Ark. 384, and cases there cited."

The facts in the case of the *State* v. *Morrill,* 16 Ark. 384, were that Morrill had published an article in a newspaper reflecting upon a decision of the Supreme Court and apparently attributing the decision to extraneous influences. In response to the summons which there issued, the defendant filed a plea to the jurisdiction, submitting that the publication was not embraced within the statute regulating the punishment of contempts. Speaking for the court, Chief Justice ENGLISH conceded that the act charged against the defendant was not embraced within any clause of the statute. The insistence was made by counsel for the defendant that the court must look to the statute for its power to punish contempts, and not to any supposed inherent power of its own springing from its constitutional organization, and that the courts were controlled by this statute, and could not go beyond its provisions. The Chief Justice proceeded to answer and to refute this insistence in an

opinion evincing great research and learning. He quoted from the opinion of this court in the case of *Neel* v. *State,* 9 Ark. 263, as follows:

"By the common law, a court may punish for contemptuous conduct toward the tribunal, its process, the presiding judge, or for indignities to the judge while engaged in the performance of judicial duties in vacation, or for insults offered him in consequence of judicial acts; but indignities offered to the person of the judge in vacation, when not engaged in judicial business, and without reference to his official conduct, are not punishable as contempts."

The opinion in the Neel case is one of equal erudition, and the two, together, so thoroughly discuss the common-law doctrine of contempt that this writer is unequal to the task of adding anything to the discussion, and the two opinions, together, make it clear that courts have power to punish for contempt as a necessary incident to the exercise of their express powers, and that in doing so statutory authority need not be sought or found to warrant that action.

It is insisted, however, that our present Constitution has deprived the courts of this power, and that since its adoption the courts must look to the statute for authority to punish for contempt except those committed in the immediate presence or hearing of the court, or in direct disobedience to its process.

The provision of the Constitution referred to is section 26, of article 7, and reads as follows: "The General Assembly shall have power to regulate by law the punishment of contempts not committed in the presence or hearing of the courts, or in disobedience to process." Section 1483, C. & M. Digest.

A similar contention was made in the case of *Turk and Wallen* v. *State,* 123 Ark. 341. There Turk and Wallen were never shown to have been at any time in the actual presence of the court. On the contrary, it affirmatively appears that the conduct complained of, to-wit, the intimidation of a litigant from appearing in

court and prosecuting his suit there pending, was committed "before reaching the courthouse." It was there insisted that, as the offense with which Turk and Wallen were charged "was not committed in the presence or hearing of the court, and was not in disobedience of any process of the court, its power to punish was exceeded in the fine and imprisonment assessed," inasmuch as section 1485 C. & M. Digest (sec. 721 Kirby's Digest) provides that punishment for contempts not so committed "shall in no case exceed the sum of $50 nor the imprisonment ten days."

Answering this insistence, Mr. Justice KIRBY, for the court, said: "It is universally held that intimidating a witness and preventing his appearance at court or procuring him to absent himself from the trial is a contempt of court. Preventing the appearance of a litigant in court for the prosecution of a suit brought to enforce a right, by intimidation and threats, is such an obstruction of judicial procedure as renders absolutely worthless all process of the court, which is instituted for the enforcement and protection of the rights and the redress and prevention of wrongs of the litigants. It destroys the dignity and power of the court and brings the administration of justice into disrepute.

"Here a citizen appealed to the court for the redress of an alleged wrong only to find himself confronted by the wrongdoer and his associate on the day set for the trial, at the door of the court, and so intimidated with threats, that he found it necessary to absent himself from the court of justice to which he had appealed, and abandon the prosecution of his cause of action through fear.

"The conduct of appellants was a flagrant offense against the dignity and power of the court. whose arm is long enough and strong enough to keep open and unobstructed the way to its door to all who must invoke its authority, which is not limited in the right to punish offenses of this kind except by the infliction of such punishment as is commensurate with the the enormity of

the offense and calculated to preserve and uphold the dignity and honor of the court and its respect in the confidence of the people. *Ford* v. *State,* 69 Ark. 550. The court had jurisdiction to hear the proceeding and did not exceed its authority in the assessment of the punishment."

If full faith and credit is given to that opinion, we think it must necessarily follow that petitioner is as guilty of contempt as were Turk and Wallen.

If intimidating a witness and preventing his appearance at court, is a contempt; if preventing the appearance of a litigant in court is such an obstruction of judicial procedure as constitutes contempt, why is it not contempt to be guilty of improper conduct designed and intended to influence and control the action of the court itself? The reasoning of Mr. Justice SCOTT in the case of *Neel* v. *State, supra,* is applicable here. He said: "When, therefore, the common law deemed it so necessary for this great purpose, to protect the juror, the witness, the informer, the party, the jailer, the attorney, and other persons, many of whom might never again be called into a court of justice, it was not to be expected that it would fail to cover, with its complete armor, the presiding minister of the law's majesty, who would be so often exposed to similar trials. Not that any higher personal privileges were arrogated for him, than for the humblest of these, but because it was obvious that the principle, which suggested the protection of these, would, at least to the same extent, protect him, if it did not rise with the grade of the officer, and the majesty of the law be more degraded in the person of a higher than a lower officer, entrusted with its administration."

In offering actual physical violence to the person of the judge, petitioner was in the constructive presence of the court, for he sought thus to influence, intimidate and control the action of the judge in the matter of re-setting his case for trial when the judge had again resumed the bench.

In the case of *Stuart* v. *People,* Scam. (Ill.) 395, the Supreme Court of Illinois said that in the class of constructive contempts would necessarily be included all acts calculated to impede, embarrass or obstruct the court in the administration of justice, and that such acts would be considered as done in the presence of the court. See also, *People* v. *Wilson,* 64 Ill. 196, 16 Am. Rep. 528; *Ex parte McCown,* 139 N. C. 95, 51 S. E. 597; 2 L. R. A. (N. S.) 603; *McCarthy* v. *Hugo,* 17 A. & E. Ann. Cas. 219, and the notes thereto in which cases supporting and opposing the view, that acts impeding the administration of justice will be held to be within the constructive presence of the court, will be found.

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

HART, J. (dissenting). My dissent is based on the ground that Weldon did not commit contempt in the presence of the court, and therefore, under our Constitution, his punishment is fixed by statute at a fine not exceeding the sum of $50 and imprisonment not exceeding ten days in jail.

State v. *Morrill,* 16 Ark. 384, sustains the inherent common-law right of constitutional courts to punish for contempt, committed either in or out of the presence of the court.

The Constitution of 1874 did not attempt to restrict the power of constitutional courts to punish for contempt, whether committed in or out of the presence of the court.

Art. 7, sec. 26, provides that the General Assembly shall have the power to regulate by law the punishment of contempts not committed in the presence or hearing of the courts, or in disobedience of process. This section recognizes the inherent power of constitutional courts to punish for contempt, but gives the Legislature power to prescribe the punishment where the contempt is not committed in the presence of the court.

The court either was or was not in session when the contempt was committed. If it was not in session, I cannot see how there could be any contempt committed in

the presence of the court, either actual or constructive. If court was in session, the case would call for the application of the doctrine in *Turk* v. *State,* 123 Ark. 341. In that case the court was in session, and the contempt consisted in the defendant, by threats, preventing the plaintiff from appearing in the circuit court to prosecute his case. At the time the contempt was committed by the defendant the plaintiff was in the town where the court was in session for the purpose of attending the trial of his case on that day. The law does not take account of different parts of days. *Central Coal & Coke Co.* v. *Graham,* 129 Ark. 550. Hence the court said that he was constructively in the presence of the court when the contempt was committed.

The doctrine of constructive presence proceeds upon the theory that the misbehavior is committed where it takes effect. Where one puts in force an agency for the purpose of interfering with the administration of justice, he, in legal contemplation, accompanies the same to a point where it becomes effective.

So in the present case, if court had been in session, it would be said that the contempt was committed in the constructive presence of the court, although not at the courthouse. I cannot perceive how contempt could be committed, either in the actual or constructive presence of the court, when the court was not in session.

Light v. *Self,* 138 Ark. 221, is authority for holding that the court was not in session when Weldon committed the contempt. In that case the county court entered an order, "Court adjourned until called by the judge," and at a later day attempted to amend the order of adjournment so as to make it read, "The court will suspend until tomorrow and remain open until the business of the term is completed." This court held that this could not be done, because the court could not be kept in session by such an order.

The effect of the holding in that case is that any order made by a court not in session is void, and I can-

not conceive how contempt could be committed in the presence of the court, which was not a court, because not in session.

All courts, unless restrained by statute, may adjourn their sittings to a distant day. *Dunn* v. *State,* 2 Ark. 229, and *McVay* v. *State*, 104 Ark. 629. In *State* v. *Canal Const. Co.,* 134 Ark. 447, the court said that we have departed from the common-law rule that a term of court should be considered as one day, and that a court of record may adjourn from one day to a distant day. It was further stated that during the interim the court had no power to transact business.

Even under the dissenting opinion in the case of *Light* v. *Self, supra,* the contempt in the present case cannot be said to have been committed in the presence of the court. The dissenting opinion in that case proceeds upon the theory that the court was not adjourned by the order made. The dissenting opinion, however, recognized the power of the court to adjourn from one day to a distant day. When it has adjourned from one day to a distant day, I cannot perceive how it could be said to be in session for any purpose during the intervening days. If so, if a court should adjourn to a distant day for the purpose of holding a regular term of the court in another county in his district, it would follow, under the majority opinion, that contempt could be committed in the presence of the court, not only of the court which was actually being held, but also of the court which was adjourned.

The CHIEF JUSTICE concurs.

BARRON v. STATE.

Opinion delivered November 7, 1921.

1. CONTEMPT—ENFORCEMENT OF ORDER AFTER FORFEITURE OF BAIL.—Where a sentence of fine and imprisonment for contempt of court has not been complied with, it may be enforced upon defendant's capture, though a bail bond given on appeal from the judgment of contempt has been declared forfeited.

2. BAIL—FORFEITURE OF BAIL BOND—DISPOSITION OF PROCEEDS.—Where defendant was ordered by the circuit court to pay $400 to the estate of a decedent, and on failure to make payment was fined for contempt, from which judgment he prayed an appeal and was allowed bail in the sum of $500, and thereafter absconded, whereupon his bond was forfeited, and was paid by his securities, the forfeiture was payable into the county treasury, and no part of it could be used to pay his indebtedness to the estate.

Appeal from Crawford Circuit Court; *James Cochran,* Judge; affirmed.

J. E. London, for appellant.

C. M. Wofford, for appellee.

SMITH, J. J. T. Meyers was ordered by the circuit court of Crawford County to pay to the clerk of that court $400 misappropriated by Meyers, the same being the proceeds of the sale of certain personal property belonging to the estate of T. C. Nall, deceased. Meyers failed to make the payment, and was cited for contempt, and on a hearing of that charge was fined $100 and sentenced to thirty days in jail. From this order of the court he prayed an appeal, and was allowed bail in the sum of $500. Meyers absconded, and the appeal was never perfected, and the bond was declared forfeited, and was paid by the sureties thereon.

Thereafter the administrator of the Nall estate filed an account with the county court asking that, after the fine and costs of Meyers were paid, the balance of this fund be turned over to him as administrator to reimburse the estate for the money which Meyers had appropriated. The county court disallowed the claim, as did the circuit court on appeal. Hence the appeal to this court.

The argument for the reversal of the judgment is that the bond was in the nature of a civil bond, and was not the property of the State; that, after the State had realized her claim out of it, that is, the fine of $100 and the costs, the balance ought to be applied to the payment of the claim of the estate against Meyers.

We do not concur in this view. Appellant is mistaken in the character and purpose of the bond executed by Meyers and his sureties on the appeal from the order of the circuit court adjudging him to be in contempt.

The judgment directing Meyers to pay money to the clerk of the court has not been satisfied. It is still a subsisting judgment, subject to be enforced through the usual processes of the law. The order of the court imposing a fine and prison sentence on Meyers has not been complied with, and is a judgment which may still be enforced if Meyers is again taken into custody. If such were not the case, one sentenced to jail for contempt might employ this method to relieve himself of that punishment.

The bond ran in the name of the State, and was for the benefit of the county in which the sentence was imposed.

The sentence for contempt was imposed because of Meyers' contumacious conduct in refusing to obey the order of the court by paying over the money.

It is true, of course, as insisted by appellant, that the purpose of the original proceeding was to compel Meyers to disgorge; but, as that proceeding progressed, Meyers became guilty of contempt by defying the order of the court, and it was for this defiance that he was fined and sentenced to jail, and as his bond operated to stay the enforcement of that sentence, its penalty, when collected, inured to the benefit of the county in which the sentence was imposed. Sec. 10183, C. & M. Digest.

The judgment of the court below is affirmed.

CLOAR v. CONSUMERS' COMPRESS COMPANY.

Opinion delivered November 7, 1921.

1. NEGLIGENCE—BURDEN OF PROOF.—In an action against a cotton compress company for the negligent destruction of cotton by fire, it was error to instruct the jury that "if the circumstances in evidence are explainable on any other reasonable theory than that

of the negligence of the defendant, your verdict should be for the defendant", as the only burden resting upon the plaintiff was to establish his case by a preponderance of the evidence.

2. WAREHOUSEMEN—INSTRUCTION.—In an action against a warehouseman for loss of property by fire, an instruction that defendant was not liable for the acts of third persons was erroneous in failing to embody the idea of his liability for acts of third persons which he could have prevented by exercising ordinary care.

Appeal from Crittenden Circuit Court, First Division, *R. H. Dudley,* Judge; reversed.

Berry & Wheeler, for appellant.

Instruction 4 given by the court on the subject of negligence, without the modification requested by the appellant, viz: "unless, after the discovery of such negligence, the defendant was negligent in failing to prevent the loss of plaintiffs' cotton," took from the jury one of the most important questions in the case. And, in giving the 4th instruction requested by the defendant, the concluding sentence thereof erroneously placed a burden on the plaintiff greater than that required of the State in criminal prosecutions. 4 Wigmore on Ev. § 2497, p. 3542; 118 Mass. 1; 38 Ark. 316; 61 *Id.* 103; 59 *Id.* 325; 76 *Id.* 325; 76 *Id.* 135; 77 *Id.* 436; 90 *Id.* 256.

A. B. Shafer, for appellee.

Instruction 4, as is made clear by instruction 3 given by the court, did not require the plaintiff to prove his case beyond a reasonable doubt, but was intended only to emphasize the fact that if the evidence was equally balanced, if the circumstances in evidence were explainable on two theories, equally reasonable, plaintiff had failed to make out his case. 77 S. W. 69; 99 Mass. 605; 117 S. W. 91.

HUMPHREYS, J. Appellant instituted suit against appellee in the Crittenden Circuit Court to recover damages in the sum of $3508.42, the value of 28 bales of cotton, stored in appellee's warehouse and destroyed by fire through appellee's alleged negligence in permitting loose lint cotton and sawdust to remain on the ground and

platform near the warehouse, and in not preventing the fire after it was discovered.

Appellee filed an answer, specifically denying that the fire originated or continued after discovery through its negligence.

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

The evidence adduced by appellant tended to show that the warehouse and contents were destroyed by fire originating in the sawdust and lint cotton round about and under the warehouse. The evidence of appellee tended to show that the fire originated from a bale of cotton which had been delivered and placed near the center of the compress, and which was burning on the interior when received, the fire being undiscoverable until it burnt out and came in contact with the air, at which time it flashed up and could not be extinguished.

Appellant insists that the court committed reversible error in giving appellee's requested instruction No. 4, which appellant interprets as requiring him to establish the origin of the fire to a moral certainty, or beyond a reasonable doubt. Appellee insists that the instruction simply emphasized that the burden of proof rested upon appellant, and has no reference to the degree of persuasion to which the jury should be brought before it should find for appellant. The instruction is as follows:

"Evidence may be either direct or circumstantial. Circumstantial evidence is the evidence of certain facts from which are to be inferred the existence of other material facts bearing upon the question at issue, or facts to be proved. But, while circumstantial evidence is legal and proper, you are instructed that no inferences or presumptions should be indulged in by you that do not necessarily arise from the circumstances proved. In other words, the circumstances proved must convey by a logical train of reasoning that the defendant was negligent, and

that such negligence was the direct and proximate cause of the loss of the plaintiff's cotton by fire, before you can find in favor of the plaintiff. If the circumstances in evidence are explainable on any other reasonable theory than that of the negligence of the defendant, your verdict should be for the defendant."

We think the last clause of the instruction imposed upon appellant the duty to establish his theory of the origin of the fire to the exclusion of any other reasonable theory as to how the fire originated, which, in effect, told the jury that appellant must establish the origin of the fire beyond a reasonable doubt. The only burden resting upon appellant was to establish his case by a preponderance of the evidence. The instruction was inherently wrong, and is not cured, as suggested by appellee, in instruction No. 3. The two were in direct conflict upon the extent of the burden of proof resting upon appellant, and because of the conflict the one cannot cure the other.

Appellant insists that the court erred in giving, on its own motion, the last instruction, which exempted appellee from liability for acts of third persons, without modifying it by adding the following clause: "Unless, after the discovery of such negligence, the defendant was negligent in failing to prevent the loss of the plaintiff's cotton."

All the instructions given are not abstracted, and we are unable, without exploring the transcript, to ascertain whether the modification requested was embodied in other instructions. The instruction, however, as given by the court, was erroneous for another reason, that is, for failing to embody the idea of appellee's liability for acts of third parties which it could have prevented through ordinary care. We are not reversing the case on account of this error, but, as the case must be reversed for error in giving appellee's requested instruction No. 4, we call attention to the error, so that the law may be properly declared on trial anew.

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

GRIFFIN v. SEARCY COUNTY.

Opinion delivered November 7, 1921.

1. EMINENT DOMAIN—DAMAGES—PROVINCE OF JURY IN ASSESSING.—In the assessment of damages for injury to real estate, juries must necessarily be governed by the testimony of the witnesses in the case, but in reaching a result, may consider all the evidence in the case, and are not restricted to values of, and estimates of damages to, real estate fixed by the opinion of one or more witnesses.
2. APPEAL AND ERROR—EVIDENCE VIEWED FAVORABLY TO APPELLEE—In testing the sufficiency of evidence to support a verdict, the Supreme Court will view it in the light most favorable to the party who secured the verdict.

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

D. T. Cotton and *George W. Reed,* for appellants.

Notwithstanding the rule not to disturb the verdict of a jury if there is any evidence to support it, yet, if a jury ignores the testimony and returns a verdict not responsive to it, this court will correct the error. The jury is not without restraint, and where, in its assessment of damages, the amount awarded is either so large, or so small, as to shock the sense of justice, its verdict should be set aside. 39 Ark. 491; 70 *Id.* 385; 47 *Id.* 567.

W. F. Reeves, for appellee.

HUMPHREYS, J. About two acres of land belonging to appellant was condemned for road purposes in the Searcy County Court, in which proceeding appellant was awarded damages in the sum of $300. An appeal was prosecuted to the circuit court, where, upon a trial *de novo,* appellant was awarded damages in the sum of $350, from which is this appeal.

Reversal of the judgment awarding damages in the sum of $350 only is sought upon the alleged ground that the least amount which could have been assessed under the evidence was $700. The basis for this contention is that, according to the testimony of any witness testifying upon the point, the lowest value of the land actually taken was placed at $200 and the lowest estimate

of damages made on account of taking it was $500. The opinions of the several witnesses, both as to the value of the land taken and the damages resulting to appellant by reason of taking it, varied widely. In valuing the land actually taken, the testimony ranged from one hundred to four hundred dollars an acre; and in estimating the damages accruing to appellant by reason of taking the land the testimony ranged from five hundred to a thousand dollars.

The record, however, contains other evidence than the opinions of the several witnesses as to the value of the land taken and the amount of damages sustained by appellant on account of taking it. The record reflects the amount, character, and shape of the land taken, the condition in which it left the remaining land belonging to appellant, and the inconvenience resulting to him on account of taking it. The fact was developed that the strip taken was adjoining and parallel to a railroad right-of-way already traversing appellant's lands, so that the taking of the land did not divide the main body of land differently from the way it was divided by the railroad right-of-way; that the railroad right-of-way separated appellant's residence from the main body of land in cultivation, so the taking of the land for road purposes did not cut off appellant's farm lands from his improvements; that the only expense entailed upon appellant by reason of taking the land for the road was the cost of constructing a crossing over it.

In the assessment of damages for injury to real estate juries must necessarily be governed by the testimony of the witnesses in the case, but, in reaching a result, may consider all the evidence in the case, and are not restricted to values of, and estimates of damage to, real estate fixed by the opinion of one or more witnesses. Jurors are accorded great latitude in the consideration of testimony, and in testing the sufficiency of the evidence necessary to support a verdict, this court

"will view it in the light most favorable to the appellee." *Bennett* v. *Snyder,* 147 Ark. 206.

Applying this rule to the facts in the instant case, the jury may have concluded that the only damage sustained by appellant was the value of the land actually taken and the cost of the construction of a crossing over the road. This, on account of the fact that the road paralleled the right-of-way of the railroad already there and did not cut the land in parts different from the parts into which it had been cut by the railroad right-of-way. The evidence would have sustained a much larger verdict than that rendered by the jury, but the evidence is legally sufficient, when accorded its strongest probative force, to sustain the verdict rendered.

No error appearing, the judgment is affirmed.

CLEMONS v. STATE.

Opinion delivered November 14, 1921.

1. LARCENY—INDICTMENT—VARIANCE.—There is a material variance between an indictment alleging the larceny of two cows and proof of larceny of a steer.
2. CRIMINAL LAW—VARIANCE BETWEEN INDICTMENT AND PROOF—ASSIGNMENT.—An assignment in the motion for new trial challenging the legal sufficiency of the evidence is sufficient to raise the question whether there is a substantial variance between the indictment and the proof.
3. INDICTMENT AND INFORMATION—VARIANCE.—A substantial variance between the allegations of the indictment and the proof amounts to a failure of proof.

Appeal from Arkansas Circuit Court, Northern District; *George W. Clark,* Judge; reversed.

Chapline & Morrison, for appellant.

One indicted for stealing a cow cannot be convicted of stealing a bull. 34 Ark. 160.

In an indictment where the allegation is unnecessarily minute as to the description, the proof must satisfy that description. 64 Ark. 231; 119 Ark. 503.

The existence of a felonious intent is a question for the jury. 25 Cyc. 129. The publicity of the taking was evidence of good faith. 79 Ga. 564; 11 Am. St. Rep. 447. And of more force was the fact that the claim was not for himself but for another. 29 Ga. 75; Am. & Eng. Ency. (2nd Ed.) Vol. 18, p. 525.

The taking of property under authority of another in the *bona fide* belief that he is authorized to do so is not larceny. 59 Ark. 641; 27 S. W. 225. One taking property under an honest belief that he is the owner, does not constitute larceny. 96 Ark. 148. The mere fact of the taking and carrying away does not raise the presumption of guilt, a criminal or felonious intent must be shown. 32 Ark. 238.

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

Even if it be conceded that there was a fatal variance between the allegation in the indictment and the proof introduced, no objection was raised by appellant at the time, and it is too late to object on appeal. 133 Ark. 66; Ency. of Evidence, Vol. 13, pp. 740, 741; Am. & Eng. Ency. of Law, Vol. 28, pp. 61, 62.

Objections to instructions made for the first time on appeal cannot be considered. 70 Ark. 348; 74 Ark. 566; 70 Ark. 490; 124 Ark. 599.

Objections will not be considered on appeal where no objections were saved below nor referred to in the motion for new trial. 62 Ark. 543. Exceptions must be preserved in the motion for new trial. 90 Ark. 482. Errors not set out in motion for new trial will not be considered on appeal. 117 Ark. 198; 106 Ark. 138.

The court will not inquire into the correctness of the verdict if there is substantial evidence to support it. 135 Ark. 117. If the evidence is substantial the verdict must stand. 134 Ark. 385.

Even if it be conceded that the juror Marshall had both formed and expressed an opinion, if appellant did

not ask him on his *voir dire* whether or not he had heard a similar case, he did not show due diligence. 154 Ark. 36; 93 Ark. 301.

McCULLOCH, C. J. The indictment against appellant charges grand larceny in the stealing of two cows, the property of George Carlson, and on the trial of the case the State proved the stealing of a steer, the property of Carlson.

There was no objection made to this testimony, but one of the grounds set forth in the motion for new trial is that the verdict is contrary to the evidence. In other words, in the proceedings below, appellant in apt time raised the question of sufficiency of the evidence; but did not, when the testimony was introduced, raise the question of the variance between the allegations in the indictment and the proof.

It is conceded by the Attorney General that there is a substantial variance between the indictment and the proof, and that if the question had been raised in apt time it would have been fatal to the State's case, but it is insisted that it is too late to raise that question here for the first time. That the variance is material is settled by several decisions of this court. *State* v. *McMinn,* 34 Ark. 160; *Keown* v. *State,* 64 Ark. 231. The case of *State* v. *Haller,* 119 Ark. 503, is not in conflict with prior decisions. We agree that the question cannot be raised here for the first time, but is it not raised by the assignment in the motion for a new trial challenging the legal sufficiency of the evidence? We think that the result of a substantial variance between the allegations and the proof is necessarily a failure of proof, for the proof must conform to the allegations, and, unless it does, there is no evidence to sustain the verdict. Our previous decisions seem to be to the effect that a material variance between the allegations and the proof may be raised on appeal in the same way that the legal

sufficiency of the evidence may be challenged. *Wilburn* v. *State,* 60 Ark. 141; *Blevins* v. *State,* 85 Ark. 195.

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

BARFIELD MERCANTILE COMPANY *v.* CONNERY.

Opinion delivered November 14, 1921.

1. VENDOR AND PURCHASER—RIGHT TO RECEIVE RENTS.—A deed conveying title to land in fee simple carries with it the right to collect the rents, and unless the deed reserves the right to the grantor to collect and use the rents, these pass as a necessary incident with the land to the grantee; and this is true where the grantee as lessee owed the rents.
2. EVIDENCE—PAROL EVIDENCE TO VARY DEED.—Where a deed is absolute on its face and contains no reservation of the rents, proof of an oral reservation is not admissible.
3. EVIDENCE—PAROL EVIDENCE RULE.—While the rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument is confined in application to the parties to it or to those claiming some right or interest in it, the rule applies where an assignee of a lease assumes the lessee's liability for rent and subsequently takes a deed in fee simple from the lessor.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. H. Dudley,* Judge; reversed.

C. A. Cunningham and *Little, Buck & Lasley,* for appellants.

The title passed when the deed was delivered. The presumption is that a deed is delivered the date of its execution. 61 Ark. 104. The deeds, being absolute on their face and containing no reservation, transferred the rent with the reversion, and such rights as appellee had before conveyance. 10 Ark. 9.

The fee simple title to land carries with it the right to its absolute dominion. 92 Ark. 315.

Where land is rented and the reversion is transferred by the lessor, the right to the rent thereafter to become due is no longer vested in him. Tiffany, Landlord & Tenant, par. 180.

The court erred in permitting the testimony of appellee over the objections of appellant, as to the reservation of the rent. 10 Ark. 9.

Gravette & Rayner, for appellee.

It matters not how the money came into the possession of the party who has it, if the plaintiff is entitled to it. Elliott on Contracts, Sec. 1372; 56 Am. St. Rep. 587; 110 Pac. 46; 30 L. R. A. (N. S.) 807; 7 Colo. App. 528; 44 Pac. 380; 65 Ark. 222; 110 Ark. 578; 163 S. W. 795; 215 S. W. 694.

McCULLOCH, C. J. Appellee was the plaintiff below in this action to recover rents on lands alleged to be due for the year 1918 under a written contract. The case was tried before the court on an agreed statement of facts. The farm which constituted the subject-matter of the lease contract was owned by appellee and others as tenants in common. Appellee owned an undivided 1-6 thereof; D. H. Wilhite and W. O. Anthony owned an undivided 1/2 thereof, and two other persons, whose names are not disclosed in this record, owned the other 2/6 interest. Appellant leased the land from the owners for a period of 5 years ending December 31, 1919, under written contract stipulating that the rents should be payable annually on November 15, and the amount sued for by appellee is the amount stipulated to be paid her in the contract for her interest. This suit is, as before stated, one to recover the rent for the year 1918. In the spring of that year, appellant made an absolute assignment of the lease to Wilhite and Anthony, they paying to appellant the sum of $500 as consideration for the assignment and as purchase price for a lot of corn, and they "succeeded to the rights and assumed the liabilities of the Barfield Mercantile Company under its lease contract covering said land." On October 12, 1918, appellee sold, and conveyed by warranty deed without reservation, her said interest in the tract of land to S. E. Simonson, and on November 12, 1918, Simonson conveyed that interest by warranty deed without reservation to Wilhite and Anthony. These

deeds were placed of record on December 8, 1918, and by the purchase Wilhite and Anthony became the owners of the whole of the land except an undivided 2/6 owned by persons not involved in this litigation.

Appellee was allowed to prove, over the objections of appellant, that in the sale by appellee of her interest in the land to Simonson there was an oral agreement that the rents for the year 1918 should be reserved to appellee.

The trial court made a finding of fact to the effect that the sum of $500 paid by Wilhite and Anthony to appellant for the lease included the rents due appellee for that year, and that in this manner "Wilhite and Anthony paid the defendant the sum of $146 for the use and benefit of plaintiff, independent of the purchase of the land." Counsel for appellee defend the judgment on this finding of fact, and contend that appellee is entitled to recover on the ground that the rent money was paid over to appellant for the benefit of appellee and accepted by appellant for her benefit. This finding by the court, however, is not only without evidence to support it, but it is contrary to the affirmative evidence on this subject. The only testimony on that subject is that of Anthony, incorporated in the agreed statement of facts, wherein he testified that Wilhite and Anthony "paid the Barfield Mercantile Company $500 for its contract on said land, and for some corn," and that "by said transaction the said Wilhite and Anthony succeeded to the rights and assumed the liabilities of the Barfield Mercantile Company under its lease contract covering said lands." Nor can we, for the purpose of sustaining a recovery in favor of appellee against the Barfield Mercantile Company, treat the alleged oral agreement between appellee and Simonson as an undertaking on the part of the latter to pay the rent for that year as a part of the consideration for the deed. It may be conceded that oral proof of such an agreement would not offend against any of the established rules of evidence, but that would not help appellee's case, inasmuch as

Simonson is not sued and appellant can not be held responsible for Simonson's undertaking to pay the rent as part of the consideration for the deed. Appellee's right to recover must be tested solely upon the question of her right to prove an oral reservation of the rents in the sale of the land to Simonson.

It is well settled that a deed conveying the title to land in fee simple carries with it the right to collect the rents, and, "unless the deed reserves the right in the grantor to collect and use the rents, these pass as a necessary incident with the land to the grantee." *Gibbons* v. *Dillingham,* 10 Ark. 9; *Latham* v. *First National Bank of Fort Smith,* 92 Ark. 315; *Gailey* v. *Ricketts,* 123 Ark. 18. Where the deed is absolute on its face and contains no reservation of the rents, proof of an oral reservation is not admissible. *Gibbons* v. *Dillingham, supra; Hardage* v. *Durrett,* 110 Ark. 63; *Broderick* v. *McRae Box Co.* 138 Ark. 215.

"The rule that parol evidence," this court has held, "is inadmissible to contradict or vary the terms of a written instrument, is necessarily confined in its application to the parties to it or those claiming some right or interest under it." *Talbot* v. *Wilkins,* 31 Ark. 411; *Gates & Bro.* v. *Steele,* 48 Ark. 539. However, the situation of appellant, Barfield Mercantile Company, falls within the operation of this rule, for appellant assigned the lease to Wilhite and Anthony, and they undertook to assume the obligation by paying the rent. The leasehold estate thus acquired by Wilhite and Anthony under the assignment became merged into the fee simple title in the purchase by them of appellee's interest, and the obligation of appellant, as the original lessee, to pay the rent to appellee was thereby extinguished. Appellant was therefore directly interested in the deed from appellee to Simonson, because it was in the chain of conveyances to Wilhite and Anthony, which constituted the extinguishment of appellant's obligation under the lease by the merger of the leasehold into the greater estate. The court therefore erred in permitting appel-

lee to prove the oral reservation and in rendering judgment in favor of appellee on the undisputed facts.

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

HOXIE v. GIBSON.

Opinion delivered November 14, 1921.

1. MUNICIPAL CORPORATIONS—INTEREST IN STREETS—ABANDONMENT.—The interest which the public acquires by the dedication of land for a highway or street is merely an easement or right of passage over the soil, the original owner still retaining the fee together with all rights of property not inconsistent with the public use; and when the streets are vacated or the use abandoned, they revert to the owners of abutting lands.
2. MUNICIPAL CORPORATIONS—STREETS—ADVERSE POSSESSION.— Prior to Acts 1907, p. 1147, there was no statute exempting incorporated towns from the running of the statute of limitations as to streets and alleys, that statute limiting its operation to adverse possession or occupancy commenced or begun after its passage.
3. ADVERSE POSSESSION—DEDICATED STREETS.—The statute of limitations begins to run against private rights in a street acquired by individuals under purchase of lots according to a plat filed by the owner of adjacent property from the time the latter's possession became adverse.
4. ADVERSE POSSESSION—WHEN NOT PERMISSIVE.— The fact that an adjacent proprietor took possession of a street after the town council had passed an ordinance vacating it did not render the former's possession permissive, so as to prevent the statute of limitation from running.
5. ADVERSE POSSESSION—CHARACTER OF POSSESSION.—Where an adjacent proprietor took possession of a street upon its abandonment by the town, and thereafter held possession adversely, it is immaterial whether the special act authorizing the town to vacate the street was valid or not.
6. QUIETING TITLE—JURISDICTION OF EQUITY.—Where a suit to quiet title to an abandoned street was properly brought in the chancery court, that court could not be deprived of its jurisdiction by an answer setting up that defendant was entitled to go into the law court and condemn the land for street purposes, and requesting that the cause be transferred to the law court in order that it might be condemned.

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

Ponder & Gibson, for appellant.

1. The town council had no authority to vacate the strip of ground in controversy, the same being part of a street. C. & M. Digest, § 4006; 75 Ark. 534; art. V. § 24, Const. 1874. The act No. 254, Acts 1905, p. 667, was void, and conferred no rights on the town or its council to vacate or close any of its streets or alleys. 134 Ark. 366; 120 *Id.* 214; 121 *Id.* 610 & Ark. cases cited; 98 *Id.* 156; 66 *Id.* 40; 65 *Id.* 410; 68 *Id.* 62; 50 *Id.* 473; 24 *Id.* 102; 27 Am. & Eng. Enc. 103; 9 *Id.* 20.

2. When the owner of the land dedicated the streets and alleys to the town, the fee passed to the town forever. 27 Am. & Eng. Enc. 117; 21 Fed. 223; 27 Am. St. Rep. 415; 8 Am. Dec. 263; 6 Peters (U. S.) 513; 1 Elliott on Roads and Streets, § 21; *Id.* § 128; 121 N. C. 350; 3 Colo. 472; 135 Ark. 48.

3. Appellee acquired no title by adverse possession. Her testimony shows that when she enclosed the property it was not for the purpose of acquiring title, but only to protect her hotel properties from the noises of cattle and from the insanitary condition of the street; and that the idea of acquiring title was conceived only after the burning of the old hotel in 1912, which was replaced by the new brick hotel. Her adverse possession, therefore, began after the passage of the act of 1907, Acts 1907, p. 1147, and within its provisions.

There could be no adverse possession until the street was ordered opened. 1 Gray (Mass.) 203; 56 Tex. 514. The rights of the public in a highway are not barred or lost by the failure of the city to act. Elliott on Roads and Streets, § 1188. And it is not every encroachment thereon that constitutes adverse possession. Setting out shade trees, making of sidewalks, fencing in a portion of the street, have been held insufficient. *Id.,* 33 Atl. 435; 34 *Id.* 366; 55 *Id.* 755; 71 *Id.* 141; 27 Am. Rep. 295; 18 Am. Dec. 86; 69 Am. St. Rep. 212; 29 *Id.* 500; 27 *Id.* 295; 88

Ark. 478. City not estopped on account of inaction of officers for a long period. 66 Ark. 40; 85 *Id.* 524.

4. The act of March 25, 1921, is valid and binding. Our statutes do not provide for a jury trial in matters of condemnation, except where private corporations seek to condemn, and the act is not violative of any provision of the Constitution. It provided a method for the settlement of the litigation in regard to this street. 96 Ark. 411; 32 *Id.* 553; 78 *Id.* 432; 77 *Id.* 171; 40 *Id.* 290; 62 Ala. 569; 124 Ark. 61; 132 *Id.* 412; 134 *Id.* 121, 130; *Id.* 293; 124 *Id.* 569; 75 *Id.* 530; 64 *Id.* 562; 79 *Id.* 159; 69 *Id.* 642.

Cohn, Clayton & Cohn, for appellee.

1. Mrs. Gibson was the heir of the original owner of the land and entitled to claim as such. At most the town acquired nothing more from the platting and dedication than an easement over the soil. 24 Ark. 102; 77 *Id.* 570, 579. She acquired title by adverse possession, enclosed it with a view to claiming it as her own, kept it enclosed for over fourteen years, built houses—garage and warehouse—thereon. 58 Ark. 151, 156; 73 *Id.* 106. 111; 76 *Id.* 48, 59; 84 *Id.* 52; *Id.* 516, 520; 133 *Id.* 527; 144 *Id.* 208. Title by adverse possession will sustain an action to quiet title. 83 Ark. 535; 20 *Id.* 508; *Id.* 542; 12 *Id.* 822. Cases cited by appellant from other jurisdictions are not in accord with this court and many others. See 2 Dillon Mun. Corporations, 4th Ed., §§ 673, 674. Acts 1907 p. 1147 related to adverse possession which commenced after its passage. 133 Ark. 527, 530.

2. It is not claimed that the town of Hoxie could legally vacate the street in question; but it could, and did, abandon it. 77 Ark. 570; 3 McQuillin, Mun. Corporations, § 1399; 26 L. R. A. 449. It is *not* the rule in this State that where a street has been dedicated, the fee in the land goes to the city. 24 Ark. 102; 77 *Id.* 570, 579; 50 *Id.* 466. Nor in the majority of the States. 3 McQuillin, Mun. Corp. § 1305:

3. Whatever the intention of the legislative body in enacting the Act No. 397, approved March 25, 1921, the act does not in terms seek to deprive the chancery court

of jurisdiction of this suit, which was pending therein at the time of the act was passed. Intention to oust jurisdiction will not be presumed. 26 Am. & Eng. Enc. 645; 132 Ark. 481; 33 *Id.* 778, 785-87; 53 *Id.* 37, 45; 18 *Id.* 585, 588; 38 *Id.* 406. It could not, in any event, deprive the chancery court of jurisdiction in this case, being an action to quiet title. 116 Ark. 490; 95 *Id.* 628; 80 *Id.* 145; 109 *Id.* 250.

4. Act No. 397, Acts 1921, is invalid. It is an act to settle rights of property of a property holder, by a special proceeding, gotten up for that specific purpose. 1 Gill & J. 365; 31 Am. Dec. 72, 97-99. It provides no adequate time in which to appeal. 76 Ark. 184; 97 *Id.* 116; 134 *Id.* 294.

McCULLOCH, C. J. This is an action instituted in the chancery court by appellee against the town of Hoxie to quiet appellee's title to a strip of land in the town, formerly owned by appellee's mother, Mary A. Boaz, and dedicated by the latter to the public as a part of a certain street of the town of Hoxie. The chancery court granted the relief sought by appellee, and an appeal is prosecuted to this court.

Appellee's mother, Mrs. Boaz, formerly owned the land on which the town of Hoxie is situated, and in the year 1883 she caused the same to be platted into lots and blocks, intersected by streets and alleys, and filed the plat for record. Lots were sold according to the descriptions set forth in the plat, and the streets and alleys thus became dedicated to public use.

The property in controversy is a strip 60 feet in width and 291 feet in length, south of block 12, according to the plat filed by Mrs. Boaz, and is a part of Springfield Street between two other streets designated as Texas Street, which is east of block 12, and Maple street, which is west. Mrs. Boaz erected a building on one of the lots in block 12 for use as a hotel. She died, leaving appellee as her sole heir. According to the testimony adduced, the part of Springfield Street on which block 12 abutted was left open for public use,

but was little used as a street. It was used so little by the public that it got to be a place where cattle congregated in the evening and at night near the rear entrance to the hotel, and the place became insanitary. It is not contended, however, that the attempted dedication by Mrs. Boaz was not complete, nor that the dedication remained unaccepted by the public. The contention of appellee is that the street was vacated and abandoned, and that all rights acquired under the original dedication were thereby extinguished.

In the year 1905 a petition of certain citizens of the town of Hoxie was presented to the Legislature, perhaps at the instance of appellee, and a special statute was enacted by the legislative session of that year authorizing the town of Hoxie to vacate, by ordinance, this portion of Springfield Street and a certain part of another street contiguous to appellee's land not involved in this appeal. Pursuant to this statute, the town council enacted and published an ordinance on October 6, closing this part of Springfield Street, and within a short time thereafter appellee took possession of the strip of land in controversy and fenced it in connection with her other property in block 12. She has kept the property fenced and has maintained exclusive dominion over it from that time until the commencement of this action. The old hotel building was burned in the year 1912, and was replaced by a brick building, used for the same purpose and still owned by appellee.

The testimony is abundantly sufficient to establish the fact that appellee has continuously held the property since the autumn of 1915, in hostile possession and under a claim of ownership sufficient to completely vest the title in her by limitation unless, under the law and the facts of the case, the statute did not run in her favor.

This court, in an early decision, announced the rule, which has been several times reiterated, that "the interest which the public acquires by the dedication of land for a highway or street is merely an easement or

right of passage over the soil, the original owner still retaining the fee, together with all rights of property not inconsistent with the public use," and that "when the streets are vacated or the use abandoned, they revert to the owners of abutting lands." *Taylor* v. *Armstrong,* 24 Ark. 102; *Packet Co.* v. *Sorrels,* 50 Ark. 466; *Dickinson* v. *Arkansas City Improvement Co.,* 77 Ark. 570.

At the time the adverse possession of appellee began, there was no exemption in the statute of limitation in favor of incorporated towns. A statute was enacted declaring such exemption at the legislative session of 1907 (Acts 1907, p. 1147), but that statute contains a provision limiting its operation to "adverse possession or occupancy commenced or begun after the passage of this act." The effect of this statute was construed and its provisions applied in the case of *Madison* v. *Bond,* 133 Ark. 527. The statute, of course, ran against private rights acquired by individuals under purchases of lots according to the plat filed by Mrs. Boaz. *Mebane* v. *Wynne,* 127 Ark. 364. The fact that appellee acquired possession of the property in controversy pursuant to to the ordinance enacted by the town council vacating the street does not render such possession a permissive one, so as to prevent the statute of limitation from running. It is contended by learned counsel for appellant that the special act of the Legislature authorizing the town council to vacate the street was invalid, a question which we do not deem it necessary to discuss; but, whether this be so or not, it demonstrates the fact that appellee's possession began under a claim of legal right and not by permission, for it constituted an assertion of her right to resume possession of the property, in which she owned the fee after the public use was abandoned. Nor is it material that when appellee took possession of the property in controversy and fenced it she did not then, as now, purpose to extend the hotel building thereon. The controlling fact, however, is that she took possession and maintained it as a matter of right and under a hostile claim of ownership. *Madison* v. *Bond, supra.*

Our conclusion is, that regardless of the question of the legality of the proceedings on the part of the town in vacating the street, appellee's title is complete by adverse possession, and that all other rights have been extinguished by operation of the statute of limitation.

There is another feature of the case, however, which calls for discussion. The General Assembly of 1921 passed a special statute (Act No. 397) referring to the property in controversy and to the special statute of 1905 in regard to vacating Springfield Street, and authorizing the town of Hoxie to institute proceedings in the circuit court of Lawrence County "against any one claiming ownership in said street, for the purpose of determining whether any one has acquired rights in said street by limitation or under the provision of said statute." The statute further provides that, if the circuit court "finds that other parties have acquired rights in said street, it shall appoint three citizens of Lawrence County to act as appraisers," and that there shall be an appraisal of the value of the property, and that when the appraisal has been made the town council "shall determine whether they are willing to pay the amount thereof and to open said street; and, in the event they determine to open said street, the incorporated town of Hoxie shall execute and deliver to the parties who are adjudged by the circuit court to be the owners of said street, the warrants of said incorporated town, drawn on its treasurer, for the amount of the appraised value of said street."

Appellant, in its answer in the present case, pleaded the statute just referred to, and moved the court to transfer this cause to the circuit court for further proceedings in accordance with the statute. This motion was overruled.

We are of the opinion that the court was correct in refusing to transfer the case. The chancery court rightfully acquired jurisdiction for the purpose of quieting appellee's title to the strip of land in controversy.

The relief sought in this action fell within the original jurisdiction of chancery courts, and the statute in question was nothing more nor less than one prescribing the method for condemnation of this property for public use under the right of eminent domain. It could not deprive the chancery court of the jurisdiction already rightfully acquired, nor was it an attempt to do so. Appellee's title to the property has been quieted by the decree of the chancery court, and her rights therein are thus settled, but appellant's authority under this statute to proceed to condemnation of this property is still unimpaired, notwithstanding this decree adjudicating and quieting appellee's title to the property, for, as before stated, the only purpose of the act is to prescribe the method of condemnation. It is unnecessary for us at this time to determine the question of validity of the mode of condemnation prescribed in this statute, nor is it proper that we should do so, for that question will not arise until the prescribed method is pursued.

The decree is affirmed.

WILDER v. LITTLE ROCK.

Opinion delivered November 14, 1921.

MUNICIPAL CORPORATIONS—BUILDING PERMIT—EXTENSION OF FIRE LIMITS.—The grant by a city of a permit to build a frame building did not constitute a contract, nor, in the absence of any vested rights acquired thereunder, did it prevent the city from extending its fire limits so as to prohibit the erection of such frame building.

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

Hendricks & Snodgress, for appellant.

The city may extend its fire limits, but cannot give it an *ex post facto* effect, as it attempted to do in this case.

The permit contains no provision for revocation, and the law provides for none, and the city's action was

without authority. 1 L. R. A. (N. S.) 458 and cases cited. See also case note thereto; 3 Dillion, Municipal Corp. p. 1875; 145 Ill. 451.

By the issuance of the permit and the payment by appellant of rent in advance on the premises and other expenditures for lumber, etc., he acquired a vested right which could not be taken away by the action of the city council.

John F. Clifford, for appellee.

Authority for the passage of the fire ordinance and ten amendments thereto is found in §§ 7544, 7554-5, Crawford & Moses' Digest. Their justification is sustained by 35 Ark. 352; 18 Ark. 252.

The cases cited by appellant to sustain his theory of a vested right are not applicable, as under those cases some sustantial part of the work of building had been completed, whereas here nothing of this sort had been done, and appellant was out no money, not even for rent, as his lease contained a clause that the contract should be void in case the council revoked the permit. He had reason to expect that this might be done, as the present ordinance was pending at the time the permit was issued.

Appellant did not comply with § 107 of the ordinance.

McCULLOCH, C. J. On March 17, 1921, appellant applied to the building inspector of the city of Little Rock for a permit to erect a frame building on a certain lot in this city, said lot not then being within the fire limits as fixed by existing ordinances of the city. The structure was to cost approximately $1,000, and on the same day the permit was issued to appellant, signed by the building inspector and countersigned by the city collector, in accordance with the provisions of the ordinance. At that time there was pending before the city council a proposed ordinance extending the fire limits so as to include the lot mentioned in the permit issued to appellant. On the following Monday night, March 20, the city council passed the new ordinance, which was approved by the Mayor and published, and on

March 23 appellant leased the lot mentioned in his permit from the owner, one Dodd. The written contract of lease between the parties contained the stipulation that "if the city of Little Rock revokes permit to put up building, this contract is void." The building contemplated by appellant would be contrary to the provisions of the ordinance creating the fire limits, which prohibits the construction of frame buildings. Later the city council revoked the permit, and this action was instituted by appellant in the chancery court of Pulaski County to restrain the city and its officers from interfering with the construction of the building. Appellant alleges in his complaint that, in contemplation of the construction and erection of the building, he purchased material of the value of $100 and that he leased the lot for a period of 5 years, obligating himself to pay $30 per month, and that he paid the sum of $180 in advance.

At the hearing appellant proved that he had entered into a verbal contract with Dodd, the owner of the lot, whereby he agreed to lease the lot on the Saturday before the city council enacted the ordinance on Monday, but that the lease was not reduced to writing and signed and delivered until after the enactment of the ordinance. There was no proof, so far as the testimony is abstracted, tending to show that appellant had incurred any other liability. So, as the case stands, appellant is insisting that the permit issued by the city authorities is irrevocable, and that his right to construct the building is unaffected by the ordinance subsequently passed.

The statutes of this State authorize city councils of all municipalities to "regulate the building of houses; to make regulations for the purpose of guarding against accidents by fire, and to prohibit the erection of any building or any addition to any building unless the outher walls thereof be made of brick or mortar, or stone and mortar; and to provide for the removal of any building or addition erected contrary to such prohibi-

tion." Crawford & Moses' Digest, § 7544. Another statute, applicable to cities of the first class, provides that such municipalities "shall have the power to regulate the building of houses, and to provide that no house or structure shall be erected within the city limits except upon a permit to be issued by such officer or officers as the city council shall designate, and to provide that no permit shall be issued for the building of any house or structure deemed to be unsafe, insanitary, obnoxious, or detrimental to the public welfare." *Id.* § 7754. This statute also authorizes such municipalities to "order the removal or razing of, or to remove or raze, any buildings or houses that have become, in the opinion of the city council, dilapidated, unsightly, unsafe, insanitary, obnoxious or detrimental to the public welfare." *Id.* § 7755. Ordinances of the city of Little Rock have been enacted pursuant to this legislative authority. The chancery court dismissed the complaint for want of equity, and an appeal is prosecuted to this court.

A permit to build a house in the city is, under the statutes and ordinances of the city, issued without regard to its situation, either in or out of the fire limits. The officers of the city have no authority to issue a permit in conflict with the valid ordinances of the city relating to fire limits and the construction of buildings, nor can such officers restrict the lawful authority of the city by issuing permits. Conceding that a permit is irrevocable, it does not follow that the issuance thereof is a bar to the exercise by the city of its power in extending the fire limits so as to include the lot on which the building is to be erected. The permit was merely the granting of a privilege, and did not constitute a contract between the city and appellant. No vested rights were acquired by obtaining a permit, and none arose in the acquisition of property or preparations for the construction of the building prior to the enactment of the new ordinance, so we do not have to deal here with the question of displacement of vested rights by the pass-

age of the ordinance extending the fire limits. The city council was clearly within its powers in passing the new ordinance, and, as before stated, appellant was not exempted from its operation by the fact that he held a permit to construct a building on the lot in question.

The cases cited by learned counsel for appellant relate merely to the question of the irrevocability of a permit issued by a municipality, and do not reach the question of the power to extend the fire limits after the issuance of a permit.

Our conclusion is that the decree of the chancellor was correct, and the same is affirmed.

INGRAM v. THAMES.

Opinion delivered November 14, 1921.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICTS—FILING PLANS.—Under Crawford & Moses' Dig. §§ 5656-7, providing that boards of improvement in cities and towns shall form plans for the improvement and procure estimates of the cost thereof, and shall report the same to the city or town council, which shall appoint a board of assessors of the benefits to be received by each lot, *held* that where the board of improvement formed plans and procured an estimate of costs, and reported to the city council that it had done so, but did not file the plans or estimates with that body, the council was authorized to appoint the assessors.
2. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—LIMITATION TO ATTACK ON ASSESSMENT.—Under Crawford & Moses' Dig. § 5668, providing that, within 30 days after passage of an assessment ordinance, a copy of it shall be published, and all the persons who fail to begin proceedings to correct or invalidate such assessment within 30 days after such publication shall be barred, an attack upon an assessment ordinance upon the ground that the plans and estimate of costs were not filed with the city council before the assessors were appointed was barred by failure to institute proceedings within 30 days after publication of the assessment ordinance.

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

Sherrill & Mallory, for appellant.

There was no compliance with the provision of the statute requiring the filing of plans with the city council. C. & M. Digest, § 5657. A report is a mechanical reproduction of what actually took place. 61 N. Y. Sup. Court, 207.

The city council was without authority to appoint a board of assessors until the board of improvement had made plans and ascertained the cost of the improvement, 134 Ark. 319; and was without authority to return the assessment list to the board of assessors. 86 Ark. 1.

No notice of the second assessment being given, the statute of limitations of thirty days did not apply. C. & M. Digest, § 5668.

Wallace Townsend, for appellees.

The report of the commissioners was a sufficient compliance with the statute. C. & M. Digest, § 5656.

The question of whether the city council had authority to return the assessment list to the board of assessors was not raised in apt time.

Persons failing to begin legal proceedings within 30 days after the publication of the assessment ordinance for the purpose of correcting or invalidating the assessment shall be forever barred. C. & M. Digest, § 5668; 84 Ark. 257; 90 Ark. 29; 95 Ark. 575; 98 Ark. 543; 69 Ark. 68; 92 Kans. 513; 141 Pac. 299; 176 N. Y. 31; 105 N. E. 105; 55 N. Y. 361; 92 Pac. 690; 90 Pac. 353; 138 N. W. 967; 134 Pac. 961; 130 N. Y. 870.

The city council had full power to grant the petition for the improvement. 110 Ark. 511.

WOOD, J. Street Improvement District No. 305 Little Rock, Arkansas, was created by ordinance duly passed by the city council of the city of Little Rock on February 7, 1921, and duly published on February 11, 1921. On March 7, 1921, a second petition in proper form was filed with the city clerk and notice duly published that a hearing would be held thereon on March 28, 1921. On April 4, 1921, the commissioners of the district took the oath and on May 9, 1921, filed with

the city council a report which reads in part as follows: "We have formed plans for the improvement within the district as prayed for in the petition, and have ascertained that the cost of such improvement will be $11,400, which is less than 20 per cent of the assessed value of the real property of said district as shown by the last county assessment." No plans and specifications, or itemized statement of cost for the improvement, were filed with the council.

The duly appointed assessors of the district filed their assessment of benefits on June 16, 1921, and notice of such filing was duly published. Protests against the assessment of benefits as filed were immediately made by the property owners. The city council referred these protests to its finance committee, which recommended to the council as follows: "We recommend a reduction in the assessment of 5% on property facing double track car lines and 2½% on property facing a single track car line." The city council adopted these recommendations and referred them to the assessors for reassessment accordingly. The assessors revised the assessments according to these recommendations and filed the same on July 29, 1921.

On August 8, 1921, an ordinance was passed assessing the benefits in the district according to the assessments as revised, which ordinance was duly published August 12, 1921.

This action was instituted by the appellant in the Pulaski Chancery Court seeking to have all of the acts of the city council, the board of improvement, and the board of assessors subsequent to the filing of the original assessment declared void. After setting out the facts as above appellant alleged that the board of improvement failed to file with the city clerk any plan for the improvements within the district and that the council had no authority to refer assessments once filed back to the board of assessors nor to revise the assessments when no appeal had been taken from the assessments of the board of assessors to the city council.

The appellee demurred to the complaint on the following grounds, to-wit: "The complaint does not state facts sufficient to constitute a cause of action. The complaint shows that this is a suit to invalidate the assessment ordinance of said district and is begun more than thirty days after the publication of said ordinance and said suit is therefore barred and precluded."

The court sustained the demurrer. The appellant stood on his complaint. The court entered a decree dismissing the same for want of equity, from which decree is this appeal.

1. The report of the commissioners to the city council was in writing and informed that body that the commissioners had qualified and organized into a board and elected a secretary; that they had formed plans as prayed for in the petition for the improvement and ascertained that the cost of such improvement would be $11,400, which was less than 20 per cent. of the assessed value of the real property in the district as shown by the last county assessment. The report concluded by asking that three persons, naming them, be appointed assessors to assess the benefits. Attached to the report was a statement of the engineer of the district as to the cost of the work outlined. The report was a sufficient compliance wtih sections 5656 and 5657, Crawford & Moses' Digest, which require that, "immediately after their qualification, the board shall form plans for the improvement within their district as prayed in the petition, and shall procure estimates for the cost thereof * * * and shall report the same to the city or town council, which shall appoint three electors of the city or town, which shall constitute a board of assessors of the benefits to be received by each lot, etc."

It will be observed that the only purpose of requiring this report to be made to the city council is to advise that body, so that the latter may proceed to appoint the assessors, which is the only duty the city council has to perform with reference to the report. The commissioners constituting the board of improve-

ment are public agents, and necessarily vested with large discretion in the discharge of their duties under the statute, and, if it had been the design of the Legislature to have the detailed plans, together with the itemized estimated cost of the improvement, filed with the city council before the latter could appoint the board of assessors, such purpose would have been plainly stated in the statute.

It is essential that the board of improvement form plans and procure estimates for the cost of the improvement. *Mo. Pac. Ry. Co.* v. *Waterworks Imp. Dist.,* 134 Ark. 315. And the board is directed to *report the same to the city council,* but the making of such report to the city council is not jurisdictional. If the commissioners had actually formed the plans and ascertained the cost thereof, but had failed to report the same to the city council, the latter body would still have had the power to appoint the assessors to assess the benefits. In others words, the further progress of the improvement could not be arrested and the whole improvement defeated simply because the board had failed or neglected to make proper report to the city council. The report made by the improvement board in this case was in compliance with the requirements of the statute.

2. The statute requires that, within thirty days after the passage of the ordinance mentioned above (assessment ordinance), the recorder or city clerk shall publish a copy of it in some newspaper published in such town or city for one time. And all persons who shall fail to begin legal proceedings within thirty days after such publication for the purpose of correcting or invalidating such assessment shall be forever barred and precluded. Sec. 5668, Crawford & Moses' Digest. The allegations of the appellant's complaint show that it is an attack upon the assessment of benefits. The appellant did not comply with this statute, and therefore his cause of action is barred. *Board of Imp. Dist.* v. *Offenhauser,*

84 Ark. 257, 268; *Boles* v. *Kelly,* 90 Ark. 29; *Webster* v. *Ferguson,* 95 Ark. 575; *Bd. of Imp.* v. *Pollard,* 98 Ark. 543.

The decree is therefore correct, and it is affirmed.

PARKER v. TWIST.

Opinion delivered November 14, 1921.

1. CONTRACT—BREACH—DEFENSE.—In an action by a landowner for breach of a contract to cut and slash the timber on certain land, it was not error to refuse to permit defendant to prove that, after the contract was made, certain persons notified defendant to discontinue cutting timber on some of the land described in the contract.
2. CONTRACT—BREACH—DEFENSE.—It was not error, in an action for breach of a contract to cut and slash all the timber on certain land, to refuse to permit defendant to prove that not more than half of the timber embraced in the contract had been cut and removed, and that there was enough timber left to more than pay for the cutting of the timber on all of the land.
3. EVIDENCE—HEARSAY.—Proof of a conversation between one of the defendants and a third person in plaintiff's absence is hearsay and inadmissible.
4. CONTRACT—BREACH—DAMAGES.—In an action by a landowner for breach of a contract to cut and slash the timber on certain land, it was not error to instruct the jury that the only question for their determination was what would be the reasonable cost of cutting and slashing the timber on the land.
5. EVIDENCE—COMPETENCY—RES INTER ALIOS.—In an action for breach of a contract to cut and remove all the timber from certain land, it was not admissible for defendant to prove a contract between defendant and a third person whereby the latter agreed to cut and remove the timber from the land for a certain consideration; plaintiff not being present when the contract was made nor bound by it.
6. CONTRACTS—BREACH—INSTRUCTION.—In an action by a landowner for breach of a contract to cut the timber from certain land, it was not error to refuse to submit to the jury the issue as to whether or not the plaintiff was owner of the land, and whether defendant was prevented from performing his contract by the interferences of third persons; there being no testimony that defendant's rights to cut the timber was challenged in such manner as to make it incumbent on plaintiff to offer assistance or protection.

Appeal from Crittenden Circuit Court, First Division; *S. V. Neely,* Special Judge; affirmed.

Appellants *pro se.*

Parker was prevented from carrying out his contract by the interference of third parties who claimed to own the land upon which he was cutting timber. Under such circumstances it was the duty of Twist, the owner, to relieve the situation. This he failed to do and his non-action amounted to a breach of the contract, relieving Parker from liability under his bond. 98 Ark. 160; 93 Ark. 447; 80 Ark. 228; 97 Ark. 522; 105 Ark. 421.

Rudolph Isom, for appellee.

The cases cited by appellants are not in point, as under those cases the contract was breached by a party to it. Here the plaintiffs took no such action. The statements as to ownership of the lands not being in plaintiff Twist came from outside sources—parties not involved in this suit. To avail themselves of the plea of breach of the contract by plaintiff, there must have occurred some ouster or some act emanating from the plaintiff indicating an ouster. 112 Ark. 607. The assertion of ownership by outsiders would not excuse defendant from complying with his contract.

WOOD, J. This is an action for damages brought by the appellee against the appellant Ben Parker, C. G. Barton and H. Fletcher to recover of Parker, the principal, and the others as sureties on his bond, for breach of contract. The appellee set up in substance that he was the owner of the land described in the contract, and that on the 22nd day of July, 1916, he entered into a contract with Parker whereby the appellee conveyed and sold to Parker all the merchantable timber upon the 240 acres of land with the privilege of removing the same until the first day of November, 1917; that Parker agreed that he would cut and slash all the timber upon the land "while the leaves were green if possible during the season of 1916 and not later than the year 1917;" that as a guaranty of the performance by Parker of his part of the contract C. G. Barton and H.

Fletcher joined with Parker in a bond of $1,000 conditioned that Parker would perform the contract. The appellee alleged a failure of performance on the part of Parker by which he had been damaged in the sum of $2,000. He prayed that he have judgment against Parker and the other appellants in the sum of $2,000 and against Parker in the sum of $1,000.

The appellants denied the allegations of the complaint, and they set up by way of an affirmative defense that, while Parker was complying with the terms of his contract, he was notified by one Max Levy and E. J. Badinelli to discontinue cutting on the lands described in the contract, they claiming to be the owners of the lands, and they forbade Parker from cutting on the same; that Parker notified the appellee of the demand made by Levy and Badinelli, and the appellee told him (Parker) to go ahead and cut the timber, but this Parker could not do in safety to himself, and therefore he discontinued operations on the lands. Parker made his answer a cross-complaint and asked judgment against the appellee in the sum of $600 and the sureties prayed that the complaint as to them be dismissed. Before the case went to trial Parker died, and thereafter as to his estate the case was revived and progressed in the name of his administratrix.

The appellants offered to introduce testimony to prove that Max Levy notified Parker to discontinue cutting timber on some of the land described in the contract; that Max Levy and E. J. Badinelli claimed to own these lands; that this fact was communicated to the agent of the appellee, and that nothing was done by appellee to relieve the situation; that at that time not more than one-half the timber embraced in the contract had been cut down and removed, and that there was enough timber left to more than pay for the cutting of the timber on all the lands embraced in the contract; that by reason of this notice to Parker he discontinued the cutting of the timber. Appellants also offered to prove that, in a conversation between Parker and a third

party when the appellee was not present, it was said that the cost of the cutting and slashing of the timber would not have amounted to the sum for which the jury returned a verdict and for which judgment was rendered against the appellants. The court excluded this testimony, and the appellants duly excepted.

The appellants requested the court to submit the issue to the jury as to whether or not the appellee was the owner of the lands and also the issue as to the cost of cutting and slashing the timber under the contract as shown by the offered testimony. The court refused these prayers, to which rulings the appellants objected and duly excepted.

The court, in instructions on its own motion, after defining the issues raised by the pleadings and the uncontroverted testimony, told the jury that the only question left for their determination was what would have been the reasonable cost of cutting and slashing the timber on the 320 acres of land in section 8 described in the contract during the year 1917? That the plaintiff was not asking a verdict against the estate in a sum exceeding $1,000, and that in no case could they find against the sureties in a greater sum than this with interest from January 1, 1918. The appellants duly excepted to the rulings of the court. The jury returned a verdict in favor of the appellee in the sum of $1,000. Judgment was entered in favor of the appellee for that sum, from which is this appeal.

There is no error in any of the rulings of the court. The appellants offered to prove by a certain witness that, after the contract herein involved was made, the witness entered into a contract with Parker to remove the timber, and appellants also offered to prove by this witness, and from the contract entered into between him and Parker, as to what would be the cost of cutting and removing the timber from the lands. The appellee was not present when the alleged contract was entered into between Parker and the witness, and there-

fore was not bound by any contract or conversation that Parker may have had with witness. The offered testimony was purely hearsay.

The court likewise ruled correctly in refusing to allow appellants to submit to the jury the issue as to whether or not the appellee was the owner of the lands described in the contract, and as to whether or not Parker was prevented from performing his contract by the interference of third parties or strangers to the contract. The testimony offered by the appellants did not tend to prove that they were ousted from the lands by the appellee, nor that appellee had done anything to obstruct them in the performance of the contract. There is no testimony tending to prove that the appellee was in any manner responsible for the acts of the third parties who claimed to own the lands. That appellants lent "a too diligent ear" to the claims of these parties, and voluntarily quit their work and abandoned their contract because of such claims is their own fault and not the fault of the appellee. Their right of possession under him had not been challenged by third parties in a manner to make it incumbent on the appellee to offer assistance or protection. Parker, therefore, when he abandoned his contract, violated the same, and he and his bondsmen are liable for the resultant damages. See *Ingham Lumber Co.* v. *Ingersoll,* 93 Ark. 447, and cases there cited.

Since there is no error, the judgment must be affirmed.

RIVERS v. HOUSE.

Opinion delivered November 14, 1921.

1. GUARANTY—NOTICE OF ACCEPTANCE.—An offer to guaranty the purchase money of land, which was conditioned upon the satisfaction of a mortgage and was coupled with a request for an answer, did not become binding where the vendor failed to answer, though he did procure the satisfaction of the mortgage.

2. VENDOR AND PURCHASER—PAYMENT OF PURCHASE MONEY.—Where a vendee delivered a cashier's check to the vendor in payment of the purchase money of land, and the issuing bank failed before paying the check, the bank being the vendee's agent, the loss of the purchase money by its failure must fall upon the vendee, and not upon the vendor.

3. ESTOPPEL—WHAT DOES NOT CONSTITUTE.—A vendor of land was not estopped from suing the purchaser for the unpaid part of the purchase price by reason of having presented a claim to the receiver of a bank on which he had a check for such balance; such act constituting an effort to collect the money by presenting his check or claim to the proper authorities for payment.

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

John E. Miller and *C. E. Yingling,* for appellant.

1. There was a consideration for the guaranty of appellee bank to the appellant in this: that he suffered detriment and expense on account of the telegram, and the bank retained the use of the money for more than ten days, and House obtained a direct benefit on account of the action of the bank, and the bank by its action in the matter hoped to make a customer of House. This comes within the rule establishing consideration, in Elliott on Contract, vol. 1, p. 337, § 207, and vol. 5, p. 9, § 3936.

The telegram constituted an unconditional promise to pay, and no notice or acceptance from appellant was required, but only his performance of the thing required, which was done. 111 Ark. 415; 71 Ark. 585; 105 Ark. 443; 144 Ark. 522; 187 S. W. 628; R. C. L. vol. 12 p. 1064, § 13.

Appellant should not be held to be estopped because he presented a claim on the cashier's check against the First National Bank, as the appellees are getting the direct benefit of the amounts so collected. This action brings appellant within the rule stated in 131 Ark. 82.

The act of the cashier in sending the telegram was not *ultra vires,* appellant having performed his part of

the contract had the right to presume that the telegram was sent upon proper authority. 96 Ark. 602; 74 Ark. 377; 91 Ark. 367; 96 Ark. 308.

2. The finding made by the chancellor that appellee House was liable is one of fact and should be sustained under the ruling in the following cases: 144 Ark. 573; 138 Ark. 454; 138 Ark. 403; 135 Ark. 607; 132 Ark. 95.

The First National Bank was the agent of House and not of appellant, and House is liable to appellant by reason of the failure of the bank to pay over the money to him. 55 So. 47; 34 L. R. A. (N. S.) 734.

Brundidge & Neelly, for appellee.

1. It was Rivers' duty, made so by statute, to have satisfied the mortgage, and it cannot be said that any advantage passed to either the bank or House by not doing so.

The telegram was not an absolute guaranty, but only an offer of guaranty. What else could be the meaning of the word "answer" in the telegram? There was no consideration whatever for the alleged guaranty. A showing of "consideration" is necessary before the bank would be liable. 111 Ark. 223; 20 Cyc. p. 1397 and pp. 1413 and 1417; 93 N. Y. 273; 45 Am. Rep. 209; 127 Mo. 327; 4 Ark. 76; 93 Fed. 171; 104 N. E. 346; 104 U. S. 159; 12 R. C. L. 1067, 1076; 15 A. & E. Am. Cas. 1166.

Appellant should be estopped by reason of his having filed a claim with the receiver of the First National Bank, thereby recognizing that bank as his agent, and further preventing House or the F. & M. Bank from filing a claim.

The act of the cashier in sending the telegram was not binding on the bank. 138 Ark. 124; 260 Pa. 223.

2. The First National Bank was recognized by Rivers as his agent, when he filed his claim with the receiver, and he should now be barred from bringing suit against House. 124 Ark. 536, and cases cited.

WOOD, J. One H. H. Capps was the agent of W. W. Rivers to sell for him certain lands near Judsonia, Arkansas. Capps negotiated for a sale of the lands to

W. L. House for a consideration of $3,600. Rivers executed a deed and sent same to Capps for delivery; but this deed was not satisfactory in form, and, at the suggestion of House, on March 29, 1920, Rivers mailed a second deed to House in care of the First National Bank at Judsonia. Rivers had received from House through the First National Bank the sum of $600 as part payment of the purchase money. Some time elapsed, and Rivers began to urge in letters to that bank the payment of the balance of the purchase money, or a return of his deed. A letter of May 12, 1920, advised the First National Bank to return the deed to Rivers unless its client would take up same and pay balance of purchase money in twenty-four hours. On May 15, 1920, the First National Bank wrote Rivers inclosing cashier's check for $2,996, balance due on purchase, and stating that House had been ill, and the payment thus delayed. Rivers received the above letter and cashier's check on May 17, 1920, and on the same day he received from the Farmers & Merchants Bank of Judsonia (hereafter called Farmers Bank) the following telegram: "This bank guarantees payment three thousand dollars for W. L. House on your deed upon satisfaction of mortgage on lands—answer." The telegram was the first information Rivers had that there was a mortgage of record on the lands unsatisfied. Rivers had mortgaged the lands to the Bank of Hattiesburg, Mississippi, March 2, 1912. The mortgage was settled that year, but the record had not been satisfied, and River held the cashier's check pending orders from the Hattiesburg Bank to satisfy the mortgage on the record. Rivers did not deposit the cashier's check in his home bank for collection until about ten days after receiving it. The First National Bank, on which the cashier's check was drawn, did not request Rivers to withhold the deposit, and the check, he says, was not deposited because of the telegram of the Farmers Bank. Rivers sent a release—satisfaction—of the mortgage for record, and at the same time sent the cashier's

check to the First National Bank. That bank, in the meantime, had become insolvent, and was in the hands of a receiver, so when the check was presented it was not paid.

This action was instituted by Rivers against House and the Farmers Bank to recover the balance of the purchase money. House defended on the ground that he had paid the balance of the purchase money. The Farmers Bank defended on the ground that the telegram sent by it to Rivers was without consideration, and furthermore was only an offer of guaranty which was never accepted. Both House and the Farmers Bank also defended on the ground that Rivers had presented a claim for the amount involved to the receiver of the First National Bank which estopped him from claiming against them. Such other facts as may be necessary will be stated as we proceed.

The court rendered a decree dismissing the complaint against the Farmers Bank for want of equity, and a decree in favor of Rivers against House for the sum of $1899.47, and declaring same a lien, etc. Rivers appealed, and House has taken a cross-appeal here.

1. The first question is: Was the appellee, Farmers Bank, liable on the telegram. The telegram was only an offer of guaranty. The appellee bank could not know until same was answered whether appellant was willing and able to satisfy the mortgage of record and whether the offer was accepted and would be relied on by him. The offer to guarantee payment by appellee bank was conditioned upon the satisfaction of the mortgage; and the request for an answer indicated that the appellee bank did not know whether the appellant would or could have such satisfaction entered of record.

In *Bishop* v. *Eaton*, 161 Mass. 496, it is held, quoting syllabus: "Ordinarily, there is no occasion to notify a guarantor of the acceptance of an offer of guaranty; for the doing of the act specified in the offer is a sufficient acceptance; but when the guarantor would not know of himself from the nature of the transaction

whether the offer had been accepted or not, he is not bound without reasonable notice of the acceptance seasonably given after the performance which constitutes the consideration." See also *Davis Sewing Machine Co.* v. *Richards,* 115 U. S. 524; *Davis* v. *Wells,* 104 U. S. 159; *Whiting* v. *Stacey,* 15 Gray 270.

The appellant never notified the appellee bank that he would satisfy the mortgage of record. The appellee bank requested the appellant to answer in effect whether or not the mortgage would be satisfied of record. The appellant did not answer, and therefore there was no acceptance, no meeting of minds, and no completed contract of guaranty upon which the appellee bank can be held liable. The decree of the chancery court dismissing the appellant's complaint against the Farmers Bank is correct.

2. It could serve no useful purpose, and it would unduly lengthen this opinion, to set out and discuss in detail the testimony bearing upon the issue of fact as to whether or not the First National Bank was the agent of House in the negotiations for the sale of this land by appellant and the purchase thereof by the appellee House. We are convinced that a preponderance of the testimony shows that the First National Bank was the agent of House and not the agent of appellant. The Farmers Bank paid the check which appellee House had drawn in favor of the First National Bank to pay appellant the balance of the purchase money, and the First National Bank received this money for appellee House. If it had honored its cashier's check, in doing so it would have been acting for the appellee House and not the appellant Rivers. See *Virginia-Carolina Chemical Co.* v. *Steen,* 55 So. 47 (Miss.), 34 L. R. A. (N. S.) 734. The First National Bank had in its hands the money of House which it was holding as his agent or representative, and not as the agent or representative of the appellant, and, as between appellant and appellee House, the neglect or failure of the First National Bank to pay the check and the resultant loss must fall on the ap-

pellee House, rather than on the appellant. The decree therefore in favor of the appellant against the appellee House is also correct.

The appellant is not estopped because he presented a claim to the receiver of the First National Bank for the balance of the purchase money due him. That act should be viewed in the light of an effort to collect his money by presenting the check or claim to the proper authorities to make payment of same. It was not an election by appellant to pursue the bank rather than House. It was to the interest of the appellee House that such claim be made. There is certainly nothing in this to prove that the appellant had recognized the First National Bank as his agent for the collection of the balance of the purchase money due him. The decree is in all things correct, and it is affirmed.

DAVIS v. SMITH.

Opinion delivered November 14, 1921.

1. CARRIERS—FEDERAL CONTROL ACT—CONSTRUCTION.—The Federal Control Act was an exercise of paramount power which superseded the State's power to fix intrastate passenger rates.
2. CARRIERS—FEDERAL CONTROL ACT—LIABILITY FOR PENALTIES.—It was not the purpose of section 10 of the Federal Control Act to allow the Government to be sued for penalties.

Appeal from Saline Circuit Court; *W. H. Evans*, Judge; reversed.

Thomas S. Buzbee, H. T. Harrison and *C. L. Johnson*, for appellant.

1. At the time the overcharge complained of occurred, the railroad was being operated by the Director General of Railroads, the road having been placed under Federal control by proclamation of the President in the exercise of the war powers conferred upon him by act of Congress of August 29, 1916; and rates had been initiated pursuant to the Federal Control Act of March 21, 1918, § 10. There was therefore no violation of the State statute. 250 U. S. 135.

2. The Federal Control Act does not permit recovery of fines or penalties provided by State statutes from the Government. *Missouri Pacific R. R. Co.* v. *Ault,* 41 S. C. Rep. 593. § 887, C. & M. Digest, is a penalty statute. 114 Ark. 517; 95 *Id.* 218; 95 *Id.* 211.

No brief for appellee.

WOOD, J. This is an action by the appellees against the appellant to recover the statutory penalty provided in section 887, Crawford & Moses' Digest, for an admitted overcharge of passenger fare paid by the appellees for the transportation of their minor child between Bauxite, Arkansas, and Benton, Arkansas, on November 22, 1919. The Chicago, Rock Island & Pacific Railway Company's train on which the child was a passenger was at the time being operated by Walker D. Hines as Director General of Railroads under the proclamation of the President of the United States in exercise of the war powers conferred upon him by acts of Congress August 29, 1916, and March 21, 1918. Section 10 of the latter act provides: "That, during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination."

The justness and reasonableness of these fares initiated by order of the President were under the act subject to review by the Interstate Commerce Commission, such commission at the hearing to take into consideration the fact that the transportation systems were being operated under a unified and coordinated national control and the finding and certificate of the President and his recommendations concerning the expense of operation under Federal control. The passenger tariff in effect at the time of the overcharge was one promulgated by the government railroad administration and approved by the Interstate Commerce

Commission, known as local passenger tariff No. 28, and contained in a schedule of passenger fares between local points on the Arkansas Division of the Chicago, Rock Island & Pacific Railway Company, of which Bauxite and Benton are stations.

In *Northern Pacific Railway Company* v. *North Dakota,* 250 U. S. 135, it is held, quoting syllabus: "The Federal Control Act being an exercise of a complete, exclusive and necessarily paramount Federal power (the war power) and its provision for a complete change to Federal control being clear and unambiguous, there can be no room for a presumption that State control over intrastate rates was to remain unchanged because it previously existed." It is further held that the Government under the Federal Control Act "is granted the power through the President and the Interstate Commerce Commission to fix the rates on intrastate traffic, superseding the State power over that subject."

It follows that the present action will not lie to enforce the penalty imposed by section 887, Crawford & Moses' Digest.

In the recent case of *Missouri Pacific Ry. Co.* v. *Ault,* 41 S. C. Rep. 593, it was held that it was not the purpose of sections 10 and 15 of the Federal Control Act of Congress to allow the Government to be sued for penalties. Justice BRANDEIS, in that case, speaking for the Supreme Court of the United States, said: "The purpose for which the government permitted itself to be sued was compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order, 'provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures.' "

The judgment is therefore reversed, and the cause dismissed.

MURRY v. STATE.

Opinion delivered November 14, 1921.

1. CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT—SUFFICIENCY OF INDICTMENT.—Certainty in an indictment is required when charging an offense, and a demurrer thereto should be sustained unless the language of the indictment charges an offense with reasonable certainty, so as to put the accused on notice of the nature of the charge he is called upon to meet; but, when the sufficiency of the indictment is called in question by motion in arrest of judgment, the rule is different, and if it can be gathered from the language of the indictment that the essentials of the crime are charged either directly or by reasonable inference, then the motion should be overruled.

1a. INDICTMENT AND INFORMATION—WORD "SAID" DEFINED.—The word "said" in legal terminology, and as used in an indictment to designate the defendant, means aforementioned, already spoken of, and refers back to a previous mention of defendant's name.

2. INDICTMENT AND INFORMATION—MISTAKE IN NAMING OFFENSE.—It is immaterial that the indictment misnames the offense as one of removing mortgaged property, if the particular facts necessary to constitute the offense are specifically and accurately alleged as being the offense of removing property subject to a landlord's lien.

3. LANDLORD AND TENANT—REMOVAL OF CROP SUBJECT TO LIEN.—As the gravamen of the offense of removing a crop beyond the State is the intent to defeat the landlord's lien, testimony tending to prove that the landlord had authorized or consented to the removal was competent.

4. LANDLORD AND TENANT—REMOVAL OF CROP SUBJECT TO LIEN—INSTRUCTION.—An instruction, in a prosecution for removing cotton subject to a landlord's lien from the State, to the effect that if the defendant removed the cotton from the State "without the legal authority or consent of the prosecuting witness," the jury should convict him, was erroneous in using the word "legal," being calculated to mislead the jury.

5. LANDLORD AND TENANT—REMOVAL OF CROP SUBJECT TO LIEN—INSTRUCTION.—A request for instruction, in a prosecution for removing a bale of cotton subject to a landlord's lien, from the State, that if the prosecuting witness, either in person or by his duly authorized agents, consented to the removal of the bale of cotton in controversy, you should acquit the defendant, was correct and should have been declared the law.

Appeal from Craighead Circuit Court, Jonesboro District; *R. E. L. Johnson,* Judge; reversed.

Sloan & Sloan, for appellant.

1. The offense, if any, became complete in Crittenden County, and the venue of the action was in that county. The presumptive rule from the law of sales adopted by the court, that a delivery to the carrier was delivery to the consignee, applies only between a vendor and vendee, and is a presumption which was never intended to apply to a criminal case. 10 C. J. 228, § 317; 63 Md. 179; 141 Ark. 161; 71 *Id.* 398. Section 2875, C & M. Digest, does not apply. 16 Corpus Juris, 195; 150 Iowa 46; 129 N. W. 336; 13 Mont. 112; 32 Pac. 413; 19 L. R. A. 775 and note; 21 Wend. 509.

2. The indictment is defective in not charging the offense—omits to name any one as the person who removed the cotton. An indictment should be certain to every intent, and without intendment to the contrary. 6 Ark. 165; 42 Am. Dec. 689; 22 Cyc. 293. C. & M. Dig., § 3017, relates only to the correction of misnomers. 110 Ark. 51. The *Phillips* case, 35 Ark. 384, is not in point. In that case no inconsistency occurs in the indictment by accusing a person of removing *mortgaged property,* and then, as in this case, charging an unnamed person, or blank, with removing property subject to *a landlord's lien.* 27 Idaho 223; 147 Pac. 786; 199 Mo. 261; 97 S. W. 860.

3. There was a fatal variance between the allegation in the indictment charging the removal of "one bale of cotton of the value of sixty dollars, upon which cotton one L. D. Horn had a landlord's lien," and the uncontradicted evidence that Horn's lien, if any, was only on an undivided interest therein. 66 Ark. 120; 55 Ark. 244; 70 *Id.* 144; 21 Tex. App. 520; 2 S. W. 859.

4. The admission in evidence of the purported copy of Murry's letter to Strong & Cartwright, was a clear violation of the best evidence rule. 66 Mo. App. 663; 67 Mo. 446; 61 S. W. 937; 11 Ark. 504; 54 Am. Dec. 212; 12 Ark. 692.

5. Proof of value was an essential ingredient of the offense charged. 105 Ark. 172. And the testimony of the witness, Harrell, on the market value of the cotton shipped to Memphis, as to his opinion of the market value without fixing time, place, grade or condition of cotton, and without proof of the grade or condition of the cotton shipped, was clearly incompetent.

6. The court's instruction on the burden of proof and the presumption of innocence was misleading, confusing and contradictory. Underhill on Criminal Evidence, 2nd Ed., § 22; *Id.* § 23, p. 42; 9 Enc. of Ev. 924. Neither conviction nor acquittal should be emphasized in an instruction. 139 Pac. 1156. See also 156 U. S. 432; 16 Corpus Juris, 984; 46 L. R. A. (N. S.) 1149, 1156; 71 Ark. 398; 83 *Id.* 81, 84; 69 *Id.* 537.

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

1. The venue was in Craighead County. C. & M. Dig., § 2875.

2. Where the accused fails to demur to an indictment, and elects to wait and challenge the sufficiency of the indictment by motion in arrest of judgment after the verdict is returned, the motion will be overruled, if the language of the indictment is such that it can be gathered therefrom that the essentials of the crime are charged, either directly or by reasonable inference. 131 Ark. 542; 110 Ark. 549; 2 Stand. Enc. of Procedure, 1015; 16 Fed 376; 168 *Id.* 682.

3. The variance is not fatal. The proof shows that neither Horn nor his agent knew that appellant mixed the cotton with cotton grown elsewhere, until after it had been shipped. Appellee mixed it with other cotton at his own peril. 5 R. C. L. § 4, p. 1052; 44 Ark. 447.

4. The admission of the copy of appellant's letter in evidence, if erroneous, was harmless, and therefore not reversible. 111 Ark. 272; 112 *Id.* 507; *Id.* 269.

5. Harrell's testimony as to the value of the cotton was admissible for the purpose of showing that the value

of the cotton was more than $10, the purpose for which it was introduced. 105 Ark. 172.

WOOD, J. The appellant was convicted on an indictment which reads as follows:

"The grand jury of Jonesboro District, Craighead County, in the name and by the authority of the State of Arkansas, accuse H. D. Murry of the crime of removing mortgaged property committed as follows, to-wit: The said * * * in the county, district and State aforesaid, on the 24th day of January, A. D. 1921, did unlawfully, knowingly and feloniously remove from the limits of the State of Arkansas one bale of cotton of the value of sixty dollars, upon which cotton one L. D. Horn had a landlord's lien to secure the payment of one hundred dollars rent due him by the said H. D. Murry as his tenant, with the felonious intent to defeat the holder of said lien in the collection of the said debt secured by such lien; against the peace and dignity of the State of Arkansas."

The appellant moved to arrest the judgment on the ground that the indictment did not charge the appellant with a public offense.

The statute under which the appellant was indicted reads in part as follows: "It shall be unlawful for any person to sell, barter, exchange or otherwise dispose of, or to remove beyond the limits of this State, or of the county in which a landlord's or laborer's lien exists, or in which a lien has been created by virtue of a mortgage or deed of trust, any property of any kind, character or description, upon which a lien of any kind enumerated above exists; provided, such sale or barter, exchange, removal or disposal of such property be made with the intent to defeat the holder of such lien in the collection of the debt secured by such mortgage, laborer's or landlord's lien." Crawford & Moses' Digest, § 2552.

In *Davis* v. *State,* 131 Ark. 542, we said: "Certainty in an indictment is required when charging an offense, and a demurrer thereto should be sustained unless the language of the indictment charges an offense

with reasonable certainty, so as to put the accused on notice of the nature of the charge he is called upon to meet; but when the sufficiency of the indictment is called in question by motion in arrest of judgment, the rule is different, and if it can be gathered from the language of the indictment that the essentials of the crime are charged either directly or by reasonable inference, then the motion should be overruled." See also *Loudermilk* v. *State,* 110 Ark. 549.

It will be observed that the grand jury accused H. D. Murry "of the crime of removing mortgaged property, committed as follows, to wit, etc." The indictment then proceeds to describe the manner in which the offense is alleged to have been committed, and this description shows that the offense consisted in feloniously removing from the limits of the State of Arkansas a bale of cotton, of the value of $60, upon which one L. D. Horn had a landlord's lien to secure the payment of $100 rent due him by the said H. D. Murry as his tenant, etc." The word "said" in legal terminology, means "aforementioned, already spoken of," and is used in the indictment to designate the appellant. After the appellant's name is mentioned the word "said" in the clause following relates back to the appellant's name; and although in the first or accusing clause of the indictment the offense is designated as "removing mortgaged property" yet the specific acts alleged to constitute the offense are set forth, and this description shows the alleged crime to be the removal of one bale of cotton out of the State of the value of $60 upon which L. D. Horn had a landlord's lien, etc. So, although the offense was erroneously designated as "removing mortgaged property" it was in fact the removal of property upon which there was a landlord's lien.

In *Kelly* v. *State,* 102 Ark. 651-55, we said: "A discrepancy or mistake in the naming of an offense in an indictment will not vitiate the same if the particular facts necessary to constitute the offense are specifically and accurately described. 'The name of the crime is

controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the indictment.' " See also *Spear* v. *State,* 130 Ark. 457-462.

Sec. 2552 Crawford & Moses' Digest provides: "It shall be unlawful for any person * * * to remove beyond the limits of this State, or of the county in which a landlord's or laborer's lien exists * * * any property of any kind, * * * upon which a lien of the kind enumerated above exists; provided such * * * removal or disposal of such property be made with the intent to defeat the holder of such lien in the collection of the debt secured by such * * * landlord's lien."

Sections 2554 and 2555 prescribe the penalty for a violation of the above statute.

The trial court gave instruction No. 2 on its own motion, which, after setting forth the provisions of the above statute, reads in part as follows: "If you find from the evidence in this case, beyond a reasonable doubt, that the defendant, H. D. Murry, in the Jonesboro District of Craighead County on the 24th day of January, 1921, or at any time within one year next before the 19th day of April, 1921, removed or caused to be removed from the State of Arkansas, without the legal authority or consent of the prosecuting witness, L. D. Horn, one bale of cotton of the value of sixty dollars, * * * from the city of Jonesboro, Arkansas, to the city of Memphis in the State of Tennessee, and that at such time the said L. D. Horn had a valid and subsisting landlord's lien thereon for rent due him in the sum of one hundred dollars, * * * with the purpose and intent of defeating the said L. D. Horn in the collection of his said lien and thereby defraud him in the collection of any rent that may have been due him thereon, * * * then it will be your duty to convict him," etc.

Among other specific objections made to the instruction is the following: "The word 'legal' in the expression 'without the legal authority or consent of the prosecuting witness, L. D. Horn.' The use of this word

is apt to mislead the jury, causing them to believe that authority or consent must be given in some particular form. The instruction should read 'without authority or consent or subsequent ratification of the prosecuting witness, L. D. Horn.' The court overruled appellant's objection to the instruction.

Among others, the appellant presented the following prayer for instruction: "If the prosecuting witness, Horn, either in person, or by his duly authorized agent, consented to the removal of the bale of cotton in controversy, you should then acquit the defendant." The court refused to grant this prayer.

The testimony on behalf of the State tended to prove that one L. D. Horn rented to the appellant for the year 1920 sixty acres of land in Craighead County, Arkansas, for which the appellant agreed to pay $200. Appellant gave Horn his check for $100, and executed his note for the balance. The appellant moved off the place at the close of the year without paying the note. The note was placed by Horn in the hands of one Harrell for collection. Harrell went to the place in September before the note was due and informed the appellant that he held the same for collection. Appellant said that he would pay the said note when it was due, and Harrell did not at that time doubt but that he would pay it. Harrell then told appellant not to move the crops out. Horn had not at that time directed Harrell to forbid Murry marketing his crops. Harrell went to the place again in December after the note was due. Appellant had then moved off the place. He stated to Harrell that he had shipped three bales of cotton to Memphis and would pay the note when he got returns on that cotton. He made no statement about where the cotton came from. He stated that he was to pay the rent out of that cotton, and witness told him that was all right if he paid the rent out of it. Harrell did not object to his shipping that cotton to Memphis. "The old man (appellant) talked like he was going to pay it, and that

was all right then." On January 31st, Harrell went to see appellant and appellant told him that a certain bale of cotton, part of which was grown on Horn's place, had been shipped to Memphis, and he would pay the proceeds over to Harrell. The appellant did not pay, and criminal prosecution was instituted against him.

Witness Horn, among other things, testified that he did not give appellant authority to ship the cotton and did not pay anything to appellant to dispose of the cotton or ship it. "The day we went out there it seems to me that Mr. Harrell told him that it was all right so he paid that rent."

The appellant testified, and among other things denied that Harrell told him not to move the crops out. He stated that he wrote Harrell when he moved, and Harrell and Horn came to his house to speak to witness about the rent. Witness detailed the conversation between himself and Horn as follows: "I have 973 pounds of cotton that came from your place, Dr. Horn, and there was one or two hundred pounds in the patch when I left there, and I asked Mr. Jim Broadway to please not let his cattle in there to eat it up—I would like to get enough to make out a bale—if not, I have a few remnants that I intend to mix in with the 973 pounds and I intend to finish the bale out and sell it and pay you. He never said a word, he just said, 'All right.'"

The gravamen of the offense of which appellant was convicted is the removal of property beyond the limits of the State *with the intent to defeat the lien holder in the collection of his debt;* and, on the issue as to the intent of the appellant, testimony tending to prove that the landlord had authorized the removal, or that he consented to it, was competent. *Lawhorn* v. *State,* 108 Ark. 474; *Osborne* v. *State,* 109 Ark. 440. Such authority or consent on the part of the landlord could be shown by any competent testimony tending to prove it. Such

authority or consent, to be *legal,* would not have to be in writing or evidenced in any other special manner.

In view of the above testimony we are convinced that the court erred in not striking out the word 'legal' before the words 'authority or consent' in its instruction. The word 'legal' had no place in the instruction, because, if the landlord authorized the removal, or consented to it at all, it was legal, and the use of that word was surplusage, argumentative, and calculated to lead the jury into a realm of speculation as to what was or was not legal authority. If the court's attention had not been specifically drawn to this word, the error would not have been prejudicial, because the objection was to the phraseology, and was one to which the attention of the court should have been specifically called. When this was done, however, fairness to the appellant required that the objectionable word be eliminated. The error in refusing to do so is made more manifest when taken in connection with the refusal to grant appellant's prayer for instruction No. 5. This prayer was correct, and a succinct declaration of the law applicable to the testimony adduced. It occurs to us that the refusal to give it shows that the trial court was laying undue emphasis on the word 'legal' used in its instruction. At least the jury might have been so impressed.

Counsel for appellant urge that many other errors were committed, but we have found no other reversible error in the record and deem it unnecessary to discuss other assignments. For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

STATE v. MASNER.

Opinion delivered November 14, 1921.

1. CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT—GROUND.—The only ground upon which a judgment in a criminal case will be arrested is that the facts stated in the indictment do not constitute a public offense within the court's jurisdiction.

2. CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT—SUFFICIENCY OF INDICTMENT.—Upon a motion in arrest, the words used in an indictment are to be taken in their broadest sense, and the indictment is sufficient if it contains such description of the offense charged as will enable the accused to make his defense and to plead the judgment in bar of any further prosecution for the same crime.

3. WEAPONS—SUFFICIENCY OF INDICTMENT FOR CARRYING.—An indictment which accused defendant of the crime of "wearing weapons," in that he "unlawfully did wear and carry certain metal knucks," *held* sufficient on motion in arrest.

Appeal from Sharp Circuit Court, Southern District; *D. H. Coleman,* Judge on Exchange; reversed.

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

Appellee's motion in arrest did not conform to § 3224, C. & M. Digest, in that it failed to allege that the facts stated in the indictment did not constitute a public offense *within the jurisdiction* of the court. The sufficiency of the indictment should have been challenged by demurrer before the trial, and the motion in arrest of judgment after trial comes too late. Stand. Enc. of Proc. vol. 2, p. 1015.

An averment necessary for the support of the pleadings, though imperfectly stated, which might have been bad on demurrer, is cured by the verdict, if such verdict could not have been found without finding the imperfect averment to have been proved in a sense adverse to the accused. 16 Fed. Rep. 376; 168 Fed. 682.

The indictment charged appellee with "unlawfully wearing and carrying certain metal knucks", and this was sufficient to charge that he carried them as a weapon, as it put him on notice of the nature of the charge he was called upon to meet. 131 Ark. 542. The language of an indictment will be given the construction which results in holding it sufficient, if it is not manifest that another construction and interpretation is required. 110 Ark. 549.

Fred M. Pickens, for appellee.

Judgment may be arrested by the court without any motion, upon his observing that the indictment does not state a public offense. C. & M. Dig., § 3224. No public offense was stated here. This is the only ground upon which a motion in arrest can be sustained. 111 Ark. 180. Failure to demur does not waive such defect, because it is the duty of the court to arrest judgment on this ground, any time during the term at which judgment is rendered. C. & M. Dig., §§ 3223, 3224; 21 Ark. 212.

It is not a violation of law to carry metal knucks, but it is a violation to carry them as a *weapon.* Knucks and a pistol come under the same sections, and it has been held that to carry a pistol for any other purpose than a weapon is not a violation. 68 Ark. 447.

The word "unlawfully" means contrary to law, (Bouv. Law Dic. vol. 3, p. 3376) and as used in the indictment cannot be contended to have the same meaning as the phrase "as a weapon."

HART, J. T. O. Masner was convicted of the crime of carrying metal knucks as a weapon, and his punishment was fixed by the jury at a fine of $50. Judgment was rendered accordingly. The defendant then filed a motion in arrest of judgment, which was sustained by the court, and the judgment arrested. The State of Arkansas has duly prosecuted an appeal to this court.

The body of the indictment is as follows:

"The grand jury of the Southern District of the Sharp Circuit Court, in the name and by the authority of the State of Arkansas, accuse T. O. Masner of the crime of wearing weapons, committed as follows, to-wit: The said T. O. Masner in the county, district and State aforesaid, on the 15th day of October, A. D. 1920, unlawfully did wear and carry certain metal knucks, against the peace and dignity of the State of Arkansas."

Counsel for the defendant contends that the facts stated in the indictment do not constitute a public of-

fense within the jurisdiction of the court, and that the court properly arrested the judgment.

The indictment was found under § 2804 of Crawford & Moses' Digest, which reads as follows:

"Any person who shall wear or carry in any manner whatever, as a weapon, any dirk or bowie knife, or sword or spear in a cane, brass or metal knucks, razor, or any pistol of any kind whatever, shall be guilty of a misdemeanor," etc.

Counsel for the defendant claims that, inasmuch as the crime prohibited by the statute is the carrying of metal knucks as a weapon, no crime is charged by alleging that the defendant unlawfully carried metal knucks. In other words, counsel contends that the act charged is carrying metal knucks, which in itself is not unlawful, and that an allegation that it is unlawfully done does not render it indictable.

We do not agree with counsel in his contention. The only ground upon which a judgment shall be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. *Farrell* v. *State,* 111 Ark. 180. Hence the words used in the indictment to describe the act charged are to be taken in their broadest sense. The indictment is sufficient if it contains such description of the offense charged as will enable the accused to make his defense and to plead the judgment in bar of any further prosecution for the same crime. *Rosen* v. *United States,* 161 U. S. 29.

The indictment in this case meets these requirements. The first part of it accuses T. O. Masner of the crime of "wearing weapons." It then charges that said Masner "unlawfully did wear and carry certain metal knucks." These last words, when considered in connection with the accusing part of the indictment, imply that the defendant did wear or carry metal knucks contrary to law or in violation of law. In short, the indictment accuses the defendant of wearing weapons by unlawfully wearing and carrying metal knucks.

It is true the essence of the offense charged is carrying as a weapon metal knucks. But we are of the opinion that accusing the defendant of wearing weapons by unlawfully carrying metal knucks, put him on notice of the charge he was required to meet and enabled him to make his defense thereto and to plead the judgment in bar of any further prosecution for the same offense.

The indictment accuses the defendant of the crime of wearing weapons, and then charges that he committed it by unlawfully carrying the metal knucks. This sufficiently shows that the metal knucks were carried as a weapon, as otherwise it could not be said to have been done unlawfully. In this way the word, "unlawfully" connects the words, "did wear and carry certain metal knucks," with the preceding words, "accused T. O. Masner of the crime of wearing weapons," and thus becomes a part of the description of the offense.

It follows that the court erred in sustaining the motion in arrest of judgment, and for that error the judgment will be reversed, and the cause will be remanded with directions to the circuit court to enter judgment upon the verdict.

HARBOTTLE-BAILEY COAL COMPANY v. BOLTON-HALE COAL COMPANY.

Opinion delivered November 14, 1921.

RAILROADS—USE OF PRIVATE SPUR.—Where a coal company, under agreement with a railway company, constructed a private spur, which is subsequently assigned to appellants, with the railroad company's consent, appellants had the exclusive right to use the spur.

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

STATEMENT OF FACTS.

The Bolton-Hale Coal Company, a partnership, brought this suit in equity against the Harbottle-Bailey Coal Company, a domestic corporation, to enjoin it from interfering with the plaintiff's right to load coal on a

certain spur track connected with the tracks of the Missouri Pacific Railway Company. The railway company was also made a defendant to the suit.

Both the plaintiffs and the defendants are engaged in mining coal near the spur track in question on lands which they have leased from the Douglass Coal Company. The lease of the Douglass Coal Company to the Harbottle-Bailey Coal Company was executed on the 6th day of November, 1918, and continues for the period of seven years. Among the property embraced in the lease is described, "the railroad mine tracking". On the 23rd day of October, 1914, the Douglass Coal Company had made an agreement with the St. Louis, Iron Mountain & Southern Railway Company for the construction of said spur track for the purpose of loading the coal which it mined.

The agreement provides that it shall be binding upon the successors and legal assigns of the Railway Company but shall be strictly personal to the "industry", and that neither this agreement nor any interest herein, nor any right hereunder, shall be assigned or transferred without the consent of the chief operating officer of the railway company.

The object of the agreement was to provide a spur track which would connect the mine of the Douglass Coal Company with the tracks of the railway company. The word "industry", as used in the agreement, means the Douglass Coal Company. The track is 92 feet in length on the property of the "industry." On November 6, 1919, the Douglass Coal Company transferred all their rights in the agreement with the St. Louis, Iron Mountain & Southern Railway Company to the Harbottle-Bailey Coal Company. The latter company has operated its mine and loaded the coal therefrom on the cars on the spur track under the terms of the agreement made between the railway company and the Douglass Coal Company. The plaintiffs have obtained leases from the Douglass Coal Company of a later date than that obtained by the defendant.

According to the evidence adduced by the plaintiffs there was room enough for them and the defendant both to load cars from their mines on the spur track in question.

According to the evidence adduced by the defendant, it permitted the plaintiffs and their grantors to load cars on the spur track in question under a verbal agreement to that effect. It was the understanding between the parties that this agreement was to run at the will of the defendant. The capacity of the defendant's mine was increased until there was not room enough on the spur track in question to load the output of the plaintiff's mine and that of the defendant, and the defendant forbade the plaintiffs to load any more coal on cars on the spur track. Hence this lawsuit.

The chancellor found the issues in favor of the plaintiffs, and entered a decree whereby the plaintiffs were to use the spur track in question for two days in the week and the defendant the remainder of the week. To reverse that decree, the defendant has duly prosecuted this appeal.

Willard Pendergrass, G. C. Carter and *Dave Partain,* for appellant.

We are unable to find upon what theory the chancellor based his decree. It could not be sustained on the ground that appellee had an easement over appellant's property and the spur. 89 Ark. 309; 88 Ark. 148; 64 Ark. 339. Nor upon the ground that appellee had a license to use the property of appellant. 19 Ark. 23; 64 Ark. 339. There is no basis of law or fact (as the use granted to appellee by appellant was only a permissive one) upon which to sustain the decree.

J. D. Benson, for appellee.

The demurrer was properly overruled, as the complaint stated a cause of action. 72 Ark. 29; 102 Ark. 287.

No conveyance of the spur could have been made to the appellant by Douglas, without the consent in writing of the railroad company, and this was never given.

The decree, based upon the findings of fact by the chancellor, unless clearly against the preponderance of the evidence, should be affirmed. 136 Ark. 195. Here the decree is supported by the evidence.

HART, J. (after stating the facts). It appears from the record that the Douglass Coal Company transferred their mining lease, and sold to the defendant, Harbottle-Bailey Coal Company, their mine fixtures on the 6th day of November, 1918. At that time the Douglass Coal Company was operating its mines under an agreement with the St. Louis, Iron Mountain & Southern Railway Company for the construction of a spur track upon which to load coal from their mine. The spur track was constructed by the Douglass Coal Company under an agreement with the Railway Company and extended out on the land of the Douglass Coal Company 92 feet. On the 6th of November, 1918, the Douglass Coal Company, a partnership, transferred their interest in their agreement with the railway company to the defendant.

It is claimed by counsel for the plaintiffs that this transfer is void because, under the terms of the agreement between the railway company and the Douglass Coal Company, the latter could not assign their interest in the contract without the written consent of the railway company. This provision, however, was evidently inserted for the benefit of the railway company and might be waived by it. The railway company permitted the defendant to use the spur track under the terms of the original agreement between the railway company and the Douglass Coal Company. It thereby waived the provision of the contract that no assignment thereof should be made without the written consent of the railway company. Therefore, the defendant succeeded to the rights of the Douglass Coal Company in the contract with the railway company and had the right to the exclusive use of the spur track in question. The plaintiffs were permitted to load coal from their mine on cars placed on this spur track

under a verbal permission to do so. This was revocable at the will of the party granting it. It does not appear that the Douglass Coal Company or the defendant ever entered into an agreement with the plaintiffs or their grantors to use the spur track to load their coal on cars for any definite length of time.

According to the evidence for the defendant, the plaintiffs were permitted to use the track so long as it did not interfere with the business of the defendant. When the business of the defendant increased to such an extent that it was necessary for it to use the spur track at all times to load its own coal, it refused to allow the plaintiffs to use it any longer to load their coal. This the defendant had a right to do, and the plaintiffs had no right to use the spur track after their license to use it was revoked by the defendant.

As we have already seen, the contract between the railway company and the Douglass Coal Company for the construction and use of the spur track was transferred by the Douglass Coal Company to the defendant, and the latter continued to operate its coal mine and use the spur track under the provisions of the agreement. The railway company, having consented to the transfer, is in no attitude to object that the transfer was not in writing, and it does not do so.

The plaintiffs have no right to object; for they are not parties to the contract, and, no matter how great their necessities may be, they have no right to use the spur track to load their coal unless by the consent of the defendant. The spur track is a private one, and not an industrial track open to the use of the public.

Therefore, the court erred in making any finding in favor of the plaintiffs, and the decree will be reversed with directions to the chancery court to dismiss the bill of the plaintiffs for want of equity.

E. O. BARNETT BROS. v. ALEXANDER.

Opinion delivered November 14, 1921.

PRINCIPAL AND SURETY—NOTICE TO CREDITORS TO SUE PRINCIPAL.—Under Crawford & Moses' Dig., § § 8287-8, providing that a surety on a bond, bill or note for the payment of money may, "at any time after action hath accrued thereon," require the person having right of action thereon to sue the principal within 30 days, and that if such suit be not brought the surety shall be exonerated, a surety on a note who has been sued thereon may give notice and require the holder to sue the principal.

Appeal from Hot Springs Circuit Court; *W. H. Evans,* Judge; affirmed.

STATEMENT OF FACTS.

E. O. Barnett Bros., a partnership composed of Oscar Barnett and Horatio Barnett, sued W. D. Alexander, a justice of the peace, to recover $100 alleged to be due on a promissory note executed by the defendant and others to the plaintiffs.

The defendant recovered judgment in the justice's court, and the plaintiffs duly appealed to the circuit court.

The defendant then gave notice in writing to the plaintiffs requiring them to sue certain named persons as being the principal debtors who signed the note, and stated in the notice that the defendant and another person signed the note as accommodating parties. The notice was duly served on the plaintiffs, and the plaintiffs did not bring suit against the parties named as principal debtors in the notice, and the case came on for trial in the circuit court more than thirty days after the notice had been given and served on the plaintiffs.

Alexander defended the suit in the circuit court on the ground that he was exonerated as surety on the note because he had given notice in writing to the creditor to sue the principal debtors, and proved the facts above set forth in support of his defense. He also testified that he had signed the note sued on as surety.

The circuit court found the issues in favor of the defendant, and judgment was rendered accordingly. The plaintiffs have appealed.

Oscar Barnett, for appellants.

Appellee admits that he was an accommodating endorser. This is a several liability and plaintiff had the option to sue him alone. 193 S. W. 505; Kirby's Digest, §§ 522, 6009, 6010, 6229-30; Crawford & Moses' Digest, §§ 1099, 7795; 216 S. W. 1039. Moreover, the notice to sue the other parties on the note was not given until long after the suit was brought, and after all the other makers and sureties had left the State except one, against whom a judgment, when obtained, could not be enforced. See also, 153 S. W. 261; 62 Ark. 391.

D. D. Glover, for appellee.

1. This court has repeatedly held that an indorser for accommodation can avail himself of the plea of usury the same as principal.

2. The notice to sue the other parties on the note was given as provided by the statute, C. & M. Digest §§ 8287, 8228. This was a complete defense, when the plaintiff failed to sue the principals on the note within the time limited by the statute. 141 Ark. 64.

HART, J., (after stating the facts). The defendant seeks to uphold the judgment under §§ 8287, 8288, of Crawford & Moses' Digest. Sec. 8287 is as follows:

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

Sec. 8288 provides that if such suit be not commenced within thirty days after the service of such notice and proceeded on with due diligence in the ordinary course of law to judgment and execution, such surety shall be exonerated from liability to the persons notified.

The plaintiffs were the payees in the note, and notice to sue the principal debtors was given them in the manner and form provided in the statutes. The plaintiffs failed to sue the principal debtors within thirty days after the service of the notice. It is contended by them, however, that W. D. Alexander, the surety, is not exonerated because he did not give notice under the statute until after he had been sued on the note. This did not make any difference.

A surety's right to give notice to the creditor to sue and to secure his release, if suit is brought, is a right given by the statute, and not at common law. *Sims* v. *Everett,* 113 Ark. 198; *Green* v. *McCullar,* 128 Ark. 221, and *Shores-Mueller Co.* v. *Palmer,* 141 Ark. 64.

Hence we must look to the language of the statute for the exoneration. The statute provides that the notice may be given at any time after a cause of action has accrued on the note signed by the surety. If the framers of the statute had intended that no exoneration could be had under it after suit brought, they would have so provided by apt words. The language used in the statute is broad enough to cover cases where the notice was given after suit brought, and, there being nothing in the statute to indicate that the Legislature intended to restrict its operation to cases where suit had not been brought, the courts can impose no such limitation.

Therefore the judgment will be affirmed.

EDWARDS v. WILEY.

Opinion delivered November 14, 1921.

1. USURY—SALE OF LAND.—In a sale of land, the exaction of a price, however exorbitant, cannot import into the transaction the characteristics of usury, as the element of lending and borrowing money is absent.
2. SIGNATURE—ATTESTATION—Where there is no question as to a contract for the sale of land having been executed, and possession was taken under it for many years, it is immaterial that the proof fails to show that the purchaser's signature, which was by mark, was duly attested.

3. FRAUD—EXORBITANT PRICE FOR LAND.—The mere fact that a purchaser of land, by reason of lack of familiarity with land values, was induced to pay an excessive price for it, does not establish fraud.

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

George F. Youmans, for appellant.

1. The allegations of the complaint are not sufficient to charge usury. Into a sale of land or chattels usury cannot enter, as the element of lending or borrowing is absent. 55 Ark. 268; Tyler, Usury, 300; 2 Doug. 736; 224 S. W. (Ark.) 978.

2. The sole cause of action set out in the complaint was usury. It was, therefore, error to grant permission to amend the complaint, after testimony should be introduced, so as to allege that the contract was obtained through subterfuge, thereby giving permission to introduce a new cause of action. 75 Ark. 465; 87 S. W. 1179; 84 N. Y. 420; 59 Ark. 165; 26 S. W. 824; 21 Am. St. 414; 55 N. J. Eq. 37; 36 Atl. 475; 78 Ala. 284; 103 *Id.* 217; 123 Mo. 96; 24 Ark. 459; 34 *Id.* 63; 35 *Id.* 555; 77 *Id.* 355; 91 S. W. 773.

3. There was no attempt to prove usury at the trial, nor any finding by the court that any fraud or subterfuge was practiced upon Wiley, or any advantage taken of his alleged ignorance by the appellant in obtaining the contract. There was no evidence tending to support such an allegation. That Wiley was illiterate may be conceded, but the finding that he was unable to understand the contract is supported by no testimony whatever. His competency and capacity to contract will be presumed. 27 Ark. 166. In the absence of mental incapacity on the part of Wiley, and advantage taken thereof, proof of the fixing of a price for the property greater than its true value would not sustain the judgment in this case. 88 Ark. 615. 113 S. W. 1015. But that allegation was not proved.

4. The method of establishing a signature provided by the statute, C. & M. Dig. § 9732, is not exclusive. The

mark of one who cannot write, though unattested, may be proved to be his signature by other testimony. 49 Ark. 18; 51 *Id.* 48. Wiley's long acquiescence in the contract and recognition of its obligations renders proof of its execution unnecessary.

Hill & Fitzhugh, for appellees.

1. The transaction was clearly usurious. It was not necessary, under the law, that Wiley should have intentionally entered into a usurious contract. 135 Ark. 575. If property is sold at an exorbitant price, so much of the consideration as was extortionate is added to the interest, and when it makes more than 10 per cent, it renders the contract usurious. 46 Ark. 50; 146 Ark. 55; 36 *Id.* 248.

2. Plaintiffs in stating that the allegations of the complaint were probably not broad enough to cover the evidence which would thereafter be introduced, pursued only the fairer course, and thereby gave notice of a broadening of the issues, of which defendant had no right to complain. They had the right to amend to conform to the proof. 94 Ark. 365; 33 *Id.* 811; 53 *Id.* 263; 58 *Id.* 504; 59 *Id.* 317; 7 Enc. Pl. & Pr. 483; 31 Cyc. 401. Such amendments are left largely to the discretion of the trial court, and in the absence of abuse and material prejudice, that discretion will not be disturbed. 25 Ark. 7; 26 *Id.* 405; 54 *Id.* 444; 58 *Id.* 7; 103 *Id.* 79; 124 *Id.* 229. There is no claim of surprise. 130 Ark. 83. And the allegations of fraud in the amendment to the complaint are definite and certain. The decree was predicated on the allegation that the minds of the parties never met on the contract, and the proof sustains it.

3. Signatures by mark must be proved by the subscribing witnesses. C. & M. Digest, § 9732; 38 Ark. 278. While this method of proof is not exclusive, as held by this court, yet it has not held that an illiterate's name can be signed, and his mark made for him, by the other party to the contract. 76 Ala. 247; 43 Mich. 397; 5 N. W. 427; 6 N. Y. 303.

SMITH, J. Appellees instituted this suit to cancel a contract for the sale of a certain house and lot in the city of Ft. Smith on the ground of usury. The complaint alleged that on March 20, 1910, appellant, John B. Edwards, was the owner of lot 5, in block 65, in the city of Ft. Smith, and that its then value was $1,500. That, in order to obtain an exorbitant rate of interest, Edwards fixed the price of the lot at $2,250, and contracted to sell it to William Wiley at that price, payments to be made at the rate of $20 per month, payable quarterly, with interest at 8 per cent., and that this price was fixed as a subterfuge whereby usurious interest might be collected. This branch of the case may be disposed of by saying that all the testimony shows that the transaction between Edwards and Wiley was one for the sale of the lot. Neither of the parties intended or contemplated a loan of money, and it was not such in fact. This was a sale, and was so intended, and the exaction of a price, however exorbitant, cannot import into the transaction the characteristics of usury, as the element of lending and borrowing money is absent. Such was the express holding of *Ellenbogen* v. *Griffey,* 55 Ark. 268, and reaffirmed in the case of *Blake Bros.* v. *Askew & Brummett,* 112 Ark. 514, and the more recent case of *Smith* v. *Kaufman,* 145 Ark. 548.

Appellees amended the complaint to conform to the proof by alleging fraud in the procurement of the contract, in this, that Wiley was an illiterate negro, and unfamiliar with real estate values and business affairs, and that Edwards took advantage of his ignorance and imposed upon him by naming an unreasonable and excessive price for the property; that Wiley did not know that he was being thus imposed upon, and that therefore the minds of the parties never met upon the terms of the sale; and that, having been thus defrauded, Wiley should be held responsible only for the fair market value of the property, which did not exceed $1,500 for a credit sale; and there was a prayer that appellees be charged with that amount and a settlement be had on that basis.

Wiley died intestate in April, 1920, and left as his only heirs, two sons, one of whom conveyed his half interest to his half-sister, Rebecca Ellis, who, with the other son, are the plaintiffs in this suit.

Attached to the original complaint as an exhibit thereto is a copy of the contract between Edwards and William Wiley, which is signed by Edwards and by Wiley by mark without attestation of that signature.

Wiley appears to have had no fixed time for making his payments, nor were they of uniform amounts, but numerous payments were made extending up to the time of Wiley's death and aggregating $2,358.70.

The testimony is in sharpest conflict as to the value of the property, and the court found the actual value of the property at the time of the sale to have been $1,700 upon the basis of a sale on time. Without setting out or reviewing here this testimony, we announce our conclusion to be that it does not appear that this finding is clearly against the preponderance of the evidence.

It is contended that the contract made an exhibit to the original complaint, which is a typewritten instrument, is not in fact the contract made by the parties at the time of the sale, and that the original and genuine contract between the parties was written out with pen and ink.

The court made no specific finding on this issue, but the finding made, "that no legal contract of the purchase was executed, and William Wiley was illiterate and unable to read the contract purported to have been signed in his behalf by the defendant or understand the purport thereof," indicates that the instrument here referred to appears to be the writing made an exhibit to the original complaint and which was in fact there alleged to be the contract made between the parties.

The only testimony tending to show that the contract between Edwards and Wiley was written with pen and ink, and not with the typewriter, is that of a colored woman referred to by the witnesses as Mrs.

Price. Her testimony was to the effect that the contract was executed on the dining table at her home, that there was no typewriter there, and that she cleared the table and got pen and ink and went out of the room, leaving the parties to their trade. This testimony would not support a finding that Edwards had substituted a typewritten contract for one written in ink with a pen, and certainly not when it is remembered that the contract, of which a copy was attached to the complaint, was found in Wiley's trunk after his death, where he had probably kept it during all the years preceding his death. Moreover, Edwards testified that he sold to Mrs. Price a lot adjoining the one in litigation, and when he did so he told her that he would take $2,250 for the unsold lot, and she thereupon opened the negotiations between Edwards and Wiley which terminated in the sale. Mrs. Price did not deny this statement, and was asked nothing by appellees in regard to her reputed conversations with Edwards.

Appellees discuss the effect of the failure of Edwards to have the signature of Wiley properly attested; but we think that omission is not of controlling importance. There was a contract and possession was taken under it. This possession was long-continued, and many payments of purchase money were made under it. Appellees predicate their original suit, as well as their amended cause of action, upon the allegation that there was a contract of sale, and that possession was taken pursuant to this contract, and Edwards, the party sought to be charged with the contract to convey, admits that he signed it. *Jones v. School District,* 137 Ark. 414. It becomes unimportant, therefore, to determine the effect of the insufficient attestation of Wiley's signature.

There is no proof here of fraud except that Wiley was unfamiliar with land values, and that advantage was taken of that fact to induce him to pay an excessive price for the home which furnished him shelter until the day of his death. No attempt was made

to show that any false or fraudulent representations in regard to values were made. Upon the contrary, Wiley appears to have been satisfied with his bargain, and to have made a faithful effort to comply with its terms, and, while he appears from the beginning to have been tardy with his payments, constant indulgence, extending over a period of more than ten years, was shown him, although the contract contained the provision that failure to make payments as provided should have the effect to cancel and annul the contract and to forfeit all payments previously made.

We think the finding of the court below is clearly against the preponderance of the evidence.

The court below, having fixed the sale price of the property at $1,700, adjudged the balance due to be $102.36, which sum was declared a lien on the property, in satisfaction of which a sale was ordered if payment was not made within ninety days. This decree will be reversed, and the court ordered to compute the balance due upon the basis of the contract price of $2,250.

Appellant argues for reversal of the decree the failure of the court to sustain his demurrer to the original complaint and the action of the court in permitting the amendment of the complaint to be made; but, in view of the conclusion we have reached and have stated herein, it becomes unimportant to decide those questions.

LOGAN v. STATE.

Opinion delivered November 14, 1921.

1. CONTINUANCE—TIME OF FILING MOTION.—A motion for continuance which was not made or filed until after the trial had been concluded and the verdict returned, was out of time.
2. CRIMINAL LAW—ADMISSIBILITY OF CONFESSION.—Confessions freely and voluntarily made to officers are not inadmissible because the officers failed to caution defendant as to his right to remain silent and that his statements might be used against him.
3. STATUTES—CONSTRUCTION.—Statutes must be construed in the light of the purpose of the General Assembly in enacting them.

4. INTOXICATING LIQUORS—MANUFACTURE OF MASH—CONSTRUCTION OF STATUTE.—Under Gen. Acts 1921, p. 372, providing that "no mash, wort or wash fit for distillation or for the manufacture of beer, wine, distilled spirits or other alcoholic liquors shall be made or fermented by any person other than a person duly authorized under the laws of the United States to manufacture sweet cider, vinegar, non-alcoholic beverages or spirits for other than beverage purposes", the word "fit" should be interpreted as meaning "intended for," and not as meaning merely adapted to or capable of being used for such purposes.
5. STATUTES—TITLE OF ACT.—The title of an act, while not controlling, may be considered in ascertaining the legislative purpose.
6. STATUTES—CONSTRUCTION.—An act should be so construed that it may be held constitutional, if it is reasonably susceptible of such construction.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; affirmed.

John A. Hibbler, for appellant.

The verdict was contrary to law and the evidence. A continuance should have been granted. Appellant had no counsel until his present counsel was appointed by the court, and sufficient time was not allowed thereafter to have summons served on necessary witnesses. While a continuance is largely in the discretion of the trial court, this court will not permit an abuse of that discretion. 60 Ark. 521.

The alleged confession should have been excluded from the jury. Appellant was not warned as to statements made by him. The confession was obtained under circumstances which are disapproved in 114 Ark. 472. A promise of leniency to extort a confession renders it an involuntary one and it is inadmissible. 66 Ark. 53.

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

Inasmuch as appellant did not object or except to any of the instructions, he is in no attitude to complain. 70 Ark. 348; 74 Ark. 566; 70 Ark. 490. Appellant, having failed to request a peremptory instruction of not guilty, can not now complain that none was given. 89 Ark. 300; 95 Ark. 593; 101 Ark. 513; 102 Ark. 588.

The verdict having substantial evidence to support it, will not be disturbed on appeal. 135 Ark. 117; 136 Ark. 385.

The motion for continuance was not presented until after the trial and did not comply with § 1270, C. & M. Digest, and was properly overruled. *Brickey* v. *State,* 148 Ark. 595; 124 Ark. 599; 15 Ark. 252.

Appellant did not exercise due diligence in preparing his case for trial. *Coppersmith* v. *State,* 148 Ark. 597.

The confession was voluntarily made and was properly given to the jury. 34 Ark. 649. Because appellant was not cautioned by the officers about his statements, does not render the confession incompetent. 114 Ark. 472; 107 Ark. 568.

SMITH, J. Appellant has been convicted for violating section 1 of Act No. 324 of 1921 (General Acts of 1921, p. 372), which reads as follows:

"Section 1. No mash, wort or wash fit for distillation or for the manufacture of beer, wine, distilled spirits or other alcoholic liquor shall be made or fermented by any person other than a person duly authorized under the laws of the United States to manufacture sweet cider, vinegar, non-alcoholic beverages, or spirits for other than beverage purposes."

For the reversal of the judgment, it is first insisted that the court erred in refusing to continue the case. It appears, however, that a motion for continuance was not made or filed until after the trial had been concluded and the verdict returned, which was, of course, out of time.

It is next insisted that the court erred in permitting the officer who made the arrest to testify to statements made by appellant at the time which, in effect, amounted to a confession. Appellant testified that the statements made by him to the officers were induced by fear and by the representation then made that it would go lighter with him to confess, and that he was not cautioned as to his right to remain silent, and that his statements might be used against him. According

to the officers, the statements of appellant were freely and voluntarily made. The officers admit that they did not caution appellant as to his right to remain silent nor that his statements might be used against him. But the law does not require that this shall be done before such statements are admissible. *Greenwood* v. *State,* 107 Ark. 579; *Dewein* v. *State,* 114 Ark. 472. The court did give proper cautionary instructions on the value and competency of confessions, and it must be presumed that, if the jury attached any weight to the alleged confession, this was done after the finding had been made that the confession was free and voluntary, for such was the requirement of the instruction on that subject.

According to the officers, appellant was caught *flagrante delicto* making whiskey. He ran away at the approach of the officers, and was pursued into a nearby house, and upon the entry of the officers was found lying on a bed feigning to be asleep. He testified that the officers were mistaken in assuming that he was the man seen and pursued by them, as he had been asleep all the afternoon. The jury's verdict has, of course, settled this issue of fact.

This is the first conviction under this act of 1921 which has reached this court. Other sections of that act besides the one copied above make it unlawful to possess a still; to operate a distillery, which is defined; and to manufacture a still worm or still, and providing what shall be accepted as evidence in certain cases, and fixing the punishment for a violation of any of the provisions of the act.

This act must, of course, be construed in the light of the purpose of the General Assembly in enacting it. 2 Lewis' Sutherland, Statutory Construction (2 Ed.) § 456, p. 864; Endlich on the Interpretation of Statutes, § 27, p. 35; § 29, p. 37; Black on Interpretation of Laws, § 30, p. 56; *Empire Carbon Works* v. *Barber & Co.,* 132 Ark. 1; *Doles* v. *Hilton,* 48 Ark. 305, 309; *Gibboney* v.

Rogers, 32 Ark. 462, 465; *State* v. *Jennings,* 27 Ark. 422; *Wassell* v. *Tunmah,* 25 Ark. 101; *McKenzie* v. *Murphy,* 24 Ark. 155.

Manifestly, it was not the legislative purpose to make it a felony merely to make a mash, wort or wash out of which it would be possible to manufacture beer, wine, distilled spirits, or alcoholic or fermented liquors; for it is a matter of common knowledge that mashes are quite frequently made out of which such liquors might be made, with no thought or purpose of making such liquors.

We are not controlled by the title of an act in determining its meaning, but we may look to it to ascertain the legislative purpose. The title of this act is, "An Act to Make it an Offense to Set Up or Operate a Distillery in the State of Arkansas, to Provide a Penalty Therefor, and for Other Purposes."

In the practical enforcement of the prohibition law it has been found difficult in many cases to prove that the mash, wort or wash, which was admittedly intended for an illegal use, had in fact reached, in the process of its manufacture, the alcoholic or intoxicating stage. The recent cases of *Graham* v. *State, ante* p. 363, and *Foshee* v. *State,* 149 Ark. 559, together with the cases therein cited, are illustrations of this difficulty. In those cases the jury was required to find, before convicting the accused, that the mash made for an illegal purpose had in fact reached the alcoholic or intoxicating stage of its manufacture. This act of the Legislature was obviously designed to relieve the State of the necessity of making such proof, by making it illegal to make a mash, wort or wash fit for the distillation or manufacture of beer, wine, distilled spirits, or other alcoholic liquor.

But the words, "fit for" must, of course, be interpreted and defined as meaning "intended for" the uses there prohibited, and not as meaning merely adapted to or capable of being used for such purposes.

The first definition of the adjective "fit" given in Webster's New International Dictionary is "1. Adapted to an end, object, or design; suitable by nature or by art; suited by character, qualities, circumstances, education, etc., qualified; competent; worthy." The words, "suitable, appropriate, proper," are given as synonyms of the adjective "fit." And, as distinquished from its synonyms, it is there said that "fit implies adaptation, competence, or (frequently) conformity to a standard."

It must be confessed that the adjective "fit" and the phrase, "fit for" are susceptible of a wider meaning than we have given them; but the purpose of all statutory construction is to ascertain the legislative will, and, in doing so, it is proper to consider the evil against which the legislation is directed. *Empire Carbon Works* v. *Barber & Co.,* 132 Ark. 1, and the other Arkansas cases cited above immediately following this case. And, when thus viewed, the conclusion is reached that the legislative inhibition is against the making of a mash, wort or wash intended as preliminary processes in making distilled, alcoholic and fermented beverages. To give the statute the broad interpretation which would convert into a felony the making of a mash, wort or wash out of which a distilled, alcoholic or fermented liquor might be made, although such was not the purpose for which it had been made, would make the constitutionality of the act very doubtful. It is a settled rule to so construe a legislative act as that it may be held constitutional, if it is reasonably susceptible of such construction. *Commissioners, etc.,* v. *Quapaw Club,* 145 Ark. 279,283; *Booe* v. *Sims,* 139 Ark. 595; *Dobbs* v. *Holland,* 140 Ark. 398. We think we have given this act, not only a reasonable construction, but the construction which comports with the legislative purpose in its enactment.

As thus interpreted, the act fits appellant's case. Indeed, there can be no question about the use intended of the mash found in the still by the officers, for

whiskey was actually being manufactured. The only real question is appellant's connection therewith; and that question is settled by the verdict of the jury.

Judgment affirmed.

MAYS v. BARNETT.

Opinion delivered November 14, 1921.

1. EVIDENCE—AMBIGUOUS CONTRACT—PAROL EVIDENCE.—While parol testimony cannot be received to vary the terms of a written contract, it may be considered to show the relative situation of the parties in determining the meaning of an ambiguous written contract.
2. EVIDENCE—PAROL EVIDENCE TO EXPLAIN AMBIGUITY.—Where a bill of sale described the property sold as "all electric light poles on streets and alleys of Leslie, Ark., and all wire and electric light fixtures on and between said poles (including all transformers, street light fixtures," etc.), it was not error to admit parol and extrinsic evidence to show that the sale by the term "light fixtures" included a street light serial and switch board, though they were not on or between the poles.

Appeal from Searcy Chancery Court; *B. F. McMahan,* Chancellor; affirmed.

W. F. Reeves and *Carmichael & Brooks,* for appellant.

The parties are bound by the written contract. All previous conversations and understandings merged into and became a part of the written contract and can not be varied by parol testimony. 99 Ark. 218; 93 Ark. 371; 133 Ark. 112; 120 Ark. 368; 135 Ark. 38.

The finding of the chancellor is not supported by the evidence.

The contract is plain and needs no parol testimony for the purpose of explaining it. The words in parenthesis simply meant to limit the fixtures and transformers to those in use at the poles, between the poles and within the corporate limits. A "parenthesis" is defined to be an explanatory or qualifying clause, sentence or paragraph * * * without being grammatically connected there-

with." 53 Fed. 81; 3 C. C. A. 440; Words & Phrases, Vol. 6, 5174. Should the parenthetical clause in the bill of sale be treated as a general clause after a particular description, see Elliott on Contracts, Vol. 5, § 4791, for the effect thereof.

Since the cases were consolidated and the chancellor was in error on the main question, the whole case should be reversed.

S. W. Woods, for appellee.

The contract is ambiguous and required parol testimony to explain it. 90 Ark. 272; 93 Ark. 191; 94 Ark. 195. The testimony given does not vary but explains the contract. 97 Ark. 522; 105 Ark. 518. Parol testimony is admissible, however, to add to a written contract some provision, where the writing, on account of fraud or mistake, does not contain all of the contract. 78 Ark. 586; 88 Ark. 383; 94 Ark. 195; 94 Ark. 575.

SMITH, J. Appellee Barnett instituted two suits against appellant Mays (who was doing business under the name of Mays Manufacturing Company and will be hereinafter referred to as Mays), which were consolidated and tried as a single suit. The first was a suit in replevin for a street light serial and a switch board of the value of $345. The second suit was one to recover the value of certain electric light poles and certain fixtures, tools, and other appliances which had been used in connection with the electric light plant in the city of Leslie, Arkansas, which Barnett claimed he had bought from Mays, but which Mays had refused to deliver. The value of the articles thus sued for was alleged to be $205, and, in addition, judgment was prayed for in the sum of $154.30, for advances on meters furnished by Mays to patrons of the light plant during the time Mays ran it. The facts in regard to the advances on the meters need not be stated, as liability for this item was not denied. The answer filed denied Barnett's ownership of the property sued for, and alleged the fact to be that Barnett had wrongfully taken

possession of certain fixtures, and judgment for the value thereof was prayed, with damages for their usable value.

The decree was in favor of Barnett on all the issues raised except that the court gave judgment against him for $95, this being the value of certain meters taken from the warehouse of Mays and which the court found were the property of Mays, and there has been no cross-appeal by Barnett from that finding.

The main controversy in the case is over what is called the street light serial and switch board, and what we shall say in regard to these two articles will be decisive of the ownership of the other articles sued for.

On July 23, 1920, Mays sold to Barnett the electric light plant in the city of Leslie, and executed a bill of sale therefor, which reads as follows:

"BILL OF SALE.

"This bill of sale, made on the 23rd day of July, A. D., 1920, by and between Ed Mays (Mays Mfg. Co.) of Leslie, Arkansas, as grantor, and A. L. Barnett, of Leslie, Arkansas, as grantee.

"Witnesseth, that the said grantor, in consideration of the sum of $4,000 to me paid, the receipt of which is hereby acknowledged, does hereby sell, assign, transfer, set over and deliver unto the said grantee the following described personal property, to wit: all electric light poles on streets and alleys of Leslie, Ark., and all wire and electric light fixtures on and between said poles (including all transformers, street light fixtures), and in addition thereto all meters that are in resident and business houses in Leslie, Ark. I am selling the meters outright and agree to make proper adjustments or refunds to customers.

"To have and to hold said personal property unto said grantee and unto his heirs, executors, administrators and assigns forever. The said grantor covenants that said property is free from incumbrance, and that

he has the lawful right to sell and dispose of the same; and that he will warrant and defend the title thereto against all claims whomsoever.

"In witness whereof, I have hereunto set my hand and seal this the 23rd day of July, 1920.

"MAYS MFG. CO.,
"By Ed Mays,
"ED. MAYS."

Barnett contends that the property sued for was conveyed by this instrument; but this is denied by Mays; and the decision of the point in controversy depends on the construction given this instrument.

It is the contention of Mays that the bill of sale is plain and unambiguous, and that it would offend against the rule which makes parol testimony inadmissible to contradict or vary the terms of a valid written instrument to admit or consider testimony in explanation of this contract.

The portion of the bill of sale said to be ambiguous is the phrase, "including all transformers, street light fixtures" included within the parentheses. It is the contention of Mays that this phrase is one of explanation, and does not enlarge the conveyance, and was intended to limit the fixtures and transformers conveyed to those in use at the poles, between the poles, and within the corporate limits of the city of Leslie, and that the contract, if properly construed, would read: "All electric light poles on streets and alleys of Leslie, Arkansas, and all wire and electric light fixtures on and between said poles, including all transformers and street light fixtures between said poles." If the contract were so construed, Barnett cannot recover in this action.

But we are by no means certain that this is the necessary or proper construction of the language in question. Upon the contrary, we have concluded that the phrase quoted is an ambiguous one, and that the court below properly admitted and considered parol

testimony showing the relative situation of the parties in determining the meaning of that phrase.

The rule in such cases is clearly stated in the case of *Boden* v. *Maher,* 105 Wis. 539; 81 N. W. 661; 32 L. R. A. (N. S.) 389, from which we quoted in the case of *Brown & Hackney* v. *Daubs,* 139 Ark. 53, as follows: "Parol evidence to vary the terms of a written contract is one thing; such evidence to enable the court to say what the parties to a contract intended to express by the language adopted in making it is quite another thing. The former is not permissible. * * * . The latter is permissible, and is often absolutely essential to show the real nature of the agreement. * * * Both rules are elementary, and do not conflict in the slightest degree with each other. One prevents a written contract from being varied by parol evidence, either in regard to what was said at the time it was made or prior thereto; the other aids in determining what the contract is when its language, either in its literal sense or as applied to the fact, is obscure. The one is a rule to preserve the contract as expressed in writing; the other is a rule of construction to determine what the contract, as expressed, is, it being kept in mind that the mutual intention of the parties, so far as the same can be ascertained, governs within the reasonable meaning of the language they chose to express it; and that rules of construction to discover it are not to be resorted to unless there is some ambiguity to be cleared up. A failure to keep in mind the wide distinction between varying a contract by parol evidence and resorting to such evidence in aid of its construction often leads to error." See, also, *Stoops* v. *Bank of Brinkley,* 146 Ark. 127; *N. Y. Life Ins. Co.* v. *Allen,* 143 Ark. 143; *Ellege* v. *Henderson,* 142 Ark. 421; *Goodwin* v. *Baker,* 129 Ark. 513; *Livingston* v. *Pugsley,* 124 Ark. 432; *Arlington Hotel Co.* v. *Rector,* 124 Ark. 90; *Wood* v. *Kelsey,* 90 Ark. 272.

Applying this rule in the interpretation of the language of this contract, we find the following facts established by the testimony.

Mays had operated a light plant in the city of Leslie, all of which was owned by him except a dynamo, but had ceased to operate the plant, and his franchise had been declared forfeited both by the city council and the State Corporation Commission. The city was without lights. Mays owned certain manufacturing plants, and was using the power plant and dynamo and the wires between his roller mill and two other mills known as the Lenker mill and the Perkin mill in the operation of those plants. Mays had no use for the machinery or lighting system except the dynamos and the poles and wires between the manufacturing plants above mentioned, and he had been ordered to remove all poles, wires, and fixtures of every nature from the streets of the city. The citizens of the town were anxious to have the light plant operated, and as a means to that end were endeavoring to induce Barnett to buy it. Two of these citizens, David Cotton and Dr. Fendley, became quite active in promoting that object.

Mays prepared a complete inventory of the light plant, which showed the cost thereof to him to have been $6,951.67. This inventory was submitted to Barnett, who had the same checked over to ascertain whether it constituted a complete lighting system. Upon being advised that it did, he submitted to Mays the following offer in writing:

"Leslie, Ark., July 22, 1920.

"Mays Mfg. Co., Ed Mays, City:

"Dear Sir: After making a survey of your lighting system within the corporate limits of Leslie, and after due consideration of the matter, I have made up my mind that I will give you $4,000 for the entire system covering all the town, that is within the limits of the incorporated city of Leslie, Chandler & Griffin addition included.

"The above offer is for all the poles, wiring, meters, transformers and street lights, etc., and under the conditions that you turn same over to me and agree not to obstruct me in any way in carrying on the business

of a public utility here in the city of Leslie, Arkansas, you to pay consumers back amount they had advanced on meters.

"I feel that the above offer is really more than the system is worth, but the town needs the system in operation immediately, therefore I make you this offer under the conditions as above stated, and this is all that I will give you.

"So please give me an immediate answer, as I desire to know at the earliest possible moment.

"Respectfully submitted,

"A. L. BARNETT."

On the same day Mays made the following reply in writing:

"Leslie, Ark., July 22, 1920.

"Mr. A. L. Barnett, City.

"Dear Sir: Referring to your letter of even date, I will accept $4,000 for our electric light wiring system in Leslie, to include the main part of Leslie, but I reserve that part of the system which I am now using in my manufacturing business, which is the line and poles beginning at our flour mill and runs by way of our Lenker plant to include our Pekin plant. You appreciate the fact, should we sell these poles and wires that we are excluding from the sale, we would not have same under our control any longer, and therefore it might mean the shutting down of our plants. Anyway we need that part of the system which we have excluded from the deal in our manufacturing business. You want to appreciate the fact that we are not in the light business for the public, nor could we engage in the public utility work without a permit from the Corporation Commission, and that we have no intention of ever being in the light business for the public in Leslie any more. You understand that we are selling you all the meters in Leslie that are now being used in our system, and that we are to take care of all refunds to customers. I understand you have checked up this wiring system of ours and fully understand what you are buying.

"If you wish to accept our offer, please advise us today, and we will prepare a bill of sale and consummate the deal today.

"Yours very truly,

"MAYS MANUFACTURING COMPANY,

"Per Ed Mays."

The negotiations proceeded no further until Cotton and Fendley became active. These gentlemen were not the agents in fact of either Mays or Barnett, yet in a sense they acted for both parties by carrying the messages between them whereby the deal was finally closed. Barnett was asked who Dr. Fendley represented, and answered, "He came there (to Barnett's place of business) for Mr. Mays. I was going to tell you what he said. Mr. Mays sent him, for he said, 'Mr. Mays wants to know if you will give him $3,800, and let him keep those wires.'" Barnett answered, "No, I won't have anything to do with the plant unless I get it all." This message was immediately communicated to Mays by Cotton and Fendley, who returned in about an hour with the bill of sale. Upon reading it over, Barnett said, "This could have been made a little plainer." But Fendley said he would guaranty that "everything goes now."

Mays testified that when Fendley and Cotton came to him he insisted that a bill of sale be written, so that no controversy would arise over the articles sold, and that he therein specified all that was sold, and that the writing does not include the articles in controversy, because they were not between any of the poles of the system, and, as has been said, this is true if the contract is read as thus limiting the fixtures sold.

Fendley and Cotton both testified that when they reported to Mays that the counter-proposition contained in his letter to Barnett had been rejected by Barnett, and that Barnett would not entertain any proposition except upon the basis stated in his letter to Mays, that Mays finally said, "I'll trade. I'll take it." And when Mays drew up the bill of sale, and when he had finished

it asked, "Is that full enough, or does that cover everything satisfactorily?" they thought it did, and repeated the conversation to Barnett. Upon delivering the bill of sale to Barnett, which they did, they received from Barnett a check for $4,000, which they immediately delivered to Mays.

We think that, once we have considered the testimony showing the situation of the parties at the time of the execution of the bill of sale, it clearly appears that Barnett intended to buy all the property included in the invoice submitted to him, and that Mays knew that Barnett so understood the bill of sale, and when he accepted the check the deal was consummated on that basis. The street lights could not be operated without the street light serial and switch board, and they will, therefore, be held to be included in the term, "street light fixtures," although they were not on or between the poles.

The court below so found and decreed accordingly, and, as we concur in that finding, the decree will be affirmed.

DAVIS v. STATE.

Opinion delivered November 14, 1921.

1. RAPE AND CARNAL ABUSE—EVIDENCE OF UNCHASTITY OF PROSECUTRIX.—Upon a prosecution for carnal abuse, it was not competent for defendant to prove that the prosecuting witness had had sexual intercourse with some person other than defendant, as her chastity was not involved in the charge.

2. WITNESSES—IMPEACHMENT AS TO COLLATERAL MATTER.—Evidence of specific instances of immorality of the prosecuting witness in a prosecution for carnal abuse is not admissible as affecting her credibility, because it relates to matters collateral to this issue.

3. WITNESSES—IMPEACHMENT AS TO COLLATERAL MATTER.—While it is proper to permit a witness to be asked as to specific acts affecting his credibility, yet, if such matters are collateral to the issue, he can not, as to his answer, be contradicted subsequently by the party putting the question.

4. CRIMINAL LAW—ABSTRACT INSTRUCTIONS.—Where there was no evidence upon which to base an instruction as to credibility of the prosecutrix in a prosecution for carnal abuse, there was no error in refusing such instruction.

5. CRIMINAL LAW—INVITED ERROR.—Where defendant's attorney went out of the record in making a certain argument, a statement by the prosecuting attorney in reply that defendant's attorney had previously taken a different position was invited error.

6. CRIMINAL LAW—ARGUMENT OF ATTORNEY.—It was not error in a criminal case to permit the prosecuting attorney to say to the jury that "the jurymen are the ones that enforce the law; and if the people know the law is not enforced, the law is going to be violated."

7. CRIMINAL LAW—INSTRUCTION—CREDIBILITY OF ACCUSED.—While the practice of declaring the law relative to the credibility of an accused separate from that of the other witnesses is not commended, it is not reversible error.

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

Lake & Lake, for appellant.

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

Instruction 1 given by the court, correctly declared the law. C. & M. Dig. § 2720. Its instructions 2, on the credibility of witnesses, and 3, relative to the credibility of the appellant as a witness, were correct. This court will not reverse because the credibility of the defendant is made the subject of a separate instruction.

There was no proof on which to base instruction 5 requested by appellant. It was not error to refuse it. 21 Ark. 69; 23 *Id.* 731; 217 S. W. (Ark.) 779.

Instructions should not be based on rejected testimony. 14 Ark. 286; 21 *Id.* 370; 23 *Id.* 101. The reputation for chastity of the female is not involved in a prosecution for carnal abuse. 15 Ark. 624; 72 *Id.* 409; 103 *Id.* 119.

Evidence of specific acts of immorality of the prosecuting witness was not competent; it was in no sense a defense against the charge. 72 Ark. 409; 15 *Id.* 624; 84 *Id.* 16; 103 *Id.* 119.

There was no error in the argument. If so, it was invited. Moreover, appellant did not request its exclusion. 84 Ark. 128. Prosecuting attorneys have the right to appeal to the jury to do its duty. 106 Ark. 131.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Sevier Circuit Court for the crime of carnal abuse, and as punishment therefor sentenced to serve a period of two years in the State penitentiary. From the judgment of conviction an appeal has been duly prosecuted to this court.

According to the evidence adduced in behalf of the State, appellant had sexual intercourse with Nina Olmstead, a female under the age of sixteen years, on the night of the 26th day of April, 1920, in his home where she was employed to wait upon appellant's wife during her illness occasioned by childbirth.

In the course of the trial the court refused to permit appellant to show by other witnesses specific acts of immorality of the prosecuting witness, Nina Olmstead, with other men, because the State had not put the chastity of the prosecutrix in issue, to which ruling of the court an exception was saved. Bearing upon this particular question, appellant requested instruction No. 5, which was refused by the court, to which ruling appellant also saved an exception. Appellant's requested instruction No. 5 is as follows:

"While it would be no defense which would justify or excuse the defendant if other men had been criminally intimate with the prosecuting witness, this fact, if you should find it to be a fact, should be considered as it might tend to discredit or impeach the testimony of the prosecuting witness and render her unworthy of belief."

The court also ruled that, if appellant interrogated the prosecuting witness in reference to specific acts of intercourse with other men upon cross-examination for the purpose of discrediting her, he would be bound by her answers, to which ruling an exception was saved.

The court gave a number of instructions to which general objections were made and exceptions saved by appellant.

The refusal of the trial court to permit appellant to show by other witnesses specific acts of immorality of the prosecuting witness was correct. Her chastity was not involved in the charge, and such proof would not have been responsive to the issue. *Pleasant* v. *State,* 15 Ark. 624; *Plunkett* v. *State,* 72 Ark. 409; *Renfroe* v. *State,* 84 Ark. 16; *Peters* v. *State,* 103 Ark. 119.

It is not admissible as affecting the credibility of the prosecuting witness because it related to matters collateral to the issue. *McAlister* v. *State,* 99 Ark. 604.

The holding of the trial court to the effect that appellant would be bound by the answers of the prosecuting witness on cross-examination with reference to specific acts of intercourse with other men was correct. The questions and answers related to collateral matters. This court held in the case of *McAlister* v. *State, supra* (quoting syllabus): "While it is proper to permit a witness to be asked as to specific acts affecting his credibility, yet, if such matters are collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question." The refusal of the court to give appellant's requested instruction No. 5 did not constitute reversible error because it was abstract. There was no evidence in the record upon which to base the instruction.

During the progress of the trial, the prosecuting attorney, over the objection and exception of the appellant, was permitted to say: "I remember Judge Lake, in Howard County, stating there that a girl had been seduced, and he was representing the State in the case, and claimed it only happened one time, and that standing up, and she and the boy living in the same community, and it was never repeated again, and the jury believed him." Judge Lake, while making his argument in defense of appellant, made some remarks tending to show the improbability of sexual relations

having occurred between appellant and the prosecuting witness as testified to by her. These remarks related to matters outside of the record. The statement made by the prosecuting attorney was an attempt to answer these remarks. The error, therefore, if any, was invited error.

The prosecuting attorney was also permitted, over the objection and exception of the appellant, to say to the jury that "the jurymen are the ones that enforce the law, and if the people know the law is not enforced, the law is going to be violated." We do not think error was committed in permitting the prosecuting attorney to make the statement. It was ruled in the case of *McElroy* v. *State,* 106 Ark. 131, that "prosecuting attorneys have a right to appeal to the jury to do its duty in the punishment of heinous crimes." The statement simply emphasized the necessity of enforcing the law if it had been violated.

We have carefully examined the several instructions given by the court, and are unable to discover any reversible error in them. No. 1 defined the crime for which appellant was indicted in accordance with section 2720 of Crawford & Moses' Digest, and, in substance, instructed that the jury should convict appellant if convinced beyond a reasonable doubt that he had sexual intercourse with the prosecuting witness in the county within three years before the filing of the indictment. Instruction No. 2 announces the correct rule of law relative to the credibility of witnesses. No. 4 gave a proper definition of the term "reasonable doubt." Instruction No. 3 instructed on the credibility of appellant, who testified in his own behalf. While the practice of declaring the rule of law relative to the credibility of an accused separate from other witnesses is not commended, the court has ruled that it is not reversible error to do so. *Vaughan* v. *State,* 58 Ark. 353.

The judgment is affirmed.

ROAD IMPROVEMENT DISTRICT NO. 1 *v.* COOPER.

Opinion delivered November 21, 1921.

APPEAL AND ERROR—FINAL ORDER.—An order granting an injunction in a case until a similar case pending in another court shall be determined is interlocutory and not final.

Appeal from Hot Springs Chancery Court; *J. P. Henderson,* Chancellor; appeal dismissed.

L. E. Sawyer and *Wm. R. Duffie,* for appellant.

The decree entered in this case is a final one from which an appeal will lie. There is a substantial denial of justice on the part of the trial court, which held, in effect, that it is without jurisdiction to determine the issue presented until the Federal court has done some act or other. The right of appeal falls squarely within the second and third paragraphs of § 2129, C. & M. Digest. The determination of the issues should be first by the State court rather than the Federal court. Sec. 1031, Barnes' Federal Code. The denial of the motion to dissolve the injunction was a final order. 14 R. C. L. p. 336.

The proof shows that the assessment was fully completed before the filing of any suit, and the chancellor was in error in holding otherwise.

Appellees are estopped to ask an injunction as they did not appear at the proper time and make complaint of their assessments. 139 Ark. 277; 139 Ark. 322.

In view of the statute requiring a speedy determination of issues raised, the order made is a final one, denying substantial justice.

D. D. Glover, John L. McClellan and *Henry Berger,* for appellees.

The decree was interlocutory, and one from which an appeal will not lie. A decree is final only when all the facts and circumstances material and necessary to a complete explanation of the matters in litigation are brought before the court. 34 Ark. 129; 36 Ark. 204; 100 Ark. 500.

The taxpayers are proper parties to maintain suits against public officers to remedy misapplication of public funds, and the chancery court has power to grant affirmative as well as injunctive relief, and it is the duty of equity courts to mould a remedy for taxpayers whose interests are involved in the operation of improvement districts. 114 Ark. 299.

Interlocutory orders are always subject to the control of the court until a final adjudication upon the rights of the parties. 40 Ark. 508. It was not possible to proceed with the case and determine the rights of all parties, with the injunction pending in the Federal court.

L. E. Sawyer and *Wm. R. Duffie,* in reply.

The lower court has abdicated its power to determine a legal right and the facts relative to whether or not the railroad property is taxable under this act, and made that the sole question upon which the whole case turns. In this respect the order entered is final. 100 Ark. 500.

McCULLOCH, C. J. The General Assembly of 1921, by special act approved February 18, 1921, (Act No. 143) created a road improvement district in Hot Spring County and named the commissioners thereof. Authority was conferred to improve a certain road or roads, to levy assessments to pay for the same and to issue bonds. A complaint was filed against the commissioners in the chancery court by an owner of real property in the district attacking the validity of the statute and seeking to enjoin proceedings thereunder. Other owners of real property in the district intervened. The chancellor granted a temporary injunction at the commencement of the action, and on July 14, 1921, the court entered an order or decree from which an appeal is prosecuted.

The finding of the court is recited in the order to the effect that in a suit pending in the United States District Court for the Eastern District of Arkansas a temporary injunction had been issued at the instance of the Missouri Pacific Railroad Company and the Chica-

go, Rock Island & Pacific Ry. Co., plaintiffs in the suit, temporarily restraining the commissioners of this district from collecting any of the taxes assessed on the property of said railroad corporations, which the court found to be at least 40 per cent. of the entire taxes assessed against the property of the district, and the order of the court was that the "temporary injunction heretofore granted by this court in this cause against Road Improvement District No. 1, and the commissioners thereof, their agents, servants and employees, should be continued until the temporary injunction issued by Jacob Trieber, Judge of the United States District Court of the Eeastern District, Western Division of Arkansas, enjoining and restraining said commissioners and their servants, agents, and employees from the collection of taxes or penalties assessed against the Missouri Pacific Railroad Company and the Chicago, Rock Island & Pacific Railway Company, is fully and finally determined by said United States courts, or until the further order of this court." There was a further order that the commissioners be enjoined from attempting to enforce the payment of the taxes for the year 1921 until the further orders of the court, and that the injunction bond executed by the plaintiffs in the action (appellees) "be and remain in full force and effect."

The first question which arises is whether or not this is a final decree from which an appeal will lie. We think that it is not such a decree, and the appeal must be dismissed. An order granting or refusing a temporary injunction is interlocutory and not final. *Miller* v. *O'Bryan,* 36 Ark. 200; *Ex parte Batesville & Brinkley R. Co.,* 39 Ark. 82. An order or decree extending an injunction for a fixed time, or until the happening of a certain event, may be final, but it appears clearly from the recitals in the decree that the court meant to continue control over the injunction granted in this case and over the subject-matter of the litigation. It was so declared in the decree, and the court continued in force the bond executed by plaintiff at the commence-

ment of the action, which shows that the injunction was not intended to be permanent nor the order final; it was merely interlocutory, and remains within the control of the court. It is argued by counsel with much earnestness that a decree of this sort may work great injury unless there can be an appeal from it. This may be true, but the authority of this court is limited by the Constitution to jurisdiction over final judgments and decrees, and we are without power to correct errors which occur during the progress of proceedings until after there has been a final decree from which an appeal can be prosecuted. If injury results, it is one merely incident to the litigation which cannot be corrected by an appeal in advance of a final decree.

Appeal dismissed.

FT. SMITH, SUBIACO & ROCK ISLAND RAILROAD COMPANY v. LOVELADY.

Opinion delivered November 21, 1921.

1. APPEAL AND ERROR—SUFFICIENCY OF BILL OF EXCEPTIONS.—Where a bill of exceptions, duly signed by the trial judge, did not contain the evidence or the instructions in the case, but merely gave direction that they should be inserted by the clerk, this was insufficient.
2. APPEAL AND ERROR—PRESUMPTION.—Every presumption should be indulged in favor of the rulings of the trial court until it affirmatively appears from the record that its rulings were erroneous.

Appeal from Logan Circuit Court, Northern District; *James Cochran,* Judge; affirmed.

E. H. McCulloch, for appellant.

The required notice was properly given and the fund was distributed, and a collateral attack could not be made. Black on Judgments, Vol. 1, § 251; 113 U. S. 179; 108 U. S. 18; 130 U. S. 482; 138 U. S. 439; 141 U. S. 260; 144 U. S. 75; 141 U. S. 475.

Though a foreclosure decree is erroneous, it cannot be attacked in the State court. 53 Iowa 202.

The court erred in refusing to make the persons mentioned in the motions, parties to the action. C. & M. Digest, § 1097.

Evidence of notice to put in stock gaps should not be admitted unless service is shown. 68 Ark. 236. Stock guards as well adapted as is practicable to make them in connection with safe operation of the road is all the law requires. 71 Ark. 232.

Where the owner stands by and sees his property sold by the sheriff without objecting, he cannot afterward assert his title. Dud. 72; 9 Ga. 23; 16 Ga. 593; 60 Am. Dec. 744; 65 Ga. 360; 12 La. Ann. 473; 30 La. Ann. 1251; 7 Watts 163 (Pa.); 16 Cyc. 764; 16 Cyc. 765; 83 Ga. 161; 18 Abb. Prac. 3; 27 N. C. 587; 44 Ann. Dec. 63; 3 Serg. & R. 283 (Pa.); 3 Rawle 492; 10 Ark. 211; 14 Ark. 505; 18 Ark. 142; 24 Ark. 371. The acceptance of other security raises the presumption that the vendor intended to waive his equitable lien for the purchase money. 33 Ark. 240. Plaintiff had no lien on the land. 51 Ark. 285.

Robt. J. White, for appellee.

A paper which constituted a part of a bill of exceptions must be marked so it can be identified. 45 Ark. 485; 46 Ark. 482; 69 Ark. 114; 61 S. W. 372; 89 Ark. 553; 115 S. W. 923; 20 L. R. A. (N. S.) 453.

A stenographer's report can be made available on appeal only by being made a part of the bill of exceptions. 65 Ark. 330; 46 S. W. 127.

Giving a note for the purchase price of land is not paying for it. 51 Ark. 235.

WOOD, J. The appellees instituted an action in the Logan Chancery Court against the appellant—the appellees J. W. Lovelady and A. Newman to recover compensation for the alleged taking of a right-of-way through their lands and damages to the severed parts and appellee J. C. Lovelady for damages to crops on account of the alleged failure of the appellant to put in safe and sufficient stop gaps, and also for damages to his land by reason of an alleged overflow washing the

same and damages on account of the alleged failure of the appellant to maintain a dirt road-crossing in compliance with an alleged agreement to do so.

The allegations setting forth the causes of actions in the respective complaints were all denied in separate answers by the appellant. The trial resulted in judgments in favor of each of the appellees against the appellant. Each of these judgments recited as follows: "Now on this day comes on for hearing this cause, comes the plaintiff in person and Robert J. White, his attorney, comes also the defendant, by E. H. McCulloch, its attorney, and both parties announcing ready for trial, and the cause was submitted to a jury of twelve good and lawful jurors, who, after hearing the evidence, the instructions of the court, and the argument of counsel, retired to their room to consider of their verdict and after deliberation returned into court the following verdict." Then follow the verdict and judgments for the amounts returned by the jury against the appellant in each case.

The transcript in this case first sets out the pleadings. Then follows what purports to be "a bill of exceptions" showing that the causes were by consent consolidated and tried before one jury; that before the jury was impaneled special demurrers to the complaints were filed in each of the cases, and that these demurrers were by the court overruled. Then follows a statement to the effect that the parties introduced the full testimony as reported by the official stenographer in the case. Then follows a deed from masters appointed by the United States District Court for the Western District of Arkansas in a case pending in that court between the St. Louis Union Trust Company and the Ft. Smith, Subiaco & Eastern Railroad Company to the Commonwealth Trust Company, a Missouri corporation; and a deed from the Commonwealth Trust Company to the appellant. Then follow the judgments as above set forth. Then follow motions for a new trial and the orders overruling the same and an entry giving the ap-

pellant ninety days within which to prepare its bill of exceptions, followed by the recital, "and now comes the defendant and offers the above and foregoing as and for its bill of exceptions in all cases tried, and asks that the same be signed and sealed and made a part of the record herein, which is accordingly done this 4th day of April, 1921."

Then follows what purports to be another "bill of exceptions," in which is set forth what purports to be the testimony of the appellees and also of appellant and of other witnesses in behalf of the respective parties; and also documentary evidence consisting of certified copies of certain proceedings had before the United States District Court of the Western District in the case of Union Trust Company v. Ft. Smith, Subiaco & Eastern Railroad Company. Then follows what purports to be certain instructions given by the trial court on its own motion and the exceptions of the appellant to these instructions. Then follows the recital showing that the causes were argued and submitted to the jury. Then follows a call for a copy of the jury's verdict and a call for the copy of the motion for a new trial, and concluding with the recital that the appellant was given ninety days within which to prepare and file his bill of exceptions and that the same was presented and found correct. This purported bill of exceptions concludes as follows: "In testimony whereof, I hereunto set my hand as judge of the 15th Judicial Circuit of Arkansas and of Logan Circuit Court, northern district thereof, on this.....day of....., 1921." This bill is not signed.

Then follows a certificate of the reporter that the above is a correct and complete copy of the evidence introduced at the trial of the above entitled cause as shown by his notes. Then follows a statement to the effect that "the foregoing bill of exceptions contains all the evidence heard or offered in the trial of the cause and all the instructions and all the proceedings had and done at the trial of the cause. In witness

whereof the said counsel have hereunto set their hands this the ..... day of April, 1921." The statement of counsel is left blank, unsigned.

Then follows a notation by the clerk that the above was filed for record on the 22nd day of May, 1921. Then follows a statement to the effect that the defendant requested instructions and setting them forth and noting the rulings of the court in refusing to give the prayers, and concluding with the recital that "the above and foregoing instructions, together with the instructions reported and transcribed in the official stenographer's report of the cases, were all the instructions asked for, given or refused by either side in these several cases." Then follows another statement to the effect that the causes, after argument, were submitted and the following verdicts returned. Then follows another recital purporting to be "bills of exceptions" containing a call for the clerk to copy the special demurrer interposed in each of the cases and for the clerk to copy the records, deeds, etc., which were introduced in support of the demurrers referred to. This is followed again by a recital to the effect that the demurrers were overruled, and that the causes came on for trial, and the plaintiff in each case presented his testimony, and with a call for the clerk to insert the testimony as reported by the official stenographer. Then follows a recital that the court instructs the jury and a call for the clerk to insert the instructions as reported by the official stenographer. Then follows the recital that the causes were again submitted and the verdicts returned, and a call for the clerk to copy the verdicts in each case. Then follows a call for the clerk to copy the motions for a new trial. Then follows certain sheets containing the instructions asked by the defendant with a notation on the margin thereof, "Refused—all of them."

Then follows a statement signed by the trial judge to the effect that the motions for new trials were overruled, and that the appellant saved its exceptions, was granted ninety days within which to prepare its bill of

exceptions, and "offers the above and foregoing as and for its bills of exceptions in all cases tried, and asks that the same be signed, sealed and made a part of the records herein, which is accordingly done this 4th day of April, 1921."

The transcript concludes with a certificate of the clerk that the annexed and foregoing pages contain a true and correct transcript of the proceedings had, signed the 3rd day of June, 1921.

It is impossible from the transcript of the record thus presented by the appellant to ascertain which of the entries was the bill of exceptions and what it really contains. With the record in this confused condition, the appellees obtained a writ of certiorari to have the clerk of the Logan Circuit Court "certify the original bill of exceptions as approved and ordered made part of the record by the trial judge." In response to the writ of certiorari, the clerk has brought into the record the original bill of exceptions, which is a mere skeleton bill. It contains a call for certain records of the United States District Court for the Western District of Arkansas and certain deeds that were introduced in evidence to be copied by the clerk; and for the testimony that was introduced in the causes by plaintiffs and defendant and reported and transcribed by the official stenographer to be copied by the clerk, and for the instructions that were given by the court at the request of the plaintiffs to be copied by the clerk, and the instructions given orally by the court on its own motion to be copied by the clerk. It thus appears that the testimony and the instructions are not contained in the bill of exceptions.

In *Dozier* v. *Grayson-McLeod Lumber Co.*, 100 Ark. 244, we held, quoting syllabus: "Where a bill of exceptions recited: 'The following testimony was introduced before the court and jury, which was all the evidence introduced by either party (insert testimony),' meaning that the clerk should insert the official stenographer's notes of the testimony, and the certificate of the stenographer shows that the testimony was subsequently

transcribed, and it does not appear that the transcribed testimony was ever presented to the circuit judge for examination, it did not become a part of the bill of exceptions, and cannot be considered on appeal."

In the above case we said: "Before the bill of exceptions receives the signature of the judge, it must be allowed by him, and this means that it must be approved by the judge after an examination thereof and a finding by him that it is correct. The bill should be complete when it receives the signature of the judge, so that there is no further discretion relative thereto. 'It must be its own evidence of all it contains.' "

The above case rules the present one. This bill of exceptions shows that the testimony adduced by the parties and the instructions given by the court on its own motion and at the request of the appellees were not transcribed by the official stenographer and copied into the bill before the same received the signature of the trial judge. The causes were submitted to the jury upon the testimony and instructions of the court as shown by the recitals in the judgments, as well as in the "bill of exceptions." Every presumption must be indulged in favor of the rulings of the trial court until it affirmatively appears from the record that its rulings were erroneous. No such showing is made by the record in this case.

The judgments are therefore affirmed.

ARKANSAS CENTRAL RAILROAD COMPANY v. WALKER.

Opinion delivered November 21, 1921.

1. EVIDENCE—JUDICIAL NOTICE.—The courts take judicial notice of the fact that in August, 1919, the railroads were being operated by the United States through its agent.
2. RAILROADS—OPERATION BY UNITED STATES—NEGLIGENCE.—During the time in which the United States operated the railroads, the corporations which owned them were not liable for their negligent operation.

3. CARRIERS—FAILURE TO FURNISH CAR FOR SHIPPING CATTLE.—Evidence *held* to sustain a finding that defendant carrier was negligent in failing to furnish a car for shipment of plaintiff's cattle.

Appeal from Logan Circuit Court, Northern District; *James Cochran,* Judge; reversed and affirmed.

Thos. B. Pryor, for appellants.

The court will take judicial knowledge of the fact that at the time of the accrual of plaintiff's cause of action the government was in charge and operating the railroads of the country. 167 N. W. Rep. 59; 170 N. W. Rep. 149; § 206, par. "A" of Act of Congress, February 28, 1920.

Robt. J. White, for appellee.

WOOD, J. The appellee instituted this action against the appellants. He alleged, in substance, that the appellant, Arkansas Central Railroad Company, at the time of the filing of the complaint, was under the direction of the agent of railroads for the United States; that the Fort Smith, Subiaco & Eastern Railroad Company was operated in connection with the Arkansas Central Railroad Company; that it was the practice of those roads for shippers of live-stock to order stock cars for destination out of this State from the Arkansas Central through the agent of the Fort Smith, Subiaco & Eastern Railroad Company at its station of Scranton, Arkansas; that on the 18th day of August, 1919, the appellee so ordered two stock cars; one in which to ship cattle and the other to ship hogs. The shipments were to be made to Kansas City, Missouri; that the agent at Scranton placed the order for the cars with the agent of the Arkansas Central Railroad at Paris and was assured by the agent at Paris that the cars would be ordered immediately; that on the 22nd day of August, 1919, the appellee was notified by the agent of the Fort Smith, Subiaco & Eastern Railroad at Scranton that one of the cars in which to ship the hogs had arrived at Scranton, and that the other had arrived at Paris; that the appellee had notified the agent at Scranton to

notify the agent at Paris that appellee desired to ship both the car of cattle and the car of hogs at the same time and on the same train. The appellee was assured by the agent at Scranton that the cars were ready for appellee's use. That, relying upon this assurance, on the morning of the 23rd of August, 1919, appellee loaded his hogs into the car at Scranton to be shipped out in the afternoon and drove his cattle to Paris to be shipped out by the same train on which the hogs were being shipped; that, on arriving at Paris with his cattle, he was informed by the agent there that no car had been ordered for him for his cattle; that appellee immediately placed another order for a cattle car and when his car of hogs reached Paris he was compelled to unload same and await the arrival of the cattle car; that the delay caused damage to the appellee by shrinkage in value of his cattle and hogs and by the loss of part of his hogs and one cow in the sum of $689.25, for which he asked judgment.

The appellant answered, denying all the allegations of the complaint as to the liability of the appellants. The trial resulted in a verdict in appellee's favor in the sum of $400 against the appellants. Judgment was rendered for that sum in favor of the appellee against appellants, from which is this appeal.

The complaint alleged, and the court will take judicial knowledge, that at the time of the accrual of the appellee's cause of action the appellant railroad was being operated by the United States Government through its agent, John Barton Payne, Director General of Railroads. *Marshall* v. *Bush,* 167 N. W. 59; *Commercial Club* v. *C., M. & St. P. R. Co.,* 170 N. W. 149. Therefore, no cause of action is alleged or proved against the appellant company under the provisions of the acts of Congress August 29, 1916, and February 28, 1920, as construed by the Supreme Court of the United States in *Missouri Pacific Railway Co.* v. *Ault,* 41 Sup. Ct. Rep. 593. The court, therefore, should have instruct-

ed the jury to return a verdict in favor of the appellant company, and should have entered a judgment dismissing the cause of action as to it.

The allegations of the appellee's complaint show that his cause of action was grounded upon the alleged neglect of the agents of the Director General of Railroads having charge of the operation of the Arkansas Central Railroad at Paris, Arkansas, to have a car ready for the shipment of appellee's cattle when the car of hogs to be shipped over the same train reached Paris from Scranton. On the issue as to the liability of the appellant, Director General of Railroads, there was testimony tending to sustain the allegations of appellee's complaint. There was testimony tending to prove that it was the custom of shippers of live-stock who desired to ship same from Scranton to foreign markets to order cars from the agent of the appellant company at Paris. When shippers at Scranton desired cars, they would make requisition orally for same of the agent there, and he would in turn make requisition of the agent of the appellant company at Paris. This custom was pursued in the present case, and there was testimony tending to prove that the station agent at Paris was notified by the appellee that he desired a car for the shipment of cattle and also a car for the shipment of hogs on the 23rd of August, 1919; that he desired to ship this stock through on the same train; that he prepared to make the shipment in this way, giving the reason why it was necessary for him to do so in order to conserve his interests, and that the agent at Paris promised to furnish the cars; that he drove his cattle to Paris for the purpose of making shipment on the same train that the hogs were on, and when he demanded the car for his cattle at Paris he was informed by the agent that no car had been ordered for him, and the agent told the appellee to let the hogs go forward and to pasture the cattle until he could order and get a car for them. The appellee then enters into detail

giving the circumstances as to the loss of his stock and the resultant damages caused by his failure to get the car for the shipment of his cattle.

It could serve no useful purpose as a precedent to set out at length and discuss this testimony. It suffices to say that on this issue there was substantial testimony to sustain the allegations of appellee's complaint and to warrant a verdict for the sum returned by the jury in his favor. The issue as to the liability of the appellant, Director General of Railroads, for a failure to furnish cars was submitted to the jury under correct instructions. The judgment as to the Director General is therefore affirmed. As to the railroad company, the judgment is reversed and the cause dismissed.

McMILLAN v. BROOKFIELD.

Opinion delivered November 21, 1921.

1. ATTORNEY AND CLIENT—TRANSACTIONS BETWEEN.—An attorney may purchase from his client the results of a suit promoted by him, but the burden is upon the attorney to show the utmost good faith, the absence of undue influence, a fair price, knowledge, intention and freedom of action by the client, and that he gave his client full information and disinterested advice.
2. EQUITY—DUTY TO DO EQUITY.—The maxim, he who seeks equity must do equity, means that, whatever be the nature of the controversy and of the remedy demanded, the court will not give equitable relief to the party seeking it unless he will admit and provide for all the equitable rights, claims and demands of his adversary growing out of or necessarily involved in the subject-matter of the controversy.
3. LIMITATION OF ACTIONS—DISCOVERY OF ADVERSE CLAIM.—A suit by a client to set aside a deed to land given by him to his attorney as security for his fees was not barred where brought within seven years from the time the attorney placed the deed on record, that being the first time that the plaintiff knew that defendant was claiming the land.
4. APPEAL AND ERROR—NECESSITY OF BILL OF EXCEPTIONS.—No bill of exceptions is necessary in chancery cases except where oral testimony has been taken and not written and filed as a deposition in the case, or as part of the record in the cause.

5. APPEAL AND ERROR—BRINGING UP ORAL EVIDENCE IN CHANCERY.—Recital in the decree that certain oral testimony should be reduced to writing and filed, coupled with a recital that this had been done, and the certificate of the clerk that the transcript contains a complete record of all the proceedings, made the oral testimony a part of the record.

Appeal from Cross Chancery Court; *A. L. Hutchins,* Chancellor; reversed.

STATEMENT OF FACTS.

C. T. McMillan brought this suit in equity against J. C. Brookfield to set aside a deed to about 14 acres of land, on the ground that the execution of the deed was obtained through undue influence while the defendant was attorney for the plaintiff to recover the land from a third person. Subsequently Susanna McMillan, the wife of C. T. McMillan, was permitted to become a party plaintiff to the suit.

C. T. McMillan is a colored man. According to his testimony, he purchased the land in question from a Mr. Davis, but was not able to secure a deed from him to the land. He employed J. C. Brookfield, an attorney, to get the land for him. He agreed to pay Brookfield $185 as his compensation. McMillan lived on the land when he first purchased it, but moved away from it several years before he employed Brookfield to recover it. Brookfield brought suit for him for the land in 1912, and a decree was rendered in McMillan's favor for the land in 1915.

J. C. Brookfield was a witness for himself. According to his testimony, C. T. McMillan came to him to borrow some money, and he refused to lend him any, but purchased the land in controversy from McMillan for $20. McMillan executed to him a warranty deed to the land on the 1st day of August, 1921. The consideration expressed in the deed is "the sum of $1 and other good and valuable considerations to me paid by J. C. Brookfield". Brookfield subsequently brought suit for the possession of the land in the name of C. T. McMillan.

On cross-examination, he stated that he did not

bring suit in his own name, because he did not want to file the suit and prosecute it in his own name. He admitted that there was nothing in the pleadings to notify the court who was the real party in interest. He placed his deed from McMillan on record soon after the court entered a decree in McMillan's favor for the land. The land was worth about $75 when he purchased it from McMillan. He paid McMillan other sums after the execution of the deed. McMillan got $65 from him before he gave his deposition. Brookfield never got this back.

F. O. Cogbill, a notary public, was a witness for the defendant. He took C. T. McMillan's acknowledgment to the deed in question. McMillan could not write his own name, and Cogbill witnessed his signature. McMillan seemed familiar with the deed, and did not hesitate to sign. The land is worth $100 per acre now, and was worth $150 at the time the deed was executed.

The court found the issues for the defendant, and dismissed, the complaint for want of equity. The plaintiffs have appealed.

Killough, Lines & Killough, for appellant.

Appellee has not met the burden of showing that no undue influence was used and that he gave his client all the information and advice as against himself that was necessary in order to enable him to act understandingly. 73 Ark. 575; 87 Vt. 1.

The property in suit was the homestead of appellant, and the court should have so held. It is a question of intent, whether the homestead has been abandoned. 134 Ark. 519; 55 Ark. 55. The absence of the wife and children will not affect the husband's right of homestead. 29 Ark. 280.

The wife did not sign the deed, and the deed purporting to convey the homestead is a nullity. 123 Ark. 189.

S. W. Ogan, for appellee.

What purports to be the bill of exceptions is not signed by the trial judge, and therefore is not properly

before the court. As no error is alleged otherwise in the record, the case should be affirmed. C. & M. Dig., §§ 1321, 1323.

No order was made making Susanna McMillan a party to the suit, merely a motion asking that was filed, so she is not properly a party. C. & M. Dig., § 1102.

The relation of attorney and client never existed. Appellee prosecuted the suit in the name of his grantor which he had a right to do. C. & M. Dig., §§ 1498 and 1500.

The land was never impressed with the character of a homestead. When appellee purchased, appellant had neither legal title nor possession, but mere equity. If mistaken in this view, the homestead was abandoned. 21 Cyc. 597; 5 Ky. Law Rep. 422.

There was no present intention to return to the place required to preserve the homestead character. 60 Ark. 262; 21 Cyc. 603. Abandonment is a question of intent. 148 S. W. 245.

A husband may not convey but can abandon a homestead without his wife's consent. 101 Ark. 101.

The record brought up under the *nunc pro tunc* order is not properly identified and has no place in the case. This is so for the further reason that the trial court had lost jurisdiction of the case.

Killough, Lines & Killough, in reply.

The decree of the court identifies the testimony brought up in the *nunc pro tunc* order, and is sufficient to bring the evidence before this court. 117 Ark. 221.

This record shows that Susanna McMillan was a party to the suit.

A departure from a homestead for the purpose of business, pleasure or health does not constitute an abandonment. 80 Ark. 249. The loss of the members of one's family does not terminate a homestead right. 71 Ark. 206; 65 Ark. 393.

HART, J. (after stating the facts.) It is well settled in this State that an attorney may purchase from his

client the results of a suit promoted by him, but the burden is upon the attorney to show the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention, and freedom of action by the client, and also that he give his client full information and disinterested advice. *Davis* v. *Webber,* 66 Ark. 190; *Thweatt* v. *Freeman,* 73 Ark. 575; and *Weil* v. *Fineran,* 78 Ark. 87.

Tested by this rule, we think that the deed should be set aside. The consideration recited in the deed is the sum of $1 and other good and valuable considerations. Brookfield admits that he paid McMillan only $20 at that time. He subsequently brought suit for the land in the name of McMillan and prosecuted the suit in his name for three years. Brookfield did not record his deed until after a decree was rendered in favor of McMillan for the land. Brookfield claims that he made other advances to McMillan after the execution of the deed before he gave his testimony in the pending suit for the land. If he had already purchased the land, this was not necessary. His making the advancement is consistent, however, with the theory that he was to have a lien on the land for his services in recovering it.

The fact that Brookfield brought the suit in McMillan's name and prosecuted it to a conclusion in his name, together with the almost nominal price given for it, are facts to be considered in determining whether the deed should be set asid. Indeed, all of the attending circumstances tend to show that the parties intended that the deed should be a mortgage for the security of Brookfield's fee in the prosecution of the suit to recover the land and for any advances he might make McMillan during the progress of the suit.

This suit is in equity, and the court has the right to impose conditions upon the plaintiffs in granting them the relief prayed for. He who seeks equity must do equity, is a favorite maxim. In its broadest sense, it is regarded as the foundation of all equity, and as the source of every doctrine and rule of equity jurisprudence.

Its practical meaning is that, whatever be the nature of the controversy and of the remedy demanded, the court will not give equitable relief to the party seeking it, unless he will admit and provide for all the equitable rights, claims and demands of his adversary growing out of or necessarily involved in the subject-matter of the controversy. 1 Pomeroy's Equity Jurisprudence, (3 Ed.) § 385.

The record shows that McMillan has not paid Brookfield for his services in recovering the land for him, for advances made during the progress of the suit and for the taxes on the land paid by Brookfield.

Upon the remand of the case, the deed from Brookfield to McMillan will be set aside upon the payment by McMillan to him of the amounts due him for his legal services in recovering the land, the advances made by him to McMillan during the progress of the suit, and the amount of taxes on the land paid by him.

Inasmuch as these amounts are not definitely shown by the evidence in the record, both parties, if so advised, will be allowed to take additional testimony to establish the amount of Brookfield's fee for recovering the land, the advances made by him to McMillan and the amount of taxes paid by him. In default of the payment of these amounts by McMillan during the time to be fixed by the court, the land shall be sold under orders of the court for the payment thereof.

The defendant Brookfield has pleaded the statute of limitations. The record discloses that he did not file his deed for record until the 26th day of February, 1915, and the present suit was not brought until the 28th day of September, 1920. McMillan testified that he did not know that Brookfield was claiming the land under the deed until after he had filed it for record. There is no contradiction of his testimony in this respect, and indeed it is corroborated by the fact that Brookfield brought suit to recover the land in the name of McMillan, and did not file his deed for record

until after that suit had been concluded. Hence the plaintiffs are not barred by the statute of limitations.

It is also insisted by counsel for the defendant that the decree should be affirmed because there is no bill of exceptions preserving the evidence taken at the trial. The record shows the entry of a *nunc pro tunc* decree, and that decree recites that the case was heard upon the pleadings which are named and the oral testimony of certain witnesses whose names are set out.

The decree contains a further recital "that the oral testimony of said witnesses be and is ordered to be taken down in shorthand by Miss Mabel Kellogg and by her transcribed and filed with the other papers in the case, which is accordingly done."

No bill of exceptions is necessary in the chancery court except where oral testimony has been taken and not written and filed as a deposition, or as a part of the record in the case. *Lemay* v. *Johnson,* 35 Ark. 225; *Bradley Lumber Co.* v. *Hamilton,* 109 Ark. 1; and *Alston* v. *Zion,* 136 Ark. 376.

In the case of *Bradley Lumber Co.* v. *Hamilton, supra,* the court said:

"The only way of preserving testimony taken orally before the chancery court was to have same reduced to writing at the time and properly identified by the court and filed and made a part of the record by order of the court, or afterward having it reduced to writing and brought into the record by bill of exceptions."

The amended record shows that the oral testimony in the present case was ordered reduced to writing and filed as part of the record. It contains the further recital that this was done. This identifies the testimony and makes it a part of the record, just as if the oral testimony of the witnesses had been depositions and filed in the case.

In *Lenon* v. *Brodie,* 81 Ark. 208, the recital of the decree was, "the depositions of witnesses taken *ore tenus* at the bar of the court and agreed to be filed and used as depositions in the case." The clerk in his

certificate stated that the transcript included the oral evidence. The court held that was sufficient, and that the oral testimony became a part of the record in the case by the agreement of the parties that it should be reduced to writing and filed as depositions in the case. Here the court ordered the testimony to be reduced to writing and filed with the other papers in the case. It recites that this was done.

The record also contains the certificate of the clerk that the transcript contains a complete record of all the proceedings in the chancery court. The recital in the decree that the oral testimony should be reduced to writing and filed with the other papers in the case, coupled with the recital that this had been done, and the certificate of the clerk made the oral testimony a part of the record and no bill of exceptions was necessary.

It follows that the decree will be reversed because the court erred in not setting aside the deed from C. T. McMillan to J. C. Brookfield, and the case will be remanded for further proceedings in accordance with the opinion.

MORRIS v. DRAINAGE DISTRICT NO. 24.

Opinion delivered November 21, 1921.

1. DRAINS—ORDER ASSESSING COST OF IMPROVEMENT.—Under Crawford & Moses' Dig., § 3617, providing that the county court shall order an assessment upon the real property of a drainage district to pay "the estimated cost of the improvement," the phrase quoted means the whole cost of constructing the drainage ditch, including the overhead charges.
2. DRAINS—ASSESSMENT OF TAX.—Crawford & Moses' Dig., § 3617, providing that the county court shall levy an assessment to pay the cost of a drainage improvement, contemplates that, where the district is created by the county court, the court shall make but one assessment for the entire cost of the improvement, and an assessment for preliminary expenses merely is unauthorized.
3. DRAINS—ASSESSMENT OF TAX—TIME OF APPEALING.—Crawford & Moses' Dig., § 3617, providing that the remedy against an assess-

ment of drainage taxes shall be by appeal taken within 20 days from the time that the assessment is made by the county court, means that the appeal shall be taken within 20 days from the making of the assessment for the entire cost of the improvement, and where an assessment was improperly made for preliminary expenses merely an appeal therefrom may be taken within six months, under Crawford & Moses' Dig., § 2287.

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

J. F. Gautney, for appellants.

There is no provision in the drainage law providing for an appeal from the county court allowing claims against the district; the general law applies. C. & M. Dig., § 3617; 90 Ark. 219; 143 Ark. 67.

The order of the county court allowing claims and assessing a tax to pay same is void. C. & M. Dig. § 3610, par. 2.

Sloan & Sloan, for appellees.

The county court had the power to levy a tax to pay the indebtedness of the drainage district. C. & M. Dig. § 3617.

The fact that the actual cost of construction exceeds the cost as estimated by the engineer does not preclude the construction of the improvement. 213 Pa. St. 123; 62 Atl. 516; 176 N. W. 373. It was clearly the intention of the Legislature to levy a tax sufficient to pay for the improvement, even though it was in excess of the engineer's estimate. C. & M. Dig., § 3620; 55 Conn. 437; 12 Atl. 519; 25 R. C. L. 1022, § 258. Power to levy a tax for the entire cost of an improvement necessarily carries with it the power to do a lesser thing, *i. e.,* to levy a tax to pay a part of the cost of the improvement. Broom's Legal Maxims, star page 174.

In making additional assessments it is sufficient if the general method is followed. 134 Ark. 447. The presumption is in favor of the county court's order. 134 Ark. 121.

The county court can exercise only such powers as are conferred upon it by law. 115 Ark. 130; 4 Ark. 473; 28 Ark. 359; 89 Ark. 456; 37 Ark. 359; 33 Ark. 407.

The only obligations upon which the county court passes are those represented by the bonds for which the taxes are pledged. 127 Ind. 422.

An appeal from the order establishing the district must be taken in twenty days. 117 Ark. 292; 138 Ark. 131.

A property owner may appeal within the time prescribed. 132 Ark. 141.

A statute providing for appeals in a particular case supersedes the general statute. 134 Ark. 411; 127 Ark. 266; 104 Ark. 113; 103 Ark. 209; 53 Ark. 417.

HART, J. This appeal challenges the correctness of a judgment of the circuit court dismissing the appeal of property owners from a judgment of the county court levying an assessment upon the real property in a drainage district to pay certain indebtedness.

Drainage District No. 24, Craighead County, Ark., was organized under the alternative system of drainage districts. Crawford & Moses' Digest, §§ 3607-3655 inclusive. The commissioners of the drainage district held a meeting on the 4th day of September, 1920, in Jonesboro, Ark., at which all the members were present. The matter of the indebtedness of the district was taken up and discussed. Claims for engineering services, attorney's fees, fees and expenses of the commissioners, fees paid an abstracter of title and certain printing expenses, amounting in the aggregate of $5,528.21, were allowed. After all the claims had been allowed, a resolution for a tax to be levied to pay said claims was adopted.

A petition setting up the foregoing facts more in detail was filed in the county court by the commissioners. The commissioners further stated that the claims as allowed at their said meeting represented all of the lawful indebtedness of said district, and that a tax of 3 per cent. on the face of the assessed benefits would be required to pay said indebtedness.

The prayer of the petition is that the county court make an order approving the action of the commissioners and directing the levy of the tax.

On the 12th day of November, 1920, the county court made an order approving the proceedings of the board of commissioners of said drainage district, and the levy of the tax by them on the real property in said drainage district. The county clerk of Craighead County was directed in the order to extend said taxes on a book specially procured by him for that purpose, and the collector was directed to collect the taxes in the year 1921.

On the 25th day of January, 1921, Allen Morris and J. D. Haynes, property owners in said drainage district, filed affidavits for appeal duly verified and prayed an appeal to the circuit court from said order. The affidavits for appeal were duly examined by the county court, and an order was made on said 25th day of January, 1921, granting an appeal from said judgment of the county court to the circuit court.

On the 7th day of February, 1921, the commissioners of said drainage district appeared in the circuit court and filed their motion to dismiss the appeal of Allen Morris and J. D. Haynes. The circuit court granted the motion and dismissed the appeal.

Allen Morris and J. D. Haynes excepted to the ruling of the court, and have duly prosecuted an appeal to this court.

The correctness of the judgment of the circuit court depends upon the construction to be given to sections 3610 and 3617 of Crawford & Moses' Digest.

Sec. 3610 provides that, when the county court has established the drainage district, it shall appoint three owners of real property within the county to act as commissioners. After providing the form of oath the commissioners shall take, and how vacancies may be filled by the county court, the section continues as follows: "Upon their qualification, the board shall prepare plans for the improvement within the district, as

prayed in the petition, and shall procure estimates from competent engineers as to the cost thereof. For this purpose the board may employ such engineers and other agents as may be needful, such engineers to give bond as required in § 3607, and may provide for their compensation, which, with all other necessary expenditures, including the services of such attorneys as the county may employ, shall be taken as a part of the cost of the improvement. If for any cause the improvement shall not be made, said cost shall be charged on the real property in the district, including railroads and tramroads, and shall be raised and paid by assessment in the manner hereinafter prescribed."

Sec. 3617 reads as follows: "The county court shall at the same time that the assessment of benefits is filed, or at any subsequent time when called upon by the commissioners of the district, enter upon its records an order, which shall have all the force of a judgment, providing that there shall be assessed upon the real property of the district a tax sufficient to pay the estimated cost of the improvement, with ten per cent. added for unforeseen contingencies; which tax is to be paid by the real property in the district, in the proportion to the amount of the assessment of benefits thereon, and which is to be paid in annual installments, payable not to exceed twenty-five per cent. for any one year, as provided in such order. The tax so levied shall be a lien upon all the real property in the district from the time that the same is levied by the county court, and shall be entitled to preference over all demands, executions, incumbrances or liens whatsoever created, and shall continue until such assessment, with any penalty and costs that may accrue thereon, shall have been paid. The remedy against such assessment of taxes shall be by appeal, and such appeal must be taken within twenty days from the time that said assessment has been made by the county court, and on such appeal the presumption shall be in favor of the legality of the tax. Any owner of real property

within the district may by mandamus compel compliance by the county court with the terms of this section."

It will be noted that § 3617 requires that the remedy against the assessment of taxes as provided in the section shall be by appeal, and that such appeal must be taken within twenty days from the time the assessment has been made by the county court

It is the contention of counsel for appellees that the appeal in the present case should be taken as provided in said section, and that, inasmuch as the appeal was not taken within twenty days as prescribed by the statute, the circuit court was right in dismissing the appeal from the judgment of the county court. We do not agree with counsel in this contention. Sec. 3617 provides that the county court shall make an order which shall have all the force of a judgment, providing that there shall be assessed upon the real property of the district a tax sufficient to pay the estimated cost of the improvement with 10 per cent. added for unforeseen contingencies. The section further provides that the tax is to be paid in annual installments not to exceed 25 per cent. for any one year as provided in the order. The words, "estimated cost of the improvement," mean the whole cost of constructing the drainage ditch including the overhead charges. When the plans of the commissioners for making the improvement are carried out, the preliminary expenses contemplated in § 3610 become a part of the cost of the improvement. They are then included in the words, "estimated cost of the improvement," in § 3617, and that section means that the county court should make but one order for the assessment of the real property of the district for the payment of the cost of improvement to be paid in annual installments not to exceed 25 per cent. for any one year as provided in such order.

It does not appear from the record in this case that the county court made an order under this section for the assessment of the real property of the district to pay the estimated cost of the improvement. Therefore, the

part of that section providing that the remedy against such assessment shall be by appeal to be taken within twenty days from the time the assessment was made by the county court has no application to the facts presented in the record.

It will be noted that § 3610 provides that, if for any cause the improvement shall not be made, its costs shall be charged on the real property in the district. This means that when the district is not established by the county court the preliminary expenses shall be charged on the real property in the district and shall be paid by assessment in the manner hereinafter prescribed. *Sain* v. *Bogle,* 122 Ark. 14.

Under the provisions of the act, if the improvement is constructed, the preliminary expenses become a part of the estimated cost of the improvement, and as such are embraced in the amount for which the county court makes an order for the assessment of the real property of the district under § 3617. When the district is not established by the county court, the preliminary expenses become a charge on the real property in the district under § 3610 and are to be collected by an assessment made by the county court in the same manner as when the improvement is constructed.

The amounts allowed in the present case are not perliminary expenses, as contemplated in § 3610, because the district was established by the county court, and the charges in question will become part of the estimated cost of the improvement to be collected as provided in § 3617, as interpreted in this opinion. That section contemplates one assessment for the whole estimated cost of the improvement, and does not contemplate that the county court should make an assessment at one time for part of the costs of the improvement and another assessment at a later date for the remaining costs of the improvement.

It follows that the commissioners had no right to present the claims to the county court and ask an assessment upon the real property in the district to pay

them in advance of an assessment for the payment of the whole cost of the improvement. It is no answer to say that the commissioners might refuse to go ahead with the district and thus indefinitely delay the claimants in the collection of their claims. There is no allegation or proof to that effect in the record, and that question will not be decided until presented by a record calling for its decision.

It is sufficient to say in the present case that the court had no authority to make the assessment under § 3617 for the reasons above stated, and that on this account the time for appeal given by that section has no application to the present case.

The taxpayers had a right to appeal under the general statute regulating appeals from the county court, which is six months. *Huddleston* v. *Coffman*, 90 Ark. 219.

It follows that the circuit court erred in dismissing the appeal of appellants from the judgment of the county court, and for that error the judgment will be reversed and the cause remanded with directions to the circuit court to overrule the motion of the commissioners to dismiss the appeal, and for further proceedings according to law.

BENSON v. FIREMEN'S INSURANCE COMPANY OF NEW JERSEY.

Opinion delivered November 21, 1921.

INSURANCE—LOSS OF PROPERTY BY RAINS AFTER FIRE.—Where a policy of fire insurance provided that the insurer should not be liable for loss caused, directly or indirectly, by neglect of the insurer to use all reasonable means to save and preserve the property during and after the fire, the insurer was not liable for damage by rains which occurred several days after the fire and which could have been avoided by the exercise of reasonable care by the insurer.

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

Coleman, Robinson & House, for appellants.

The policy insured against all loss or damage by fire, and all damages directly traceable to the fire. Compensation should therefore have been made for the damage caused by the rain. 178 Mass. 570; 30 L. R. A. 346; 111 N. W. 400; 100 Minn. 528; 10 L. R. A. (N. S.) 326.

It was not the duty of the insured to restore the property to its condition before the fire, but that of the insurer, and to relieve the company from liability the acts of the insured must be wilful, wanton or fraudulent. 32 N. Y. 405; 39 Kan. 449.

The defendant knew of the necessity of protecting the house from rain and had an equal opportunity with plaintiff to do so, and had the same interest in preventing further damage.

J. A. Watkins, for appellee.

The words of the policy "direct loss or damage by fire," mean loss or damage occurring directly from fire as the destroying agency, in contradistinction to the remoteness of such agency. 133 U. S. 415; Clement on Fire Insurance, p. 85; Kerr on Insurance, p. 358; 27 S. E. 172.

The policy required the insured to give notice of the fire and *to protect the property from further damage.* This duty rested upon the plaintiff alone, and by his failure to attend to it, he cannot augment his damages. 45 N. E. 806; Clement on Fire Insurance, p. 1.

SMITH, J. Appellee, an insurance company, hereinafter referred to as the company, issued its policy of insurance "against all direct loss or damage by fire," to the extent of $2,300, on a one-story, shingle roof, frame building, in the city of Little Rock, owned by the appellant Benson. The house was damaged by a fire, which occurred on Monday, September 29, 1919, at two o'clock in the afternoon. Benson notified the agent who had written the policy on the afternoon of the fire, and on the following morning he and the agent inspected the property, and the agent advised Benson to have some

contractor figure what it would cost to replace the house as it was. A contractor named Schay made an estimate of $1,280; but there is some controversy as to the items included in his estimate. This estimate was given to the company's agent, who told Benson that he would mail it to Smallwood, the company's inspector and adjuster. About the end of the week in which the fire occurred, it commenced raining and continued to rain every day for a period of three weeks, and it was about three weeks before Smallwood appeared at the scene of the fire to make an inspection and adjustment of the loss for the company. When he came, he made some objection to Schay's estimate, but finally said he would pay it. Benson declined to accept Schay's estimate in satisfaction of his claim and demanded $2,300, the face of the policy. At the trial the court excluded all testimony in regard to the damage done by the rain, and the instruction on the measure of damage expressly excluded this element of damage from the jury's consideration. There was a verdict in Benson's favor for $1,500, and both parties have appealed.

It is insisted on behalf of the company that the verdict should not have exceeded Schay's estimate. But the undisputed testimony does not show that the damage (exclusive of that caused by the subsequent rains) did not exceed that amount. On the contrary, there was testimony placing the damage as high as $1,650. The appeal of the company is, therefore, disposed of by saying that there is testimony legally sufficient to support the verdict.

Benson took the position, and still maintains it, that the company was liable for all damage which occurred after the fire and until the time of the inspection by Smallwood, and his insistence is that, if he had made sufficient repairs to have protected the house from further damage after the fire, it would merely have added to his troubles in adjusting his loss with

the company, and that he was under no duty to protect the property by repairing the roof; that this duty rested upon the company and not upon him.

We do not concur in this view. The policy sued on contained the stipulation that there could be no abandonment of the property to the company. The policy further provided "This company shall not be liable for loss caused, directly or indirectly, * * * by neglect of the insured to use all reasonable means to save and preserve the property at and after the fire. * * *"

Smallwood testified—and his statement was not denied—that by using a tarpaulin, or an army fly, or putting on the roof four or five squares of shingles, the rains which later came could have been kept out and no additional damage would have occurred on account of these rains.

We can easily imagine a case where the insurance company would be liable under such a policy as is here sued on for damage done by rain as a "direct loss or damage by fire." Such would be the case if the rain followed so closely after the fire that no reasonable opportunity was offered to protect the property from that damage, because the fire would continue to be the proximate cause. We need not stop here to decide what would be a reasonable time for such purpose, as the undisputed testimony shows that Benson had a reasonable time to protect his property, and did not do so. Several days elapsed between the date of the fire and the beginning of the rains, and it was not until about the middle of December that Benson commenced to rebuild his house. He testified, however, that as much damage was done by the first three days of rain as ever occurred.

In the case of *Beavers* v. *Security Mutual Insurance Co.*, 76 Ark. 595, the policy sued on contained the identical provision found in the policy here sued on, that the company should not be liable for loss caused "by neglect of the insured to use all reasonable means to save

and preserve the property at or after a fire. * * *" We there said: "This part of the contract only requires the insured to exercise care in saving and preserving the property at or after the fire, and prevents a recovery for loss of so much of the property as could have been saved by the insured with the exercise of due care and the use of reasonable means. *German-American Ins. Co.* v. *Brown,* 75 Ark. 251."

There was here a failure to exercise due care and use reasonable means to protect the property after the fire; and this failure broke the causal connection between the fire and the subsequent damage, so that it cannot be said that this subsequent damage was a "direct loss or damage by fire" against which the company had contracted to indemnify the insured.

Judgment affirmed.

TRIMBLE v. STATE.

Opinion delivered November 21, 1921.

1. CRIMINAL LAW—FORM OF OBJECTION TO INSTRUCTION.—Where a general objection was taken to an instruction, specific objections dictated subsequently to the court stenographer, not in the presence and hearing of the court, were without effect.
2. CRIMINAL LAW—ORAL INSTRUCTION.—It is not reversible error in a felony case to give an oral instruction, in the absence of a request that the instructions be reduced to writing.
3. CRIMINAL LAW—DEFENSE OF ALIBI—SUFFICIENCY OF EVIDENCE.—While the defense of an alibi is an affirmative one, yet, if the testimony tending to sustain this defense suffices to raise in the minds of the jury a reasonable doubt of the guilt of the accused, he would be entitled to an acquittal.
4. CRIMINAL LAW—OPINION OF NON-EXPERT.—A non-expert witness may testify his opinion that certain tracks were made by defendant, basing his opinion upon the peculiar shape of defendant's foot.

Appeal from Mississippi Circuit Court, Osceola District; *R. E. L. Johnson,* Judge; affirmed.

S. L. Gladish, for appellant.

Instruction No. 12 was erroneous in that it failed to tell the jury that if the evidence which appellant had offered in support of his defense (an alibi), taken in connection with all other evidence in the case, was sufficient to raise a reasonable doubt of his guilt, the jury should acquit him. 110 Ark. 15, citing 105 Mass. 456; 113 Ark. 112; 59 Ark. 379; 102 Ark. 627; 62 Ark. 478.

It was error to refuse to give instruction No. 1 requested by appellant, which in substance told the jury to acquit the defendant if they believed from the evidence that defendant was at the home of Ray Causey at the time Stokes was shot. 65 Ark. 475; 103 Ark. 70.

The court erred in permitting witness Bud Stokes, who was not called as an expert witness, to testify as to his opinion based on facts within his knowledge. 5 Enc. of Evi. p. 651; 52 Ark. 181.

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

Appellant did not object to the giving of instruction No. 12, and save his exceptions, and it is too late to raise the objection for the first time on appeal. 124 Ark. 599; 192 S. W. 174. Exceptions cannot be reserved by merely assigning them as grounds for a new trial. 135 Ark. 499.

Appellant's requested instruction No. 1 is merely a condensed statement of No. 12 given by the court, and, if No. 12 is wrong, so is his requested instruction No. 1.

It was not error to admit the testimony of Bud Stokes, as same was only a conclusion of fact drawn from appearances, in reference to an ordinary transaction, which any man of common understanding was capable on comprehending, but which could not be reproduced or described to the jury precisely as it appeared to the witness. 52 Ark. 180.

S. L. Gladish, on question of correcting record.

The court gave, as one reason why the motion to correct the record should not be granted, his belief that the record could not be amended by *nunc pro tunc* order

after the appeal had been lodged in Supreme Court. The following cases hold to the contrary: 53 Ark. 250; 21 Ark. 212; 17 Ark. 154.

The evidence introduced by appellant was sufficient to establish the fact that he did specifically object to instruction No. 12, and the record should have been amended to so show.

SMITH, J. Appellant was convicted for assault to kill, and has appealed. His defense is reflected in the only instruction which he asked, which was numbered 1 and reads as follows: "If you believe from the evidence that the defendant was at the home of Ray Causey at the time Charley Stokes was shot, the defendant can not be guilty of the crime as charged in the indictment, and you will acquit him." This instruction was refused, and an exception saved to that action, whereupon the court gave the following instruction numbered 12:

"The defendant pleads an alibi in this case, which means that he was not present at the time and place where and when the assault was committed as charged in the indictment. Therefore, if you should find from a preponderance of the evidence in the case that the defendant, Earl Trimble, was not present at the time and place where and when the assault was committed, if you find beyond a reasonable doubt that the assault was committed, if you find beyond a reasonable doubt that the same was committed from the facts and circumstances in proof, then such an alibi as set up and claimed by the defendant would be established, and it would be your duty to acquit him."

The original bill of exceptions does not show that an objection was made to this instruction, and we have before us now a bill of exceptions made on the hearing in the court below of a motion to amend the original bill of exceptions to show that an objection was in fact made to the instruction at the time it was given. According to the insistence of appellant, the instruction was given orally, and a general objection was made at the time, and later specific objections to the instruction were dictated

to the court stenographer, but this occurred out of the presence and hearing of the court. Under the view most favorable to appellant, we have concluded that only a general objection was made to the instruction, if an objection was in fact made at all.

It is further insisted that error was committed in admitting testimony in regard to appellant's tracks.

We perceive no reason why the court should have refused appellant's instruction set out above. It presented concretely and correctly the law applicable to his defense, and was not more favorable to him than he was entitled to have the law declared. It stands as an undisputed fact in the case that if appellant was at the home of Ray Causey at the time the shots were fired, he could not be guilty of the crime charged, and the testimony in his behalf, if believed, established the fact that he was at Causey's home at the time the shooting was shown to have occurred.

Notwithstanding what we have just said, we have concluded that the refusal to give instruction numbered 1 and the giving of instruction No. 12, is not error calling for the reversal of the judgment, even though a general objection may have been made to instruction No. 12. The instruction No. 12 told the jury that, if they should find, from a preponderance of the evidence, that appellant was not present at the time and place when and where the assault was committed, the alibi set up and claimed by him was established, and that it would be their duty to acquit him. It is true there appears in the instruction an unnecessary repetition; but this repetition resulted no doubt from the fact that the instruction was given orally. The better practice, of course, is to reduce the instructions to writing before giving them; but we have held that it is not reversible error to give an oral instruction, in the absence of a request that the instructions be reduced to writing. *Mazzia* v. *State,* 51 Ark. 177; *National Lbr. Co.* v. *Snell,* 47 Ark. 407; *Anderson* v. *State,* 34 Ark. 257; *Merrill* v. *City of Van Buren,* 125 Ark. 248; *Reed* v. *Rogers,* 134 Ark. 528.

This repetition emphasizes the thought that the finding must be made beyond a reasonable doubt that an assault was committed, but it told the jury to acquit the defendant if his alibi was established, and it told the jury that the alibi was established if they found from a preponderance of the evidence that appellant was not present at the time and place when and where the assault was committed.

It is insisted that the instruction is bad under the decision in the case of *Wells* v. *State,* 102 Ark. 627. But we do not concur in this view. The instruction on the defense of alibi in that case told the jury to find the defendant guilty if the evidence failed to establish the defense of alibi. The instruction under review does not contain that error. Neither does the instruction fall within the condemnation of the instruction given in the case of *Haskins* v. *State,* 148 Ark. 351. There the instruction told the jury that, if the evidence of an alibi did not cover the whole period of time during which the crime was committed, the jury should not consider any of it. In condemning that instruction, we there said it was the duty of the jury to acquit if the evidence upon the subject of an alibi, in connection with the other evidence in the case, raised a doubt as to the guilt of the accused. The defense of an alibi is an affirmative defense, yet if the testimony tending to sustain this defense suffices to raise in the minds of the jury a reasonable doubt of the guilt of the accused, he would be entitled to an acquittal. This is pointed out, and we think made clear, in the recent case of *Woodall* v. *State, ante* p. 394.

We think the instruction now under review, when fairly interpreted, means that, if the appellant had established, by a preponderance of the evidence, that he was not present at the time and place when and where the assault was committed, his defense was established, and it would be the jury's duty to acquit, and such was the effect of the instruction numbered 1 which he asked himself. In other words, the instruction given was as favorable as the one asked which was refused.

His own instruction did not tell the jury to acquit if the evidence in support of an alibi raised a reasonable doubt about his guilt; and he made no objection that the instruction given was open to the same objection as was his own instruction; and we must therefore hold that the defect in the instruction given should have been called specifically to the attention of the court. As this was not done, no prejudicial error, of which appellant can now complain, was committed.

Stokes, the person assaulted, was permitted to testify, over appellant's objection, that certain tracks which he found in his yard the next day after the shooting were the same tracks which he had followed around his field —these last being tracks admittedly made by appellant. The objection to the question is that it called for the opinion of the witness upon a subject upon which he had not shown himself qualified to testify as an expert.

We do not think the objection well taken. Stokes had known appellant for ten years, and for the two years preceding the shooting they had lived on the same farm. He had frequently observed appellant's tracks in the field and had noticed how he walked. He testified that appellant had a funny shaped foot, and he had frequently laughed about it, that his foot turned in and sets a little heavy on the inside. This was not a matter upon which only an expert could properly be allowed to testify. Upon the contrary, it is a matter about which a close observer could form an opinion without qualifying as an expert, and one of those things which could not be better reproduced or described than by comparing the track in question with the known tracks of appellant. *Fort* v. *State,* 52 Ark. 180; *Brown* v. *State,* 55 Ark. 593-599; *Railway Co.* v. *Yarbrough,* 56 Ark. 581; *Miller* v. *State,* 94 Ark. 538.

No error appearing, judgment is affirmed.

J. R. WATKINS MEDICAL COMPANY v. WARREN.

Opinion delivered November 21, 1921.

1. TRIAL—DIRECTION OF VERDICT.—Where a defendant surety by affidavit denied execution of the instrument sued on, as provided by Crawford & Moses' Dig., § 4114, and plaintiff offered no evidence on the issues so raised, it was proper to direct a verdict for defendant.
2. BILLS—NOTES—LIABILITY OF INDORSERS.—Where one's indorsement of a note expressly describes him as a surety, his liability is that of a surety, and not that of a guarantor.
3. BILLS AND NOTES—LIABILITY OF INDORSERS.—Where appellant, as "first surety", signed a note containing blank space for the signature of a "second surety," but there was no showing that appellant knew who would be the additional surety, or whether any other person would sign as surety, nor any showing that his signature was conditional, or, if so, that the condition was known to the obligee, the appellant was liable, though the signature of the "second surety" was forged.

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

Strait & Strait, for appellant.

The court erred in taking from the consideration of the jury the question of the liability of Hall on the bond. He was notified by letter of the fact that he was named as surety on the bond of Montgomery, and he took no steps to advise appellant of the forgery, and by his conduct which amounted to acquiescence, has rendered himself liable. 50 Ark. 458; 85 Ark. 156; 83 Ark. 444; 101 Ark. 145.

Regardless of the liability of Hall, Warren is liable on his signature (140 Ark. 491) unless he signed conditioned that certain persons would be procured as sureties, and that this fact was known to the payee at the time he accepted the contract. *Wheeler* v. *Traders' Deposit Bank,* 49 L. R. A. 315; 3 Ohio St. 302; 113 Ind. 365; 71 Iowa 675; 73 Ind. 325; 85 Ill. 218; 7 Ind. App. 381, and other cases cited in note to case of *Wheeler* v. *Traders' Bank.*

J. Allen Eades, for appellee Hall.

The contention made by appellant as to the liability of Hall, arising from the fact that he was notified by the company of his being a surety on the bond, is raised in this court for the first time.

Hall denied the genuineness of the instrument by proper affidavit before the trial was begun (C. & M. Dig. § 4114) and appellant had no right to introduce it until its genuineness was proved. 82 Ark. 110; 35 Ark. 204; 38 Ark. 278; 49 Ark. 19. He who relies on a writing has the burden of proof as to its genuineness. 88 N. E. 178; 30 Neb. 104. This appellant failed to do.

Edward Gordon, for appellee Warren.

The contract in this case is one of guaranty and not suretyship. For the distinction between the two see Brandt on Suretyship & Guaranty, Sec. 1; 34 Fed. 104. 4 W. Va. 29; 7 Metc. 518. Montgomery, not being a party to the contract of guaranty, was the agent of appellant in procuring the signature of Warren (111 Ark. 436; 142 Ark. 132), and being their agent the company is bound by his misrepresentations.

The forgery of the name of Hall materially alters the contract and renders same void. 49 Ark. 48. In the absence of evidence to the contrary, the legal presumption is that the alteration was made by the party having the custody of the contract. 5 Ark. 380. Alterations by strangers also render the contract void, when made without the consent of the party whose rights are affected. 48 Am. Dec. 412; 70 Miss. 157; 31 N. J. L. 127; 47 Am. Dec. 299; 86 A. S. R. 82; 24 L. R. A. (N. S.) 1155.

The party producing a writing as genuine, which has been altered after its execution, shall account for the alteration, otherwise it cannot be introduced in evidence. 34 Fed. 109. The court correctly found for Warren. Alteration by one co-mortgagor after others have signed renders same void as to those who have signed. 79 Am. Dec. 506. The forging of Hall's name to the contract relieved Warren of liability.

SMITH, J. This is the second appeal in this case. The opinion on the former appeal is found in 140 Arkansas at page 487. As a result of that opinion, certain issues have passed out of the case.

Appellant instituted the action to recover the sum due on a contract for the purchase price of certain articles sold and delivered to N. E. Montgomery, and against appellees, W. L. Warren and J. J. Hall, as sureties on the contract of Montgomery with appellant.

At the trial from which the first appeal was prosecuted, the court took the case from the jury as to the liability of Hall, upon the ground that he had filed an affidavit denying the execution of the instrument sued on, and no testimony was offered that he had in fact signed the obligation. We reversed that judgment because the affidavit denying the execution of the obligation was not an unqualified denial as required by the statute, but was made merely on belief. Sec. 4114, C. & M. Digest.

Upon the remand of the cause, such an affidavit as the statute required was filed, and as no evidence was offered contradicting the recitals of the affidavit denying the execution of the obligation, the court properly directed a verdict in Hall's favor. Thereupon Warren the other surety, asked that a verdict be also directed in his favor, upon the ground that the discharge of Hall operated to materially alter the obligation and to discharge him also.

This prayer was granted, and a verdict in Warren's favor was also directed, and the appellant seeks by this appeal to reverse the judgment of the court below as to both parties.

We have just said that a verdict was properly directed in Hall's favor. Must Warren be discharged from his liability on that account?

There is an interesting discussion in the brief of appellee Warren of the difference in the obligations of sureties and guarantors, and it is earnestly insisted that Warren is a guarantor, and not a surety. We dispose

of this contention by saying that the obligation signed by Warren designates him as a surety, and makes him such, and required him to sign expressly as a surety.

Places were provided for the signatures and for the attestation of the signatures of the sureties. These sureties were designated first surety and second surety. Warren signed as first surety. There is no showing that he knew anything about who would be the additional surety, or whether any other person would sign as surety, except that there was a blank space for that purpose; nor was there any showing that his signature was conditional or, if so, that the condition was known to the obligee, the appellant medicine company; and so far as appellee Warren was concerned the obligation would have become a completed contract upon its delivery to, and acceptance by, the appellant, although no other person had signed as surety.

Warren is liable, although the subsequent signature of Hall was a forgery, for appellant did not know that such was the case. It received its first intimation that the signature of Hall was a forgery after it brought this suit to enforce the obligation; and, this being true, the rule would be the same, even though Hall had signed before Warren did.

In the case of *Wheeler* v. *Traders' Deposit Bank,* 55 S. W. 552, it was decided by the Court of Appeals of Kentucky (to quote the syllabus as it appears in the Southwestern Reporter) that "A surety in a note cannot escape liability on the ground that a signature which appeared to the note when he signed, and which he supposed to be genuine, has turned out to be a forgery, as the fraud was practiced upon him by the principal, and not by the payee, who accepted the note supposing all the signatures to be genuine." This case is extensively annotated in 49 L. R. A. 315, and the editor's note thereto is as follows: "The main case, to the effect that one signing an obligation as surety guarantees the genuineness of preceding signatures, is supported by nearly

all of the cases. Those holding the contrary have either been repudiated in the States in which they were rendered, or were decided on the ground that the agent of obligee procured the signatures." The cases cited in the notes to this annotated case are to the effect that one signing a contract as surety, so far as his own liability thereon is concerned, guarantees the genuineness of the signatures of all sureties whose names precede his own, and that regardless of the validity of the names following his own, unless his own signature was obtained upon a condition not complied with known to the obligee at the time he accepted the contract.

Our cases of *Stiewel* v. *American Surety Co.,* 70 Ark. 512, and *Williams* v. *Morris,* 99 Ark. 319, do not decide this express point, but the reasoning of those cases is applicable here. In the first of these cases, this court held that misrepresentation made to induce a surety to sign a bond, if unknown to the obligee, would not defeat the right to recover against the surety. In the second case the court held that, where a surety signed a note as joint maker, and left it in the hands of his principal, who procured it upon condition that it be first signed by a co-surety, but delivered it to the payee, who took it in good faith without notice of such agreement, the surety was bound for its payment.

The insistence is renewed that Montgomery was the agent of appellant in the procurement of the signatures of Hall and Warren; but the opinion on the former appeal is against appellee in this contention.

The judgment in favor of Hall will be affirmed; that in favor of Warren will be reversed, and the cause, as to him, remanded for a new trial.

MASON v. STATE.

Opinion delivered November 21, 1921.

INJUNCTION—NOTICE OF DECREE.—Where the record shows that on the 10th day of December, 1915, a temporary injunction was issued against appellant prohibiting him from selling intoxicat-

ing liquors in a certain building, and that on the —— day of December, 1915, the temporary injunction was, by consent of appellant's counsel, made permanent, it sufficiently appears that the permanent injunction was made by consent after the temporary injunction was granted, and appellant will not be heard to say that he had no notice of the entry of the decree of injuction.

Certiorari to Jefferson Chancery Court; *John M. Elliott,* Chancellor; affirmed.

H. K. Toney and *Caldwell, Triplett & Ross,* for appellant.

The order of December 10, 1915, was temporary only. § 6199, C. & M. Digest. To make the order permanent appellant should have had five days notice previous to the hearing. *Id.*

The record shows that he had no such notice.

Appellant should not have been punished for contempt. §§ 5817, 5818, C. & M. Digest; 22 Cyc. 1013.

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

The amended record will reflect that appellant had legal notice of the decree entered on Dec. 10, 1915. Whether he had such notice or not, the judgment in the contempt proceeding ought not to be quashed, because, under the statute, § 6202, C. & M. Digest, appellant could be punished for violating either a temporary or permanent injunction.

There is no bill of exceptions showing the testimony heard in the contempt proceeding. The testimony not being shown, this court will presume that the lower court's judgment was correct. 109 Ark. 543; 139 Ark. 415.

HUMPHREYS, J. This is an appeal from a decree of the Jefferson Chancery Court rendered on the 27th day of June, 1921, imposing a fine of $50 and a jail sentence of six months upon appellant for an alleged violation of an order entered in said court on the 10th day of December, 1915, under the provisions of section 6196 of Crawford & Moses' Digest, prohibiting ap-

pellant from selling intoxicating liquors in a building located at No. 225 State street, Pine Bluff, Arkansas. A reversal is sought upon the ground that the record does not reflect that appellant had notice of the application for the order or the making thereof, or that a copy of the order was served upon him. At the time appellant filed his brief, the record reflected that a temporary injunction had been issued against him on the 10th day of December, 1915, ordering the building closed at No. 225 State Street, and prohibiting him from selling intoxicating liquors therein. But since that time the record has been perfected by certiorari so as to show that on the —— day of December, 1915, the temporary injunction was modified by the consent of appellant's counsel in open court so as to restore the building to appellant, but making permanent that part of the temporary decree prohibiting him from selling intoxicating liquors therein. This correction in the record eliminates the contention of appellant that he had no notice of the entry of the decree of injunction, for the violation of which he was fined and sentenced to serve a term in the jail of Jefferson County.

While the record, as it stands, does not show the date in December, 1915, when the temporary injunction was made permanent, it does show that it was made permanent after the temporary decree was made. So, under the rule that every presumption will be indulged in favor of the validity of a decree, this court must indulge the presumption that on the same day, to-wit, on the 10th day of December, 1915, after temporary order had been entered, the parties appeared and had it modified by consent so as to restore the building to appellant, and to enjoin him from selling intoxicating liquors therein.

No error appearing, the decree appealed from imposing a fine and jail sentence upon appellant for violating the order of injunction of date December 10, 1915, is affirmed.

OLIVER CONSTRUCTION COMPANY *v.* ERBACHER.

Opinion delivered November 21, 1921.

1. CONTRACTS—CONSTRUCTION.—Where a contractor agreed to become liable for all outstanding bills against a subcontractor "for work and labor and material, services done for and furnished to" the subcontractor, this did not bind the contractor to pay the meat bill of the subcontractor incurred in boarding employees.
2. CONTRACTS—CONSTRUCTION.—A stipulation in the contract between a road contractor and the road district that the contractor should pay "for work and labor done, material, machinery, appliances and supplies of every kind and nature furnished and used in and about the work contemplated in the contract" did not bind the contractor to pay the meat bill of a subcontractor incurred in boarding employees.
3. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—An agency cannot be presumed, but must be established by proof, and one dealing with an agent is bound to ascertain the extent of his authority.
4. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—An agent of a contractor, authorized to pay bills for labor and materials entering into construction of a road, was not authorized to bind the contractor to pay for meat furnished to a subcontractor, which was used in feeding employees.

Appeal from Faulkner Circuit Court; *George W. Clark,* Judge; reversed.

Coleman, Robinson & House, for appellant.

1. In the contract between the appellant and Rich, the former agreed to assume the payment of bills owed by the latter for work, labor and material. It did not obligate appellant to pay debts of a different nature.

Before appellees could recover under this contract, they must show by the contract itself that the parties at the time of its execution had appellees in contemplation, and intended a direct benefit to appellees by virtue of the agreement. 121 Ark. 414; 128 *Id.* 149; 101 *Id.* 223.

2. Appellees failed to establish a valid oral agreement between appellant and themselves because, 1st, there was no consideration for Smith's alleged promise; 2nd, the alleged promise not being in writing, falls within the statute of frauds, and 3rd, the uncontradicted evi-

dence shows that he had no authority to make such agreement binding upon appellant. C. & M. Digest, § 4862; 3 Cook on Corporations, 7th Ed., § 720 and cases cited. The burden of proving Smith's authority was on appellee. 21 R. C. L. par. 36. One who deals with an agent is bound to ascertain the nature and extent of his authority. 55 Ark. 627; 92 *Id.* 315; 94 *Id.* 301. The authority of an agent to bind his principal will not be presumed, neither is it proved by his own acts and declarations. 132 Ark. 155; 140 *Id.* 306.

3. Appellee was not a party to the contract between appellant and the road improvement district, neither was the subcontractor who incurred the debt to appellee a party to that contract. There can be no liability on the part of appellant to appellee for the subcontractor's debt, growing out of the original contract. 121 Ark. 414; 128 *Id.* 149; 101 *Id.* 223.

Moreover, it was too late to plead liability under the original contract, at the time the amendment was offered. The court erred in reopening the case. C. & M. Digest, § 6529; 129 Ark. 253; 138 *Id.* 606; 75 *Id.* 465.

J. H. Dunn, for appellees.

1. As to the oral agreement, it is well settled that a promise to one party to pay a third party, upon sufficient consideration, is an original undertaking, and not within the statute of frauds. 103 Ark. 407; 31 *Id.* 411.

2. Appellees are beneficiaries under the memorandum agreement between appellant and Rich, and also under the contract between the appellant and the road improvement district, and as such they had the right to sue. 31 Ark. 411; *Id.* 155; 46 *Id.* 132; 93 *Id.* 346.

3. It was within the discretion of the court to permit the amendment of the complaint. 1 Standard, Enc. of Proc. 874-876.

HUMPHREYS, J. This suit was commenced by appellees against appellant in a magistrate's court in Cadron Township, Faulkner County, Arkansas, to recover the sum of $181 for meat furnished by appellees to J. F. Rich, a subcontractor under appellant, which had a con-

tract with the Conway-Damascus Road Improvement District to construct a road from Conway to Damascus and had given a bond under the provisions of Act No. 466 of the General Assembly of the State of Arkansas approved June 2, 1911. (Gen. Acts 1911, p. 462).

Under the allegations of the complaint filed before the justice of the peace it was sought to charge appellant with the debt upon two grounds: *first,* that appellant had bound itself by written contract with J. F. Rich, its subcontractor, to pay said indebtedness as a part of the consideration for surrendering his contract for grading the road back to appellant; and, *second,* that appellant bound itself by oral agreement with appellees to pay said indebtedness upon appellees' release of the obligation against J. F. Rich, its subcontractor.

A default judgment was rendered in the magistrate's court for said sum against appellant, from which an appeal was duly prosecuted to the circuit court, where the cause was tried *de novo* by the circuit court sitting as a jury by the consent of the parties. At the conclusion of the testimony the court took the case under advisement until a later date in the term, at which time, over objection and exception of appellant, the case was re-opened, the complaint amended to also charge liability against appellant for the indebtedness under the provisions of the original contract entered into between appellant and the Conway-Damascus Road Improvement District for the construction of the road, and additional evidence introduced in support of the amendment. Thereafter the court rendered a judgment in favor of appellees for the sum of $181 with six per cent. interest thereon from December 20, 1920, from which an appeal was duly prosecuted to this court.

The written memorandum of agreement between appellant and its subcontractor, J. F. Rich, upon which appellees rely as fixing liability for the account upon appellant, is as follows: "Whereas, on August 3, 1920, the Oliver Construction Company and J. F. Rich did en-

ter into a contract whereby the said J. F. Rich did agree to do certain work in the construction of the road being constructed by the Conway and Damascus Road District of Faulkner County, Arkansas, for the consideration set forth in said contract; and whereas, the said J. F. Rich now finds himself unable to proceed with said contract and desires to release therefrom; and whereas, certain sums are due to said J. F. Rich for said work, and said J. F. Rich is indebted to various parties for work and labor and material, services done for and furnished to J. F. Rich in and about the prosecution of said work; now in consideration of the premises the said J. F. Rich does hereby release and surrender to the Oliver Construction Company said contract and all rights thereunder, and does acknowledge full payment and settlement of all amounts due and owing to him from the Oliver Construction Company thereunder; and the Oliver Construction Company does hereby agree that it will assume and pay off all valid claims against the said J. F. Rich for work and labor and material, services and done for and furnished to said J. F. Rich in and about the prosecution of said work. This..... day of November, 1920." Signed by Oliver Construction Company and J. F. Rich.

The clause in the original contract between appellant and the Conway-Damascus Road Improvement District under which the appellees seek to charge appellant for the meat bill is as follows: "The contractor shall pay promptly when due for work and labor done, material, machinery, appliances and supplies of every kind and nature furnished and used in and about the work contemplated in the contract; and the contractor shall file, within ten days after receiving the notice provided for in paragraph 10 of this contract, a bond as provided by section 2 of act No. 446 of the General Assembly, approved June 2, 1911. Should the contractor fail to file said bond, the board may, at its option, require the contractor to file at such time as it may direct, with it, written receipts and releases from all persons and cor-

porations furnishing any material, labor, machinery, or appliances in said work or any part thereof."

The evidence responsive to the issue of whether appellant became responsible for the indebtedness under an oral contract assuming it, is in substance, as follows:

Appellant entered into a contract with the Conway-Damascus Road Improvement District to build a road from Conway to Damascus in Faulkner County. J. F. Rich procured a contract from appellant to grade the road. During the time he was grading the road he maintained boarding camps for his laborers, and in settling with the laborers at stated intervals deducted their board bills from their wages. The account sued upon was a balance due appellees for meat furnished by them for consumption in the boarding camps. J. F. Rich issued a check on the Conway Bank to appellees to cover the account. Before cashing same, it developed that Rich was unable to complete his contract, and he was released therefrom by appellant.

J. E. Erbacher, one of the appellees, testified that Rich requested the return of the check, stating that appellant would pay the amount; that he interviewed R. S. Smith, a representative of appellant, who agreed to pay the account, and requested an itemized statement thereof; that he returned the check, and therefore looked to appellant for the debt; that he itemized the account as per request and gave it to Smith, who agreed to take it up; that he called on Smith a week later, who then said, if anything was due J. F. Rich under the contract after paying the labor, he would apply it on the debt.

Charley Jones testified, over the objection and exception of appellant, that during the time J. F. Rich was grading the road the Jones Milling Company furnished him feed and flour to the amount of $597.05 for which the Oliver Construction Company, by its president, R. B. Oliver, later executed its note payable in sixty days after date.

R. S. Smith testified that he was an agent of appellant, and as such had charge of the books and payrolls

for it in connection with the construction of the road; that he deducted the board bills from the wages of the laborers on the payrolls turned over to him by J. F. Rich before paying them; that he told appellees if any money was left after paying the labor which belonged to J. F. Rich he would pay it on the meat bill; that he had that authority; that he did not agree to pay the bill, as he had no authority to do so.

W. R. Emmit, vice-president and secretary of appellant, testified that he did not agree to pay the account, and that R. S. Smith had no authority beyond paying labor and material with money furnished him for that purpose; that Smith had no authority to promise to pay other accounts.

Appellant insists that appellees' claim is not within and protected by its written contract with J. F. Rich, assuming certain of his indebtedness, nor the original contract between it and the road district. We think the contention is correct. The contract between appellant and Rich, in specific terms, covered bills for work, labor and material only; and while the language in the original contract between appellant and the road district is extended to include supplies, the context clearly indicates that it relates to supplies which should enter into the construction of the road. We find nothing in the language or context, when given a natural construction, which would include meat furnished to a sub-contractor. Thus interpreting the meaning of the contract, it becomes unnecessary to determine whether any privity existed between the promises in the contract and appellees.

Appellant also insists that it is not liable under oral contract to pay the account. The contention is that R. S. Smith was without authority to make the alleged oral agreement assuming the payment of the debt; that, if made, it was without consideration, and also within the statute of frauds. It is true that J. E. Erbacher testified that R. S. Smith was the representative of appellant, but that he did not pretend to testify as to the extent of

his authority. The rule is well established that an agency cannot be presumed, but must be established by proof, and that one dealing with an agent is bound to ascertain the extent of his authority. *Liddell* v. *Sahline,* 55 Ark. 627; *Latham* v. *First National Bank,* 92 Ark. 315; *Wilson* v. *Shocklee,* 94 Ark. 301; *Wales-Riggs Plantation* v. *Grooms,* 132 Ark. 155; *Pierce* v. *Fioretti,* 140 Ark. 306.

R. S. Smith, the book-keeper, and W. R. Emmit, vice-president and secretary of appellant, testified that the authority conferred upon Smith was limited to the payment of accounts for labor and material entering into the construction of the road with money furnished him for that purpose. According to the undisputed evidence therefore, the alleged oral contract of Smith, assuming to pay the meat bill, was made without authority, if made at all. In this view, it is unnecessary to determine whether there was a consideration for the alleged promise, or, if made, whether within the statute of frauds.

The case appears to have been fully developed, and no liability being established against appellant under the evidence, the judgment is reversed, and the cause dismissed.

WEST v. STATE.

Opinion delivered November 28, 1921.

1. JURY—COMPETENCY—OPINION ALREADY FORMED.—In a criminal case one juror testified that he had formed an opinion as to accused's guilt from reading newspapers and from a discussion between two of the jurors in a former trial. Another juror testified that he had heard a part of the argument on a former trial and had formed an opinion as to accused's guilt. Both jurors testified that they could lay aside their opinions and be controlled by the testimony. Neither of them stated that he had heard a narrative of the facts in the case nor what purported to be the testimony of the witnesses. *Held* that a finding of the trial judge that they were not disqualified will be sustained.

2. JURORS—COMPETENCY—OPINION ALREADY FORMED.—The entertainment of a preconceived opinion about the merits of a criminal case renders a juror *prima facie* incompetent, and to render him competent it must be shown that such opinion is based on the rumor, or is not of a nature calculated to influence an intelligent and fair-minded man, even though he states that he can lay aside the opinion and try the case upon the evidence adduced at the trial.

3. CRIMINAL LAW—EVIDENCE—CONDUCT OF BLOODHOUNDS.—Upon proof that a bloodhound has been trained to follow the trail of human beings, it was competent to prove that the hound was taken to the place of an alleged rape, shortly after the crime was committed, that the dog picked up the trail and followed it several blocks to the car line, where defendant was shown to have boarded the street car.

Appeal from Pulaski Circuit Court, First Division; *J. W. Wade,* Judge; affirmed.

Mehaffy, Donham & Mehaffy, for appellant.

Four of the jurors who, on their examination, said they had formed or expressed an opinion as to the guilt or innocence of the defendant, were not competent to serve. 13 Ark. 741; 19 Ark. 159; 45 Ark. 170; 47 Ark. 185; 56 Ark. 583; 69 Ark. 322; 79 Ark. 132; 85 Ark. 68; 91 Ark. 579; 102 Ark. 183; 113 Ark. 304; 135 Ark. 524; 142 Ark. 479; 146 Ark. 582.

The evidence was not sufficient to show that the dogs were properly trained nor were they properly handled. 46 Sou. 166; 16 L. R. A. (N. S.) 285; 116 S. W. 344.

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

Opinions formed on hearsay, rumor and from reading newspapers, are not sufficient to disqualify a juror. 72 Ark. 613; 79 Ark. 127; 80 Ark. 13; 85 Ark. 64; 101 Ark. 443; 103 Ark. 21; 104 Ark. 616; 109 Ark. 450; 113 Ark. 301; 114 Ark. 472; 141 Ark. 496.

The testimony as to the bloodhounds being *experts* in their line was admissible, the proper foundation having been laid. 116 Ark. 227; 125 Ark. 471.

McCULLOCH, C. J. This appeal is from a judgment of conviction under an indictment charging appellant with the crime of rape. The charge is that appellant as-

saulted and raped a certain young woman on the night of March 19, 1921, in the city of Little Rock.

The assaulted female testified that on the night mentioned she rode home on a street car from her place of work, and walking a short distance after she debarked from the car she was met and assaulted by a negro man, whom she identified as appellant, and another negro, about whose identity she was uncertain.

It appears from the record that there was a former mistrial of the case before a jury which was discharged.

The first assignment of error relates to qualifications of several talesmen, each of whom appellant challenged peremptorily after the court had refused to sustain challenges for alleged cause, and later appellant exhausted all of his challenges. One of them testified that he had formed an opinion in regard to the guilt or innocence of the accused, and that the opinion was formed from reading newspaper accounts of the crime and from hearing a discussion of the case between two of the jurors at the former trial. He testified that he had heard two of the jurors discuss the merits of the case and had read the accounts in the newspapers and formed an opinion, but that he could not state that the opinion was formed exclusively from either of the sources mentioned, and further stated that he could lay aside that opinion and be controlled, in arriving at a verdict, by the testimony adduced at the trial. Another one of them testified that he had heard the case discussed, that he heard a part of the argument in the former trial of the case and formed an opinion, but that it was not a fixed or definite opinion, and that he could lay it aside and be controlled by the evidence adduced at the trial. Another one testified that he had formed an impression from what some one had told him what a juror in the former trial had said about the case, but that he had no fixed opinion, and could lay aside the impression thus obtained and try the case according to the law and the evidence adduced.

The law with reference to the qualifications of jurors has been often discussed in the decisions of this court, and it is scarcely necessary to reiterate what has already been said. The oft-repeated rule announced is that the entertainment of a preconceived opinion about the merits of a criminal case renders a juror *prima facie* incompetent; and unless it is shown that such opinion is based on rumor or is not of a nature calculated to influence an intelligent and fair-minded man, the disqualification is established, notwithstanding he states that he can lay aside the opinion and try the case upon the evidence adduced at the trial. *Polk* v. *State,* 45 Ark. 170; *Hardin* v. *State,* 66 Ark. 53; *McGough* v. *State,* 113 Ark. 304. In the present instance it fairly appears that the opinions of these talesmen were founded, not on narratives of what purported to be the facts in the case, but upon newspaper accounts and other discussions. It is true that one of them said that he heard a discussion between two jurors which influenced him in arriving at an opinion, and another stated that he had heard a portion of the argument at the former trial, but neither of them stated that he heard a narrative of the facts in the case nor what purported to be the testimony of the witnesses. An opinion thus founded is not one calculated to influence an intelligent juror when he declares himself to be able and willing to discard such opinion and try the case upon the testimony adduced at the trial. In other words, it is such an opinion that can be discarded by an intelligent and fair-minded person without having testimony to remove it. Neither of the talesmen said that the opinion entertained was based on a statement by the jurors in the former trial of the facts or what purported to be the facts. The examination was had by the trial judge, and he was in situation to correctly determine whether or not the jurors entertained settled or fixed opinions which would likely influence them in the trial of the case. A due amount of deference ought, under the circumstances, to be given the finding of the

trial judge on that issue, and his conclusions should not be discarded unless it appears that he erroneously accepted a juror who had a fixed opinion on the merits of the case, based on a narrative of facts traceable to a definite source and not based merely on rumor. *Hardin* v. *State, supra; Reynolds* v. *United States,* 98 U. S. 145.

Our conclusion is, therefore, that this case falls within the rule announced in many of our decisions where such opinions have been held not to disqualify if the juror declares himself able and willing to lay aside the opinion thus formed.

In the progress of the trial the State introduced a witness who testified that he owned a dog trained to following the trail of human beings, and that on the night the offense was committed he took the dog to the scene of the crime, and he undertook to relate the action of the dog on that occasion. He testified, in substance, that when the place of the alleged assault was pointed out to him he took the dog there, that the dog picked up the trail and followed it several blocks to the car line. There was testimony tending to show that appellant, shortly after the crime was committed, boarded a car at the place where the trail followed by the dog ended. The witness testified that he had trained the dog to follow human trail; that he and his brother had trained the dog, and that it had on other occasions followed human track. We have held in a number of cases that such testimony is competent, but in each case it was stated that there must be preliminary proof that the dog had been trained for this purpose or that the dog possessed the capacity of following the human trail. *Holub* v. *State,* 116 Ark. 227; *Padgett* v. *State,* 125 Ark. 471; *Cranford* v. *State,* 130 Ark. 101. It is contended in the present instance that there was not sufficient proof of the training or capacity of the dog, but we think that the proof was sufficient to justify the submission of this issue to the jury. The question of the weight of the testimony was one for the jury.

Finally, it is contended that the evidence is not sufficient to sustain the verdict, but it is clear from a perusal of the testimony that it is legally sufficient. The young woman alleged to have been assaulted testified concerning the assault and definitely identified appellant as the man who had committed the assault. Her testimony was sufficient to establish all of the elements of the crime of rape, and that appellant was the man who committed the crime. Appellant attempted to establish an alibi and to show that the young woman was mistaken in her identification of appellant as the criminal, but the weight of all this testimony was a question for the jury, and we find that there was sufficient testimony to sustain the verdict.

Affirmed.

VAN TROOP v. DEW.

Opinion delivered November 28, 1921.

1. ACTION—MISJOINDER—PREJUDICE.—It was not prejudicial error to join several causes of action having sufficient identity to justify consolidation under Crawford & Moses' Digest, § 1081.
2. TORTS—JOINT AND SEVERAL LIABILITY.—Separate and distinct tortious acts resulting in separate and distinct injuries, even to the same subject-matter, do not create joint liability on the part of the tort-feasors.
3. TORTS—JOINT AND SEVERAL LIABILITY.—Joint liability for separate acts of negligence exists where there is a common design or purpose or concert of action in the commission of the separate acts, or where such separate acts of negligence are concurrent as to time and place and unite in setting in operation a single force which produces the injury.
4. TORTS—JOINT AND SEVERAL LIABILITY.—Where several defendants working to a common purpose in the construction of a road opened and used gaps in plaintiff's fences, and negligently let in cattle which destroyed plaintiff's crops, defendants are jointly liable.
5. HIGHWAYS—CONSTRUCTION—INJURY TO CROPS—INSTRUCTION.—In an action against a defendant who was employed to dig a ditch along a road which was being constructed through plaintiff's fields, an instruction that defendant was not liable for any damage except such as might have been suffered from the dep-

redation of cattle which entered through the fence on the ditch was properly modified to make defendant liable for depredations through gates or gaps negligently left open by defendant.

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

Coleman, Robinson & House, for appellants.

There is no proof of a unity of interest, common design, purpose, or concert of action between the defendants held jointly liable in this case, and the verdict is contrary to the law and the evidence.

The instructions were conflicting, those given on behalf of plaintiffs holding that the defendants were liable jointly, and those given for defendants holding that each defendant was liable only for damages occurring from gaps which he individually made in the fences. The plaintiffs' instructions took the question of individual liability from the jury, which was error. 38 Cyc. 491.

There being no connection between the various defendants and no concert of action, the liability is several only. 38 Cyc. 484-5; 78 S. W. 92 and cases cited; 24 L. R. A. (N. S.) p. 1185.

The evidence shows that Troop only made one gap in the fence, which he closed in a few days, whereas some of the other defendants made various gaps in the fences and made no effort to repair or guard them. By the verdict of the jury Troop is held liable for the greater damage done by the other defendants, when as a matter of fact any damage done through his negligence could have been but slight. The judgment should be reversed and dismissed as to Troop and Maddox and reversed and remanded as to Van Orden-Winans Construction Co.

Compere & Compere, for appellees.

It was a question for the jury to decide whether or not appellants were liable jointly, and they have so found.

The concurring negligence of two parties makes both liable to a third party injured, if the injury would not have occurred from the negligence of one of them only. 61 Ark. 381; 62 Ark. 118; 73 Ark. 112.

Where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, although his act alone might not have caused the entire injury. 26 R. C. L. 764, and 767; 77 Neb. 351, 109 N. W. 367; 25 Ohio St. 255; 18 Am. Rep. 298; 207 S. W. 724; 190 S. W. 612; 41 Mo. 484; 97 Am. Dec. 283; 185 S. W. 170; 38 Cyc. 1159; note to 73 Am. Dec. 134-137. See also 15 Ark. 452; 29 Cyc. 487-8; and 64 N. Y. 138.

McCULLOCH, C. J. W. E. Dew, one of the appellees, held a lease for the year 1920 and other years on a farm in Ashley County through which the Wilmot Road Improvement District constructed a public road. The other appellees were his sub-tenants, all of whom separately cultivated and produced crops of corn and cotton. There were about 300 acres in cultivation on the farm, enclosed by a 4-wire fence around the entire premises, there being no intersecting or cross fences. The construction of the road was begun in October of that year, and it occupied a right-of-way 60 feet wide through this farm. The Oliver Construction Company, one of the defendants in this action, entered into a contract with the road improvement district to construct the road and made sub-contracts with the other defendants. Appellant Van Troop took the contract for the grading and ditching, and appellant Maddox was his foreman. Appellant Van Orden-Winans Construction Company (a corporation) took the contract for what is termed the gravel work in the construction of culverts or bridges, and some of this work was sublet to L. L. Winans, one of the defendants. It is alleged somewhere in the pleadings that E. O. McDermott and R. L. McDuffie took the contract for removing fences. The farm occupied by appellees was entered for the purpose of constructing the road, the fence was broken, and, as is alleged in the complaint, it was not replaced for a considerable time, and cattle

were permitted to enter at will and to destroy the crops. This is an action at law instituted by appellees against all of said parties jointly to recover damages resulting from the destruction of the crops by the depredation of cattle. Each of the appellees claimed separate damages for the destruction of their respective crops. After the testimony had been introduced, the court gave peremptory instruction in favor of the Oliver Construction Company, the principal contractor, and Tipton, its foreman, and also in favor of McDermott and McDuffie and L. L. Winans. The issues were submitted to the jury concerning the liability of Van Troop, Maddox and the Van Orden-Winans Construction Company, and the jury returned a verdict against each of these appellants jointly, assessing damages separately in favor of each of the appellees, aggregating the sum of $1,700, total damages.

No question has been raised as to the right of appellees to join in a suit each to recover compensation for his separate injury, and,. it being conceded that, since there is sufficient identity in the causes of action to justify consolidation under our statute, there was no prejudice in joining the action originally, instead of instituting separate actions and then consolidating them. *Mahoney* v. *Roberts,* 86 Ark. 130.

It is, however, very earnestly insisted that the facts of this case, as disclosed by the evidence adduced, do not constitute joint liability on the part of appellants, if indeed it establishes liability at all, and that the court erred in submitting the case to the jury on instruction permitting recovery as on joint liability.

Of course, it must be conceded, as too clear for argument, that separate and distinct tortious acts resulting in separate and distinct injuries, even to the same subject-matter, do not create joint liability on the part of the tort-feasors. There seems to be a considerable contrariety of opinion among the authorities on the question whether separate and distinct acts of negligence committed by different persons, which unite

and culminate in injurious results, constitute joint liability of the different persons committing the separate tort, so as to make each responsible for the entire result. There are numerous authorities on both sides of this question. 26 R. C. L. 763-764; 29 Cyc. 484-488; *Day* v. *Louisville Coal & Coke Co.,* (60 W. Va. 27) 10 L. R. A. (N. S.) 167; *Gibboney Sand Bar Co.* v. *Pulaski Anthracite Coal Co.* (Va.) 24 L. R. A. (N. S.) 1185; *Swain* v. *Tennessee Copper Co.,* 111 Tenn. 430. It is clear, however, that joint liability exists for separate acts of negligence where there is a common design or purpose or concert of action in the commission of the separate acts, or where such separate acts of negligence are concurrent as to time and place and which unite in setting in operation a single force which produces the injury. See the same authorities cited above.

The testimony was sufficient to bring this case within the rule last stated and to warrant the submission of the issue to the jury.

Viewing the testimony in the light most favorable to appellees, it shows that the fences were broken on or about October 18, 1920, and on subsequent days at different places, and were not replaced for a considerable length of time; that appellant Van Troop and his foreman caused the removal of the fence at least at one of the places, and that appellant Van Orden-Winans Construction Company caused the fence to be removed at other places; and that Van Troop, who was engaged in doing the ditching and grading, and the Van Orden-Winans Construction Company, which was doing the work of constructing culverts, used the openings for a considerable length of time in hauling and removing teams and other equipment back and forth without guarding the gaps or putting up the fences. The proof further shows that cattle were permitted to pass through these openings at night, and that the crops of appellees were destroyed.

There was a conflict in the testimony, and some of the witnesses testified with reference to a map or plat

showing the different gaps and the locations thereof, and this map is not in the record, hence we are unable to follow the testimony as accurately as could be done with the map before us. But there is, as before stated, testimony sufficient to show that each of the parties made gaps in the fence, which were not replaced for a considerable length of time, and that both of the parties used these gaps without restoring the fence or protecting the field from the depredation of cattle. Each of these parties was working to a common purpose, that is to say, the construction of the road, and each used the open gaps while being under obligation to repair them so as to prevent injury to the farmers who had crops inside of the enclosure.

The case, therefore, comes not only within the rule of joint liability where there is concert of action, but also within the other rule stated above, that there is joint liability where the different acts of negligence concur as to time and place and unite in setting in operation the force which causes the injury. In other words, they used the open gaps for the same purposes and at the same time, each being under duty to repair the gaps, and the conduct of each resulted in admission into the field of large numbers of cattle. It cannot be said that the entrance of the cattle was the result of the separate acts of either, but it was rather the result of the act of both of the parties in failing to repair the gaps so as to keep the cattle out.

It is next contended that the court erred in its instructions on this subject, and that the instructions were conflicting. The first instruction given at the instance of appellees told the jury that if "the defendants, or any of them, did negligently and carelessly permit cattle and other stock to enter said field, as alleged, and that plaintiffs did have therein crops of corn and cotton, and that said crops of corn and cotton * * * were damaged by said cattle and other stock, and that the entry of said stock and damage to the said crops * * * were the result of the carelessness and

negligence of defendants, or some of them, then your verdict should be for the plaintiffs, against such of the defendants as, by their negligent acts, if any, caused the damage to the said crops * * *."

Other instructions given at the instance of the plaintiff told the jury that if the "defendants, or any of them, or their employees have failed to observe, for the protection of the interests of the plaintiffs, that degree of care, precaution and vigilance one of ordinary prudence would have used under the circumstances of this case, and that thereby the plaintiffs have suffered injury, then *such* defendants are guilty of negligence, and your verdict should be for the plaintiffs."

Other instructions given at the instance of appellants told the jury that each of them would only be liable for damage, if any, caused by stock which entered the field through openings caused by such appellants respectively. These instructions separately told the jury that appellant Maddox was not liable for any damage except such as was caused by stock which entered the field through openings caused by Maddox himself; and another instruction to the effect that appellant Van Orden-Winans Construction Company was not liable for any damage except that caused from stock which entered the openings in the fence caused by that appellant; and another instruction that appellant Van Troop was only liable for damages done by the stock which entered the field at openings which he had caused. These instructions were even more favorable than appellants were entitled to, for they excluded the idea of joint liability and made the liability of each depend separately upon the fact whether or not the stock entered at the openings caused by him. The instructions given at the instance of appellant did not exclude the idea of a separate liability nor assume that the liability, if it existed at all, was joint, for these instructions merely told the jury that there was liability on the part of each of the appellants whose negligent act caused injury.

There is no conflict in the instructions except that resulting from the too favorable instructions given at the instance of appellants, and they are in no attitude to complain on that account.

The verdict of the jury, under these instructions, necessarily implies a finding of facts which constitute joint liability, and, as before stated, the testimony was sufficient to justify such finding. We are of the opinion that there was no prejudicial error in the instructions given by the court.

It is also contended that the court erred in modifying instruction No. 20, requested by appellant Van Troop. The instruction, as requested, told the jury that Van Troop was not liable for any damage except such as might have been suffered from the depredation of stock which entered through the fence on the ditch. The court modified this instruction by adding the words, "and other gates or gaps left negligently open, if any." The instruction was erroneous without this modification, for the reason that the evidence was sufficient to show that Van Troop's outfit, comprised of 30 teams which he owned himself and numerous other hired teams, used the gate, and that the cattle got through the open gates, It was proper, therefore, to modify this instruction as was done by the court.

Judgment affirmed.

IMBODEN v. TALLEY.

Opinion delivered November 28, 1921.

1. ESTOPPEL—KNOWLEDGE OF IMPROVEMENTS BEING MADE.—The mere fact that a prior lien-holder knew that his lien-debtor was buying material to build a house on land the subject of the lien did not estop the former from asserting his lien as against the person furnishing the material.

2. VENDOR AND PURCHASER—FORECLOSURE OF LIEN—RIGHTS OF JUNIOR LIENOR.—A junior lienor who was not made a party to

a suit by a vendor to divest the rights of a purchaser of land for non-payment of the purchase money was not bound by the decree, and may redeem from the prior lien, but is not entitled to have another foreclosure of the vendor's lien.

Appeal from Conway Chancery Court; *W. E. Atkinson,* Chancellor; affirmed.

Strait & Strait, for appellant.

One who misleads by his acts, declarations or admissions, or by failing to speak or act when he should, with wilful disregard of the interest of others, will not be allowed to afterwards come in and assert his rights to the detriment of the person misled. 33 Ark. 465; 50 Ark. 128; 83 Ark. 554; 85 Ark. 156; 94 Ark. 354; 97 Ark. 49.

Appellant's mortgage lien, to the extent of the money furnished, was superior to any claim of appellee. C. & M. Digest, § 6909. See also 64 Ark. 503; 55 C. C. A. 579.

Gordon & Dunn, for appellee.

The appellant failed to comply with section 6922 and section 6926 of C. & M. Digest. The lien was not filed in the time required. 32 Ark. 59. The statute was not substantially complied with. 119 Ark. 44.

McCULLOCH, C. J. Appellee owned a small tract of land at or near the village of Menifee in Conway County, and on July 17, 1919, he entered into a written contract with one McCray for the sale of the land at the price of $325, of which $60 was paid in cash, and the balance was to be payable in installments. Appellant was engaged in the business of selling lumber and other building material, and he sold to McCray material at the price of $609 to use in building a house on the land which he had contracted to purchase from appellee. This material was hauled from appellant's place of business in Morrilton, and was used in constructing a house on the land purchased by McCray from appellee. Appellee did the hauling for McCray for a price agreed upon between those parties. Nothing was paid on appellant's account for the building material, nor did McCray make any further payments on his contract

with appellee for the purchase of the land. Appellant did not file his lien as prescribed by statute, but on December 20, 1919, McCray and his wife executed a mortgage on the land to appellant to secure the debt. Subsequently appellee instituted an action in the chancery court of Conway County against McCray and his wife to declare a forfeiture under the contract and to divest all interest of McCray out of the property and quiet the title of appellee. Appellant was not a party to that suit. The chancery court rendered a final decree on September 20, 1920, in accordance with the prayer of the complaint, quieting appellee's title, neither of the defendants having made appearance in the action. Subsequently appellant instituted this action in the chancery court of Conway County against McCray and wife to foreclose his mortgage. In some way not disclosed by the record now before us, appellee got to be a party to that suit. He was so treated, and filed an answer, no question being raised here as to appellee having been properly brought into the case.

The relief sought by appellant against appellee is that the latter's lien on, or title to, the land be subordinated to his (appellant's) mortgage debt on the alleged ground that appellee, by reason of having stood by and permitted appellant to furnish the material for building a house, is estopped to assert any claim or title.

The case was heard on depositions of the witnesses and documentary evidence introduced, and the court found that McCray and wife were indebted to appellant in the sum of $609 with interest from December 20, 1919, and decreed recovery of that amount as against said McCray and wife, but decreed that appellee's right and title to the property was superior to appellant's claim, and that appellant was only entitled to a foreclosure by paying to appellee the amount of the original indebtedness of McCray and wife to him, which was found by the court to amount to the sum of $260 with interest from July 17, 1919, and appellant was decreed the right to redeem by payment to appellee of the neces-

sary sum on or before January 1, 1922. The decree provided that, if said sum be paid to appellee on or before the day mentioned, appellee's title be divested, and that appellant's mortgage be foreclosed by sale to be made by the court's commissioner.

The contention of appellant is that appellee is estopped by reason of the fact that in hauling the material for McCray he lent his assistance to the procurement of the building material and led appellant to believe that McCray had a clear title to the property on which the house was to be built. Appellant also testified that appellee told him that McCray was the absolute owner of the land. This, however, was denied by appellee, who testified that he made no such statement to appellant, nor any other statement which was calculated to induce appellant to believe that McCray had absolute title to the property, or that he (appellee) did not have any lien on it. Appellee testified that, after making the sale to McCray, the latter employed him at so much per load to haul the building material, and that McCray claimed that he had the money with which to pay for the material. McCray's wife also testified as a witness in the case, and she stated that she had $450 in money and gave it to her husband to use in paying for the building material and thought that the material was paid for.

There is a conflict of testimony, but our conclusion is that the finding of the chancellor to the effect that appellee was not guilty of any conduct which would work an estoppel on his part is not against the preponderance of the testimony. That being true, appellee's rights are superior to appellant's mortgage lien. Appellant was not, however, a party to the suit against McCray and wife in which their rights in the property were divested, and he is not bound by that decree. Appellant was a junior lienor and a necessary party to any proceedings to divest the title. Having been omitted from that decree, the only remaining question which arises in the present litigation is, what are his rights now? There was no appeal by McCray or wife from the former de-

cree, and that has become final as against them. The effect of the decree was to divest the title out of McCray, and, since it is found that appellee's lien was superior to that of appellant, the latter's only remedy is to redeem from that lien by payment of appellee's original debt with interest. *Dickinson* v. *Duckworth*, 74 Ark. 138; *Longino* v. *Ball & Warren Commission Co.*, 84 Ark. 521.

It is unimportant to inquire whether the decree was correct in appellee's suit against McCray and wife in divesting the title, instead of directing a foreclosure of the lien. The decree being unappealed from, it is a final adjudication of the rights of the parties to it, and, as before stated, appellant's only remedy is to redeem from the prior lien. The rule would not be altered by the fact that under the former decree the relief granted was improper. Under the authorities just cited, appellant was not entitled to have another foreclosure of the lien, for, in order to preserve his own equities, he is compelled to do equity by discharging the superior lien. The court has given him ample opportunity to do this, and the time allowed has not yet expired.

We find no error, therefore, in the proceedings, and the decree is affirmed.

FT. SMITH, SUBIACO & ROCK ISLAND RAILROAD COMPANY v. SCROGGINS.

Opinion delivered November 28, 1921.

1. CARRIERS—LIABILITY OF INITIAL CARRIER.—Under Crawford & Moses' Dig., § 924, making the carrier issuing a bill of lading liable for loss or damage to the property caused by the negligence of connecting carrier, a railroad company issuing a bill of lading is liable for the negligence of a connecting carrier, though the bill of lading exempted the initial carrier from liability except for loss occurring on its own line.
2. CARRIERS—PARTIES.—In an action against an initial carrier to recover for damages to freight caused by the negligence of a connecting carrier, it was not error to refuse to make the connecting carrier a party.

3. CARRIERS—DAMAGE TO FREIGHT IN TRANSIT—DEFENSE.—In an action against a carrier for injury to freight in transit, the carrier cannot excuse itself by showing difficulties or interferences in procuring cars for shipment.

4. NEGLIGENCE—CONCURRING CAUSES.—It was not error to refuse to charge the jury that "where the injury for which compensation is sought was occasioned by different causes, for only one of which the defendant is individually responsible, the burden is upon the plaintiff to distinguish the damage resulting from the cause for which the defendant is responsible from that resulting from other causes," as the instruction would ignore the question of liability for concurring negligence.

Appeal from Logan Circuit Court, Northern District; *James Cochran*, Judge; affirmed.

E. H. McCulloch and *James B. McDonough*, for appellant.

1. Under the stipulation in the bill of lading, there was no liability on the part of the appellant for any delay beyond its own line, and the court erred in holding to the contrary. Hutchinson on Carriers, §§ 229-235; 63 Ark. 326; 64 *Id.* 115; 84 *Id.* 423; 32 *Id.* 393; 35 *Id.* 402; 50 *Id.* 397; 87 *Id.* 339; Michie on Carriers, 3288; Elliott on Railroads § 1432; 10 Corpus Juris, pp. 529, 541. The delivery carrier is presumed to be liable. 118 Ark. 398.

2. Since the plaintiff introduced no proof that would enable the jury to separate the damages for which the defendant was liable from that for which it was not liable, the court should have directed a verdict in its favor. 118 Ark. 398; 63 *Id.* 65; 57 *Id.* 402; 117 *Id.* 638; 174 S. W. (Ark.) 547; 116 Ark. 82; 113 *Id.* 353; 179 U. S. 658; 181 Fed. 91.

3. The court erred in refusing to instruct the jury to the effect that where compensation is sought for an injury occasioned by defendant causes, for only one of which the defendant is responsible, the burden is on the plaintiff to distinguish the damages resulting from the cause for which the defendant is responsible from that resulting from other causes, etc. 4 Enc. of Ev. 11; 63 Ark. 65.

4. The court erred in refusing to give instruction 5 requested by appellant on the question as to an unusual and unprecedented press of business at the place of shipment during the time covered by the complaint. 81 Ark. 373; 77 *Id.* 357; 73 *Id.* 373; 64 *Id.* 576; 61 *Id.* 562; Hutchinson on Carriers, § 392; 4 Elliott on Railroads, § 1470; 6 Cyc. 372; 89 Ark. 466; 105 *Id.* 415; 91 *Id.* 180.

5. If the defendant was prevented from supplying cars sufficient for the movement of freight offered it, on account of war conditions, that was a defense in this case, and the court erred in refusing to instruct the jury on that subject. 6 Cyc. 445; Hutchinson on Carriers §§ 314-327.

6. Instructions 10 and 11 and 12 on the question of delay caused by press of business at the compress in Ft. Smith, and the embargo thereon, should have been given. 20 Wis. 594; 10 Ky. L. Rep. 1020; 105 Ark. 415; 144 Ky. 561; Michie on Carriers, 249.

7. On the question of the measure of damages the court erred in refusing to instruct the jury that it was the difference between the market price of the cotton when received for shipment and the market price thereof at the time it should have been delivered. 69 Ark. 150; 76 *Id.* 220; 74 *Id.* 358; 46 *Id.* 485; 54 *Id.* 22; 101 *Id.* 172; 90 *Id.* 452.

8. The defendant was not liable for any delay due to a cause not within its power to prevent, and the jury should have been so instructed. 47 Ark. 97.

9. The court erred in refusing to make the Arkansas Central Railway Company, the Director General and the Missouri Pacific Railroad Company parties defendant. 10 Corpus Juris, § 937 and cases cited.

Cravens, Oglesby & Cravens, for appellee.

1. Under the statute, C. & M. Digest § 924, the initial carrier is made absolutely liable for loss or damage caused by its own negligence or that of any connecting carrier to which the property accepted by the initial carrier shall pass, giving to the initial carrier a right of

action over against the connecting carrier on whose line the actual damage may have occurred.

2. Since the statute, *supra,* fixes liability on the initial carrier, it was immaterial, for the purposes of this case, for the jury to determine whether all or any part of the damage occurred on the line of the defendant.

3. Instruction 3 requested by appellant was not a correct declaration of the law. Moreover, there was no evidence on which to base it, since the proof showed that the entire damage occurred on defendant's line of railroad.

4. Damages are not sought in this case for delay, therefore an instruction on the subject of an unusual press of business at the place of shipment, etc., had no place in the instructions. The same reason justifies the refusal to give the instruction on the subject of interference with shipments on account of war conditions.

5. There was no evidence on which to base instructions 10, 11 and 12 on the question of press of business at the compress in Ft. Smith and the embargo there.

6. There was no evidence to base an instruction that defendant would not be liable for damages due to causes not within its control.

McCULLOCH, C. J. Appellant owns and operates a short-line railroad in Logan County, Arkansas, between the towns of Paris and Scranton, connecting at Paris with the road operated by the Arkansas Central Railway Company, running from Paris to Fort Smith. In the year 1919, appellee delivered cotton to appellant at Scranton for shipment to Fort Smith, and appellant issued bills of lading for through transportation over appellant's line from Scranton to Paris, thence over the line of the connecting carrier to Fort Smith. These bills of lading contained a stipulation to the effect that appellant's agreement was only to transport the cotton over its own lines, and would not be liable for loss, damage or injury not occurring on its own line of road. This is an action instituted by appellee against appellant to recover damages alleged to have been sustained by de-

preciation in the weight and value of the cotton and expense of rebaling the same resulting from alleged delay and exposure of the cotton to inclement weather while in transit. The damages were laid in the sum of $1,933.62, and the verdict of the jury awarded damages in the sum of $1401.43.

The testimony adduced by appellee was sufficient to establish the fact that the cotton was delivered to appellant at Scranton in good condition, and that it was considerably damaged and depreciated in value when it arrived at Fort Smith; that the cotton had to be repicked and re-baled—"reconditioned"—as the witnesses term it, and that the damage amounted to the sum named in the complaint.

The principal ground urged for reversal is that, under the clause in the bills of lading exempting the initial carrier from liability, except for loss occurring on its own line, there can be no recovery, for the reason that the evidence does not show that any loss occurred while on appellant's line of railroad, and that the court not only erred in refusing to give a peremptory instruction, but also erred in refusing to give other requested instructions submitting that issue to the jury. In making this contention, counsel either overlooked or ignored the statute of this State, patterned to some extent after the Federal statute, making the initial carrier issuing the bill of lading liable for any loss or injury occurring during transportation over the line of a connecting carrier. Crawford & Moses' Digest, § 924. This statute provides that "when a railroad or other transportation company issues receipts or bills of lading in this State the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be liable for any loss or damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may pass, and the common carrier, railroad, or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a

proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company through whose negligence the loss, damage or injury may be sustained." Most of the numerous assignments of error are settled by the application of this statute, for the case was apparently tried below by appellant's counsel on the theory that there was no liability unless it was shown that the loss occurred on appellant's own line.

It is also insisted that the court erred in refusing to make the Arkansas Central Railway Company, the Director-General and the Missouri Pacific Railway Company, defendants. It is not shown why the Director General was sought to be made a party, but it is contended that the Arkansas Central Railway Company was a proper party, so that appellant could have judgment over and against it on proof that the loss occurred on its line. The statute does not require that the connecting carrier be made a party, but merely declares the liability of the connecting carrier to the initial carrier. There was no error in refusing to make the connecting carrier a party, for under the statute the right of action against the connecting carrier is preserved.

Error is assigned in the refusal of the court to give several instructions relating to the question of congestion of traffic to the extent that there was an interference in obtaining cars for shipment of commodities. This is not a suit for failure to furnish cars, but is one for damage which occurred during transportation where the carrier had received the commodity for transportation and given a bill of lading. Under those circumstances, the carrier cannot excuse itself by showing difficulties or interferences in procuring cars for shipment.

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

"When the injury for which compensation is sought was occasioned by different causes, for only one of which the defendant is individually responsible, the burden of

proof is upon the plaintiff to distinguish the damage resulting from the cause for which the defendant is responsible from that resulting from the other causes; and if the plaintiff has failed in this, your verdict should be for the defendant; and damages cannot be proved by the opinion or conclusion of witnesses."

This instruction is erroneous, because it ignores the question of liability for concurring negligence. *Payne* v. *Orton, ante* p. 307. There was some evidence introduced by appellant tending to show that the cotton was damaged before delivery to the carrier and not after; but this instruction does not submit that issue, and the court was correct in refusing to give it.

Again, it is urged that the court erred in refusing to give certain requested instructions in regard to delay caused by an embargo laid by the compress company at Fort Smith. It is sufficient to say in regard to these assignments that there was no evidence to justify the submission of that issue to the jury.

There are other assignments, which we do not think are of sufficient importance to discuss in detail, as they are covered by the principles hereinbefore announced.

The judgment is affirmed.

FRIEND v. PATTERSON.

Opinion delivered November 28, 1921.

EXECUTORS AND ADMINISTRATORS—PRESENTATION OF CLAIM.—Under Crawford & Moses' Digest, § 100, one having a claim based upon a written contract must present a copy of such contract, together with the original, to the executor or administrator, before the claimant can have judgment in the probate court.

Appeal from Mississippi Circuit Court, Osceola District; *R. H. Dudley*, Judge; reversed.

W. J. Lamb and *Joe Rhodes, Jr.*, for appellant.

The instrument sued on is not a will under the law of Arkansas, because not executed and witnessed as prescribed by law, and never probated. Neither is it a promissory note.

The claim was not probated within the time prescribed by law. The only pretense that the claim was filed within a year is the testimony of Hammons to the effect that he mailed such claim to the administrator, but he admits that he addressed the letter to the wrong postoffice. A demand of such claim by mail presupposes a proper postoffice address (133 Pac. 975, 49 L. R. A. [N. S.] 458) including a street address, if any (26 S. W. 280; 174 Fed. 293) and prepayment of postage.

The mailing of a letter properly creates a presumption of it receipt by the addressee, but this presumption may be rebutted. 93 Ark. 259; 72 Ark. 305. Mr. Friend denied receiving the first letter sent him, and if there be a *prima facie* case it was overthrown by such denial. 64 Pac. 117.

The law does not contemplate the presentation of a claim by mail unless the original be enclosed or presented to the administrator in some way for his inspection. C. & M. Dig., § 100. This was not done.

L. E. Hammons and *Driver & Simpson* for appellee.

The instrument sued on is a direction to the legal representative of the maker to pay to appellee $1000 for an expressed consideration. The same sort of instrument was held valid by this court in 99 Ark. 523. See also 99 Ark. 527; 42 L. R. A. 802 and 2 A. L. R. 1469, 176 Pac. 37.

A positive denial by the appellant that he received the claim which was properly mailed to him within the statutory time would not be sufficient, as a matter of law, to nullify the presumption of its receipt. Such testimony leaves the matter a question for determination by the jury. 98 Ark. 392; 127 Ark. 499. The same rule would apply to finding by the court.

WOOD, J. This is an action by the appellee against the appellant as administrator of the estate of R. W. Friend, deceased, on the following order:

"Pecan Point, Ark.
"April 23, 1914.

"I hereby direct the executor of my will to pay to Mollie Patterson one thousand dollars after my death for her faithful servitude and kindness to me during my sickness.

(Signed "R. W. FRIEND."

To the order was attached the affidavit of the appellee authenticating the claim. The order was presented to the probate court for allowance, and the cause was appealed to the circuit court. The circuit court rendered a judgment in favor of the appellee against the appellant, from which is this appeal.

Several interesting questions are presented by this appeal; but it is only necessary to consider one. The appellee does not prove that the original order, which is the foundation of the action, was ever exhibited to the administrator, C. W. Friend. She does show that a copy of the order, with the attached affidavit duly authenticating the same, were enclosed in a letter addressed to C. W. Friend, the administrator, at Pecan Point, Arkansas, which letter was duly stamped and mailed on March 15, 1919. The appellant denies receiving this letter, but it was a question of fact as to whether he did receive it, and the court would not disturb the finding of the trial court on that issue. However, the failure of the appellee to exhibit the original order to the administrator of the estate of R. W. Friend, deceased, bars her right to recover thereon.

Sec. 100, C. & M. Digest, provides: "Any person may exhibit his claim against any estate as follows: If the demand be founded on a judgment, note or written contract, by delivering to the executor or administrator a copy of such instrument with the assignment and credits thereon, if any, exhibiting the original, and if the demand be founded on an account, by delivering a copy thereof, setting forth each item distinctly and the credits thereof, if any." This provision of the statute

requiring the original to be exhibited to the administrator is mandatory. If a non-resident claimant, or a non-resident lawyer of such claimant, wishes to present a claim, he must enclose the original along with the copy of the instrument in the letter to the administrator or executor, or he must exhibit the same to the administrator in person or by some one whom he has duly authorized to do so.

The statute conserves a wise purpose, inasmuch as it was intended to prevent possible mistakes, frauds, or forgeries, by giving to the executor or administrator the opportunity to examine the original instrument which is the basis of claim before approving or rejecting it. As we have said, it must be complied with before the claimant can have judgment in his favor allowing the claim against an estate in the probate court. The judgment of the circuit court is therefore reversed, and the cause will be dismissed.

LAMBDIN v. STATE.

Opinion delivered November 28, 1921.

1. INTOXICATING LIQUORS—MANUFACTURE OF—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of manufacturing or of being interested in the manufacture of alcoholic and fermented liquors.

2. CRIMINAL LAW—ADMISSION OF EVIDENCE—NECESSITY OF OBJECTION AND EXCEPTION.—Admission of evidence in a criminal case will not be reviewed on appeal where no objection was made or exception saved thereto in the trial court.

3. CRIMINAL LAW—NEWLY-DISCOVERED EVIDENCE.— A motion for new trial for newly-discovered evidence which states that a person unknown to defendant told some of his friends that defendant was not guilty, and admitted that the unknown person was guilty, is too vague and indefinite to warrant a reversal of the judgment

4. CRIMINAL LAW—ADMISSION OF ACCUSED AS EVIDENCE OF GUILT.—Evidence that defendant accused of manufacturing liquor, pleaded guilty in the Federal court to having a still in his possession at

the time he was charged in the State court to have been engaged in manufacturing liquor, was competent as an admission tending to connect defendant with the crime charged.

5. CRIMINAL LAW—NECESSITY OF MOTION FOR NEW TRIAL.—Error cannot be predicated on rulings of a trial court which were not assigned as erroneous in defendant's motion for new trial.

Appeal from Grant Circuit Court; *W. H. Evans,* Judge; affirmed.

D. E. Waddell and *Isaac McClellan,* for appellant.

The verdict of the jury is wholly against the preponderance of the evidence. 2 Ark. 360; 70 Ark. 365; 100 Ark. 344. The allegation is for manufacturing whiskey and not for having a still in his possession.

Proof of another crime is not sufficient to convict. 34 Ark. 160; 54 Ark. 660.

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

If there is substantial evidence to support the verdict, the judgment must stand. 135 Ark. 117; 136 Ark. 385.

There was no error in admitting the record of the Federal court. The plea of guilty in another action is competent. Ency. of Ev. Vol. 3, p. 334; 67 S. W. 96; 71 N. H. 435; 52 Atl. 493. The admissibility of the conconfession was a question for the court. 28 Ark. 121; 28 Ark. 531. One cannot complain of evidence favorable to himself. 52 Ark. 180. The admission of the letter was harmless. 121 Ark. 570.

The admission of incompetent evidence is not prejudicial if the point testified to is admitted. 73 Ark. 407; 74 Ark. 417; 76 Ark. 276.

The competency of evidence without objection will not be considered on appeal. 76 Ark. 276; 130 Ark. 111.

The motion for new trial on account of newly discovered evidence was wholly inadequate. 2 Ark. 33.

HART, J. Ransom Lambdin was indicted on March 3, 1921, charged with the crime of manufacturing and of being interested in the manufacture of vinous, malt, spirituous, alcoholic, and fermented liquors. He was

tried before a jury and convicted, his punishment being fixed at one year in the State penitentiary. From the judgment of conviction the defendant has duly prosecuted an appeal to this court.

The first assignment of error is that the evidence is not legally sufficient to support the verdict.

Ed F. McDonald, sheriff of Grant County, Ark., was the principal witness for the State. According to his testimony, in company with several other parties he located a still on the farm of the defendant Ransom Lambdin, about a week before he arrested him. It looked like the still had been operated at that place about two months. It was inside the defendant's field about one-quarter of a mile from his house. On the 18th day of January, 1921, the sheriff and others went back there to arrest the defendant. They found that the still had been moved, and tracked the parties moving it across the field of the defendant towards his house. They found the still located in a dense thicket about 100 yards from the defendant's house. There was a pit dug in the ground, and two 60-gallon barrels of mash, which were ready to be run off, were placed on the covering of the pit. They found an oil stove burning in the pit between the barrels. There was a place near the still where they had been getting water. While watching this place, they saw a son of the defendant come down to the still from the defendant's house carrying something in his hand. He then went back to the house. There was a small path leading from the still to the house. They found some fruit jars about 100 yards from the still and about the same distance from the house. Some of the jars had whiskey in them and others were empty. The sheriff then went to the house and arrested the defendant. The house was searched, and several fruit jars were found there. Two of them had about two tablespoons full of whiskey in them, and the others smelled like they had contained whiskey. A pair of rubber boots, with clay on them like the

clay that came out of the pit where the mash was found, was on the porch. The bottoms of the boots were rough and some of the tracks leading from the house to the still corresponded with the tracks of these boots. A spade was also found at the house which had clay on it like the clay in the pit. A small sack of nails was on the porch which compared in size and kind with the nails used to make a cover for the pit. The still had not been operated at the place where last found, but it was ready to be operated. Everything was there except the worm, and it was found in the defendant's lot. The defendant was arrested at his house and was not seen near the still. The persons who were with the sheriff corroborated his testimony. The mash in the barrels was just ready to be made into whiskey, and mash at this stage contains a small per cent. of alcohol. This evidence, if believed by the jury, was sufficient to warrant a conviction. It tended to show that a still was being operated in the defendant's field, and that whiskey was being manufactured there. After the sheriff began watching the still, it was moved into a thicket near the defendant's house. There was a path leading from the still to the defendant's house. A spade and a pair of rubber boots were found at the defendant's house which had on them clay similar to that found in the pit at the still. Fruit jars containing whiskey were found about the same distance from the still and the defendant's house. Fruit jars which smelled like they had contained whiskey were found in the defendant's house. These facts were sufficient to show that the defendant was at least interested in the manufacture of intoxicating liquors.

It is true the defendant introduced witnesses who testified that the still was 200 yards from his house, and that a person could not see from it to the defendant's house. This evidence, however, did not overcome the evidence for the State, but only tended to contradict it. These witnesses also testified that they were neighbors of the defendant, and had frequently visited

him for many years, and had never seen any whiskey at his house. This, however, was negative testimony and had but little probative value.

The evidence for the State is as strong as that held to be sufficient to warrant a conviction in *Robertson* v. *State,* 148 Ark. 585, and *Cox* v. *State,* 149 Ark 387.

It is next insisted that the court erred in permitting one of the witnesses to testify that he saw a son of the defendant at the still, and another witness to testify that a boot was found at the home of the defendant which corresponded with tracks found near the still. No objection was made to the introduction of this testimony in the court below, and no exceptions saved to the action of the court in admitting it. Admission of evidence will not be reviewed on appeal where no objection was made, or exceptions saved thereto in the trial court. *Maxey* v. *State,* 76 Ark. 276, and *Walker* v. *State,* 138 Ark. 517.

It is next insisted that the judgment should be reversed because the court erred in not granting the defendant a new trial on account of newly-discovered evidence. The defendant states in his motion for a new trial that a party who is unknown to him told some of his friends that he, the defendant, was not guilty, and that the unknown party admitted his own guilt. The statement is too vague and indefinite to warrant a reversal of the judgment. The application of the defendant on this account is not corroborated by the affidavits of other persons than his own. The name of the witness is not disclosed. His friends evidently knew who he was. There is no allegation that the witness is within the jurisdiction of the court, or any statement of facts indicating that his attendance could be secured. The defendant only states that he believes he could secure his attendance. The application, under the circumstances, was not sufficient, and the court did not abuse its discretion in refusing to grant a new trial on this account. *Rynes* v. *State,* 99 Ark. 121.

It is also insisted that the court erred in permitting the State to introduce in evidence a copy of the judgment of the Federal court in which the defendant pleaded guilty of having a still in his possession.

The indictment in the present case was returned on the 3rd day of March, 1921. The evidence shows that the defendant was arrested on the 18th day of January, 1921. The information filed in the Federal court charged the defendant with having a still in his possession on the 19th day of January, 1921.

The defendant pleaded guilty to this offense. It will be noted that the two occurrences were about the same time, and the fact that the defendant pleaded guilty to having a still in his possession was competent evidence in the present case. It tended to connect the defendant with the manufacture of intoxicating liquors. It amounted to an admission on his part that he had a still in his possession at the time the sheriff discovered the still near his house. *Beason* v. *State* (Tex. Crim. App.) 67 S. W. 96, and *State* v. *LaRose* (N. H.) 52 Atl. 943. The other evidence in the case showed beyond question that some one was manufacturing intoxicating liquors at the still found in the defendant's field near his house.

It is true the information in the Federal court which was introduced in evidence contained two other counts. One of these charged the defendant with manufacturing intoxicating liquors and the other charged him with unlawfully possessing intoxicating liquors.

The record in the Federal court, however, shows that these two counts were dismissed, and the defendant only pleaded guilty to the offense of having a still in his possession. Hence no prejudice could result to him in the present case from introducing in evidence the full information filed in the Federal court.

Finally, it is insisted that the judgment should be reversed because, after the jury had been out a while to consider its verdict, it returned into court and asked

for special instructions concerning the certified copy of the Federal court proceedings. The court then instructed them that they could consider the same together with all the other evidence in determining the defendant's guilt.

With regard to this, it need only be said that it was not made one of the defendant's grounds for motion for a new trial. It is well settled in this State that error cannot be predicated on rulings of a trial court which were not assigned as erroneous in the defendant's motion for a new trial. *Freeman* v. *State,* 150 Ark. 387, and *Gooch* v. *State,* 150 Ark. 268.

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* STEWART.

Opinion delivered November 28, 1921.

1. PUBLIC SERVICE COMMISSIONS—REVIEW OF ORDERS.—Where the Corporation Commission, in the exercise of its discretion, determined that a new railroad station should be built at a certain town, and on appeal to the circuit court the finding of the Commission was approved, the Supreme Court on appeal is not authorized to substitute its judgment for that of the Commission, nor to set aside the Commission's order unless it appears that it would be unwise or unjust to require the railroad company to comply therewith.
2. PUBLIC SERVICE COMMISSIONS—RECORD ON REVIEW.— Although Crawford & Moses' Dig. § 1639, authorized the Corporation Commission, upon the filing of a petition for a new railroad station, "to make a personal inspection of the conditions complained of", this does not mean that evidence was to be heard which could not be put into the record, and on a review of the Commission's order by the courts the case is heard on the record made.
3. PUBLIC SERVICE COMMISSIONS—RECORD ON REVIEW.—Although the Corporation Commission, in its report upon its action in ordering a new railway station to be built at a certain town, recited that the local conditions were inspected by the Commission and its engineer, the railroad company cannot on appeal complain because the report of the engineer, if any was made, was not brought into the record, since it could have been brought into the record in the trial in the circuit court.

4. PUBLIC SERVICE COMMISSIONS—AUTHORITY TO PRESCRIBE KIND OF STATION.—The power in the Corporation Commission to require the building of a new railroad station implies the authority to prescribe the kind and capacity of the building and the material, subject to review when arbitrarily exercised.

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

Daniel Upthegrove, J. R. Turney, and *Gaughan & Sifford,* for appellant.

1. On this appeal the duty of this court is to try the case *de novo,* in accordance with the procedure defined by Act No. 124, approved February 15, 1921, and it should not govern itself by the rule heretofore established not to pass upon the weight of the evidence on appeals from findings of facts by trial courts or verdicts of juries.

2. The court can consider no evidence other than that shown in the record,—it cannot consider the personal impressions of the members of the commission, nor the information given the commission by the engineer not incorporated in the record. 227 U. S. 88.

3. The commission was not authorized to prescribe the materials out of which the depot building should be constructed. The police power of the State can be exercised no further than to require things *necessary* for the public health, moral safety and convenience. 55 Ark. 12; 172 U. S. 269; 97 Ark. 475; 113 *Id.* 384, 396; 200 U. S. 562.

The Railroad Commission, the creature, cannot rise above its creator, the Legislature, and the latter in its latest expression on the subject has required only that "every corporation engaged in public service business in this State shall establish and maintain *adequate* and *suitable* facilities" etc. This has no reference to the appearance nor to the materials out of which the buildings—facilities—shall be constructed.

R. L. Montgomery and *Hamiter & Dickson,* for appellees.

1. This proceeding was instituted and the appeal to the circuit court was filed before the enactment of Act 124, Acts 1921, and the procedure contended for by appellant does not apply; moreover, section 22 of that act provides that cases previously appealed to the circuit court shall be heard and determined in accordance with existing law.

2. The Commission had express authority under § 11, Act 571, Acts 1919, to make a personal inspection either by its members, inspectors or employees.

3. The reasonableness and necessity for the order requiring better station facilities is established by the proof, and in requiring the erection of a new station it was neither arbitrary nor unreasonable, but comes within principles recognized by this court. 85 Ark. 12; 99 *Id.* 1; 113 *Id.* 384, 385; 25 *Id.* 298; 97 *Id.* 473; 206 U. S. 7.

4. It is within the power of the Commission to prescribe the character of the building and the materials out of which it shall be constructed. Act 338, § 2, Acts 1907; Act 124, § 6, Acts 1921; Act 571, § 6, Acts 1919.

McCULLOCH, C. J. This appeal brings up for review proceedings before the Corporation Commission, initiated against appellant by citizens of the town of Lewisville, to require the company to construct a new passenger station at that place. Notice was given as required by statute, there was a hearing upon the testimony of witnesses and an order was made by the Commission requiring the construction of a new building as prayed for in the petition. An appeal to the Pulaski Circuit Court was prayed and granted, and a few days thereafter the statute now in force was enacted abolishing the Corporation Commission and transferring its functions, so far as related to control over public utilities, to the Railroad Commission.

The old statute (Act 571, Acts of 1919) provided for an appeal from the decision of the Corporation Commission to the circuit court of Pulaski County, where the matter should be heard upon the record made

before the Commission, and also provided for an appeal to the Supreme Court from the judgment of the circuit court, and that "in such case appeals to the Supreme Court shall be governed by the procedure, and reviewed in the manner which is now or may hereafter be prescribed by law governing appeals from chancery courts." Secs. 27-28, Act 571, Session of 1919. The statute abolishing the Corporation Commission (Act 124, Session of 1921) provided for appeals to the circuit court of Pulaski County, thence to the Supreme Court, and that on appeal to the Supreme Court that court "shall be governed by the procedure, and reviewed in the manner applicable to other appeals from such circuit court, except that any finding of fact by the circuit court shall not be binding on the Supreme Court, but the Supreme Court may and shall review all the evidence and make such findings of fact and law as it may deem just, proper and equitable." Sec. 21, Act 124.

Sec. 22 of the last statute provides that "all cases which have heretofore been appealed to the circuit courts of this State from any decision or order of the Corporation Commission and which appeals are now pending shall be heard and determined by said courts on the merits as in other cases by law made and provided."

The first controversy here between counsel relates to the question of procedure, whether this court shall, hear the cause "in the manner which is now * * * prescribed by law governing appeals from chancery courts," as provided by the act of 1919, *supra;* or whether it shall disregard the findings of fact by the circuit court and "review all the evidence and make such findings of fact and law as it may deem just, proper and equitable," as provided in the act of 1921, *supra,* for appeals from the Railroad Commission as now constituted; or whether the court shall hear the case and review merely for error, as on other appeals from judgments of circuit courts. The contention of counsel for appellee is that section 22 of the act of

1921, *supra,* is controlling, and that this appeal affords merely review for error as in other law cases. On the other hand, counsel for appellant contend that the procedure on the present appeal is controlled by the provision of the old statute declaring that the Supreme Court shall hear the cause according to the practice governing appeals in chancery courts, or by section 21 of the act of 1921, *supra.*

There is another question which might raise itself, and that is, whether or not the Legislature has the power to change the practice in this court on appeals in law cases from a review for error to a trial *de novo* as in chancery cases. We do not deem it necessary to decide these questions, for, if we adopt the practice most favorable to the appellant and review the evidence *de novo,* as in chancery cases, we do not find that the conclusions of the Corporation Commission and of the circuit court on appeal are contrary to the preponderance of the evidence.

It appears from the evidence that Lewisville is a growing town, with a population of about 2000 inhabitants, and is situated at the junction of appellant's line of railroad and a branch line known as the "Shreveport branch;" that the present station building, which is a combination one for both freight and passengers, is a frame building about 30 years old; that it is not of sufficient capacity for the convenience of travel, that it is unsightly and insanitary, and that it is inconveniently located in that it is too close to the main track to afford platform space between the station building and the railroad. The contention of appellant was, and is, that a building constructed according to the orders of the Corporation Commission would cost about $25,000, and that the present building could be repaired and additions made thereto so as to furnish adequate accommodations at an expense not exceeding $6,000. It was shown by the testimony that the building was insanitary for the reason that water stood under it for seven or eight months in the year, furnishing a breeding

place for mosquitoes, but testimony was adduced by appellant tending to show that, according to reports of its engineers, this condition could and would be rectified.

We do not think that the testimony in the case presents such a state of facts as would justify this court in disregarding the finding of the Corporation Commission and the circuit court. If we indulge ourselves the utmost latitude in reviewing the testimony, it cannot be said that the preponderance is against the findings of the Commission and the circuit court. When it comes to the exercise of mere discretion, we do not feel authorized to substitute our judgment for that of the Corporation Commission or the circuit court unless we can discover that, according to the preponderance of the evidence, it is unwise or unjust to require the carrier to comply with the order with respect to the construction of a new building. The statutes of the State lodged that power, primarily, in the Corporation Commission, and have since transferred it to the Railroad Commission, and it was not the purpose, we conceive, of the framers of the statute in allowing an appeal to substitute the judgment of the courts, unless it appears that an error was made by the Commission in its conclusions.

An attack was made on the validity of the order on the ground that the report of the Commission recites that the conclusions were reached after a personal inspection of the locality by the members of the Corporation Commission and also upon a report of the Commission's engineer as well as upon the evidence in the case. The contention is that, the statute having given a hearing in the courts concerning the propriety of the Commission's order, and that the hearing in the courts must be on the record made before the Commission, this provision would be nullified if the Commission be permitted to gather evidence from personal investigation or inspection. The claim is that this renders the order of the Commission void because it acquired information which could not be put into the record, and which is not avail-

able to the courts on review. Counsel rely upon the decision of the Supreme Court of the United States in the case of *Interstate Commerce Commission* v. *L. & N. Ry. Co.*, 227 U. S. 88, where it was held that the provision in the statute creating the Interstate Commerce Commission (par. 12) which authorizes the Commission to gather information on its own initiative, was only available for use in instituting prosecutions for violations of law and not for a hearing on the fixing of rates.

The statute (Crawford & Moses' Digest, § 1639) authorizes the Corporation Commission, after filing of such petition, "to proceed to make a personal inspection of the conditions complained of and investigate the objects sought to be accomplished," but this does not mean that evidence is to be heard which cannot be put into the record, for the provision of the statute in regard to appeals contemplates that the court shall hear the cause upon the record made before the Commission. It is true that the statute provides for an appeal to the circuit court on the record made before the Commission, and this, of course, negatives the idea that the Commission may consider matters within their personal knowledge which cannot be put into the record, but aside from any express statutory authority it was within the power of the Commission to make a personal inspection, not to gather evidence, but to understand that which is introduced in such form as can be put into the record for consideration on appeal. That is all that it is shown was done in this case. It does not appear from the report of the Commission that it gathered any evidence not in the record, but merely that there was a personal inspection. Notwithstanding such inspection by the members of the Commission, the case is heard in review by the courts on the record made, and not by any outside matters which the Commission may have considered, and if upon that record it appears that the order was erroneous, it becomes the duty of the court to set it aside. The fact that the Commissioners have made a personal inspection may put them in a better attitude

than the courts on review to comprehend the evidence adduced before them, and this affords a reason why the order should not be overturned unless it affirmatively appears to be erroneous, yet the fact that there was an inspection does not alter the rule that in a review by the courts the case must be heard upon the record as made before the Commission.

It is also recited in the report of the Commission that there was an inspection by the engineer of the Commission. It is contended that this invalidates the order of the Commission because the report of the engineer is not in the record. The record does not show that the engineer made a report in writing to the Commission. The written report or opinion of the Commission merely recites that "the conditions at the town of Lewisville were inspected by the engineer of the Commission and by the members of the Commission." The Commission had the right to consider the report of its engineer, if there was such report, as it would have been advisory in its character and not evidentiary, and the report should have been put into the record. Appellant had the right to insist that it go into the record, but, having failed to have it done, is not in an attitude to complain. Furthermore, appellant has had the benefit of a trial *de novo* in the circuit court on the record, which included all of the testimony which it saw fit to introduce before the Commission. It is not shown that anything was omitted which is material to appellant's case, and it has been afforded full protection of the law in all of its rights by a trial in the circuit court where the cause was heard, not for the purpose of reviewing for errors of the Commission, but to determine the merits of the controversy. The fullest requirements of the law are thus satisfied. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287.

Lastly, it is contended that it is beyond the power of the Commission to prescribe the character of the building and the material of which it should be constructed. The power to require the construction of a new station building carries with it, by implication, the

power to prescribe the kind and capacity of building and the material. Of course this power cannot be captiously or arbitrarily exercised. We do not find that the order of the Commission is open to that charge. Appellant merely denies the authority of the Commission to give any directions with respect to the kind of material, and in this we think that counsel is mistaken.

We discover no ground for setting aside the order of the Commission, and the judgment of the circuit court will therefore be affirmed.

HART and SMITH, JJ., dissent.

SADLER v. CAMPBELL.

Opinion delivered November 28, 1921.

1. QUIETING TITLE—COMMON SOURCE OF TITLE.—Where plaintiff and defendants derive their titles to land from a common ancestor, defendants cannot challenge the source of plaintiffs' title, though she acquired possession of the land by virtue of a void decree in partition.
2. DESCENT AND DISTRIBUTION—ANCESTRAL ESTATE.—On the death of an heir intestate and without issue, lands descended from the mother ascend to the mother's heirs, under Crawford & Moses' Dig. § 3480.
3. CURTESY—NATURE OF ESTATE.—Curtesy at common law is a life estate which a husband acquires, upon the birth alive of lawful issue of the marriage, in all the lands of which his wife was seized in fee; the estate being initiate upon marriage, seizin and birth of issue, and becoming consummate upon the death of the wife.
4. ADVERSE POSSESSION—POSSESSION OF LIFE TENANT.—Since the deed of a life-tenant, though purporting to convey the fee, conveys merely the right to possession and to the rents and profits during the grantor's life, the possession of the grantee thereunder during the grantor's lifetime cannot become adverse to a remainderman.
5. EQUITY—LACHES.—One who seeks relief in equity to which he is entitled at law, and which is not barred by the statute of limitations, is not barred by laches.
6. APPEAL AND ERROR—PRESUMPTION.—Where the answer to a bill to quiet title alleged the making of improvements by defend-

ants, but there was no evidence as to such improvements, a decree was rendered quieting title in plaintiff without awarding the value of such improvements, it will be assumed on appeal either that the issue as to the improvements was abandoned or that there was no proof to justify a judgment for such improvements.

7. QUIETING TITLE—ALLEGATION OF IMPROVEMENTS.—A denial of allegations of the answer as to improvements is not necessary, but such allegations are in issue without a formal denial and must be proved by the defendants.

8. JUDGMENT—RES JUDICATA.—A decree in a former suit to which the parties to a pending suit were strangers is not binding on them.

9. QUIETING TITLE—TITLE OF PLAINTIFF.—Where the parties to a suit to quiet title do not deraign title through a common source, the plaintiffs, to recover, must deraign title from the government.

Appeal from Yell Chancery Court, Dardanelle District; *Jordan Sellers,* Chancellor; reversed in part.

Davis & Bohlinger, Parker & Lee and *Evans & Evans,* for appellants.

Mrs. Wooten never acquired any title to the lands involved. On the death of Ruth Ann Keywood, these lands, inherited by her from her father, ascended to the nearest lineal ancestor in the paternal line, if living, and if dead, to his collateral heirs, and did not vest in the heirs of Ruth Ann's mother. Therefore, neither the Price nor the Vicker heirs inherited any interest. Kirby's Digest, § 2645; *Id.* § 2636, clause 3; *Id.* § 2646; 15 Ark. 555.

She acquired no title by the order of the circuit court allotting to Sarah Price half of the land involved in this suit, because, first, the land in section 14 was never mentioned in the partition proceedings; second, the title never having been put in issue, that order did not vest title nor color of title in her. 96 Ark. 89; Thompson, Title to Real Property, § 670; 70 Ark. 432; 71 *Id.* 544. Third, Mrs. Wooten was dead at the time the allotment was made in the name of Sarah Price, and the allotment was therefore a nullity. 36 Ark. 456. Fourth, the order

of partition was void, and no title could be based upon it. 15 Cyc. 42, note 61; 3 Johns 459; 26 Barb. 499; 12 S. W. 784; 23 Cyc. 926, 931; 5 Am. Eng. Enc. of L. 1st Ed., 432; 17 *Id.* 1st Ed., 810; 23 Cyc. 919; *Id.* 963; *Id.* 1073, 1074; 48 Ark. 151; 101 Ark. 390; 60 *Id.* 369; Kirby's Digest §§ 5771, 5772.

At no time during the life of Mrs. Wooten was she seized of an estate of inheritance in the Keywood land, nor had she at any time a right to the possession of the freehold. Her husband, therefore, acquired no curtesy right in that land. 64 Ark. 357; 4 Am. & Eng. Enc. of L. 1st Ed., 961, 963.

Appellee is barred by the statute of limitations. Her right of action, if any, accrued at the date of the death of Newton Wooten, and, that right not having been asserted within seven years of his death, it is barred. Kirby's Digest, § 5056.

Appellee is not an heir of Newton Wooten. If he inherited from his mother, the title ascended at his death to his mother's heirs as prescribed by § 2645, Kirby's Digest. As to Mrs. Wooten's heirs see Kirby's Digest §§ 2636, clause 3, 2646, 2648. The nearest lineal and paternal ancestor of Mrs. Wooten was Isaac Price, her father. He being dead, the estate, if any, was transmitted through him to his only daughter, Mrs. McCrackin, and not to the heirs of James Vickers nor to the heirs of the mother, Mrs. Vickers. 15 Ark. 555, 591. Mrs. Campbell, the appellee, being of the half blood in the maternal line, is postponed to the paternal line. *Id.*

The burden was on appellee to show her title. Kirby's Digest § 2742. It is not true, as she alleged, that both parties trace title to the same source.

Perry, who held under color of title, by virtue of a warranty deed from Mrs. McCrackin and her husband and W. P. Wooten, acquired title by adverse possession, and Sadler likewise acquired title by adverse possession from the date of Perry's deed in 1891 to the time this suit was instituted.

If appellee was entitled to judgment, then, under the allegations of the answer, not denied by the plaintiff, the defendants were entitled to judgment for improvements, and possession should not have been awarded until said cost was paid. Kirby's Digest, § 2754; 48 Ark. 183; 120 *Id.* 620; 64 *Id.* 645.

Hays & Ward, for appellee.

It having been proved that the plaintiff and the defendants deraign title from the same, source, to-wit: Sarah Price Wooten, defendants cannot assail that title, and plaintiff is not bound to trace title beyond the common source. Even if the partition proceeding in the circuit court was a nullity, defendants cannot question it. 41 Ark. 21; 44 *Id.* 517; 109 *Id.* 500; 137 *Id.* 170; 106 N. C. 553; 11 S. E. 322; 54 Ga. 689; 7 A. L. R. 860; 145 U. S. 367; 21 S. W. 299.

Appellants are concluded by the judgment in partition. C. & M. Dig. § 8108.

Even without a judgment of court dividing the lands, the parties themselves having agreed upon the partition, and each having gone into possession, and the same having been acquiesced in for fifty years, appellants are now estopped to deny such division. 84 Ark. 584; 121 *Id.* 197; 77 *Id.* 309.

Notwithstanding the deed of W. P. Wooten to J. K. Perry purported to carry the fee simple title in the lands, Perry acquired thereby only the right of possession thereof for the lifetime of Wooten. 35 Ark. 84; 43 *Id.* 427; 58 *Id.* 510; 117 *Id.* 371; 126 *Id.* 1; 60 *Id.* 74.

Appellee is not barred. The statute does not run against the reversioner until the death of the life tenant. 35 Ark. 90; 44 *Id.* 490; 58 *Id.* 510; 60 *Id.* 7. The possession of the life tenant or his grantee is not adverse to the reversioner or remainderman. 58 Ark. 510; 128 *Id.* 342; *Smith* v. *Maberry,* 148 Ark. 216.

W. P. Wooten held the lands, not adversely to, but in subordination to, the rights of appellee. 97 Ark. 33; 33 *Id.* 633; 42 *Id.* 118; 58 *Id.* 142.

As to the heirs of Newton Wooten and of his mother, the statutes referred to by appellants are not applicable; but the inheritance goes in accordance with § 2645, Kirby's Digest, being § 3480, C. & M. Digest; 129 Ark. 7; *Id.* 573.

Appellants, without having made proof supporting the allegations as to betterments, were not entitled to judgment therefor. 13 Ark. 88; 41 *Id.* 394.

WOOD, J. This is an appeal from a decree of the Yell Chancery Court in favor of the appellee against the appellants. The decree adjudged that the appellee was the owner and entitled to the possession of an undivided one-fourth interest in the S½ of the SE¼ of section 15, (designated in the record and hereafter called the "Keywood Place") and the SW¼ (fr.) of section 14 in township six north, range 19 west, and the accretions thereto. The decree also awarded the appellee judgment in the sum of $700 as her portion of the rents and profits with interest thereon at the rate of six per cent. per annum from the rendition of the decree, less $19.50, taxes for the years 1919 and 1920. While the decree awards to the appellee an undivided one-fourth interest in the SW fr. ¼ of section 14, and the accretions thereto, the appellee, in her brief, has abandoned here her claim to this tract, for she says that "by the judgment of the circuit court of Yell County rendered in 1870 to Evaline Vickers and James Vickers jointly were set apart the N½ of the SW¼ of section 36, T. 6 N. R. 20 W. This was the Tipton tract, being seventy-four acres, * * * * and to Laura McCrackin and Sarah Price, sisters, jointly, the commissioners set apart the S½ of the SE¼, section 15-6-20, known as the "Keywood tract, being sixty-six acres." Again she says: "This Keywood tract is the land involved in this suit."

The appellee instituted separate actions against the appellants, one in the chancery court, September 19, 1919, and the other in the circuit court of Yell County. The purpose of these actions was to have the appellee adjudg-

ed the owner and entitled to the possession of the lands in controversy. The action at law was transferred to the chancery court and consolidated with the cause pending in that court, and the consolidated cases proceeded to a trial and decree in the chancery court.

The appellee alleged in her complaint, among other things, that she and the appellants deraigned title from a common source as follows: "That the original owners of said lands from whom plaintiffs and defendants deraigned title were Laura Vickers and Miss Ruth Ann Keywood; that Laura Vickers was the mother of the following children, who were her heirs at law, her husband being dead at the time of the partition of her lands: 1st. Lavina Price, who married E. L. McCrackin. 2nd. Sarah Price, who married W. P. Wooten. 3rd. James Vickers, who died without issue. 4th. Evaline Vickers, this plaintiff, who married W. S. Campbell in January, 1874, and since and now is, a married woman. 5th. Ruth Ann Keywood, who with her mother was the owner of said lands; that Ruth Ann Keywood was never married, died in 1867, about eighteen years of age, without issue, leaving the first four children, her sisters and brother of the half blood on her mother's side as her only heirs at law; that, on the death of Laura Vickers and Ruth Ann Keywood, said lands descended in equal parts to Lavina McCrackin, Sarah Price, James Vickers, and plaintiff, who held same as tenants in common.

That at the November term, 1870, of the chancery court of Yell County, Arkansas, Lavina McCrackin, Sarah Price, James Vickers and Evaline Campbell filed a petition for the partition and division among them of said lands, and other lands, alleging that they were the only heirs at law of Laura Vickers and Ruth Ann Keywood, both deceased, who at the time of their death were owners of said lands, and the court appointed commissioners to partition said lands among the four tenants in common."

Then follows an allegation that the lands were partitioned by the circuit court of Yell County, and the title

to the lands vested in fee simple in Lavina McCrackin and Sarah Price, giving to each an undivided one-half interest. The complaint then alleged that Sarah Price married W. P. Wooten after the lands had been set apart to her as above; that one child, Newton Wooten, was born to them; that Mrs. Wooten died in 1871 intestate, leaving surviving an infant son, Newton Wooten, and her husband, W. P. Wooten; that at the time of her death she was the owner of an undivided half interest in the lands which descended to her son, Newton Wooten, subject to the curtesy of her husband, W. P. Wooten; that Newton Wooten lived three days after the death of his mother, and at his death his interest in the lands vested in fee simple subject to the curtesy rights of W. P. Wooten, his father, in his material aunts and uncle as above; that his uncle James Vickers, died intestate and without issue, leaving as his only heirs at law his sister of the half blood on his mother's side, Lavina McCrackin and plaintiff, his father being dead; that James Vickers at the time of his death was the owner as the heir of Newton Wooten of an undivided one-sixth interest in said lands, which thereupon became vested in Lavina McCrackin and plaintiff, subject to the curtesy of W. P. Wooten; that in 1883 W. P. Wooten and his then wife, Mary E., and Lavina McCrackin and E. L. McCrackin executed a deed to J. K. Perry; that, at the time of the execution of this deed, W. P. Wooten had a life estate only in an undivided one-fourth interest in the lands, and by said deed conveyed such interest to J. K. Perry; that Perry in 1891 conveyed the lands to Elizabeth C. Sadler and Rufus Sadler under whom appellants claim; that W. P. Wooten died in 1919, and upon his death the plaintiff was entitled to immediate possession of an undivided one-fourth interest in the lands. She prayed that the lands be partitioned, and, if this could not be done, that they be sold; that she have the portion of the lands or the proceeds of the sale to which she was entitled, and have judgment for rents and profits.

In their answer the appellants denied all the material allegations of the complaint. They deny that they were tenants in common with the appellee; deny that she had any right, title, or interest in the lands; deny that she had ever been in possession of same with or without color of title. They admit the appellants claim the lands by virtue of the will of Elizabeth C. Sadler. Among other things, they allege that John T. Keywood died seized and possessed of the lands; that he left surviving him his widow, Laura Keywood, who afterwards married James Vickers, and had by him two children, plaintiff and her brother, James Vickers, Jr.; that Keywood, at his death, left surviving him his daughter, Ruth Ann, his only child and heir at law, and his widow, Laura Keywood; that the only interest Laura Keywood, afterward Vickers, had in the land was a dower interest; that at the death of Keywood the lands descended to his daughter, Ruth Ann Keywood; that Mrs. Laura Keywood Vickers died before Ruth Ann Keywood, and that at the death of Ruth Ann Keywood the lands vested in her paternal uncle and aunts, to-wit, Jeff Keywood, and others, and not in the half sisters and half brother of Ruth Ann Keywood.

The appellants set up that the partition under which the appellee claims title through Ruth Ann Keywood was void and was obtained by fraud practiced on the court. They allege that at the time of the approval of the report of the commissioners appointed to partition the lands under that judgment, Mrs. Sarah Price, then Wooten, and her son, Newton Wooten, were dead; that the title of the heirs of John T. Keywood who inherited the lands from him was not put in issue and was not divested by that judgment of partition, and that Sarah Price Wooten acquired no title or right of possession to the lands, and hence none descended from them to the plaintiff (appellee.) They deny that Sarah Price Wooten obtained title by purchase from Ruth Ann Keywood, but say that, if so, then on the death of Newton Wooten the lands would vest in the father of Sarah Price Wooten

and descend at his death to his daughter, Mrs. Lavina McCrackin. They deny that the plaintiff obtained title by the statute of limitations. They deny that the plaintiff and the defendants claim under the same source of title, and allege that Wooten and Lavina McCrackin obtained title through the heirs of Ruth Ann Keywood; that they entered into possession of the same and held the same adversely for more than seven years, and had title by limitation in 1883, when they conveyed the same to James K. Perry; that if Newton Wooten, at his death June 15, 1871, owned an undivided interest in the lands and the plaintiff and her half brother inherited such interest, they were at that time entitled to the possession, and plaintiff, being at that time a single person, the statute of limitations began to run against her in favor of Wooten and Lavina McCrackin, who were then in possession of the lands; that they acquired title by such adverse possession, which title was conveyed by them to Perry and by him to Mrs. Elizabeth C. Sadler, who willed the lands to appellants.

The appellants set up title by adverse possession and pleaded the statute of limitations and laches. Such are the issues. The evidence adduced at the trial established the following facts, which are uncontroverted.

Miss Laura Tipton was thrice married; first, to Isaac Price, then to John T. Keywood, and then to James Vickers. By her first husband she had two daughters, Lavina, who married E. L. McCrackin, and Sarah, who married W. P. Wooten. By Keywood she had one daughter, Ruth Ann, and by Vickers she had two children, James Vickers, Jr., and Evaline, who married W. S. Campbell in the year 1874. John T. Keywood, the owner in fee of the "Keywood place" died about the year 1852. Laura Price Keywood Vickers died in 1864, and Ruth Ann Keywood died in the year 1868 intestate and without issue. At the November term in the year 1870 Lavina McCrackin and her husband, Sarah Price and James and Evaline Vickers, minors, through their guardian, filed in the circuit court a petition for the partition of the "Keywood place"

and other lands, alleging that they were the only persons interested therein, and no others were made parties. The court entered a judgment at that term for a partition of the lands described in the petition and appointed commissioners and directed them to make a partition and report at a subsequent term of the court. The commissioners made the partition and set aside the "Keywood place" to Lavina McCrackin and Sarah Price. Their final report was made November 8, 1871, and the same was approved by the court on that day.

After the judgment for partition, but before the final report of the commissioners was made to and approved by the court, Sarah Price married W. P. Wooten. To them was born a son, Newton Wooten. The mother died about the 12th of June, 1871, in childbirth, leaving her son and only issue Newton Wooten, who survived her only three days. James Vickers died in the year 1882 without issue.

The appellants contend that Sarah Wooten did not during her lifetime take possession of the lands set apart to her by the commissioners under the partition decree.

The appellee testified that, after the land was divided, Lavina McCrackin and Sarah Price Wooten took possession of the Keywood farm; that they were in possession and renting the same at the time of Mrs. Wooten's death; that after her death her husband, W. P. Wooten, took possession of Mrs. Wooten's part and controlled it until he sold it to Perry.

By agreement between the parties evidence contained in a transcript of the record before the Supreme Court in an action between Mrs. James K. Perry and R. C. Sadler was considered by the chancery court herein. In that case W. P. Wooten testified that he was a joint owner with E. L. McCrackin and Lavina McCrackin of a tract of land in Yell County known as the "Keywood Place," (describing it). "I was," he says, "joint owner of the above-described land. Said lands were inherited by my wife and the wife of E. L. McCrackin. At the time of the conveyance made by McCrackin and myself, my

wife was dead, and my interest in the land at that time was the interest of a child born during the marriage, who died soon after its mother's death. In 1883 McCrackin and his wife and myself sold the 'Keywood Place' to James K. Perry."

In that case a warranty deed dated May 16, 1883, was also in evidence conveying the "Keywood Place" as above described to James K. Perry from E. L. McCrackin and wife and W. P. Wooten and wife. Perry took possession under said deed and held the same until the 9th of June, 1891, when he (Perry) conveyed to R. C. and Elizabeth Sadler, under whom the appellants claim, and the Sadlers have been in possession ever since.

1. The first question for our consideration is: Do the appellee and the appellants deraign title from a common source? The testimony of the appellee shows that Mrs. Sarah Wooten and Mrs. McCrackin took possession of the "Keywood Place" that was set apart to them by the commissioners appointed by the court to make the partition of this and other lands; that they were in possession of the same and owned it at the time of Mrs. Wooten's death. The testimony of Wooten was to the effect that the Keywood farm was inherited by his wife and the wife of McCrackin, and that at the time of the conveyance made by him and McCrackin and wife to Perry, his (Wooten's) interest in the land was that of a child born during his marriage to Sarah Price, which child died soon after his mother's death. While Wooten was mistaken as to the nature of the estate he held in the land, his testimony shows unmistakably that the estate he claimed was derived from his wife, Sarah, at the time of her death. The undisputed testimony shows that James K. Perry went into possession of the land under the warranty deed executed to him by E. L. McCrackin and wife and W. P. Wooten. We conclude, therefore, that the appellee and the appellants trace their title to the land in controversy to a common source, to-wit, Sarah Price Wooten. Such being the fact, even though the judgment in partition, under which Mrs. Wooten ob-

tained possession of the land, be void, and even though she acquired no title thereunder, nevertheless appellants cannot challenge the source of her title. *Stafford* v. *Watson,* 41 Ark. 18, 21; *Freisler* v. *McKennon,* 44 Ark. 517; *Wood* v. *Freeman Lumber Co.,* 109 Ark. 499; *Eichoff* v. *Scott,* 137 Ark. 170, 173, 174; *Cox* v. *Hart,* 145 U. S. 376; *Bonds* v. *Smith,* 106 N. C. 553; *Scott* v. *Singer,* 54 Ga. 689, and numerous cases cited in note to *Jenkins* v. *Marston,* 7 A. L. R. p. 860. Since the appellee and appellants claim from a common source, it was only necessary for the appellee to prove that her title was superior to that of the appellants. This she has done, for when Mrs. Sarah Wooten died intestate, her son Newton inherited her interest in the "Keywood Place," and at his death without issue this interest in the lands ascended or passed to his material aunts and uncle. Sec. 3480, C. & M. Digest; *Kelley's Heirs* v. *McGuire,* 15 Ark. 555; *West* v. *Williams,* 15 Ark. 682; *Oliver* v. *Vance,* 34 Ark. 564; *Campbell* v. *Ware,* 27 Ark. 65; *Coolidge* v. *Burke,* 69 Ark. 238; *Carter* v. *Carter,* 129 Ark. 7 and 573.

2. Although Wooten, in his testimony, designated the interest he held in the land as that of a child born during his marriage to Sarah Price, this was a mistake of law on his part, for Wooten did not inherit any interest from his wife, nor, as we have seen, did he inherit any interest from his son. The interest which Wooten acquired in the Keywood Place was that of curtesy. Curtesy at the common law is an estate for life which the husband acquires upon the birth of lawful issue of the marriage born alive and capable of inheriting, in the lands or tenements of which his wife is seized in fee simple or in tail. *Owens* v. *Jabine,* 88 Ark. 468. See also *Smith* v. *Maberry,* 148 Ark. 216. Curtesy becomes initiate upon marriage, seizin, and the birth of issue, and becomes consummate when added to the above requisites is the death of the wife. 1 Washburn on Real Estate, Sec. 313; 17 C. J. 413 *et seq.* 416-421; 8 R. C. L. p. 387, Secs. 1-6 inclusive. "Seizin is either in deed or in law.

Seizin in deed in actual possession." *Tate* v. *Jay,* 31 Ark. 576. See also *McGuire* v. *Cook,* 98 Ark. 118.

Mrs. Sarah Wooten and Mrs. McCrackin took possession of the "Keywood Place" in 1870, and Mrs. Sarah Wooten was in possession when she married W. P. Wooten and remained in possession until she died in 1871. As we have seen, Mrs. Sarah Price Wooten was the common source of title, and at the time of her marriage to W. P. Wooten was in actual possession of the land in controversy, and after her marriage a son was born alive and capable of inheriting from her. This all occurred before the married woman's statute (1873) and the Constitution abolished the curtesy initiate. Therefore, W. P. Wooten had such curtesy, which, upon the death of his wife, Sarah, in 1871, became consummate. *Loyd* v. *Planters' Mutual Ins. Co.,* 80 Ark. 486; *Neeley* v. *Lancaster,* 47 Ark. 175; *Hampton* v. *Cook,* 64 Ark. 353. As the estate of curtesy in W. P. Wooten was only a life estate, it was inferior to the estate which the appellee inherited upon the death of Newton Wooten.

3. This brings us to the consideration of the questions as to whether or not the appellants have acquired title by the seven years statute of limitations, and whether or not the appellee is barred by that statute and by laches, all of which questions we will consider together. Although the deed from W. P. Wooten purported to convey to J. K. Perry the fee in the Keywood place, nevertheless he could not convey a greater estate than that of which he was possessed. Therefore, the deed of W. P. Wooten purporting to convey the fee to Perry in fact conveyed to him the right to the possession and rents and profits of the lands during Wooten's life only. *Morris* v. *Edmunds,* 43 Ark. 427; *Smith* v. *Maberry, supra.* W. P. Wooten having the right to the possession of the lands during his life, the appellee could not institute an action to recover her interest which was inherited from Newton Wooten until the death of the life tenant, W. P. Wooten.

It is well established by the decisions of this court that "neither the possession of the life tenant nor his grantee by any possibility can become adverse to the reversioner or the remainderman for the reason that such possession is not an interference with the rights of the latter." *Smith* v. *Maberry, supra.* The appellee instituted an action to recover her interest in the "Keywood Place" in less than one month after the death of W. P. Wooten, the life tenant. She is seeking relief to which she is entitled at law, and is therefore neither barred by the statute of limitations nor by laches. *Smith* v. *Maberry, supra. Lesser* v. *Read,* 142 Ark. 320; *Galloway* v. *Battaglia,* 133 Ark. 441; *Anders* v. *Roark,* 108 Ark. 248; *Neeley* v. *Martin,* 126 Ark. 1; *LeSieur* v. *Spikes,* 117 Ark. 366; *Ogden* v. *Ogden,* 60 Ark. 74; *Moore* v. *Childress,* 58 Ark. 510; *Padgett* v. *Norman,* 44 Ark. 490; *Morris* v. *Edmund, supra; Banks* v. *Green,* 36 Ark. 84.

4. There is an allegation in the answer to the complaint in the chancery action that the appellants, believing themselves to be the owners, had made valuable improvements on the land to the value of $1,000, and that plaintiff had not tendered one-fourth thereof nor offered to pay for the improvements nor the taxes paid thereon by the defendants before instituting her action against them. There is no allegation of this kind in the answer to appellee's action at law. The answer concludes with a prayer that the judgment of the court in partition rendered in 1870 and the approval of the report of the commissioners in that action be cancelled and set aside, and that the appellee's complaint be dismissed, and that the appellants have judgment for costs and for such other relief as in equity and good conscience they are entitled to. We do not find that the appellee denied the allegations of the answer as to the improvements and taxes. But there is no evidence in the record as to the amount appellants expended for improvements. It does appear that the court in its decree rendered judgment in favor of the appellee in the sum of $700 less $19.50, taxes

for the years 1919 and 1920. Since the court had under consideration the amount claimed for rents and taxes and rendered a decree in favor of the appellants, the court, we must assume, did not render any decree in favor of the appellants for the improvements claimed because that issue was abandoned, or because there was no proof in the record to justify a judgment in appellant's favor for improvements. A denial of the allegations of the answer as to the improvements and taxes was not called for under the betterment statute. That allegation was in issue without a formal denial thereof, and it was incumbent on the appellants to prove the allegations in order to entitle them to a judgment thereon. Sections 3703-3704, Crawford & Moses' Digest.

5. As we view the statements made in brief of counsel for the appellee concerning the land in section 14 and the accretions thereto for which appellee obtained a decree against the appellants, the appellee has abandoned her claim to those lands.

Therefore, the decree as to the lands in section 14 should be reversed and remanded, and appellee's complaint as to that tract dismissed, and appellant's title to that tract quieted. It is so ordered. The decree in all other respects is correct, and it is affirmed.

Justice HART not participating.

WOOD, J., (on rehearing). On reading the petition and brief of the appellee for rehearing, we are convinced that we were in error in holding that the appellee had abandoned her rights in the decree to the SW frl. ¼ of Sec. 14-6-20, and this conclusion makes it necessary to consider whether or not the decree of the court was correct in awarding the appellee an undivided one-fourth interest in the SW frl. ¼ of section 14-6-20. Upon an examination of the record as to this tract we find that the appellants and the appellee do not trace their title to this particular tract to a common source. The appellee traced her title to the Keywood place to a suit in partition in which, by the judgment of the circuit court of Yell County at its November term, 1870, the court

awarded to Lavina McCrackin and Sarah Price, sisters jointly the S½ of the SE ¼ of section 15-6-20, known as the "Keywood tract," being 66 acres. It will be observed that this decree, from which the appellee deraigns her title, did not adjudge to Mrs. Sarah Price Wooten, through whom the appellee claims, any title whatever in any lands in section 14.

After the judgment for partition, but before the final report of the commissioners was made and approved, W. P. Wooten married Sarah Price. Sarah Price Wooten took possession of the lands awarded her under the partition decree. She died about June 12, 1871, after the birth of a son by Wooten. After her death, W. P. Wooten again married. On May 16, 1883, Lavina McCrackin and her husband, E. L. McCrackin and W. P. Wooten and his then wife, Mary E., joined in a warranty deed in which they conveyed the "S½ of the SE¼ of Sec. 15, township ———N., and range 20 west, containing 66 acres more or less" to James K. Perry. On the 9th of June, 1891, James K. Perry and wife conveyed to Mrs. Elizabeth C. Sadler for her natural life and Rufus C. Sadler, and his heirs and assigns forever in remainder after the death of Elizabeth C. Sadler, the following described land in the Dardanelle District of Yell County, Arkansas, to wit: "The S— of the E fr. ¼, containing 68 acres more or less, and 32 acres off of the south side of the N½ of the SE fr. ¼, all in Sec. 15, tp. 6 N. of base line, and range 20 west of the fifth principal meridian, making in the aggregate 100 acres more or less."

It will be noticed that the deed from McCrackin and wife and Wooten and wife does not convey to Perry any lands in section 14, but only 66 acres in section 15, describing it; nor does the deed from Perry to the Sadlers convey any land whatever in section 14. After these deeds passed, the Sadlers claimed that Perry should have conveyed to them, and intended to convey to them, a small tract of .62 of an acre described as the SW fr. 1/4 of section 14, Tp. 6 N., R. 20 W., and its accretions,

and in a suit between Perry and the Sadlers it was so held. *Perry* v. *Sadler,* 76 Ark. 45. In that suit it was shown that Perry and Sadler entered into a written contract containing, among others, the following clause: "Said Perry to deed unencumbered to said Sadler, the *Keywood place,* say about 68 acres more or less, and 32 acres off lower side of Brown place along the upper side of the Keywood place." The court, in that case, said: "It is indisputably shown that it was an unintentional oversight in the conveyance to Perry and from Perry to Sadler that said fractional quarter section of section 14 was not included. It was a small wedge-shaped tract running almost to the dwelling house on the Keywood place, including part of the yard and garden. This part of it was enclosed with other land, and all of it under control of the owner of the Keywood place. The parties did not know that this fraction did not pass under the deeds, as they supposed all of this land was in section 15, and it was clearly shown that it was intended to be conveyed." After quoting the above, counsel for the appellee say: "The Supreme Court has held and declared that the SW fr. ¼ of section 14 is a part of the Keywood place." But the appellee was not a party to that suit, and neither she nor the appellants in this case are bound by that decision. That decision could not settle the rights of the parties to this litigation, and the appellee could not use that decision as proof that the lands in section 14, which she now claims, were embraced in the "Keywood place" which was partitioned to Sarah Price and Lavina McCrackin. The decision of *Perry* v. *Sadler, supra,* was not competent to show that Mrs. Sarah Price Wooten ever acquired any possession to the lands in section 14. She and Mrs. McCrackin, so far as the parties to this suit are concerned, must be held under the partition decree to have taken possession of the "Keywood place" described as in section 15 and not in section 14. Wooten, by his curtesy rights, acquired only such possession as his wife, Sarah Price Wooten, had. He and Mrs. McCrackin conveyed the lands to

Perry in section 15 and not in section 14, and Perry likewise conveyed to the Sadlers the land in section 15 and not in section 14. So, as far as the record evidence of title is concerned, there is an utter absence of proof to show that the parties to this lawsuit deraigned title to the lands in section 14 from a common source. Such being the case, before the appellee could have her title quieted and dispossess the appellants of the lands in section 14, it devolved upon her to show that she had perfect title by tracing same back to the government. This she has wholly failed to do. It follows that the decree of the chancellor as to the lands in section 14 was erroneous and must be reversed for the reason now given. The appellee's motion for a rehearing as to this tract is therefore overruled.

The appellant's motion for rehearing as to the lands in section 15 is overruled. Mrs. Sarah Price Wooten was the common source of title as to this tract. Therefore, appellants are not allowed to challenge her title or to inquire of its source. When she died, her son Newton inherited her estate. His estate was ancestral from her, and at his death, intestate, and without issue, his estate ascended to the line of the mother from whom he inherited, as stated in the original opinion.

The trial court, having rendered a decree in favor of the appellee for both the lands in section 14 and in section 15, awarded a judgment in favor of the appellee in the sum of $700 as rents for both tracts. Since our conclusion is that the appellee is not entitled to a decree for the lands in section 14, it follows that she is not entitled to a judgment for rents as to this tract. There is no proof in the record from which we can enter a satisfactory decree as to the betterments, rents and profits when same are apportioned between the lands in sections 14 and 15. The decree of the chancellor in favor of the appellee in the sum of $700 for rents must therefore be reversed.

The decree therefore will be reversed as to the lands in section 14, and the cause remanded with direc-

tions to dismiss the appellee's complaint for want of equity as to that tract and quiet appellants' title thereto; and also with directions, if the parties are so advised, to allow them to further develop the cause on the issue as to betterments, rents, and taxes. In all other respects the decree is affirmed.

McHENRY v. VAUGHT.

Opinion delivered November 28, 1921.

USURY—BONUS PAID TO LENDER'S AGENT.—Where a lender's agent, with the borrower's knowledge, exacted from the borrower a bonus in addition to the highest lawful interest charged by the lender, this rendered the transaction usurious, and the contract is void.

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

STATEMENT BY THE COURT.

Carrie McHenry brought this suit in equity against Frederica Vaught and J. J. Vaught to foreclose a mortgage on 120 acres of land in Polk County, Ark., given to secure a note for $900. The defense was usury.

According to the testimony of J. J. Vaught, the husband of Frederica Vaught, they resided on their farm comprising 120 acres in Polk County, Ark., during the year 1916, and ever since that time. R. S. Cox resided in Ft. Smith, Ark., and came to see them with regard to a loan on their farm. They made an agreement with Cox to borrow $900 and give a mortgage on their farm to secure the same. Cox represented that he was lending money for F. B. Collins. Early in January, T. M. Miller came to inspect the farm and brought the note and mortgage for the Vaughts to execute. They signed a note for $900, dated January 7, 1916, payable to the order of F. B. Collins with interest at the rate of 6 per cent. per annum from January 15, 1916, until maturity, payable semi-annually, according to the tenor of the fourteen interest notes. The first of the interest notes was for

$24.75, and the remaining thirteen interest notes were for $27 each. They signed the mortgage on their farm to secure the principal and interest notes on the same day. Miller also presented to them a loan contract, which they also signed on the 7th day of January, 1916. This contract recites that R. S. Cox is appointed their agent to negotiate a loan of $900 for seven years. It was agreed to pay him as commissioner the sum of $252. $126 of this amount was in cash, and the remaining $126 was payable by two notes for $63 each due respectively January 1, 1917 and 1918. It was also agreed that these two notes should be secured by a second mortgage on their farm. Two or three months after the execution of these instruments, J. J. Vaught received $774. Several months thereafter F. B. Collins sent an additional $36 to Vaught, stating that a mistake had been made in that amount in the mortgage. This made $810 which was received by J. J. Vaught, and the whole amount was sent through the office of the F. B. Collins Investment Company. Cox was not present when the note and mortgage were executed. Cox transferred the loan contract signed by J. J. Vaught and wife to F. G. Tompkins.

R. S. Cox was a witness for the plaintiff. According to his testimony, he assigned the loan contract to F. G. Tompkins, paid him the $126 cash, and retained the two notes for $63 each. During that year Cox was not an agent for F. B. Collins, or for the F. B. Collins Investment Company. Since 1917, he had been inspector for F. B. Collins and for the F. B. Collins Investment Company on a salary. Cox admitted that he was not present when the note and mortgage were executed, but said that he had instructed F. G. Tompkins as to the nature of the contract he had with the Vaughts.

F. B. Collins was also a witness for the plaintiff. According to his testimony, in January, 1916, he was engaged in making farm loans. He agreed to purchase the loan made by F. G. Tompkins and R. C. Cox on a farm in Polk County, Ark., belonging to Frederica Vaught

and J. J. Vaught. The loan was for $900. Collins did not have any interest in the second mortgage given to F. G. Tompkins to secure the $126. Collins sold his loan to the plaintiff, Carrie McHenry.

T. M. Miller was the inspector of Collins, and approved the loan in question after it had been submitted to Collins by F. G. Tompkins. It was Miller's custom to follow the instructions of the agent for the borrower in drawing the notes and mortgages and looking after the execution of the same. Collins carried an account with F. B. Collins Investment Company, and in closing out his loans the proper officer of that company was authorized to pay out the money and charge the same to his account. This method of procedure was followed in this case. Neither R. S. Cox nor F. G. Tompkins were his agents in the premises. Collins had bought some loans submitted to him coming from Cox. F. G. Tompkins was treasurer of the F. B. Collins Investment Company at the time.

The court found that Cox and Tompkins were the agents of Collins, and that the note sued on was void for usury. It was therefore decreed that the complaint of the plaintiff should be dismissed for want of equity.

The plaintiff has duly prosecuted an appeal to this court.

Pearson & Baird and *Minor Pipkin,* for appellant.

When a borrower employs an agent or broker to negotiate a loan for him, and the compensation paid for such services, when added to the legal rate of interest, exceeds the highest interest allowed by law, this does not make the loan usurious. 27 R. C. L. 236, Sec. 3; 51 Ark. 534.

The fact that the agent who negotiated the loan divided the compensation with the agent of the lender does not render the transaction usurious. 27 R. C. L. 237, Sec. 38; 46 A. S. R. 197, note.

A loan is not rendered usurious by the lender's agent charging a commission for procuring the loan without

the lender's knowledge or consent. 27 R. C. L. 237, § 39. Innocence and ignorance on the part of the lender is immaterial. *Ibid.*

Usury will not be inferred where from the circumstances the opposite conclusion can be reached. 68 Ark. 162; 74 Ark. 253; 67 Ark. 74.

Where the agent of a borrower in making a loan, having no connection with the lender, demands a commission for himself, this does not render the loan usurious, even though in excess of the highest legal rate. 141 U. S. 384; 35 L. Ed. 786; 12 Sup. Ct. 1; 61 Ala. 507; 33 Conn. 81; 90 Ill. 952; 6 Bradw. (Ill.) 523; 89 Mo. 375; 1 S. W. 359; 81 N. Y. 351; 16 Hun. 209; 81 N. Y. 293; 66 N. Y. 544; 32 N. Y. 165; 21 N. Y. 219; 78 Am. Dec. 137; 14 Hun. (N. Y.) 537; 84 N. Y. 627; 64 Ark. 662; 43 S. W. 507.

Brokerage in excess of legal interest cannot affect the principal when paid without his knowledge or consent. 141 U. S. 384, 35 L. Ed. 786, 12 Sup. Ct. 1; 33 Fed. 636; 92 Ala. 163; 9 So. 143; 92 Ala. 135; 8 So. 388; 54 Ark. 573; 16 S. W. 575; 82 Ga. 299; 9 S. E. 1092; 7 S. E. 265; 133 Ill. 291; 24 N. E. 428; 133 Ill. 199; 24 N. E. 414; 23 Am. St. 603; 132 Ill. 550; 24 N. E. 573; 110 Ill. 390; 66 Miss. 365; 5 So. 239; 29 N. J. Eq. 454; 28 N. J. Eq. 568; 28 N. J. Eq. 345; 18 N. J. Eq. 481; 16 N. J. Eq. 537.

J. I. Alley, for appellees.

If the lender knew of the usury or had knowledge of it, he is bound by it, and the contract is void. 51 Ark. 534; 132 Ark. 374; 54 Ark. 40; 54 Ark. 573; 51 Ark. 548; 51 Ark. 546.

HART, J. (after stating the facts). The defendant signed a note for $900 dated January 7, 1916, payable to the order of F. B. Collins on the 1st day of January, 1923. The note bore 6 per cent. interest per annum, and the defendant signed fourteen interest notes payable semi-annually. Cox and Tompkins received $252 as commission.

Counsel for the plaintiff concedes that the commission paid Cox and Tompkins added to the principal and

interest of the notes exceeds in amount the legal rate of interest and renders the contract usurious, provided Cox and Tompkins were the agents of Collins.

In *Vahlberg* v. *Keaton,* 51 Ark. 534, the court, in discussing whether or not a bonus paid to the agent of the lender constitutes usury, said: "The lender may receive for the forbearance of money ten per cent. per annum and no more. In excess of that his agent can receive no bonus from the borrower. If the agent do receive from the borrower a bonus in excess of the highest lawful interest, either with his knowledge or under circumstances from which the law will presume he had knowledge, then the transaction is usurious; while, if the agent received the excessive bonus without his knowledge, and under circumstances from which his knowledge could not be reasonably presumed, the transaction would not be usurious. What circumstances will raise the presumption of knowledge must be determined in each case in accordance with the principle by which knowledge is imputed to persons, in controversies generally. We will add now, that where a lender places money with an agent to be loaned, with the understanding that he must receive the highest lawful interest, and that the agent must look to the borrower for his commissions, the circumstances necessarily impute knowledge to the lender, of an usurious bonus received by the agent upon each loan."

This rule has been steadily adhered to by the court ever since. *Habach* v. *Johnson,* 132 Ark. 374.

In *Jones* v. *Phillippe,* 135 Ark. 578, the court held that, where a loan of money was made at the highest rate of interest, and the lender, contemporaneously with the contract and as part consideration of it, received part of a bonus paid by the borrower to a broker for procurring the loan, the loan is usurious.

Here the lender did not receive the highest rate of interest, but it is conceded that the commission received when added to the interest amounted to more than ten per cent. per annum on the amount received by

the borrower. The question then is, were the commissions paid to Cox and Tompkins a part of the interest? As we have just seen, to render a loan usurious on account of a commission paid to a broker or intermediary, it must appear that he was the agent of the lender and took the commission under authority, express or implied, from his principal.

In the present case the borrowers agreed to pay Cox $252 as commission. Although Cox and Collins deny that Cox and Tompkins were the agents of Collins, the attending circumstances contradict them. Collins furnished the money directly to the borrowers. He was engaged in the farm loan business and paid all his loans to the borrower through the F. B. Collins Investment Company. Tompkins was treasurer of that company. Neither Cox nor Tompkins prepared or had anything to do with the note and mortgage in question. The note and mortgage were prepared by T. M. Miller, the agent of F. B. Collins, who was sent to inspect the farm. At the same time he prepared the loan contract in which it was agreed to pay Cox $252 commission. Miller had never seen Cox, and did not have any instructions from him as to preparing this loan contract. If Tompkins and Cox were not the agents of Collins, neither Collins nor Miller were interested in securing the signature of the Vaughts to the loan contract to Cox. This contract was executed simultaneously with the execution of the notes and mortgage. Tompkins was the treasurer of the company through which the payment to the Vaughts was made, and, as such treasurer, it was his duty to keep the account of Collins as to farm loans. When the relationship of Tompkins and Collins is considered in connection with the attending circumstances, we are of the opinion that the transaction was a cloak for usury, and that the chancellor did not err in finding for the defendants.

Tompkins took a second mortgage on the land in question to secure his commission in the sum of $126. He brought suit to foreclose his mortgage, and the testimony

was practically the same as in the present case. The chancery court held that the contract was usurious and void. Upon appeal to this court the decree of the chancery court was affirmed. *Tompkins* v. *Vaught,* 138 Ark. 262.

It is true, as pointed out in that opinion, that neither Collins nor his assignee was party to the suit, and the decree in that case did not affect their rights. However, the substance of the transaction is the same. In that case the court said that the evidence justified the conclusion that the notes in controversy were executed purely as a bonus to the lender, or his agent, for making the loan, and that the contract was usurious.

No reason has been given for making a different holding here, and we can perceive none. Therefore, the decree will be affirmed.

McGEHEE v. OXNER.

Opinion delivered November 28, 1921.

1. PARTITION—PROCEDURE.—While the statutory procedure in partition cases must be followed in a suit at law, such is not the case in equity, the statutory remedy being cumulative only.
2. PARTITION—ORDER OF SALE—VALIDITY.—Chancery courts may order a sale of property if necessary to effect an equitable division thereof among the owners upon evidence other than and wholly independent of a report of commissioners.
3. **PARTITION—CONCLUSIVENESS OF COMMISSIONERS' REPORT.—Where partition is by equitable proceeding, the court may appoint commissioners, but their report as to the necessity of sale for partition or as to the possibility of partition in kind is advisory merely, and not binding on the court.**

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

Isaac McClellan, for appellant.

The second report of the commissioners was set aside by the court for the same reason as the first, in direct conflict with C. & M. Dig., § 8107.

The court has no authority to direct the commissioners to make partition until after hearing the evidence. The situation of the property, and not the circumstances of the parties, must control the court in determining whether there should be a partition in kind or sale. 54 Fed. Rep. 961; 40 Wis. 357. The commissioners act as judges, the whole power of the court being delegated to them for this purpose, and their action should be ratified or new commissioners appointed when their report is set aside. Every presumption is indulged in favor of the fairness of the report of the commissioners. 56 W. Va. 185; 19 N. J. Eq. 133.

The court can make partition only on recommendation of the commissioners. In this case they did not recommend partition. Where this recommendation is based on evidence to support it, the court is absolutely justified in making the sale. 99 S. E. 325.

A part of an estate can be partitioned and the balance sold, which might include timber. 52 W. Va. 559; 223 S. W. 376.

The report of commissioners is conclusive unless based on erroneous principles or shown by clear preponderance of the evidence to have been grossly unequal and unjust, and the report can be impeached only for fraud, partiality or gross error of judgment. 19 Tex. 567.

W. D. Brouse and *D. E. Waddell,* for appellees.

Authority for the sale is found in § 8110, C. & M. Digest, even though the prayer was for partition.

The burden is upon appellant to show the necessity for the partition. 30 Cyc. 268, 269, 270; 81 Ark. 440; 76 Ark. 146; Freeman on Cotenancy and Partition, No. 543; 77 Ark. 317. The proof does not show that appellant would be damaged by partition of the land in kind. In fact appellees offered him the appraised value of his share.

Appellant acquired his interest, which was a minority one, by purchase, and he therefore does not come within the provisions of the statute.

Humphreys, J. Appellant instituted suit in the Grant Chancery Court against appellees for partition of the northeast quarter of section 21, township 5 south, range 12 west, in said county, alleging that he owned an undivided one-twelfth interest, Minnie Miller an undivided one-sixth interest, and Oneal Oxner, Fannie Boyd and Martha Oxner an undivided one-fourth interest each in said real estate; that appellees inherited their several interests, and appellant acquired his by purchase. The prayer of the bill was for a decree of partition if it could be made without prejudice to the owners thereof, and, if not, that the land be sold and the proceeds divided according to said interests.

Appellees filed answer, admitting the allegations of the bill as to ownership of the land by appellant and appellees in the proportions alleged, stating that the lands could be partitioned, praying for partition and the appointment of commissioners to divide same in kind among them according to the value of their respective shares.

Pursuant to the pleadings, and by consent of the parties, the court rendered a decree of partition in kind, if the land could be divided without great prejudice to the parties, and appointed W. D. McDonald, S. F. Fielding and Geo. V. Griffith commissioners to divide the lands.

After a view of the lands the commissioners formally reported, in substance, that the land could not be partitioned in kind entirely, and recommended that the timber be sold and the proceeds divided among the owners in proportion to their several interests in the land; that the southwest quarter of the northeast quarter be assigned to Fannie Boyd, the southeast quarter of the northeast quarter to Oneal Oxner, and that the north half of the northeast quarter be sold and the proceeds divided among Martha Oxner, Minnie Miller and F. O. McGehee, in proportion to their several interests in the land.

Appellees filed exceptions to the report upon the ground that the location of the timber on the land, the topography and quality of the land warranted a division of the land in kind among the owners, and that it was unnecessary to sell the timber or any part of the land in order to make a division thereof. At the same time the attorneys filed a motion to set the decree of partition and the report of the commissioners aside upon the ground that they had represented one of the appellees, Minnie Miller, through mistake. Thereupon the decree and report of the commissioners were set aside, and, after Minnie Miller was made a party and proper service was had upon her, a decree was rendered and the commissioners reappointed. The commissioners made a second view of the land and reported that, on account of the timber being located very thickly at some places and very scatteringly at other places upon the land, it was impossible to divide all the land in kind, and that in their opinion it was necessary to sever and sell the timber from the land and divide the proceeds, and that in that event the forty-acre tracts designated in the former report might be assigned to Fannie Boyd and Oneal Oxner and the north half of the tract sold and the proceeds divided among Martha Oxner, Minnie Miller and F. O. McGehee according to their several interests in the land; that, unless their original report was adopted, it was impossible to divide all or any part of the land in kind without great prejudice to the parties in interest; that the only other alternative would be to sell the land in 40-acre tracts and divide the proceeds, which would give each owner an opportunity to bid on the forty acres he desired to retain.

Appellees' exceptions to the first report were renewed as to the second and sustained. The report was set aside, and the commissioners ordered to partition the land in kind according to the interests of each. Pursuant to the order, the commissioners valued each forty-acre tract, including the timber thereon, at $800,

assigning to each owner of a one-fourth interest 40 acres, to the owner of a one-sixth interest 26 2-3 acres, and to appellant, the owner of a one-twelfth interest, 13 1-3 acres. The report contained the following statement of the commissioners:

"We in making said partition have tried to divide the land and timber under instructions of the court to the best of our knowledge and ability as to value and location. We in making this partition as set forth above believe it would be prejudicial to small land owners and would recommend that all the land be sold in 40-acre lots and the proceeds thereof prorated among the respective owners as their interests appear."

Appellant filed exceptions to that part of the report partitioning the lands in kind, alleging that the division in kind was contrary to the best judgment of the commissioners and prejudicial to the rights of the small land owners, especially to appellant, because in that locality a 13 1-3 acre tract was too small to possess a marketable value. Appellees filed an answer to the exceptions, and testimony was heard in support of and against the partition in kind, which resulted in a decree approving the division in kind and vesting title to the particular tract assigned to each in him or her. From that decree an appeal has been duly prosecuted to this court.

Appellant's first insistence for the reversal of the decree is that the first and second reports of the commissioners were set aside for the same causes. Section 8107 of Crawford & Moses' Digest is cited in support of the contention. That section is as follow: "Upon good cause shown by either party, on the report being made and returned to the circuit court, it may be set aside by the court, who may appoint new commissioners, who shall proceed in like manner as hereinbefore directed; but the court shall not set aside a second report for the same cause for which the first report was set aside."

The section quoted relates to and is binding upon circuit courts in partition proceedings. This court ruled in the case of *Moore* v. *Willey,* 77 Ark. 317 (quoting syllabus): "While the statutory procedure in partition cases must be followed in a suit at law, such is not the case in equity, the statutory remedy being cumulative only."

Appellant's next insistence for reversal is that the partition in kind contained in the third report of the commissioners was a partition directed by the court and not a partition made in the exercise of the commissioners' best judgment. This contention is based upon the assumption that a chancery court, in partitioning lands, is compelled to do so by the adoption of the report of the commissioners appointed by it to divide the land in kind. This is not the law. Commissioners appointed to divide lands in kind are arms or agents of the court for the purpose of making a division under the order and direction of the court. It is the duty and province of chancery courts to partition lands among those interested therein justly and equitably upon proper petition and may use commissioners for that purpose, but are not required to accept as absolute a division made by commissioners. The division and report made by the commissioners can only be regarded as advisory to the court. Chancery courts may order a sale of property if necessary to effect an equitable division thereof among the owners upon evidence other than and wholly independent of a report of commissioners. *Moore* v. *Willey, supra; Glasscock* v. *Glasscock,* 98 Ark. 151.

Appellant's last insistence for reversal is that the partition in kind made by the commissioners under direction of the court was prejudicial to him for the reason that the tract assigned to him was so small it was not marketable at a fair value in that locality. The evidence is in conflict as to whether the 13 1-3 acre tract assigned to appellant would sell on the market for as much per acre as it would sell for if sold as a part of the whole tract, or if sold in 40-acre tracts.

The entire tract was appraised at $20 per acre. There was much evidence tending to show that the 13 1-3 acre tract would readily sell upon the market for as much as the appraised value per acre of the 160-acre tract. In fact, appellees offered in open court to pay appellant $20 an acre for the tract, which he refused to accept. We have read the evidence carefully bearing upon the market value of the 13 1-3-acre tract, and are convinced that the finding of the chancery court to the effect that no prejudice resulted to appellant in the partition in kind is sustained by a preponderance of the evidence.

The decree is therefore affirmed.

LAMBERSON v. BOARD OF COMMISSIONERS OF DRAINAGE DISTRICT No. 16.

Opinion delivered November 28, 1921.

1. DRAINS—ENFORCEMENT OF LIEN—DEFENSES.—In a suit by a drainage district to foreclose a lien for delinquent assessments, an answer attacking the validity of the assessment on the grounds that the county judge who created the district was disqualified, that an appeal was pending in the Supreme Court for abandonment of the district, that the assessment was confiscatory, that bonds had been issued for construction of an extension in territory not embraced in the district, and that the commissioners had failed to record contracts made by them for the improvements, was demurrable, as constituting a collateral attack upon the orders of the county court creating the district and confirming the the assessment of benefits.
2. DRAINS—ENFORCEMENT OF LIEN—DEFENSES.—Matters rendering a drainage district or the assessment of benefits void for jurisdictional reasons may be pleaded as a defense in suits for the enforcement of assessments.

Appeal from Craighead Chancery Court, Western District; *Archer Wheatley*, Chancellor; affirmed.

H. M. Mayes, for appellants.

The declarations of facts set out in the answer are not demurrable, but, appellees having demurred, the

facts thereby admitted are conclusive. 141 Ark. 8. In testing the sufficiency of a pleading on demurrer, every inference reasonably deducible therefrom must be considered. 142 Ark. 431. Indefiniteness and uncertainty should be reached by motion to make more definite and certain, rather than by demurrer. 134 Ark. 311.

Basil Baker and *Horace Sloan*, for appellees.

The answer does not state facts sufficient to constitute a defense.

(1) The attempted denial of corporate capacity amounts to a mere negative pregnant. 84 Ark. 409; 3 Ore. 161; 5 C. B. 440; 57 E. C. 440; 136 Reprint 950; 12 Mont. 474; 31 Pac. 87; 19 L. R. A. 211; 65 Neb. 34; 90 N. W. 997; 36 Ore. 259; 59 Pac. 189.

(2) The denial as to penalty and interest, and existence of lien raises no issue of fact. The statute prescribes the penalty and rate of interest.

(3) The allegation as to disqualification of the county judge is a collateral attack on the order establishing the district. The remedy was by appeal, taken within 20 days. C. & M. Dig., § 3609; 117 Ark. 292. The issue as to disqualification cannot be raised collaterally. 139 Ark. 130; 213 S. W. 7; 43 Ark. 33; 80 *Id.* 57. His ownership of land in the district did not disqualify him. 94 Ark. 563; 43 *Id.* 324.

(4) This court held, in the case referred to in the allegation with reference to a pending appeal, that the county court had no jurisdiction to dissolve or abandon a drainage district. *Wilson* v. *Mattix*, 149 Ark. 23.

(5) The allegations as to the validity of the assessments of benefits attempt to raise issues that cannot properly be invoked in this proceeding, (a) because their validity has already been settled by the order of the county court, and a collateral attack cannot now be permitted. C. & M. Dig. § 3165; 138 Ark. 131 *Id.* 471; 117 *Id.* 30, 32. (b) Their validity cannot be challenged without setting out the facts rendering the assessments improper. 139 Ark. 277, 280; 139 *Id.* 153. (c) Their validity can be

challenged only in the statutory mode. C. & M. Dig. § 3165; 125 Ark. 163, 167; 49 *Id.* 518; 63 *Id.* 588; 90 *Id.* 413; 94 *Id.* 217; 105 *Id.* 450; 110 *Id.* 34; 52 *Id.* 529; 71 *Id.* 556; 98 *Id.* 543; 94 *Id.* 563; 90 *Id.* 29; 84 *Id.* 257; 96 *Id.* 609.

HUMPHREYS, J. This is an appeal from a decree of the Craighead Chancery Court, Western District, foreclosing a lien for delinquent assessments for the year 1920, with a penalty of 25 per cent. thereon, interest and costs, against lands owned by appellants in Drainage District No. 16, Craighead County. The complaint, in substance, alleged the creation of the drainage district, the appointment of commissioners, the assessment of benefits for the year 1920 against appellants' lands, the delinquency in payment of the assessments and the accrual of penalty and interest on account of the failure to pay the same.

Appellants filed an answer denying the corporate capacity of the drainage district to sue, and any liability for a penalty and interest, or the existence of a lien on the land for the payment of same; and, as additional defenses, alleged the disqualification of the county judge who made the order creating the district, the pendency of an appeal to the Supreme Court from a suit instituted in the circuit court by a large number of the land owners in the district for the abandonment of said district, the confiscatory nature of the assessment, alleging that it amounted to more than the current cash value of the property of the owners in said district, the sale of bonds to the amount of $50,000 for the construction of an extension or outlet of the drainage district in Poinsett County which was in territory not embraced in the district, and the failure of the commissioners to record the contracts made by them for the improvements in said district.

A general demurrer was filed to the answer, which was sustained by the court. Appellants elected to stand upon their answer, whereupon the court rendered a decree declaring a lien upon each parcel of land for the tax,

penalty, interest and costs thereon, and foreclosing the same, from which an appeal has been duly prosecuted to this court.

Appellants contend that the court erred in sustaining the demurrer to the answer. We think not. The defenses interposed were collateral attacks on the order establishing and creating the drainage district and assessing the benefits on account of the improvements against the several parcels of land within said district. In a suit to enforce a lien against lands for benefits assessed against them in a drainage district theretofore organized, all defenses except a plea of payment are necessarily collateral. It is not contended that the assessments were paid. The matters as set forth in the answer attacking the validity of the assessment cannot be inquired into in this proceeding because they constitute a collateral attack on the judgments of the county court creating the district and confirming the assessment of benefits. *Mudd* v. *St. Francis Drain. Dist.*, 117 Ark. 30; *St. L. I. M. & S. R. Co.* v. *Maple Slough Drain. Dist.*, 138 Ark. 131; *Dickerson* v. *Tri-County Drain. Dist.*, 138 Ark. 471; *Washington Fire Ins. Co.* v. *Hogan*, 139 Ark. 130.

Of course, matters rendering a district or the assessment of benefits void for jurisdictional reasons might be pleaded as a defense in suits for the enforcement of assessments, but the matters pleaded in the answer in the instant case do not go to that extent.

No error appearing, the decree is affirmed.

McILVENE v. WARREN.

Opinion delivered December 5, 1921.

ANIMALS—STOCK LAWS—CONSTRUCTION.—Under special act No. 510 of 1919, relating to a stock law for Columbia County, which provides by § 8 that it shall not be in force until adopted by a

majority vote of the electors, and by § 10 that it shall not be construed to repeal special act No. 156 of 1915, until it has been adopted and put into full force and effect in Columbia County, *held,* that where the vote of the electors was adverse to adopting the act of 1919, the act of 1915 remained in force, and a stock district created under the act of 1915 was not affected by the later act.

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

Joiner & Harris and *Henry Stevens,* for appellants.

In cases of doubt as to the meaning of a statute, the condition and circumstances surrounding the enactment of the law may be considered. 76 Ark. 303; 102 Ark. 205; 169 U. S. 649; 108 S. W. 1095; 68 S. W. 588; Black on Interpretation of Laws, 285. The cumulative part of the act is the method of procedure. 35 N. W. 881; 115 Pac. 344; 73 S. W. 951.

McKay & Smith, for appellees.

The passage of an act to take effect only when favorably voted on by the people in the locality affected is not a delegation of legislative power. 131 Ark. 291.

McCULLOCH, C. J. Appellants are farmers and owners of livestock in Columbia County, and claim the privilege of permitting their stock to run at large in a certain territory. This territory, it is claimed by appellees, is embraced within a stock-law district created under a special act of the General Assembly of 1915 (Acts of 1915, p. 676), the validity of which was upheld in the case of *Harrington* v. *White,* 131 Ark. 291. Appellants instituted this action in the chancery court to restrain appellees from impounding livestock pursuant to the provisions of the aforementioned statute. The court sustained the demurrer to the complaint and dismissed the complaint for want of equity.

The act of 1915, *supra,* provides for the formation of stock-law districts in units of three or more townships in a county, to be adopted by a majority vote of

the electors, at an election to be ordered by the county court on the petition of 25 per centum of said electors. The General Assembly of 1919 enacted another statute to provide, as stated in the caption, "a stock-law and to regulate the operation of same in Columbia County, Arkansas." This statute, in its first seven sections, provides a complete method of impounding certain livestock found running at large, and for the punishment of the owners of such stock. The method of putting the law into operation is different from that prescribed in the act of 1915, *supra,* and also different livestock is mentioned.

Sec. 8 of the act of 1919 provides that upon the petition of 35 per centum of the electors of any township or any number of townships in Columbia County, filed with the county court at least sixty days before a general election, the court shall order the submission of the question of adoption to the electors of the county at such general election, and that the words "For Stock Law" and "Against Stock Law" shall be placed on the tickets at that election. Sec. 10 of that statute reads as follows:

"If it is shown by the returns of any election under this act that a majority of those voting for and against said law vote for stock law, four months thereafter this act shall become operative, *provided,* nothing in this act shall be so construed as to repeal any of the provisions of act No. 156 of the Acts of 1915 as it applies to Columbia County, until this act has been voted on and adopted and put into full force and effect in all of Columbia County, and until this is done this act will be considered cumulative."

It appears from the allegations of the complaint in this case that at the general election in the year 1920 there was submitted to the voters of the townships composing the aforementioned district, formed under the act of 1915, *supra,* the question of the adoption of the stock law of 1919, and that in each of said townships

the majority vote was against the adoption. The contention of counsel for appellants, as we understand it, is that the vote upon the question of adoption of the stock law was determinative of operation under either of the statutes, and that either an affirmative or negative vote on that question suspended the operation of the act of 1915 and constituted a dissolution of a district formed under that statute. This contention is, we think, directly contrary to the express language of the statute itself, which provides that the act of 1915 is not repealed "until this act has been voted on and adopted and put into full force and effect in all of Columbia County, and until this is done this act shall be considered cumulative." Whatever else the statute may mean—and we do not deem it necessary to enter any further into a discussion of other provisions of the statute—it is clear that the statute of 1915 is not repealed or suspended until there is a complete adoption of the new statute in the whole of Columbia County, and that districts formed under that statute are not, until then, suspended. The last statute is declared, in express terms, to be merely cumulative and leaves the former statute in force until the provisions of the latter one are adopted in the whole of Columbia County.

It is further contended that there is an irreconcilable repugnance between the proviso in section 10 and the other sections of that statute, and that the proviso should be discarded, leaving the remainder of the act in effect. To do this we would have to disobey the plain letter of the statute itself, which declares in the proviso that the former statute is not repealed but is to remain in full force until there be an adoption of the new statute by the whole county. It will be our duty, when the question of the validity of the new statute arises, to reconcile, if possible, the apparent inconsistencies in the different sections for the purpose of harmonizing them. It is unnecessary to do that in the present case, for we have reached the conclusion that, under the state of facts as set forth in the com-

plaint, the act of 1915 has not been suspended, and that the negative vote on the question of the adoption of the new statute did not operate as a dissolution of the district thus formed.

The decision of the chancellor was therefore correct, and the decree is affirmed.

SCHAAL v. STATE.

Opinion delivered December 5, 1921.

1. ABUSIVE LANGUAGE—INDICTMENT—CLERICAL MISPRISION.—In an indictment under Crawford & Moses' Dig., § 2774, which charges that defendant used abusive and insulting language toward and about the prosecuting witness "and in the presence and hearing," the context shows that the use of the word "the" instead of "his" was a clerical misprision.
2. ABUSIVE LANGUAGE—SUFFICIENCY OF INDICTMENT.—An indictment for using abusive and insulting language toward another and in his presence and hearing substantially follows the language of the statute and is sufficient.
3. ABUSIVE LANGUAGE—DEFENSE.—Though the prosecuting witness was a trespasser on defendant's premises, this fact would not justify defendant in using profane and opprobrious language toward and about him.

Appeal from Howard Circuit Court; *A. P. Steel*, Special Judge; affirmed.

James S. McConnell, for appellant.

The indictment is bad and the demurrer should have been sustained. Either the letter or substance of the statute must be followed, and nothing is left to implication, intendment, or conclusion. 22 Cyc. 336; 12 Ark. 608; 47 Ark. 488; 31 Minn. 207; 17 N. W. 344. The words of the indictment "and in the presence and hearing" might refer to Hodge, or Mrs. Schaal, who were present also, and wholly fail to allege that the language complained of was used in the presence of Walden.

The indictment not having charged an offense under the statute, appellant's motion to arrest the judgment

should have been sustained. Defendant was entitled to have given an instruction on the legality of the service of the papers by Hodge and the prosecuting witness.

The evidence of the justice shows that the writ was issued March 21, 1921, and served the next day. The indictment charges the offense was committed on March 3rd. If this be true, the verdict was contrary to both the law and the evidence.

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

The indictment is drawn in accordance with the statute. There is a clerical error, however, in the use of the word "the" for "his" in the following part of the indictment: "And in *the* (his) presence and hearing" but any person of common understanding would understand that the indictment alleges that the words were spoken to and in the presence of the prosecuting witness. Bad or awkward writing will not vitiate an otherwise good indictment. Stan. Enc. of Proc. Vol. 12, pp. 311-317; 94 Ark. 215; 58 Ark. 47; 94 Ark. 327.

The defect was not one which would tend to the prejudice of the rights of defendant in the trial and judgment. C. & M. Dig., § 3014.

Appellant's instruction No. 2 is inapplicable to the question at issue and was properly refused. It is not error to refuse to give an inapplicable instruction. 93 Ark. 20; 99 Ark. 648; 90 Ark. 570; 29 Ark. 17.

Provocation will not justify the use of opprobrious words. 8 R. C. L. Sec. 307, p. 286.

WOOD, J. This is an appeal from a judgment of conviction for the crime of a breach of the peace. The indictment, omitting the formal opening and conclusion, as as follows: "The grand jury of Howard County, in the name and by the authority of the State of Arkansas, accuse G. W. Schaal of the crime of breach of peace committed as follows, to-wit: The said G. W. Schaal in the county and State aforesaid, on the 3rd day of

March, 1921, did unlawfully make use of violent, abusive, and insulting language toward and about one E. K. Walden and in the presence and hearing, said language in its common acceptation being calculated to arouse to anger the said E. K. Walden and cause a breach of the peace, against the peace and dignity of the State of Arkansas."

The court overruled a demurrer to the indictment and also a motion in arrest of judgment. Section 2774 of Crawford & Moses' Digest reads in part as follows: "If any person shall make use of any profane, violent, vulgar, abusive, or insulting language toward or about any other person in his presence and hearing, which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault, shall be deemed guilty of a breach of the peace, and upon conviction thereof shall be punished by a fine, etc."

The indictment charges that the insulting language was "toward and about E. K. Walden and in the presence and hearing." The use of the word "the" before the word "presence," taken in connection with the other words in the sentence just quoted, could not have meant anything else than that the insulting language was used in the presence and hearing of E. K. Walden. The context shows that the word "the" was intended for the word "his," and the use of the word "the" instead was a mere clerical misprision. The indictment charges a public offense under the above statute. The indictment follows substantially the language of the statute and is sufficient. There was no error therefore in overruling appellant's demurrer and motion to arrest. *Blais* v. *State,* 94 Ark. 327; *State* v. *Perry,* 94 Ark. 215; *Evans* v. *State,* 58 Ark. 47.

There was testimony on the part of the State tending to show that one Hodge was appointed to act as constable in a replevin suit to take possession of a machine which at the time was at the home of the appel-

lant. Hodge was accompanied to appellant's home by E. K. Walden. When they arrived at appellant's house, Hodge showed appellant the writ in his hands. The appellant objected to the service of the writ on the ground that it did not show that Hodge had been legally appointed constable to serve the same, Hodge not being the duly elected constable. When this controversy arose, Hodge referred appellant to Walden, who was an attorney for the plaintiff in the civil action. Walden stated he thought the papers were regular. Thereupon appellant said to Walden, "What in the hell have you got to do with it?" Walden replied, "I haven't got a thing--only I am attorney in the case." Appellant then said, "By G—, you will leave here; I am a good mind to take a billet of wood to you." Walden remonstrated with him, and appellant further said, "By —, you will leave here. If you don't, I will go in the house and get my pistol." This all occurred at appellant's home outside the gate.

After defining the offense in the language of the statute, the court instructed the jury that the burden was on the State to prove the guilt of the defendant beyond a reasonable doubt, and further said, "The defendant in this case claims the prosecuting witness, Walden, accompanied Mr. Hodge there for the purpose of serving the papers, and did not have legal authority for that purpose, and that E. K. Walden, after he reached the place to serve the papers, was the aggressor and caused the disturbance. If you find this to be the case, you may take that fact in mitigation of the punishment of the defendant, if you find the defendant guilty." The appellant duly excepted to that portion of the instruction which said, "you may find in mitigation only," and asked the court to instruct the jury in effect that, if Hodge was not duly appointed special agent to serve the writ, then he was a trespasser, and the defendant would be justified in forcing them to leave the premises. The court refused appellant's prayer, to which ruling the appellant duly excepted.

The court did not err in its ruling. The fact that Hodge was not legally appointed special agent to serve the writ could furnish no justification to appellant in using profane, abusive and insulting language toward and about Walden. 8 R. C. L. § 307, p. 286. Even though Walden and Hodge were proceeding illegally, and in that sense were trespassers, nevertheless such fact would not justify the appellant in using profane and opprobrious language toward and about Walden. The court correctly instructed the jury that they might consider the fact that Hodge and Walden were proceeding illegally in mitigation, if they found the appellant guilty as charged.

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

CENTRAL COAL & COKE COMPANY v. ORWIG.

Opinion delivered December 5, 1921.

1. CORPORATIONS—FOREIGN CORPORATIONS—RESIDENCE.—Crawford & Moses' Dig. §§ 1826-27, providing that a foreign corporation shall designate its general office or place of business in the State and name an agent upon whom process may be served, and shall consent that service of process may be had upon any agent of the company or upon the Secretary of State, *held* not intended to confer a local residence upon such corporations, but only to provide remedies for those who may have causes of action against them in this State.
2. REMOVAL OF CAUSES—CITIZENSHIP.—Where a cause of action was brought in a State court in a county situated in the Western Federal District by a resident of such district against a foreign corporation doing business in this State and having in the State an agent designated upon whom process might be served, the defendant was not entitled to have the cause removed to the Eastern Federal District upon the ground of diversity of citizenship.
3. MASTER AND SERVANT—PERSONAL INJURY—QUESTIONS FOR JURY.—Under the evidence in a personal injury case, *held* that the issues of negligence, contributory negligence and assumed risk were for the jury.

4. TRIAL—IMPROPER ARGUMENT—PREJUDICE.—An improper reference, in an attorney's argument in a personal injury case, to the fact that an insurance agent was sitting beside defendant's counsel was cured by a direction to the jury to disregard such remark.

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

James B. McDonough, for appellant.

1. The petition for removal should have been granted. The appellant is an inhabitant and resident of the Eastern District of Arkansas, within the meaning of the act of Congress. 4 Fed. Stat. Ann. p. 838; 5 *Id.* p. 16; *Id.* p. 846; U. S. Stat. at Large, Vol. 36, p. 1101. Yell County, in which the suit was brought is, under the act of Congress, in the Little Rock Division of the Eastern District of Arkansas, and appellant could have been sued originally in the United States District Court of that division and district. The act of 1907, requiring a foreign corporation desiring to do business in this State to consent to service upon an agent, etc., applies to Federal courts as well as State, and as a matter of law makes the corporation consent to be sued in the Federal courts. The act is valid. 108 Ark. 562. The words "inhabitant," "found" and "residence" are synonymous. 230 Fed. 968; 193 *Id.* 728; 145 U. S. 444; 27 Fed. Cas. 486. See also 48 Fed. 202; 29 Fed. 17; 6 Sawyer, 262; 45 Fed. 345; 57 *Id.* 529; C. & M. Dig., §§ 1825 to 1831 incl.; 48 Fed. 1; 179 *Id.* 569. A foreign corporation is "found" in the district, and has a residence therein, if it may be served in the district. 69 Fed. 704; 199 *Id.* 927; 7 *Id.* 139; 21 *Id.* 288; 39 *Id.* 290; 41 *Id.* 833; 49 *Id.* 297; *Id.* 884; 117 *Id.* 732; 179 *Id.* 556.

The residence of a corporation is any place where it has a service agent. 3 Thompson on Corporations, § 3014; 51 Mo. 308. The Legislature of the State has determined that the corporation may be sued in any county in the State, and appellant having consented thereto has therefore consented that it might be sued in the Fed-

eral court. 96 Am. Dec. 183; 9 N. H. 394; 40 N. J. L. 111; 42 *Id.* 490; 170 U. S. 100; 172 U. S. 602; 89 Fed. 121; 92 *Id.* 3.

The suit was brought in Yell County for the sole purpose of defeating the right of removal to the Federal court and was therefore fraudulent. 22 L. R. A. (N. S.) 1235.

2. The circuit court of Yell County was without jurisdiction to hear and determine the case. § 11, art. 12, Constitution; §§ 1825-1832, C. & M. Digest; § 1171 C. & M. Digest, and cases cited; *Id.* §§ 1164, 1165, 1174. To give a domestic corporation the right to be sued in its own county (C. & M. Dig. § 1171) and deny that right to a foreign corporation doing business in the State is to discriminate against the foreign corporation, in violation of the State Constitution and of § 1 of the 14th Amendment to the U. S. Constitution. The statute is void, 252 U. S. 60; 241 U. S. 329; 249 U. S. 522.

3. Non-expert witnesses may state facts only; they cannot give opinions as experts. 125 Ark. 86; 95 *Id.* 310; 19 *Id.* 533; 23 *Id.* 730; 1 Elliott on Ev. §§ 675, 676 and cases cited; 122 Am. St. Rep. 580.

4. It was improper and prejudicial to refer, in argument to the jury, to the witnesses of the defendant as a gang. 31 N. Y. S. 926; 82 Hun 349. The use of this word was reversible error. 61 Ark. 130; 82 S. W. 562; 80 Ark. 23; 63 *Id.* 174; 70 *Id.* 305; 180 S. W. 474. The reference to W. L. Leavy as an insurance agent, he not being a witness in the case, and there being no testimony that he was an agent of an insurance company was wrongful, harmful, and constituted reversible error, even though the court attempted to cure them. 80 Ark. 158; 87 *Id.* 461; *Id.* 515; 89 *Id.* 58; 104 *Id.* 1; 114 *Id.* 542; 131 *Id.* 6; L. R. A. 1915-A, p. 155, note; 196 S. W. 606; 104 *Id.* 384; 177 N. W. 217; 175 *Id.* 470; etc., etc.

5. The verdict is contrary to the clear weight of the testimony, and the fact that the trial judge over-

ruled the motion for new trial ought not, in the light of the affidavit appearing in the addition to the bill of exceptions presented by the appellant, to be taken as a finding by the trial judge of a preponderance in favor of the plaintiff. 126 Ark. 427; 133 *Id.* 166; 136 *Id.* 45.

Wilson & Chambers and *John W. Goolsby,* for appellee.

On the question of removal, this court has frequently held contrary to appellant's contention. 129 Ark. 550; 98 *Id.* 507; 107 *Id.* 512. Appellant, being a Missouri corporation, has no residence in this State. 140 Ark. 135; 253 U. S. 325. Neither the plaintiff, a resident of Sebastian County, nor the defendant, a Missouri corporation, was a resident of the Eastern Federal District of Arkansas. That the act providing that an action may be brought against a foreign corporation in any county in the State is constitutional, has been settled by the decisions of this court. 140 Ark. 135.

WOOD, J. This is an action by the appellee against the appellant to recover damages for alleged personal injuries. The appellee alleged in substance that the appellant is a corporation doing business in Arkansas and operating a coal mine at Hartford; that appellee, on the 21st of July, 1920, while working in the mine, was injured by coming in contact with a wire charged with electricity, which wire, through the negligence of appellant, had not been insulated or protected in any way, but left exposed in a manner to be dangerous to the employees; that the appellee, without any fault or carelessness on his part, while engaged in the discharge of his duties, came in contact with the same, causing his injuries, which he set forth in detail, to his damage in the sum of $20,000, for which he prayed judgment. The appellant filed a petition and bond, which were in due form, for removal of the cause to the United States District Court. The trial court denied the petition, to which appellant duly excepted.

1. This presents the first question for our consideration which must be determined by the decisions of the Supreme Court of the United States. The question has been settled by the decisions of our own court and also by the decisions of the Supreme Court of the United States adversely to appellant's contention. *St. L. S. & F. R. Co.* v. *Kitchens,* 98 Ark. 507; *C. R. I. & P. Ry. Co.* v. *Smith,* 107 Ark. 512; *Central Coal & Coke Co.* v. *Graham,* 129 Ark. 550; *Pekin Cooperage Co.* v. *Duty,* 140 Ark. 135; *Boston, etc. Mining Co.* v. *Montana Ore Co.,* 188 U. S. 632; *Ex parte Wisner,* 203 U. S. 449; *In re Winn,* 213 U. S. 458.

The petition for removal alleges, among other things, "that within the meaning of the removal act of Congress your petitioner has a venue residence both in the Eastern District of Arkansas and in the Western District of Arkansas, and may be sued in either district in the Federal courts thereof." It is further alleged that the appellant "has a service agent in the State of Arkansas as required by the laws of this State upon whom service of process may be had, and that under the law of Arkansas the appellant could be sued by the appellee in the United States District Court at Little Rock and also at Ft. Smith." Our statutes require a foreign corporation to designate its general office or place of business in the State and to name an agent upon whom process may be served (Sec. 1826, C. & M.). And also requires such corporation to consent that service of process may be had upon any agent of the company or upon the Secretary of State. (Sec. 1827, C. & M.)

These statutes prescribe the conditions upon which foreign corporations can do business in this State, and were not intended to, and do not, confer a local, State or county residence upon them. These statutes were intended to provide remedies for residents of this State against foreign corporations, or corporations that have no residence in and are not inhabitants of this State.

Sec. 11, article 12 of our Constitution as to foreign corporations authorized to do business in this State

among other things provides: "As to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State." And section 1828 of Crawford & Moses' Digest provides among other things: "Such corporations shall be entitled to all the rights and privileges and subject to all the penalties conferred and imposed by the laws of this State upon similar corporations formed and existing under the laws of this State." But the above provisions do not make foreign corporations residents or inhabitants of this State in which they are authorized to do business.

Our statutes designating the agents and fixing the forums in which foreign corporations may be sued do not take away any of the rights guaranteed to foreign corporations under our Constitution. They relate only to the remedies provided for those who may have causes of action against them in this State. See *American Hardwood Lbr. Co.* v. *Ellis & Co.,* 115 Ark. 524. "Foreign corporations have their legal existence and are located within the boundaries of the State under whose laws they are organized." *Pekin Cooperage Co.* v. *Duty, supra.* Neither the appellee nor the appellant was a resident of the Eastern Federal District of Arkansas where the action was brought. Since, therefore, the appellant was not a resident or inhabitant of the Eastern Federal District of Arkansas, but had its domicile or residence in a foreign State, it had no right to remove the cause of action under the removal acts of Congress. 5 Fed. Stat. Ann. p. 16 Sec. 28; 5 Fed. Stat. p. 486, § 51 (Judicial Code).

2. After the petition for removal of the cause was denied, the appellant answered and denied that the appellee was injured in the manner set forth in his complaint and also denied specifically the allegations of negligence contained therein, and set up the affirmative defenses of contributory negligence and the assumption of risk on the part of the appellee. The trial resulted in a verdict and judgment in favor of the appellee

in the sum of $5,000. The appellant contends that the evidence was not sufficient to sustain the verdict, and that the trial court erred in refusing to give a peremptory instruction directing them to return a verdict on the above issues in its favor. The facts developed at the trial on these issues are substantially as follows:

The appellee was working in the appellant's coal mine No. 4 in Sebastian County, Arkansas. He was driving what was known as the "fourteenth east entry" loading coal out of that entry. Two men were working together. The entry was being driven so as to prepare for rooms and develop the airway. The coal in the entry is undercut by a coal machine. It is then shot down by the shot-firer and removed by the diggers. The electricity is conducted to the machine by copper wires. The row of posts carrying the wires was about three feet from the lower rail of the dip switch. The dip switch turned off from the track into the back entry to air course and goes down the heading. Canvas curtains were attached to the same posts that the wires were attached to, but not on the same side of the post that the wires were on. These curtains were put up to block the air currents and turn them into the working places. The wires are put on the posts, the positive wire on one side and the negative on the other. The posts bearing the wires are placed between the lower rib, or wall, and the track. The dead or return wire is on the side of the posts next to the track, and the live wire is on the other side. The live wire was extended down the track something like ten or twelve feet further on the posts than the dead wire. There was no purpose in so extending it. It was not worth anything from the point where the dead wire ended to the live wire's extended end, but, so far as the electricity was concerned, it was just as dangerous beyond the end of the dead wire as it was back of it. The appellee did not know before his injury that the live wire was thus extended. The appellee had put wires in the slope air course, but had never stretched one inch of

wire in the fourth east entry, unless it was up at the fourteenth east air course. The fourteenth east entry branches off from the slope. The appellee had acted as a lineman, whose duty it was to put wires up for the machine—the live wire and the dead return wire. Appellee was not there when the machine men made the cable and did not remember anything about the machine men, except when they were in his entry or place cutting. He didn't know at what point they had stopped the wire. The appellee was familiar with the manner of fastening the cable nips to the power wires. It would be practical to put the nips on the end of the power wire. If witness or any other man should discover the cable hooked to the power wires back behind where he was working, that would indicate to him that the end of the power wires was back where the connection was made. The appellee did not have any means of knowing, without an investigation, that one of the power wires extended further toward the face than where the nips were hooked on.

The appellee thus describes the manner of his injury: "We were at our working place performing our duty. The driver had given us a back switch, placing us an empty car to receive a load, which we did, and pulled the load out of the back entry, and in so doing the mules backed, dragging the cable down. I was holding the weight of the car with both hands pushing the car in. Naturally my 'buddie' (fellow worker) was going to drop in on the back end with me to help me with the knuckle, as we call it, and frog, and, instead of him returning with me as I expected, he hallooed, 'Wait a minute, the machine cable is down.' Probably the car was along about the frog at that time. Then he put the cable up on his side, which is in between the two tracks, the top entry track and the lower entry switch. He put the cable up that extends into the entry on his side and remarked, 'Here,' or something like that, calling my attention. I stepped up to the side of the car, as innocent as a little dove, hanging

that cable up on the board trying to get it to fasten up there. There was a little nail in there, probably a sixpenny nail, which the weight of the cable had bent down until it would hold the cable no longer. The board that had been put up to support the canvas across the entry was sticking up there, and it was down probably an inch, one-half inch, or something like that, I don't know how far, but that is the first thing I thought of—stick you in there and you will be out of my way. This is no place for you. I held the cable with this hand trying to pull the slack cable up from this entry along to me as a man would a lariat rope, trying to get enough cable up so as I could place it up to keep it from coming out from this board; when doing so, I had no place to put it—it wouldn't stay. My thought was next, stick you over this curtain, and you will stay there probably—your own weight will hold the weight there naturally, and in doing so I came in contact with that live wire in this arm, and it knocked me absolutely as dead and as cold as a wedge."

The appellee's testimony further shows that he was endeavoring to pick up the cable to keep the car from running on to it and cutting same in two, which would have rendered the situation of appellee and his fellow worker very dangerous. His testimony shows that it was his duty and the duty of others operating in the mine to pick up the cable. There was supposed to be no danger connected with this. The appellee stated that he did not know that the live wire from which he received the shock was behind the canvas. He then testified that there were several different ways to have protected the wire; that it could have been an insulated cable It could have been put, if necessary, five or six feet from the rail, instead of three. There could have been a board nailed between the workman and the wire, which would have prevented the man from coming in contact with the wire and make it absolutely safe. The appellee then describes his sensation when

he returned to consciousness and his physical condition before and after the alleged injury.

His testimony further shows that his arm came in contact with the wire somewhere about the wrist or an inch from the wrist joint. There was no burn. At the time of his alleged injury he had on gum boots and woolen socks. The boots had holes in them both in the bottom and in the sides. The appellee at the time was standing on a muck or mud bottom—inclined to be damp. He stated that the place where he was injured was not wet, but that none of it was perfectly dry. It was counted dry, and there was dry dusty coal—there was no water standing at the place where he was hurt.

One of the witnesses on behalf of the appellee testified that he went back to the place where the people were surrounding the appellee at the time he was injured. He found them about three or four feet from the curtain up toward the dip switch. Appellee was up on an entry—the main entry—sitting down on his knee and had his hands down. He was next to the face from the curtain coming across the main entry. The car was under the dip switch curtain and turned into the dip switch. It had six or seven props in there. Witness and one Pete Coffman helped to unload the props so they could put appellee in the car to send him out of the mine. The wire could not have been seen by a person standing at the place where witness found appellee, because the curtain was hanging between him and the wire. The wire was not insulated. It was the hot wire. It carried a dangerous current of electricity. There was nothing between the two props that the wire was fastened to, to prevent a person from coming in contact with the wire. If they had nailed a couple of boards on the two props horizontally, this would have protected a person from falling against the wire.

Another witness testified that he assisted in hanging the wire in question; that the wire was laid back beyond the dead wire and stretched up. "We stretched them to this dip switch and stopped at a point a dis-

tance from the track which was safe for everybody, and in that particular instance we had a few feet of wire that extended beyond that prop, and we turned it back and wrapped it around itself. If we had stopped this live wire at the end of the dead wire, we would have had possibly twelve feet to wrap back. It would have been just as practical to wrap this amount back as it was the little amount we did wrap back. The nips could have been used on it just as well. If the live and dead wires both extended the same distance, you would have reached the dead wire before you reached the live wire in stepping toward them. The dead wire is harmless."

This witness further testified that, if a ten-inch board had been nailed on the opposite side of the post from the wire, that would probably have made it safer to people working in the entry in keeping them from coming in contact with the wire. This witness also testified that he had been shocked by electric wires in the same mine when they were charged with 250 volts; that the only injury he had received from it was that it knocked him down. Another witness also testified that he had been knocked down two or three times by the direct current from the electric wires in Mine No. 4, but was never burned with any of them.

On behalf of the appellant, there was testimony to the effect that it was impossible for a man to put his hand against the live wire if he stood in the angle of the curtains where the appellee said he stood. The witness went into detail as to the condition and the situation of the mine at the time and place the appellee is alleged to have been injured. The appellant also introduced the testimony of a medical expert who had had occasion to study and treat injuries due to electricity. He, in company with other physicians, had examined the appellee. He found no physical injury of any kind whatever, no evidence of any burn from electricity, and found the plaintiff normal in every way. In his opinion the plaintiff was a malingerer. This examination

was made long after the injury and just before the trial, the examination being authorized by the court.

Two other physicians, experts, testified. One of them had been called to treat the appellee at the time of his injury. He found him complaining and trembly and apparently exhausted from some cause, claiming that he had been in contact with an electric wire. He made a diagnosis of his case in the usual way and found that he had the same symptoms of a person recently after a shock who had been struck by lightning. He stated that appellee had no organic trouble that he knew of, but that he seemed to be "all down and out" and witness was unable to explain why. At the time of the trial appellee didn't seem to be sick at all, but he was weak and emaciated. The physician gave it as his opinion from the history of the case that the cause of appellee's weak and run-down condition was the electric shock. The other physician who had also examined the appellee testified substantially to the same effect.

There was testimony to the effect that the appellee, before he received the injury, was "healthy, strong, energetic, a good worker and enthusiastic." At the time of the alleged injury he weighed 158 pounds and at the time of the trial he weighed 136 pounds. There was also testimony to the effect that appellee was known in the community as a good man; was the president of the Red Cross unit at Hartford during the war, and was exceedingly active in all the Liberty drives for the sale of bonds—was a leader in all these things.

The above facts speak for themselves. Without discussing them in detail, it suffices to say, giving them their strongest probative force in favor of appellee, they show that the issues of negligence, contributory negligence and assumed risk were issues for the jury. The court did not err therefore in refusing appellant's prayer for a peremptory instruction.

3. The court gave instructions, numbered 1 to 22 inclusive, embracing therein instructions on its own

motion and certain prayers for instructions requested by the appellant and also certain prayers requested by the appellee. These instructions covered the evidence adduced at the trial. They correctly announced familiar principles of law applicable to the issues of negligence, contributory negligence and assumed risk, and were in accord with the well established doctrines on these subjects as they have been announced in numerous former decisions of this court. Appellant presented seventeen prayers for instructions which the court refused. Such of these as were correct, the court covered in the instructions it gave. We find no error in the ruling of the court in the giving and refusing of prayers for instructions.

4. During the opening argument before the jury, one of the attorneys for the appellee referred to W. L. Leavy as "an insurance agent setting beside Mr. McDonough." The appellant objected to the statement on the ground that it was wrongful, harmful and erroneous, the said W. L. Leavy not being a witness in the case and there being no testimony that he was the agent of an insurance company. The appellant asked the court to instruct the jury to disregard the statement. The court did this, stating to the jury that there was no evidence that Leavy was an insurance agent, and that the jury should disregard the statement. The appellant duly saved its exception "to the making of the unfounded and erroneous remark" by counsel for the appellee. The remarks of counsel were highly improper. See *Williams* v. *Cantwell,* 114 Ark. 542; *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1. But it does not occur to us that they were so flagrant as to produce a deep-seated and irremovable prejudice in the minds of the jury. To so hold would impeach the jury of a desire or willingness to give heed to the remarks of interested counsel, rather than to follow the instructions of the impartial judge, and this too notwithstanding their oath to decide the case according to the instructions of the court and the evidence adduced by the witnesses. A sensible and

honest jury is not likely to be swerved from the path of duty by such conduct on the part of counsel. The court promptly complied with the request of counsel for the appellant to instruct the jury not to consider the remarks of counsel for the appellee. The statement of the court in the presence of the jury that there was no evidence that Leavy was an insurance agent and to disregard the statement of counsel to that effect would, we believe, remove all prejudice in the minds of the jury that the remarks might have produced.

The appellant objected to certain other remarks of counsel for the appellee, all of which we have considered. But we do not find any errors prejudicial to appellant in the rulings of the court concerning the remarks of counsel. There are many other assignments of error in the motion for a new trial, which have been ably presented in the elaborate brief of counsel for the appellant. We have considered all of these assignments, but it would unduly extend this opinion to discuss them, and we deem it unnecessary to do so.

After a careful consideration of the whole record we find no error prejudicial to the appellant in any ruling of the trial court, and its judgment must therefore be affirmed.

CEGARS v. STATE.

Opinion delivered December 5, 1921.

1. INDICTMENT AND INFORMATION—ALLEGATION OF VENUE.—Under Crawford & Moses' Dig. § 3020, providing that "if the indictment contains no statement of the place in which the offense was committed, it shall be considered as charged therein that it was committed in the local limits of the jurisdiction of the court in which the grand jury was impaneled", *held* that where an indictment for murder alleged that the crime was committed in a certain county of the State, but failed to allege in which of the two districts of the county it was committed, it will be considered that it was committed in the district in which the grand jury was impaneled.

2. HOMICIDE—APPEAL—OBJECTIONS NOT RAISED BELOW.—On appeal from a conviction of murder in the first degree, objections to evidence adduced or to the instructions given by the court will not be considered on appeal where such objections were not saved in the court below.

Appeal from Arkansas Circuit Court, Northern District; *George W. Clark,* Judge; affirmed.

Mehaffy, Donham & Mehaffy, for appellant.

The indictment is fatally defective, in that it did not set out the district. 14 R. C. L. 181; 1 Bish. Crim. Proc. 375; 22 Cyc. 310; Std. Enc. of Procedure, Vol. 12, p. 429; 92 Cal. 277; 28 Pac. 270; 228 Ill. 581; 81 N. E. 1129; 10 Humph. (Tenn,) 615; 1 Va. Cas. 1. See also, 1 Chit. Crim. Law, 131. The indictment was bad for uncertainty. Std. Ency. of Procedure, Vol. 12, p. 428; 29 Fla. 455; 10 Sou. 891; 8 N. J. L. 307; 18 Tex. 391; 39 Me. 291; 26 Neb. 263; 20 Mo. 411; C. & M. Dig. Secs. 3212-13; 14 R. C. L. Sec. 27, p. 181.

The jury were not sworn on their *voir dire.* C. & M. Dig. Sec. 3144.

The court erred in its instructions to the jury as to the weight and credibility of the testimony of the witnesses. 82 Ark. 540; *Prewitt* v. *State,* ms. op.

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

The bill of exceptions must be filed within the time allowed by the lower court. 103 Ark. 46; 80 Ark. 410. It must be signed and filed in time. 103 Ark. 44; 39 Ark. 558; 52 Ark. 415.

No motion for new trial was filed, and this court can only correct such errors as appear on the record proper. 215 S. W. 385; 129 Ark. 217.

Before this court will review the testimony and instructions for errors, it is essential that objections be raised in the lower court. 123 Ark. 66; 12 Stand. Ency. of Proc. pp. 661-662.

If there was any defect in the indictment, the objection should have been raised in the court below. 99 Ark. 134; 105 Ark. 82; 215 S. W. 703; 32 Ark. 179; 34 Ark. 321. The defect was cured by the verdict. 12 Stand. Ency. of Procedure, p. 700.

Indictment must be found in the county where the offense was committed. 55 Ark. 556.

Objections to instructions made for the first time on appeal cannot be considered. 70 Ark. 348; 74 Ark. 557; 124 Ark. 599; 94 Ark. 68.

HART, J. George Cegars prosecutes this appeal to reverse a judgment and sentence of conviction against him upon the verdict of a jury finding him guilty of murder in the first degree.

It is earnestly insisted by counsel for the defendant that the judgment should be reversed because of a defect in the indictment charging the venue of the crime. The indictment is as follows:

State of Arkansas

Against

George Cegars

In the Arkansas County Circuit Court, Northern District, August Term A.D. 1921.

The grand jury of the Northern District of Arkansas County, in the name and by the authority of the State of Arkansas, accuse George Cegars of the crime of murder in the first degree committed as follows, to-wit: The said George Cegars, in the county and State aforesaid, on the 15th day of April, A.D., 1921, did then and there unlawfully, wilfully, feloniously, with malice aforethought and after premeditation and deliberation, kill and murder one Henry Carter by then and there shooting him, the said Henry Carter, with a certain gun, then and there loaded with gunpowder and leaden balls, which said gun was then and there had and held in the hands of him, the said George Cegars, contrary to the

statute in such cases made and provided, and against the peace and dignity of the State of Arkansas.

W. J. WAGGONER,
Prosecuting Attorney.

It will be noted that the place where the crime is alleged to have been committed is stated in such manner as to show that the court had jurisdiction of the offense. The body of the indictment shows that the grand jury of the Northern District of Arkansas County in the name and by the authority of the State of Arkansas accuses George Cegars of the crime of murder in the first degree. It is true that the charging part of the indictment alleges that the crime was committed in the county and State aforesaid, without alleging that it occurred in the Northern District of said county and State. This was not necessary under our statute. Section 3020 of Crawford & Moses' Digest reads as follows:

"If the indictment contains no statement of the place in which the offense was committed, it shall be considered as charged therein that it was committed in the local limits of the jurisdiction of the court in which the grand jury was impaneled."

This section of the statute is a part of our Criminal Code and has been upheld in the following cases: *Whetstone* v. *State,* 32 Ark. 179, and *Brassfield* v. *State,* 55 Ark. 556. In each of these cases the defendant was convicted of the crime of murder in the second degree and made the same objection to the indictment as is made in the present case. Therefore the objection to the indictment applies to matters of form and not substance and is not well taken.

The body of the indictment shows that it was found by the grand jury of the Northern District of Arkansas County, and under the statute the crime will be considered as having been committed within the local jurisdiction of the court in which the indictment is found.

The court gave instructions at the request of the State, and also of the defendant. Counsel for the de-

fendant in this court urged a reversal of the judgment on account of certain instructions given by the court. No objections were made to these instructions by counsel who represented the defendant in the court below.

The jury returned the defendant guilty of murder in the first degree. He made no objections to the evidence adduced, or to the instructions given by the court. Therefore, we cannot consider any alleged errors on account of the introduction of evidence or the giving of instructions. *Harding* v. *State,* 94 Ark. 65, and *Morris* v. *State,* 142 Ark. 297, and cases cited.

Evidence on the part of the State warranted the jury in finding the defendant guilty of murder in the first degree. The deceased, Henry Carter, and his wife were separated. The defendant, Gorge Cegars, had been paying attention to Carter's wife. Carter told him that he must cease doing this until a divorce had been secured. Between five and six o'clock in the morning on the first day of April, 1921, the defendant, George Cegars, approached Henry Carter in the Northern District of Arkansas County, Ark., and drawing his gun, shot him to death. The deceased was unarmed, and there was no cause for the shooting. The deceased did nothing whatever to provoke the defendant to attack him. When the defendant fired the first shot, the deceased started to run, and the defendant continued shooting at him until he had killed him.

According to the defendant's evidence, he was afraid of the deceased and killed him because he had his hand in his pocket, and he thought the deceased was going to shoot at him.

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

MINERS' & CITIZENS' BANK v. MAXINE MINING COMPANY.

Opinion delivered December 5, 1921.

CORPORATIONS—INSOLVENCY—PREFERENCE OF LABORERS.—Under Crawford & Moses' Dig. §§ 1798-1801, prohibiting preferences by attachment, confession of judgment or otherwise among creditors of insolvent corporations, except for wages and salaries of laborers and employees, and providing that such preferences shall be set aside where complaint is made within 90 days after the same is given or sought to be obtained, *held* that where laborers and employees of an insolvent corporation intervened in an attachment suit brought by a general creditor within 90 days from the levy of the attachment and asked that their claims be preferred to that of the attaching creditor, it was proper to set aside the attachment lien and to enforce the preference of the interveners.

Appeal from Marion Chancery Court; *B. F. McMahan,* Chancellor; affirmed.

STATEMENT OF FACTS.

On the 20th of September, 1917, appellant filed a suit in equity against appellees in which it asked for judgment on certain notes and for a foreclosure of certain mortgages given to secure the same.

The complaint also alleged grounds for attachment and asked that a general attachment be issued and levied on certain property belonging to the Yellow Rose Mining Company, one of the appellees.

On the 20th day of September, 1917, the writ of attachment was duly issued and levied by the sheriff upon certain personal and real property belonging to the Yellow Rose Mining Company. On the 13th day of October, 1917, appellant filed in the chancery court an application for a receiver for the Yellow Rose Mining Company. A receiver was duly appointed and took charge of the property of said company.

On the 25th day of October, 1917, the Bank of Yellville, the Silver Hollow Mining Company, and W. S. Petit, as trustee in bankruptcy of the Maxine Mining Company, filed an intervention in the chancery suit brought by appellant against appellees as above men-

tioned. They state that they are creditors of the Yellow Rose Mining Company and ask judgment against said company in the sum of $1940.34. They state that the Yellow Rose Mining Company, in addition to being indebted to them, owes to its workmen and laborers for labor performed about $3,000. They allege that laborers and mechanics' liens have been filed against the property of said Yellow Rose Mining Company, and that said company owes other large sums for supplies which it is wholly unable to pay. They further allege that said company has ceased operations and has abandoned its property in this State. They allege that said corporation, the Yellow Rose Mining Company, is wholly insolvent, and that its officers are permitting its assets to become wasted.

The prayer of the interveners is that the affairs and business of the Yellow Rose Mining Company in this State be wound up, and its property and holdings be ordered sold and distributed as provided by law.

In October, 1917, numerous laborers filed suit in the justice court for their wages and obtained judgment against the Yellow Rose Mining Company. They also presented their judgments and claims to the receiver of said company for allowance as preferred claims under the statute.

On the 10th day of November, 1917, the receiver filed an inventory of the assets of the Yellow Rose Mining Company. On the 6th day of December, 1917, the receiver of the Yellow Rose Mining Company filed a report of all the claims which had been presented to him by the laborers of said company and recommended to the court that the amounts due the laborers be allowed as preferred claims.

The record shows that the Yellow Rose Mining Company was insolvent at the time appellant had the attachment issued and also at the time the interveners filed their petition in the chancery court for the purpose of winding up the affairs of said corporation and

distributing the assets among the creditors after paying the wages and salaries due its laborers and employees.

The court found that the Yellow Rose Mining Company was insolvent, and that the laborers of said company were entitled to be preferred in their claims, and set aside the preference obtained by appellant from its attachment.

The property of said company was ordered sold by the receiver and the proceeds to be distributed among the preferred claimants. A decree was entered accordingly. This did not leave sufficient assets to pay the appellant. Hence it has duly prosecuted an appeal to this court.

Williams & Seawel, for appellant.

The attachment lien was fixed by the levy of the attachment on the property. C. & M. § 512. When the receiver was appointed, he took the property subject to valid liens against it at the time of his appointment. 97 Ark. 534.

The intervention of the Bank of Yellville *et al.* within 90 days from the levy of the attachment, did not operate to dissolve same. See C. & M. Dig., §§ 1798, 1800, inclusive. No complaint was made by any creditor or stockholder within 90 days of the preference secured by the attachment, and thereafter the attachment lien became fixed absolutely, and it was not within the power of the chancery court to vacate or set it aside. 67 Ark. 111; 109 Ark. 584; 114 Ark. 26; *Cole* v. *Bloyd,* 147 Ark. 396.

The only right employees and laborers have under the statute is to have their wages paid out of the funds in the hands of the receiver upon which no lien exists. 97 Ark. 534.

G. W. Rogers, for appellee.

Appellant lost its lien acquired by attachment when it failed to have the attachment sustained when it took judgment. 80 Pac. 422; 67 Ark. 261; 135 Pac. 885.

The statutes give laborers preferred claims for their wages. C. & M. Dig., §§ 1798-1800; 96 Ark. 556; 64 Ark. 132; 7 R. C. L. 768; 26 Cyc. 1072-H; 34 Cyc. 349-III.

The preference given laborers by the statute is superior to a lien acquired by attachment. While this question has not been decided by our court, it has been so held by the Missouri courts under a similar statute. 65 Mo. App. 329; 117 U. S. 434; 106 U. S. 286; 97 U. S. 146; 103 N. Y. 245; 103 Mo. App. 398; 138 Mo. 430.

Attachment liens do not affect prior rights of third parties. 58 Ark. 252. An attaching creditor acquires no greater right in attached property than defendant has at the time of attachment. 3 Pac. 647.

The appointment of a receiver does not affect the vested rights of any party, but merely changes the remedy.

HART, J. (after stating the facts). The decree of the chancellor was correct. Sections 1798-1801 of Crawford & Moses' Digest provide for the procedure for the winding up of the affairs of insolvent corporations and the distribution of their assets to their creditors.

Sec. 1798 provides that no preference shall be allowed among the creditors of insolvent corporations except for wages and salaries of laborers and employees

Sec. 1799 provides that any creditor of such insolvent corporation may institute proceedings in the chancery court for the winding up of its affairs and the distribution of its assets among the creditors after paying the wages and salaries due laborers and employees.

Sec. 1800 provides that every preference obtained or sought to be obtained by any creditor of such corporation, whether by attachment, confession of judgment or otherwise, shall be set aside by the chancery court, and such creditor shall be required to relinquish his preference and accept his *pro rata* share in the distribution of the assets of such corporation, provided

that no such preference shall be set aside unless complaint thereof be made within ninety days after the same is given or sought to be obtained.

The attachment in favor of appellant was issued and levied on the 20th day of September, 1917. The laborers and employees of the company filed their claims with the receiver within three months thereafter, and asked that the preference by attachment obtained by appellant be set aside.

The receiver allowed the claims of the laborers and employees of the company and classed them as preferred claims. He made his report thereof on the 6th day of December, 1917. This all occurred within three months after the preference by attachment was obtained by the appellant.

Hence the chancery court correctly held that the preference sought to be obtained by appellant by the issue and levy of the attachment should be set aside.

A decree was entered accordingly, and it follows that the decree must be affirmed.

TRI-STATE PACKET COMPANY *v.* G. R. BRICKEY MERCANTILE COMPANY.

Opinion delivered December 5, 1921.

1. SHIPPING—HARTER SHIPPING ACT—CONSTRUCTION.—The act of Congress of February 13, 1893, for the regulation of commerce and navigation, applies to domestic voyages.
2. SHIPPING—LIABILITY OF SHIPOWNER—BURDEN OF PROOF.—Under act of Congress of February 13, 1893, providing that "if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charters, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel," *held* that the burden is on the shipper to prove that the shipowner failed to carry freight and deliver it to the consignee; but the burden is

on the shipowner to show that the loss or damage complained of resulted from faults or errors in navigation or in the management of the vessel.

3. PLEADING—ISSUES, PROOF AND VARIANCE.—Where a suit against a shipowner alleged, and was tried upon the theory, that plaintiff's freight was lost in transit, and it was submitted to the jury upon that theory, it is immaterial that the complaint also alleged that the freight was delivered to a third person who converted the same to his own use.

4. PLEADING—ADMISSION—EFFECT.—The admission by plaintiff in its complaint that defendants' vessel was properly manned and seaworthy did not operate as an admission that the boat was properly loaded or that the loss of plaintiff's freight in transit was due to one of the excepted causes.

Appeal from Mississippi Circuit Court, Osceola District; *R. H. Dudley,* Judge; affirmed.

STATEMENT OF FACTS.

G. R. Brickey Mercantile Company sued the Tri-State Packet Company to recover damages for the loss of two bales of cotton shipped by the plaintiff on one of the boats of the defendant from Osceola, Ark., to Memphis, Tenn.

The agent of the packet company at Osceola testified that he loaded the cotton on one of the defendant's boats at Osceola and issued a bill of lading therefor. The cotton was shipped on the Helen Blair, which was duly licensed to operate on the Mississippi River, and it was admitted by the plaintiff that the boat was properly manned and was seaworthy.

According to the testimony of the manager and head clerk of the Helen Blair at the time the cotton in question was shipped, he knew nothing about the shipping of the cotton. His record showing the cotton shipped on that trip does not show the two bales in question. He had no knowledge as to whether the two bales in question were actually placed on the boat or not. They were not on the boat when it reached Memphis. The defendant has never been able to locate the cotton sued for. On that trip the river was rough and rolling on

account of the winds. There was stormy weather during the entire trip, and a bale or two of cotton might have rolled into the river before the boat got to Memphis. The plaintiff also proved the value of the cotton.

There was a verdict and judgment for the plaintiff, and the defendant has appealed.

J. T. Coston, for appellant.

Plaintiff admits that the steamer was properly manned and was seaworthy, therefore defendant was exempt from losses resulting from faults or errors in navigation or in the management of the vessel or losses arising from dangers of the sea or other navigable water. U. S. Comp. Stat. § 8351; 183 Fed. 146. The loss is bound to have occurred through *faults* or *errors* in navigation or in the *management* of the vessel, or from dangers of the river, therefore liability is not only proven but is disproved. 201 U. S. 386; 191 U. S. 7.

The burden was on the plaintiff to show what became of the cotton. It recognized this fact by allowing the court, without objection, to so instruct the jury.

As to what is meant by error or fault in navigation and management of a vessel, see the following cases: 92 Fed. 671; 104 Fed. 154; 96 N. E. 604; 64 Atl. 914; 109 N. W. 84.

The vessel being admitted to be seaworthy and properly manned, and it being shown that the cotton was properly loaded, there is nothing under the terms of the Harter Act upon which to predicate liability.

Instruction No. 4 ignored the provisions of the Harter Act exempting the defendant from liability under conditions of that act and made defendant absolutely liable, no matter what caused the loss. The instruction was not only erroneous, but in conflict with No. 5.

Instructions should be harmonized, else they will confuse and mislead the jury. Sackett's Instr. to Juries, § 28, p. 25; 85 Ill. 194; 55 Ark. 397; 65 Ark. 68; 57 Ark. 203; 147 S. W. 90.

Driver & Simpson, for appellee.

The Harter Act does not relieve the shipowner of liability for improper loading, care, handling and delivery of a cargo. 108 Fed. Rep. 886; 124 Fed. Rep. 3; 89 Fed. 528; 92 Fed. Rep. 670.

The burden of proof to show proper loading, handling, etc., is upon the appellant. 82 Fed. Rep. 679; 4 Fed. Stat. Ann. 863. There was even a denial that the cotton was ever on the boat, and at most only a bare statement that it was put on the boat. Certainly this evidence would not of itself alone establish the fact that the cotton was properly loaded.

The verdict and judgment were right, as appears by the undisputed evidence, and the court need not and will not, on appeal, determine whether the instructions given were correct.

J. T. Coston, for appellant, in reply.

The Harter Act applies to domestic voyages. 179 U. S. 76; 86 Fed. 671.

The complaint alleges that the cotton actually reached Memphis, and was confiscated there by Wilson-Ward Co. How can they now be heard to say the cotton was not properly loaded? A ground of relief not raised by the pleadings cannot be considered on appeal. 99 S. W. 687.

Instruction No. 5 was abstract and misleading, and the giving thereof ground for reversal. 132 S. W. 1000.

HART, J. (after stating the facts). The suit was brought under the act of Congress of February 13, 1893, for the Regulation of Commerce and Navigation. U. S. Compiled Statutes, 1916, Ann. vol. 7, §§ 8029-8031; Barnes, Federal Code, 1919, §§ 7237-7239.

In *Knott* v. *Botany Mills,* 179 U. S. 69, it was held that domestic voyages come within the provisions of the act.

The first section of the act of Congress above referred to provides that clauses in bills of lading relieving the owner of any vessel transporting merchandise or

property as provided in the act from liability for negligence, etc., are prohibited. The third or last section of the act provides that "if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

In the interpretation of these sections of the act as applied to the facts of the case, the court gave, over the objections of the defendant, the following instructions:

"4. If you find from a preponderance of the evidence that the two bales of cotton here sued for were delivered to the defendant company at Osceola landing and received by the company, then it was the duty of the defendant company to carry and deliver said cotton to the Rainer & Connell Company, consignee, at Memphis. And if you find from the evidence the defendant company did receive the cotton and failed or refused to so deliver the same, then you will find for the plaintiff for the market value of the cotton at Memphis at the time it should have been delivered there, together with interest at six per cent. from October 11, 1919."

"5. You are further instructed and it is agreed that the Helen Blair was seaworthy and properly manned. So, if you find the cotton was properly loaded on the boat and lost before the boat reached Memphis on account of any fault or error in navigation, or in the management of the boat, or on account of the danger of the river, if any, produced by heavy winds, then you will find for the defendant."

The court then instructed the jury that the burden of proof on the whole case was upon the plaintiff.

Counsel for the defendant insists that the judgment should be reversed on account of the conflict between

instructions four and five. He claims that, because the defendant admitted that it had failed to deliver the cotton to the consignee, instruction number four was a peremptory instruction for the plaintiff. We do not agree with counsel in this contention. The burden of proof was upon the plaintiff to prove that the defendant had failed to carry the cotton and deliver it to the consignee. Without making this proof, the plaintiff could not recover at all. Under the statute, there are certain exceptions to the general rule of liability. The burden of proof to show that the case came within one of the exceptions was upon the defendant. Where goods are received in good order on board of a vessel under a bill of lading agreeing to deliver them at the termination of the voyage in like good order and condition, and the goods are damaged on the voyage, in a proceeding to recover for the breach of the contract of affreightment, after the amount of damage has been established, the burden lies upon the carrier to show that it was occasioned by one of the perils for which it was not responsible. *The Folmina,* 212 U. S. 354.

In the present case it was admitted by the plaintiff that the Helen Blair was properly manned and was seaworthy. The evidence for the plaintiff showed that the cotton was loaded on the boat, and it was admitted that it was lost before the boat reached Memphis.

It was shown by the defendant that the water was rough and rolling on account of the winds. There were 512 bales of cotton on the boat. Instruction number five properly placed the burden of showing that the damage arose from one of the excepted causes upon the carrier. It, in effect, told the jury that it must find that the cotton was properly loaded on the boat before it could find for the defendant on account of any of the excepted causes. Thus we see that there was no conflict between instructions number four and five. Instruction No. 4 properly predicated the right of the plaintiff to recover upon its showing a failure of the defendant to deliver the cotton to the consignee.

The packet company defended the suit on the ground that the loss of the cotton resulted from one of the exceptions to the general rule of liability, and instruction No. 5 told the jury that the burden was upon the carrier to establish this defense. The instructions thus dealt with different phases of the case and were in harmony with each other.

Counsel for the defendant also claims that, because the complaint alleges that the cotton was loaded on the boat and delivered to the defendant, Wilson-Ward Co., which had converted the same to its own use, the plaintiff cannot recover on the ground that the cotton was not properly loaded on the boat.

It is true that the complaint contains the allegation just referred to; but it also contains another paragraph in which it is alleged that it had delivered the cotton to the Tri-State Packet Company for shipment to Memphis to Rainer & Connell Company, and that the defendant, Tri-State Packet Company, failed to deliver the cotton to the consignee or to account to the plaintiff for the value thereof. The case was tried on the theory that the cotton was lost in transit, and it was submitted to the jury on this theory. As we have already seen, the burden was on the defendant to show that the cotton was properly loaded on the boat, and that it was not lost on account of any error in navigation or on account of the danger of the river caused by heavy winds.

The admission by the plaintiff that the boat was properly manned and was seaworthy, did not also operate as an admission that the boat was properly loaded, or that there was no error in navigation, or in the management of the boat on the trip. The boat might have been properly manned and yet not properly navigated during the trip. Neither did the admission that it was seaworthy show that the boat was properly manned during the trip, or that the loss of the cotton was necessarily caused by the danger of the river from the heavy winds.

There was no prejudicial error in the record, and the judgment will be affirmed.

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